THE 1979 PHILIP C. JESSUP INTERNATIONAL LAW MOOT

COURT COMPETITION

Case Concerning the International Transfer of Technology

IN THE INTERNATIONAL COURT OF JUSTICE

April 1979

Between:

GOVERNMENT OF PATRIA
Applicant

and

REPUBLIC OF JUSTIA
Respondent

MEMORIAL FOR THE APPLICANT

TEAM 10
Agents for the Government of Patria

Mark Chudzinski
Robert Dziubla
Dario Robertson

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The parties submit the present dispute to this Court by special agreement, pursuant to Article 40(1) of the Statute of the International Court of Justice, which provides that such agreements shall be legally sufficient to bring cases before this Court. Moreover, Article 36(1) of the Statute stipulates that the jurisdiction of the Court comprises all cases which the parties refer to it.

Thus, this Court has jurisdiction in the present case and may properly resolve all the legal questions raised by the parties.

STATEMENT OF FACTS

The parties have agreed to the Statement of Facts which has been filed with this 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 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 has breached its clear obligation under conventional and customary international law to extend national treatment to foreign licensors and investors through the implementation of a discriminatory program of technology transfer.

The legal practices and procedures relating to the invalidation of the licensing agreement and the nationalization of Subpharm violated standards of procedural justice guaranteed by both international conventions and the customary practice of civilized nations.

The compensation tendered to Pharmaca for its expropriated assets was unjust and inconsistent with international law. Justia is required to pay fair market value compensation for Subpharm and for expropriated industrial property rights arising under the licensing agreement.

The Justian law requiring transfer of technology disputes to be settled in Justian courts and according to Justian law violates both international conventions and the customary practice of civilized nations by infringing Pharmaca's right to party autonomy and diplomatic protection.

I. JUSTIA HAS BREACHED ITS CLEAR OBLIGATION UNDER INTERNATIONAL LAW TO EXTEND NATIONAL TREATMENT TO FOREIGN LICENSORS OR INVESTORS.

A. Justia was legally bound by the Treaty of Friendship and Commerce[1] and the Paris Convention for the Protection of Industrial Property[2] when it undertook action inconsistent with both those accords.

1. The September 1975 denunciation of the FCN Treaty had no legal effect.

According to the terms of Article 18(2) of the FCN Treaty, the oral denunciation made by Justia's president was legally insufficient in two respects. First, the denunciation did not comply with the article's "written notice" requirement. Second, the denunciation was not given or addressed to the other contracting party. Since Article 54 of the Vienna Convention on the Law of Treaties[3] requires that termination take place "in conformity with the provisions of the treaty ..." absent mutual consent to otherwise extinguish the accord, the FCN Treaty has never lost its binding legal force.[4]

2. Pacta sunt servanda requires strict adherence to the terms of both accords.

The time-honored doctrine of pacta sunt servanda was enshrined in Article 26 of the Vienna Convention as a fundamental norm of international

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[1]Hereinafter referred to as the FCN Treaty since its provisions so closely resemble those typically found in treaties of friendship, commerce and navigation. See, e.g., Convention of Establishment Between the United States and France, November 25, 1959, 11 U.S.T. 2398, T.I.A.S. No. 4625 (containing provisions identical to those of the FCN Treaty); Treaty of Friendship, Commerce and Navigation between the United States and Japan, April 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany, October 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation between Japan and Argentina, December 20, 1961, 613 U.N.T.S. 323.

[2]March 20, 1883 (Stockholm revision), 21 U.S.T. 1583, T.I.A.S. No. 6923, [hereinafter referred to as the Paris Convention].

[3]United Nations Conference on the Law of Treaties, [1969] Second Session Off. Rec., U.N. Doc. A/CONF.39/27 [hereinafter referred to as the Vienna Convention].

[4]FCN Treaty, supra note 1.

law: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[5] No derogation from this peremptory norm is permitted unless performance of the treaty would contravene a countervailing norm in the character of jus cogens.[6] Since both accords stipulate that their provisions are legally binding on the denouncing party for one year after tender of proper notice, both accords bound Justia at least until September 1976 under pacta sunt servanda. The passage of all the inconsistent domestic legislation antedates the expiration of the one year period. Justia cannot escape the obligations which it incurred under those accords.

B. In denying national treatment to Pharmaca, Justia has flagrantly violated the express provisions of the FCN Treaty.

The mutual desire for reciprocal national treatment was the motivating force uniting the parties under the FCN Treaty.[7] Justia has repeatedly defied the letter and spirit of that accord in patent disregard of its duties under international law.

1. The massive 60% increase in import duties on pharmaceuticals deprived Pharmaca of national treatment in violation of the FCN Treaty.

The imposition of this invidious tariff barrier seriously disadvantaged Pharmaca relative to Justian-owned enterprise. By the very nature of the levy, national concerns were totally exempted from payment. Thus, in

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[5] See authorities supra note 3.

[6] Performance here would entail no contravention of other peremptory norms, rendering the doctrines of rebus sic stantibus, unequal treaties and state succession entirely inapplicable. See Case Concerning Rights of the United States of America in Morocco, [1952] I.C.J. Rep. 212; T. ELIAS, THE MODERN LAW OF TREATIES 40-46 (1974); 1 OPPENHEIM'S INTERNATIONAL LAW 880-81 (8th ed. H. Lauterpacht 1955); Kunz, The Meaning and Range of the Norm Pacta Sunt Servanda, 39 AM. J. INT'L L. 180, 181-82 (1945); Wehberg, Pacta Sunt Servanda, 53 AM. J. INT'L L. 775 (1959); Williams, The Permanence of Treaties, 22 AM. J. INT'L L. 105 (1922).

[7] FCN Treaty, preamble, supra note 1.

taxing a Patrian enterprise in a manner "more burdensome" than that to which nationals were subjected, Justia has breached its duty to extend national tax treatment under Article 9(1).[8] In addition, the import duty effectively deprived Pharmaca of "national treatment with respect to the right to dispose of property ..." as guaranteed by Article 7(3).[9] In order to offset the effect of the duty, Pharmaca would have been forced to raise the price of Calmian, thereby giving national firms manufacturing product-substitutes a predatory pricing advantage. In short, Pharmaca was denied the right to dispose of its property at the market clearing price, while the right of national firms to dispose of property was completely unimpaired.

2. The Justian industrial property law discriminated against patents and trademarks held by Pharmaca in violation of the FCN Treaty.

a. The discriminatory reduction of the life of patents registered by foreign enterprises deprived Pharmaca of national treatment.

Prior to the passage of the Law on the Protection of Industrial Property, the duration of patent protection had been fifteen years for all patents registered in Justia. The new law retroactively and prospectively reduced the life of patents held by foreigners to eight years, while allowing nationals to claim the full fifteen year period of protection. Such de jure discrimination manifestly contravenes the specific guarantee of national treatment in the maintenance of patent rights found in Article 8(1) of the FCN Treaty, the prohibition of discriminatory impairment of "lawfully acquired rights and interests" in Article 4(1), and the terms of Article 1 mandating "equitable treatment" and "full legal and judicial protection."[10]

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[8] FCN Treaty, supra note 1. [9] Id. [10] Id.

b. The discriminatory dual-trademark requirement deprived Pharmaca of national treatment.

Unlike national firms, Pharmaca was required to display a trademark initially registered in Justia in addition to its usual mark. The imposition of this discriminatory requirement manifestly violated Article 8(1) by subjecting "rights appertaining to trademarks" to inequitable, non-national treatment. The government's use of such an invidious double-standard in the application of its trademark law also transgressed the command in Article 1 requiring equitable treatment and full legal protection of Pharmaca's proprietary interests. Since non-compliance would expose trademarks held by foreigners to a risk of cancellation to which nationals a fortiori are not subjected, Articles 1 and 8(1) are independently violated by the law's enforcement mechanism.[11]

3. The Justian national ownership requirement denied Pharmaca national treatment in violation of the FCN Treaty.

The amendment to Justia's foreign investment law required, inter alia, that beneficial ownership of 61% of the shares of pharmaceutical firms be transferred to Justian nationals or the Justian government. Failure to comply within a year would result in nationalization. The amendment clearly abrogated the right of a foreign enterprise to maintain control over its subsidiaries in Justia, while leaving the right of nationals to control their subsidiaries unimpaired. Such an egregious disparity in treatment is violative of the guarantee of Article 5 that Patrian firms have the same right as Justian nationals to "acquire majority interests" in companies organized under Justian law and "to control and manage" the enterprises which they have established.[12] The amendment is also inconsistent with Articles 1, 4(1) and 10(3).[13]

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[11] Id. [12] Id. [13] Id.

C. In failing to extend national treatment to the industrial property of Pharmaca, Justia violated the Paris Convention.

Article 2(1) of the Paris Convention specifically provides 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, or may hereafter grant, to nationals...."[14] Thus, Justia was bound to afford the "same protection" to Pharmaca's patents and trademarks as that afforded to the industrial property of nationals.[15] The discriminatory reduction of the life of patents held by Pharmaca and the inequitable dual-mark requirement contravened the guarantee of equal treatment embodied in Article 2(1) of the Paris Convention.

D. Justia's failure to extend national treatment to Pharmaca independently violated customary international law.

1. The international minimum standard requires at least national treatment for aliens.

Careful analysis of the germane decisions of international tribunals,[16] state practice,[17] and the authoritative writing of distinguished publicists[18]

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[14]Paris Convention, supra note 2. [15]Id.

[16]Oscar Chinn Case, [1934] P.C.I.J., ser. C., No. 10, at 41; Case Concerning German Interests in Polish Upper Silesia (The Merits), [1926] P.C.I.J., ser. A., No. 7, at 33; Norwegian Claims Case (Norway v. United States), 2 Hague Ct. Rep. (Scott) 40, 74 (Perm. Ct. Arb. 1922), 17 AM. J. INT'L L. 362 (1923); Roberts Case (United States v. Mexico), 4 R. Int'l Arb. Awards 77, 21 AM. J. INT'L L. 357 (1927).

[17]See treaties cited supra note 1 (those accords can be taken as representative of a class of international agreements too extensive for complete citation); 3 DIGEST OF INTERNATIONAL LAW 658-60 (G. Hackworth ed. 1942); Ebb, Transfers of Foreign Technology in Latin America: The Birth of Antitrust Law? 43 FORDHAM L. REV. 719, 722 (1975)(national treatment principle "well-engrained in international practice").

[18]B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 44, 211 (1953); A. ROTH, THE MINIMUM STANDARDS OF INTERNATIONAL LAW APPLIED TO ALIENS 185-86 (1949); G. WHITE,

unequivocally establishes that national treatment of aliens is a minimum standard of state responsibility under customary principles of international law. State treatment of aliens is consistent with the minimum standards of justice when it satisfies a two-tiered test. First, the treatment of aliens must be substantially equal to that accorded nationals, that is, state treatment must be consistent with the peremptory norm of non-discrimination. Second, assuming equal treatment is extended, that treatment must be otherwise in accord with other international minimum standards, for example, due process standards. Thus, in the Roberts Case,[19] the arbitral tribunal found that national treatment had been extended, satisfying the first tier of the test, but went on to hold that national treatment was not enough given collateral violations of different indedendent procedural norms. In the instant case, by contrast, the violation is complete upon the application of the norm of non-discrimination, obviating the necessity of applying the second tier of the analysis.

2. Justia's failure to extend national treatment to Pharmaca violated the norm of non-discrimination, an international minimum standard.

While not every disparity of treatment between aliens and nationals contravenes the norm of non-discrimination, it is indisputable that the challenged domestic practices of Justia did. Differential treatment is

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NATIONALIZATION OF FOREIGN PROPERTY 119-44 (1961); Borchard, The "Minimum Standard" of the Treatment of Aliens, 38 MICH. L. REV. 445, 450-56 (1940); McDougal, Lasswell & Chen, The Protection of Aliens from Discrimination and World Public Order: Responsibilities of States Conjoined with Human Rights, 70 AM. J. INT'L L. 432, 432-433, (1976); Root, The Basis of Protection of Citizens Residing Abroad, 4 AM. SOC. INT'L L. PROCS. 20 (1910); Sohn & Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 AM J. INT'L L. 545 (1961).

[19](United States v. Mexico), 4 R. Int'l Arb. Awards 77, 21 AM. J. INT'L L. 357 (1927).

generally thought to violate the norm of non-discrimination when it fails to meet one of two independent tests. First, the differential treatment of aliens and nationals must "bear a reasonable relation to the differences in their obligations and loyalties."[20] Into this category falls a number of minor political disabilities imposed on aliens, such as the exclusion of non-nationals from political office. Clearly, the sweeping policies of discrimination pursued by Justia were not based on the differing political allegiances of aliens, but rather upon an economic self-interestedness which led to the capricious mistreatment of Pharmaca's proprietary interests. Second, the differential treatment must not be "of a type, which, if permitted to occur generally, would make the conduct of customary social and business relations impossible...."[21] This second test is predicated on the notion that the essential purpose of imposing state responsibility for injury to aliens is the maintenance of "the minimum conditions which are regarded as necessary for the continuance of international trade and intercourse."[22] Clearly, if the discriminatory practices pursued by Justia became widespread, customary international business could not be transacted. It is self-evident that the erection of tariff barriers, the imposition of national ownership requirements, and the disregard of non-national industrial property rights would inherently operate to the detriment of the world economy. Justia cannot possibly

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[20] McDougal, Lasswell & Chen, supra note 18, at 444. The authors elaborate: "Yet the principle would appear almost universally accepted that with respect to participation in many important social processes states cannot discriminate against aliens in favor of nationals in ways that have no substantial basis in the differences in their obligations and loyalties." Id. See also AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §166 (1965) [hereinafter referred to as RESTATEMENT].

[21] F. DUNN, THE PROTECTION OF NATIONALS 133 (1932). [22] Id.

justify its massive campaign of discrimination on grounds cognizable under international law. Thus, Justia's arbitrary denial of national treatment must be adjudged inconsistent with the norm of non-discrimination.

II. JUSTIAN LEGAL PROCEDURES RELATING TO THE INVALIDATION OF THE LICENSING AGREEMENT BETWEEN SUBPHARM AND PHARMACA VIOLATED INTERNATIONAL LAW.

A. The retroactive invalidation of the licensing agreement constituted an arbitrary deprivation of property in violation of the international minimum standards of justice.

1. The licensing agreement created valuable contractual property rights which cannot be arbitrarily divested.

Under the terms of the agreement, Pharmaca licensed its industrial property to Subpharm in consideration for a bundle of contractual entitlements. While those legal entitlements are not absolutely protected under international law, they are at least shielded from arbitrary infringement.[23]

2. Retroactive divestiture of rights arising under a licensing agreement must be considered arbitrary.

An inquiry into the arbitrariness of retroactive state action is not exhausted by a showing that municipal law authorized the challenged conduct. It must be additionally determined, pursuant to the principle of ex re sed non ex nomine,[24] whether the section of the law authorizing retroactive application has any rational basis. Clearly, Article 13 of the transfer of

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[23] Affaire Goldenberg (Germany v. Rumania), 2 R. Int'l Arb. Awards 901, 909 (1928); Universal Declaration of Human Rights, art. 17(2), G.A. Res. 217, U.N. Doc. A/810, at 71 (1948) ("No one shall be arbitrarily deprived of his property."); C. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 278-80 (1967); F. GARCIA-AMADOR, L. SOHN & R. BAXTER, RECENT CODIFICATIONS OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 42-44 (1974)[hereinafter cited as CODIFICATIONS]; Murphy, Limitations upon the Power of a State to Determine the Amount of Compensation upon Nationalization, 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 58 n. 22 (R. Lillich ed. 1975)[hereinafter referred to as LILLICH].

[24] B. CHENG, supra note 18, at 122.

technology law has no rational application to licensing agreements. Since licensing agreements by their very nature are limited in duration, prospective application would accomplish every conceivable policy objective which the transfer of technology law was designed to serve. Retroactive application here only inflicts unanticipated commerical disabilities upon the parties by unexpectedly undoing a carefully negotiated short-term contract without significantly furthering the substantive policy of the law. Since the obvious purpose of Article 13 was to subject more permanent commercial arrangements, such as those embodied in assignment or sales contracts, to review under the new standards, the Justian legislature must have erred on the side of overinclusiveness in subjecting licensing agreements to the strictures of Article 13. In view of the absence of any rational basis for the retroactive invalidation of the licensing agreement, Justia's conduct must be adjudged an arbitrary deprivation of property in conflict with the minimum standards of justice.[25]

B. Since the legal process afforded Pharmaca failed to satisfy the international minimum standards, the invalidation of the licensing agreement constituted a denial of procedural justice.

1. In effectively denying Pharmaca free access to the courts, Justia failed to provide the minimum legal remedy required by international law.

a. Justia was required to provide Pharmaca with free access to the courts.

It is an established principle of international law that where an alien's contractual property rights are imperiled by an administrative determination, free access to the courts for appellate judicial review

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[25] AD HCC LICENSING SUB-COMM. OF THE FOREIGN TRADE COMM., AMERICAN APPAREL MFRS. ASS'N, THE GROWING THREAT TO INTERNATIONAL LICENSING AGREEMENTS IN THE APPAREL INDUSTRY (1974); Ebb, supra note 17, at 720-21.

is required.[26] The principle of free access evolved in response to the practice of excluding foreigners from the courts through various discriminatory procedural artifices. Judicial review has traditionally been viewed as a necessary procedural counterweight to offset the almost unavoidable attitudinal propensity to discriminate against aliens.[27]

b. Justia denied Pharmaca free access to the courts.

After the Registry annulled the licensing agreement, Pharmaca had a right of appeal only to the Ministry of Industry. Only administrative review was available under the terms of the transfer of technology law. Pharmaca had no right to judicial review on the merits, but only the option of bringing a special action for abuse of authority in which the scope of review is limited to determining whether the Ministry acted within the bounds of its lawful discretion. Such a circumscribed right of action cannot satisfy the free access requirement.[28]

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[26] Ambatielos Claim (Greece v. United Kingdom), 12 R. Int'l Arb. Awards 82, 23 I.L.R. 306, 50 AM. J. INT'L L. 574 (1956); International Fisheries Co. Case (United States v. Mexico), UNITED STATES-MEXICAN CLAIMS COMMISSION, OPINIONS OF THE COMMISSIONERS UNDER THE CONVENTION CONCLUDED SEPTEMBER 8, 1923 BETWEEN THE UNITED STATES AND MEXICO, 1930-31, at 207 (1931); Ruden & Co. (United States v. Peru), 2 Moore, Int'l Arb. 1653 (1870); Universal Declaration of Human Rights, arts. 8, 10, supra note 23; CONST. OF THE REPUBLIC OF BOLIVIA art. 6(h); CONST. OF THE REPUBLIC OF ECUADOR art. 169; CONST. OF THE REPUBLIC OF GUATEMALA art. 74; RESTATEMENT §§ 180, 181 supra note 20; C. AMERASINGHE, supra note 23, at 98; F. DAWSON & I. HEAD, INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHT OF ALIENS 109-157 (1971); A. ROTH, supra note 18; Dawson, International Law, National Tribunals and the Rights of Aliens: The Latin American Experience, 21 VAND. L. REV. 712, 716-26 (1968); Dawson, International Law and the Procedural Rights of Aliens Before National Tribunals, 17 INT'L & COMP. L. Q. 404, 418-20 (1968); Stein & Vining, Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context, 70 AM. J. INT'L L. 219 (1976).

[27] F. DAWSON & I. HEAD, supra note 26, at xi, 107.

[28] See authorities cited supra note 26.

2. Since the special administrative authority responsible for the review of the licensing agreement was not an independent agency, Pharmaca was deprived of its right to an impartial hearing.

a. Justia was required to insure the institutional independence of the special administrative authority.

Although the creation of administrative tribunals with special jurisdiction is permissible under international law, great care must be taken to insure the institutional integrity of such newly created governmental organs. The Croft Case,[29] involving the validity of a decision by a special court on the cancellation of patent rights, clearly requires that agencies vested with special jurisdiction be "free and independent."[30] The special tribunal must be immune from the prejudicial effect of political cross-currents and outside the institutional chain of command in order to insure impartiality. The potentiality of undue executive interference with the determination of the rights of the parties is sufficiently prejudicial to constitute a denial of justice.[31]

b. Justia's special administrative authority was not institutionally independent.

Under the terms of the transfer of technology law, the Registry was expressly subject to "the authority of the Ministry of Industry." The Ministry is, of course, simply an arm of the executive. Thus, from beginning to end the proceedings were under executive control. The integrity of the decisional process was simply not protected from the

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[29](Great Britain v. Portugal) (1856), 50 BRITISH AND FOREIGN STATE PAPERS (1859-60) 1290.

[30]Id.

[31]C. AMERISINGHE, supra note 23, at 99; Dawson, International Law, National Tribunals and the Rights of Aliens: The Latin American Experience, 21 VAND. L. REV. 712, 727 (1968); Harvard Draft Convention on Responsibility of States for Damage Done on their Territory to the Person or Property of Foreigners, 23 AM. J. INT'L L. SPEC. SUPP. 133 (1929).

prejudicial intervention of a zealous executive anxious to implement a sweeping new economic policy. This lack of institutional independence deprived Pharmaca of the minimum legal remedy to which it was entitled under international law.

C. Since the FCN Treaty independently guaranteed procedural justice, the inadequate process afforded Pharmaca simultaneously violated the Treaty.

The denial of free access to the courts and the absence of independent review constituted prejudicial process which unequivocally contravened the express guarantee of equitable treatment and full judicial protection found in Article 1.[32]

D. Since the rule requiring the exhaustion of local remedies has been satisfied, Patria is not precluded from challenging the invalidation of the licensing agreement before this Court.

1. Since the exhaustion rule does not require the pursuit of clearly ineffective remedies, Pharmaca's claim is ripe for review.

The exhaustion rule does not oblige the injured party to file every possible action that might conceivably result in a favorable determination. International authority clearly establishes that aggrieved aliens must pursue only those actions which offer "a reasonable possibility ... of success."[33] In view of the ironclad judgment against Pharmaca rendered

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[32] FCN Treaty, supra note 1.

[33] RESTATEMENT §207, Comment b, supra note 20. The Ambatielos tribunal unequivocally stated that where there is no appellate review on "matters of fact" there is "no doubt that local remedies are ineffective." [1956] Int'l L. Rep. at 344-45. See also Finish Ships Arbitration (Finland v. United Kingdom), 3 R. Int'l Arb. Awards 1479, 1481 (1934); Robert E. Brown, (United States v. Great Britain), 6 Int'l Arb. Awards 120, 123 (1923) 19 AM. J. INT'L L. 193 (1925); M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 126-27 (1970)(noting "local remedies need not be exhausted when it is clear in advance that the local courts will not provide redress for the injured individual."); Bagge, Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders, 34 BRIT. Y.B. INT'L L. 162, 167 (1958); Briggs, Local Remedies Rule: A Drafting Suggestion, 50 AM. J. INT'L L. 921 (1956); Fawcett, The Exhaustion of Local Remedies: Substance or Procedure, 31 BRIT. Y.B. INT'L L. 452, 457-58 (1954); Fachiri, The Local

by the highest available administrative authority, the delimited scope of review in an action for an abuse of authority, and the xenophobic socio-economic climate in which the Justian courts were operating, any special appeal to the Supreme Court would certainly have been unavailing. Pharmaca's claim is clearly justiciable.

2. Since Justia waived the exhaustion requirement by becoming party to the FCN Treaty and the U.N. Convention on the Recognition of Foreign Arbitral Awards,[34] Pharmaca's claim is ripe for review.

Both the FCN Treaty and the Arbitral Convention contain provisions requiring signatory states to recognize the jurisdiction of international arbitral tribunals. In assenting to such provisions, signatory states are generally held to have waived the exhaustion rule.[35]

3. Alternatively, Justia's failure to satisfy the requirements of procedural justice excuses Pharmaca from compliance with the exhaustion rule.

Where the legal process afforded the injured alien falls below international minimum standards, rigid compliance with the exhaustion rule is not necessary since procedural deficiencies render the domestic adjudication inherently invalid.[36]

Remedies Rule in Light of the Finnish Ships Arbitration, 17 BRIT. Y.B. INT'L L. 19, 30 (1936); Meron, The Incidence of the Rule of Exhaustion of Local Remedies, 36 BRIT. Y.B. INT'L L. 83 (1959); Schwebel & Wetter, Arbitration and Exhaustion of Local Remedies, 60 AM. J. INT'L L. 484 (1966).

[34]Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 [hereinafter referred to as the U.N. Arbitral Convention].

[35]RESTATEMENT §209, Comment b, supra note 20. See also Crutchett Claim (Great Britain v. United States), 4 Moore, Int'l Arb. 3734 (1871); E. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 819 (1925); Schwebel & Wetter, supra note 33. See FCN Treaty, art. 3(2), supra note 1; U.N. Arbitral Convention, art. 2, supra note 34.

[36]Robert E. Brown Claim (United States v. Great Britain), 6 R. Int'l Arb. Awards 120, 129 (1923); RESTATEMENT §208(a); Garcia-Amador, (Sixth)

III. JUSTIAN LEGAL PROCEDURES RELATING TO THE NATIONALIZATION OF SUBPHARM VIOLATED INTERNATIONAL LAW.

A. Since the Nationalization of Subpharm was predicated on an invalid municipal law, the expropriation was itself invalid under international law.

The sole legal basis for the expropriation of Subpharm was Pharmaca's failure to comply with the amendment to the law regulating foreign investment, which required 61% national ownership of all enterprises domiciled in Justia. It has been conclusively established that the amendment violated both Justia's obligations under the FCN Treaty as well as customary international law.[37] Since the expropriation is grounded on a nullity, it lacks any juridical foundation cognizable under international law and therein must be considered arbitrary. It is well established that the mere fact of foreign ownership cannot be made the sole criterion on which the decision to nationalize depends.[38]

B. Since the acceleration of the nationalization decision deprived Pharmaca of the procedural justice required by international law, the expropriation was unlawful ab initio.

The amendment to the Justian law regulating foreign investment, passed in January 1976, required full compliance within one year. Failure to comply by the end of the one year grace period subjected the breaching party to nationalization. Subpharm was arbitrarily nationalized in September, 1976, well before the expiration of the one year period, an unambiguous violation of the express terms of the amendment.

Report on State Responsibility: Revised Draft on International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens, art. 18(3), 2 Y.B. INT'L L. COMM'N 46, 48 (1961), U.N. Doc. A/CN.4/ser. A/1961 & Add.1.

[37] See text accompanying notes 12, 16-22 supra.

[38] Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (D.C.N.Y. 1961), reversed on other grounds, 376 U.S. 398 (1964); 2 D. O'CONNELL, INTERNATIONAL LAW 854, 855 (1965); Note, The Threat to U.S. Private Investment in Latin America, 5 J. INT'L L. & ECON. 221, 230 (1971).

1. The premature nationalization denied Pharmaca the procedural protection guaranteed by the FCN Treaty.

The guarantee in Article 1, extending "full legal and judicial protection" to Patrian enterprises, precluded any Justian governmental agency, such as the Nationalization Board, from ignoring or infringing upon any rights accorded Pharmaca under the laws of Justia.[39] The blatant disregard of Pharmaca's statutory right to the full one year compliance period constituted something less than full protection.

2. The premature nationalization constituted an arbitrary deprivation of property violative of customary procedural justice.

The minimum standards of procedural justice require that the taking of property belonging to an alien enterprise be effected in conformity with the requirements of municipal law.[40] The taking of property in a manner inconsistent with local law is prima facie arbitrary as an "unjustified irregularity."[41] Under that international standard, Justia's nationalization cannot be vindicated. Furthermore, the premature taking deprived Pharmaca of adequate notice, violating another collateral procedural norm.[42] Since the taking was inconsistent with local law, it must be adjudged void.

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[39] FCN Treaty, supra note 1.

[40] Since the taking here is inconsistent with both Justia's municipal law and treaty obligations, it must of necessity be considered an arbitrary deprivation of property violative of international law. See authorities cited supra note 23; See also Case Concerning German Interests in Polish Upper Silesia (The Merits), [1926] P.C.I.J., ser. A., No. 7, at 20-22; Case Concerning the Factory at Chorzow, [1928] P.C.I.J., ser. A., No. 17, at 46-47; F. GARCIA-AMADOR, L. SOHN & R. BAXTER, supra note 23, at 48-49, 222-23, 356.

[41] Garcia-Amador, supra note 36, art. 9(2), at 47.

[42] RESTATEMENT §196(a), Comment c, supra note 20.

C. Since the nationalization and compensation proceedings deprived Pharmaca of procedural justice, the expropriation of Subpharma was unlawful ab initio.

1. Since the nationalization and compensation proceedings deprived Pharmaca of free access to the courts, Justia failed to provide the minimum legal remedy required by international law.

As established earlier, free access to the courts for purposes of appellate review of administrative decisions constituted the minimum legal remedy to which Pharmaca was entitled.[43] Since Pharmaca had no appeal as of right to a judicial tribunal from the decision of the Nationalization Board to expropriate Subpharm, free access was denied. Similarly, the unchallengeable finality of the compensation decision rendered by the special panel on compensation deprived Pharmaca of its internationally protected right to appellate judicial review.

2. Since the special administrative authorities responsible for nationalization and compensation were not independent agencies, Pharmaca was deprived of the minimum legal remedy required by international law.

Quite clearly, Justia was obligated under international law to insure the institutional independence of both the Nationalization Board and the special panel on compensation.[44] Neither of these administrative authorities, however, were sufficiently autonomous to guarantee an impartial hearing. The special panel was subject to prejudicial political pressures at the hands of the overzealous officials who appointed them to their administrative posts. The Nationalization Board was organizationally responsible to the Ministry of Industry and the Premier. In both cases, the potential for executive intervention in the decisional process

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[43] See text and authorities accompanying notes 26-27 supra.

[44] See text and authorities accompanying notes 30-31 supra.

deprived Pharmaca of procedural justice.[45]

3. The procedural deficiencies of the nationalization and compensation proceedings independently violated the FCN Treaty.

Justia breached its obligation under Article 1 to provide "equitable treatment" and "full legal and judicial protection" in failing to insure the procedural fairness of the nationalization and compensation proceedings.[46]

D. Since the compensation tendered Pharmaca was flagrantly unjust, the expropriation of Subpharm was unlawful ab initio.

International authorities are in agreement that when it appears at the time of the expropriation that just compensation will not be forthcoming, subsequent payment of deficient reparation renders the original taking unlawful under international law.[47] Since Justia's inequitable compensation formula was already the law of the land when Subpharm was taken over, it appears that at the time of the expropriation compensation in an amount consistent with the standards of customary international law and Article 4(3) of the FCN Treaty was impossible.[48] Hence, the unjust compensation that was eventually awarded had the effect of invalidating the original taking.

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[45] In the Robert E. Brown Claim, the tribunal held that the review afforded by the courts of the host state was procedurally deficient because they had been "reduced to submission and brought into line with a determined policy of the Executive to reach the desired result...." That characterization could apply with equal force to the challenged Justian proceedings. See also, Mummery, The Content of the Duty to Exhaust Local Judicial Remedies, 58 AM. J. INT'L L. 389, 403-04 (1964)(discussing the Brown Claim and the requirement of executive non-intervention).

[46] FCN Treaty, supra note 1.

[47] RESTATEMENT §185, Comment c, supra note 20. Cf. Affaire Goldenberg (Germany v. Rumania), 2 R. Int'l Arb. Awards 901, 909 (1928)(The tribunal adopted a stricter view than that urged by Patria, finding that any subsequent failure to pay just compensation rendered the original taking unlawful ab initio, notwithstanding the probability that just reparation might have appeared to have been forthcoming at the time of the expropriation.)

[48] FCN Treaty, supra note 1.

E. Since the exhaustion rule has been satisfied, Pharmaca's claim is ripe for review.

The highest available administrative authorities in Justia have rejected Pharmaca's appeal. Pharmaca had no recourse to the courts on the merits. Thus, Pharmaca exhausted all reasonable remedies. In any event, Justia must be held to have waived the exhaustion requirement in becoming party to the FCN Treaty and the Arbitral Convention. Alternatively, Pharmaca is excused from full compliance with the rule since the domestic proceedings entailed a blatant denial of procedural justice.[49]

IV. THE COMPENSATION TENDERED TO PHARMACA FOR ITS EXPROPRIATED ASSETS IS UNJUST AND INCONSISTENT WITH INTERNATIONAL LAW.

A. Since the FCN Treaty requires Justia to pay compensation equivalent to the value of the property taken, the payment of a lesser sum violated international law.

Article IV(3) of the FCN Treaty specifically requires that the compensation tendered for expropriated property be equivalent to the property taken.[50] Even assuming the accuracy of the determination of the Justian panel on compensation that Subpharm was worth three million dollars, the actual payment of only one million dollars obviously falls below Justia's own assessment of equivalent value. Unquestionably, Justia has not tendered payment in an amount equivalent to the value of the property taken, even under its own assessment standards. Ipso facto there is a violation of international law.

B. Justia violated international law when it paid less than fair market value for Pharmaca's nationalized assets.

1. Fair market value compensation is required by international law.

The indisputable weight of international authority, as reflected in the

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[49] See text and authorities accompanying note 32-35 supra.

[50] See FCN Treaty, art. IV(3) note 1 supra and discussion accompanying notes 5 and 6 supra.

rulings of international tribunals,[51] international conventions,[52] state practice[53] and the scholarly work of leading publicists,[54] manifestly establishes that fair market value is the standard of compensation for expropriate assets.

2. Justia must pay fair market value, notwithstanding the implementation of its economic development program.

Numerous international and domestic tribunals have considered and rejected the contention that the implementation of an economic development program justifies compensation in an amount less than the fair market value of the nationalized property.[55]

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[51] Case of the Factory at Chorzow, [1928-29] P.C.I.J., ser. E., No. 5, at 183 (1929); DeSabla Claim Case (United States v. Panama) 6 R. Int'l Arb. Awards 358 (1933); Shufeldt Claim Case (United States v. Guatemala), 2 R. Int'l Arb. Awards 1079 (1932); Norwegian Claims Case (Norway v. United States), 2 Hague Ct. Rep. 2d (Scott) 39 (Perm. Ct. Arb. 1922), 1 R. Int'l Arb. Awards 307 (1922); 2 M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1386 (1937).

[52] See, e.g., Convention on the International Responsibility of States for Injuries to Aliens, COFIFICATIONS, note 23 supra at 203; Draft Convention on the Protection of Foreign Property, 2 INT'L LEGAL MATERIALS 242, 248 (1963)(written by experts from fifteen nations and issued by the U.N. Organization for Econcomic Cooperation and Development).

[53] See, e.g., Cobourg v. Grafton Toll Road Co., 50 Ont. L. R. 125, 132 (1921); Halifax v. Paton, 25 D.L.R.2d 103 (1961); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1892); CONST. OF CHILE art. 16; CONST. OF THE KINGDOM OF DENMARK art. 73; CONST. OF FINLAND art. 6; CONST. OF GREECE art. 17(2); CONST. OF GRENADA art. 6(1); CONST. OF CYPRUS art. 23(2); CONST. OF ETHIOPIA art. 44; RESTATEMENT §188, Comment b, note 20 supra; Seidl-Hohenveldern, The Valuation of Nationalized Property in Austria, 1 LILLICH, supra note 23, at 64; Henry, The Valuation of Nationalized Property in Great Britain, 1 LILLICH, note 20 supra, at 86.

[54] O. LISSITZYN, INTERNATIONAL LAW TODAY AND TOMORROW 77 (1965); G. WHITE, supra note 18, at 11-18; Domke, Foreign Nationalizations, 55 AM. J. INT'L L. 585, 604-08 (1961).

[55] Shufeldt Claim Case (United States v. Guatemala), 2 R. Int'l Arb. Awards 1079 (1932); Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, 20 I.L.R. 305 (1953); DeSabla Claim Case (United States v. Panama), 6 R. Int'l Arb. Awards 358 (1933). See also Braden Copper Co. v. Le Groupment

3. The deduction of excess profits is inconsistent with Justia's obligation to tender fair market value compensation.

a. The excess profits deduction ipso facto violates the fair market value standard.

Even assuming arguendo that Justia's assessment of Subpharma's worth at three million dollars was meant to reflect its fair market value,[56] the two million dollar diminution for excess profits clearly resulted in compensation less than the fair market value of the property taken. Both French and German courts have unequivocally stated that Chile's imposition of an excess profits tax upon the compensation tendered to Kennecott Copper Corporation for expropriated copper mines was inconsistent with the fair market value standard.[57] As the most recent judicial rulings on the subject, these declarations reflect the international norm that excess profits deductions are illegal. The position of these courts is firmly supported by international conventions prohibiting excess profits deductions.[58]

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d'Importation des Metaux (French Tribunal Decision on Chilean Corporation's Plea of Sovereign Immunity in Third Party Attachment), in 12 INT'L LEGAL MATERIALS 182 (1973)[hereinafter cited as French Kennecott Case]; Sociedad Mineral El Tiente S.A. v. Aktiengesellschaft Norddeutsche Affinerie (Superior Court of Hamburg Decision Denying Third Party Attachment of Copper Sold by the Chilean Copper Corporation), in 12 INT'L LEGAL MATERIALS 251 (1973) [hereinafter cited as German Kennecott Case].

[56]Pharmaca maintains throughout that the actual fair market value is six million dollars.

[57]See French Kennecott Case, supra note 55; German Kennecott Case, supra note 55; cf. Self Claim (United States v. Italy), 29 I.L.R. 369, 376 (1960); Corn Products Refining Co. Claim (United States v. Yugoslavia), 22 I.L.R. 333 (1955); Lillich, The Valuation of Nationalized Property in International Law: Toward a Consensus or More "Rich Chaos"?, 3 LILLICH, note 23 supra, at 183 (expropriating countries prohibited from deducting taxes similar in effect to excess profits levies).

[58]See, e.g., Convention on the International Responsibility of States for Injuries to Aliens, CODIFICATIONS, note 23 supra, at 203; Draft Convention on the Protection of Foreign Property, supra note 52, art. 3 (requiring that just compensation equal fair market value without any reduction due to special taxes).

b. The application of an excess profits standard in the present case was manifestly unreasonable.

The application of an excess profits standard was unreasonable since Pharmaca's profits were not excessive. Pharmaca's profits earned on the sale of Calmian are justified in light of the collateral research and development (R&D) cost of other pharmaceutical products that yield no return on investment. Large firms like Pharmaca support large R&D programs which require substantial expenditures on a diversity of research efforts. There are, in fact, significant diseconomies of scale in R&D in the pharmaceutical industry.[59] The diversified research programs conducted by larger firms, while necessary for the future development of pharmaceutical products, are not as cost-effective as more product-specific research programs.[60] In short, diversified research results in the expenditure of valuable resources which can only be recaptures through the maintenance of a profit margin large enough to allow the parent firm to offset R&D losses.[61] In that light, the challenged profit repatriation cannot be considered excessive. Pharmaca's profits were reasonable rewards for innovation and compensation for a costly R&D program. Under these circumstances, the invokation of an excess profits standard must be considered unreasonable.

C. Justia's payment of 2% interest independently deprived Pharmaca of adequate compensation.

Even if there had been no excess profits deduction, the payment of 2% interest, standing alone, is sufficient to render the compensation award

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[59] L. WORTZEL, TECHNOLOGY TRANSFER IN THE PHARMACEUTICAL INDUSTRY 6-7, UNITAR Research Report No. 14 (1971).

[60] Id. [61] Id.

inadequate. Decades of international practice and numerous judicial decisions show that Justia must pay at least 5-6% interest on the fair market value of the nationalized assets.[62] Indeed, payment at higher rates of interest would not be unreasonable in light of current inflationary trends.

D. Justia's subsequent expropriation of Pharmaca's industrial property rights under the licensing agreement requires independent compensation.

Justia, in its capacity as the new equity owner of Subpharm, assumed the legal obligations owed to Pharmaca under the licensing agreement. The most basic of these obligations was the requirement that the licensee pay royalties in consideration for the use of patents and trademarks owned by Pharmaca, the licensor. Justia has undeniably breached this contractual obligation and has steadfastly refused to recognize Pharmaca's legal title to the Calmian patents and trademark. The continued use of Pharmaca's patents and trademarks without concommitant payment of the required royalties is tantamount to a nationalization of contractual property rights for which there must be reparation.[63] The amount of compensation required has been determined by the arbitration tribunal which upheld Pharmaca's original breach of contract claim. Thus, Justia must tender compensation for the expropriated industrial property in an amount equivalent to the arbitration award.

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[62] Case of the Factory at Chorzow, [1928-29] P.C.I.F., ser. E., No. 5, at 183; (1929); Claim of Am. Cast Iron Pipe Co., 40 I.L.R. 169 (1969); Frederic Bonner Case, 2 M. WHITEMAN, supra note 51, at 931; Sapphire Int'l Petroleums, Ltd. v. National Iranian Oil Col, 35 I.L.R. 136 (1963); Lena Goldfields Arbitration, 36 CORNELL L. Q. 42 (1950); Note, Tanzanian Nationalizations: 1967 - 1970, 4 CORNELL INT'L L. J. 59, 69 (1970).

[63] Norwegian Shipowners Claim (Norway v. United States), 1 R. Int'l Arb. Awards 307 (1922); Henry, Protection Against Non-Commercial Risks in Patent Licensing, 10 J. WORLD TRADE L. 421 (1976).

V. THE JUSTIAN LAW REQUIRING TRANSFER OF TECHNOLOGY DISPUTES TO BE SETTLED IN JUSTIAN COURTS AND ACCORDING TO JUSTIAN LAW VIOLATES JUSTIA'S TREATY OBLIGATIONS AND CUSTOMARY INTERNATIONAL LAW.

A. In denying contractual parties the right to choose arbitration as a means of settling disputes, the Justian law violates the U.N. Arbitral Convention.

The requirement that all transfer of technology disputes be settled exclusively in Justian courts in accordance with Justian law[64] directly contravenes Justia's international obligations under the U.N. Arbitral Convention. Article II requires Justia to "recognize an agreement in writing," such as an arbitral clause in a licensing contract, "under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them..." unless such agreement is invalid "under the law to which the parties have subjected it..."[65] Justia may not apply its own law when a different law has been expressly chosen by the parties, to defeat internationally protected arbitral agreements. As Justia has not withdrawn from the U.N. Arbitral Convention, the treaty is binding and must be performed in good faith.[66]

B. In denying contractual parties the right to choose the applicable law and forum for the settlement of disputes, the Justian law violates international customary practice.

Justia's exclusive jurisdiction requirements are in conflict with

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[64] Although art. 6(B)(20)(21) of the Transfer of Technology Law does not expressly exclude arbitration of disputes, Patria accepts as Justia's official position Subpharm's submission to the Patrian Chamber of Commerce that such is the effect of the Justian Law.

[65] U.N. Arbitral Convention, supra note 34, Art. II (1), Art. V (1)(a). An "agreement in writing" is defined to include "an arbitral clause in a contract." Arbitral clauses are thus severable and enjoy a legal significance independent from that of the underlying contract. Id. Art. II (2).

[66] Vienna Convention, art. 26, supra note 5; H. LAUTERPACHT, supra note 6, at 881.

current state practice in the licensing trade.[67] The doctrine of party automony - the right of parties to freely choose the law governing the validity, performance and interpretation of their licensing agreement - is recognized by most developed and developing countries alike.[68] Consistent and near universal state practice creates customary normative rules of international law that are binding generally on the members of the world community.[69]

C. To the extent that Justian exclusive jurisdiction requirements operate to deprive Pharmaca of its international right of petition for diplomatic protection, it is void under international law.

1. Foreign firms possess an internationally protected right of petition for diplomatic protection.

Every firm doing business in a foreign country has the right to seek diplomatic protection from its home state.[70] Only after formal petition will the home state possess information sufficient to bring an action on behalf of its aggrieved citizen before an international tribunal. The right of petition is thus the sine qua non of all other international rights, for without the right of petition, a foreign firm cannot by itself gain access to an international court to defend international rights.[71]

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[67] 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, 9 (1977).

[68] Id. at 3. The only state practice supporting the Justian law is that of Mexico, Argentian and Art. 51 of Decision No. 24 of the Commission of Cartagena Agreement. Id. at 10. Of these, Mexico allows the registration of arbitral agreements. Id. at 33. See, e.g., A. EHRENZWEIG, A TREATISE ON THE CONFLICTS OF LAW 470 (1962).

[69] North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)[1969] I.C.J. 3, 43.

[70] North American Dredging Case, (United States v. Mexico), 4 R. Int'l Arb. Awards 26 (1927); D. SHEA, THE CALVO CLAUSE 217 (1955).

[71] F. DAWSON & I. HEAD, supra note 26, at 25.

2. Justian exclusive jurisdiction requirements may operate to strip Pharmaca of the international right of petition.

Justia could conceivably construe the exclusive jurisdiction requirements as stripping foreign firms of the right to petition their home government to institute an action before an international tribunal. Exclusive jurisdiction requirements in Argentina and Mexico[72] have been construed to effect such an illegal deprivation. It is well-established that the right of petition for diplomatic protection can only be relinquished by the express consent of the affected party.[73] Thus, the exclusive jurisdiction requirements violate international law by depriving foreign firms of their right of petition.

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[72]Dessemontet, supra note 67, at 10 nn. 29-31; See also Lillich, The Diplomatic Proection of Nationals Abroad: An Elementary Principle of International Law Under Attack, 69 AM. J. INT'L L. 359, 359-61 (1975).

[73]North American Dredging Case (United States v. Mexico), 4 R. Int'l Arb. Awards 26 (1927).

VI. CONCLUSION

It is respectfully requested that this honorable Court:

1. Declare that Justia's denial of national treatment constituted a violation of conventional and customary international law.
2. Declare that the legal procedures relating to the invalidation of the licensing agreement and the nationalization of Pharmaca's assets were inconsistent with the requirements of procedural justice.
3. Award Pharmaca six million dollars as the fair market value compensation for Subpharm.
4. Award a sum of money equivalent to the amount of the judgment rendered by the arbitral tribunal for the expropriation of industrial property rights arising under the licensing agreement.
5. Declare that the Justian exclusive jurisdiction requirements are violative of conventional and customary international law.

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