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 RESPONDENT

TEAM 10

Agents for the Republic of Justia

Mark Chudzinski
Robert Dziubla
Dario Robertson

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JURISDICTION

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 treament 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 satisfied any legal duty it might have had under international law to extend national treatment to foreign licensors or investors.

Justian legal practices and procedures relating the invalidation of the licensing agreement and the nationalization of Subpharm were wholly consistent with international procedural justice. Moreover, since Pharmaca failed to exhaust local remedies available in Justia, Patria's claims on Pharmaca's behalf are not ripe for review by this Court.

Justia tendered just compensation for the nationalized assets of Pharmaca as required by international law. Since their is no clear international standard of compensation, the appropriate standard must be determined by municipal law. Thus, the excess profits deduction stands vindicated. Further, independent compensation for the use of industrial property formerly belonging to Pharmaca is not required.

Justia's refusal to recognize agreements mandating the jurisdiction of foreign courts is fully consistent with international law. Justia possesses indisputable sovereign authority to regulate contractual relationships affecting the national interest.

I. JUSTIA HAS SATISFIED ANY LEGAL DUTY IT MIGHT HAVE HAD UNDER INTERNATIONAL LAW TO EXTEND NATIONAL TREATMENT TO FOREIGN LICENSORS OR INVESTORS.

A. Since Justia was not legally bound by the Treaty of Friendship and Commerce[1] or the Paris Convention on the Protection of Industrial Property,[2] it was under no duty to honor any of the provisions of those accords.

1. Both accords are void ab initio by operation of the doctrine of unequal treaties.

a. Under customary international law, unequal treaties are void ab initio.

Vattel defined unequal treaties as those accords "which impose on the weaker party more extensive obligations or greater burdens, or bind him down to oppressive or disagreeable conditions."[3] Such treaties are treated as void ab initio because it is thought that the consent of the weaker party could not have been freely obtained. The imbalance in the allocation of burdens and benefits upon performance must be such that the disadvantaged state could not have reasonably assented to terms so discriminatory but for the application of economic coercion.[4] Since there

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[1]Hereinafter referred to as the bilateral treaty. The Convention of Establishment Between the United States and France, November 25, 1959, 11 U.S.T. 2398, T.I.A.S. 4625, contains provisions identical to the bilateral treaty.

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

[3]E. de VATTEL, THE LAW OF NATIONS 201 (J. Chitty trans. 1858).

[4]Case of the Diversion of Water from the Meuse, [1937] P.C.I.J., ser. A/B, No. 70, at 20; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 495-96 (1966); L. CHEN, STATE SUCCESSION RELATING TO UNEQUAL TREATIES 35-37 (1974); L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 108-256 (3d ed. 1972); K. HOLLOWAY, MODERN TRENDS IN TREATY LAW 267 (1967); Y. TSENG, THE TERMINATION OF UNEQUAL TREATIES IN INTERNATIONAL LAW 67 (1933); Buell, The Termination of Unequal Treaties, [1927] PROC. AM. SOC. INT'L L. 87, 90-91; Lester, Bizerta and Unequal Treaty Theory, 11 INT'L & COMP. L.Q. 847, 850 (1962); Murphy, Economic Duress and Unqual Treaties, 11 VA. J. INT'L L. 51, 62 (1970); Osnitskaya, Colonialist Concepts of Equal and Unequal Subjects of International Law in the Theory and Practice of Imperialist States, [1962] SOVIET Y.B. INT'L L. 49; Wilson, Freedom of Contract and Adhesion Contracts, 14 INT'L & COMP. L.Q. 172 (1965).

was never free consent, there was never a valid treaty stricto juro, and without a calid treaty, pacta sunt servanda does not apply.[5] In other words, since an unequal treaty is in conflict with the jus cogens norm of sovereign equality, the treaty is void from the outset.[6] The doctrine of unequal treaties was recently given support at the Vienna Convention on the Law of Treaties.[7]

b. Both accords are void as unequal.

Both the bilateral treaty and the Paris Convention were concluded during an era of imperialist domination of world politics.[8] A small, developing country like Justia was simply not in a position to contend with the superior resources that Patria and other developed countries had at their disposal. Because of this egregious inequality of bargaining power, which was later translated into the terms of both accords, Justia cannot be held to have freely consented to their terms. While couched in the elusive language of reciprocity, the provisions of both accords effectively exacerbate Justia's woeful technological dependence by instituting a self-defeating program of national treatment. The

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[5]U.N.Conference on the Law of Treaties, [1969] Second Session Off. Rec., art. 26, U.N. Doc. A/CONF.39/27, at 292 [hereinafter cited as VIENNA CONVENTION].

[6]L. CHEN, supra note 4; Detter, The Problem of Unequal Treaties, 15 INT'L & COMP. L.Q. 1069, 1070-71 (1966); Schwelb, Some Aspects of International Jus Cogens as Formulated by the International Law Commission, 61 AM. J. INT'L L. 946, 960-61 (1967).

[7]VIENNA CONVENTION, supra note 5, art. 52, at 296; Declaration on the Prohibition of the Threat or Use of Economic or Political Coercion in Concluding a Treaty, VIENNA CONVENTION, supra note 5, at 285. See also Malawer, New Concept of Consent and World Public Order: "Coerced Treaties" and the Convention on the Law of Treaties, 4 VAND. INT'L 1, 18 (1970).

[8]The bilateral treaty dates back to the 1920's, while the Paris Convention was concluded in the late 19th century.

obvious effect of the national treatment provisions is to insure that the technology of the developed countries remains under their exclusive control, while simultaneously precluding Justia from a program of affirmative action and preferential treatment for its struggling domestic firms. As a recent study noted, national treatment under these circumstances "simply gives the stronger party unlimited freedom to utilize his power at the expense of the weaker party."[9] In effect, both accords prclude Justia from narrowing the ever-widening technology gap--"the most important single reason" for the poverty experienced by developing countries.[10] Both accords must be adjudged invalid ab initio under the doctrine of unequal treaties.

2. Alternatively, both accords lost their binding legal effect by operation of the doctrine of rebus sic stantibus.

According to the Vienna Convention, a fundamental change of circumstances--rebus sic stantibus--presents ground for terminating a treaty when three preconditions are met. As indicated below, all those preconditions are

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[9]UNCTAD, The Role of the Patent System in the Transfer of Technology to Developing Countries, UNCTAD Doc. TD/B/AC.11/19, rev. 1 (1975). See also UNCTAD, The International Patent System as an Instrument of Policy for National Development, UNCTAD Doc. TD/B/C.6?AC.2/3 (1975); U. ANDERFELT, INTERNATIONAL PATENT LEGISLATION AND DEVELOPING COUNTRIES 210 (1971); Ewing, UNCTAD and the Transfer of Technology, 10 J. WORLD TRADE L. 197, 199 (1976); Kunz-Hallstein, Patent Protection, Transfer of Technology and Developing Countries--A Survey of the Present Situation, 6 INT'L REV. INDUS. PROPERTY § COPYRIGHT L. 427 (1977); Wasserman, Key Issues in Development: Interview with UNCTAD's Secretary General, 10 J. WORLD TRADE L. 17, 20 (1976).

[10]Ewing, supra note 9, at 197.

[11]VIENNA CONVENTION, supra note 5, art. 62, at 297. See also Hill, The Doctrine of Rebus Sic Stantibus in International Law, 9 U. MO. STUDIES 7 (1934); Lissitzyn, Treaties and Changed Circumstances (Rebus Sic Stantibus), 61 AM. J. INT'L L. 895 (1967); Shaker, Fundamental Change in Circumstances or the Internationa Law Commission and the Doctrine of

satisfied in the present case. Justia is no longer bound by either accord.

a. The continued existence of the traditional international economic order was a circumstance constitutuing an essential basis of consent in both accords.

It is self-evident that the consent of the parties could not have been obtained but for their tacit understanding that the economic fabric of international relations would remain largely unchanged in the future. Consent was implicitly predicated upon the continued existence of an underlying international economic sytem, dominated by developed countries, which adhered to certain normative presuppositions concerning the inviolability of property rights.[12]

b. The emergence of the new international economic order was not foreseen by the parties at the time of the conclusion of both accords.

At the time of the conclusion of both accords, none of the signatories could have reasonably anticipated the revolutionary reqorking of the international economic order that is only now taking place. In that bygone era of unchallenged imperialist supremacy, such a change in circumstances was clearly beyond the contemplation of the parties.

c. The emergence of the new international economic order constituted a fundamental change in circumstances that radically transformed the extent of obligations under both accords.

The General Assembly's passage of resolutions 3201 and 3202, proclaiming the establishment of a new international economic order, [13] and the Charter of Economic Rights and Duties of States evidences a fundamental

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Rebus Sec Statntibus, 23 REV. EGYPT DROIT INT'L 109, 117 (1967); Toth, The Doctrine of Rebus Sic Stantibus in International Law, 5 JUR. REV. 56, 263 (1974); Williams, The Permanence of Treaties, 22 AM. J. INT'L L. 105 (1922).

[12] Roy, Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law? 55 AM. J. INT'L L. 863, 865 (1961).

change in international economic relationships. The work of UNCTAD,[14] ECOSOC,[15] and leading international publiscists[16] all steadfastly confirm the existence of this radically new state of world economic affairs. The old international economic system to which both accords were meant to apply has ceased to exist. Those accords cannot be meaningfully or equitably applied to the new world order in which Justia is an outspoken participant. Hence, the fundamental change in circumstances radically transformed the extent of obligations under both accords.

d. Since both accords could be lawfully terminated under the doctrine of rebus sic stantibus, denunciation immediately released Justia from any further obligation.

Once it is determined that all the preconditions of rebus sic stantibus have been met, the interested state need only make a public denunciation to effect an immediate release from its obligations under the accord.[17] Thus,

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[13]Declaration on the Establishment of a New International Economic order, G.A. Res. 3201. U.N. GAOR, Supp (No. 1), U.N. Doc. A/9559 (1974); Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, U.N.GAOR, Supp (No. 1), U.N. Doc. A/9559 (1974). Both Resolutions are reprinted in 2 A NEW INTERNATIONAL ECONOMIC ORDER: SELECTED DOCUMENTS 1945-1975, at 891, 893 (G. Moss & N. Winston comps.]975).

[14]UNCTAD, MAJOR ISSUES ARISING FROM TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES (1975); UNCTAD, Selected Principle Provisions in National Laws, Regulations and Policy Guidelines, U.N. Doc. TD/B/C.6/II (1975). See generally Jeffries, Regulation of Transfer of Technology: An Evaluation of the UNCTAD Code of Conduct, 18 HARV. INT'L L. J. 309 (1977).

[15]Primoff, International Regulation of Multinational Corporations and Business--The United Nations Takes Aim, 11 J. INT'L L. & ECON. 287, 300-05 (1977).

[16]See, e.g., Coonrod, The United Nations Code of Conduct for Transnational Corporations, 18 HARV. INT'L L. J. 273, 288-307 (1977); Ewing, Transfer and Development of Technology: The Problems of Developing Countries in Perspective, 11 J. WORLD TRADE L. 1 (1977); Lall, The Patent System and the Transfer of Technology to Less-Developed Countries, 10 J. WORLD TRADE L. 1 (1976).

Justia'a denunciation released it from any duties it might have had under either accord.

3. Alternatively, both accords lost their binding legal effect by operation of the doctrine of jus cogens.

a. Economic self-determination is a new peremptory norm of general international law that emerged after the conclusion of both accords.

It is clear that since the time of the conclusion of both accords, a new jus cogens norm has emerged recognizing that the peoples of developing countries have the right of economic self-determination.[18] The Justian people have the right freely to pursue their economic development, unencumbered by the fetters of foreign domination.

b. Since both accords are in conflict with the new peremptory norm, they were properly terminated upon denunciation.

The national treatment provisions of both accords prclude Justia from instituting a program of affirmative action and preferential treatment for its failing home industry. Those provisions insure that long-term economic growth will be stifled. Since both accords negate the sovereign prerogatives of the Justian people to organize and develop their economy in their own interest, they are both inconsistent with the new peremptory norm of economic self-determination. Thus, the denunciation

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[17] Lissitzyn, supra note 11, at 912.

[18] Advisory Opinion on Western Sahara, [1975] I.C.J. 12, 29-35 (principle of self-determination relied upon by this Court); Barcelona Traction Case (Second Phase), [1970] I.C.J. 3, 304 (separate opinion of Ammour, J.)(self-determination is a jus cogens norm); International Covenant on Economic, Social and Cultural Rights, 61 AM. J INT'L L. 861 (1967); I. BROWNLIE, PRINCIPLES OF PUBLIC POLICY IN INT'L LAW 501 (2d ed. 1973); O. LISSITZYN, INTERNATIONAL LAW TODAY AND TOMORROW 75-80 (1965); Birney, Peremptory Norms of International Law: Their Source, Function and Future, 4 DENVER J. INT'L L. & POL'Y 187 (1974); Chowdbury, The Status and Norms of Self-Determination in Contemporary International Law, 24 NETH. INT'L L. REV. 72, 80 (1977).

was sufficient to release Justia from any further obligations.

4. Alternatively, both accords lost their binding legal effect by operation of the doctrine of state succession.

The ascension of the radically new Justian regime was tantamount to state succession.[19] While the structure of the new government was similar to those which preceded it, the ideological core of Justian politics had been thoroughly reworked as a consequence of Justia's alignment with the new international economic order.[20] In short, the Justia of the new international economic order is a different state from the Justia that belonged to the traditional order. Since the new Justian regime may selectively opt out of previously concluded treaties deemed inimical to the national interest, the denunciation was legally sufficient to nullify the binding effect of both accords.[21]

5. Alternatively, both accords lost their binding legal effect by September 1976.

Each of the accords contains provisions to the effect that one year after tender of notice of intention to denounce, the treaties will automatically expire.[22] Thus, by the terms of the accords themselves, they expired at the latest by Septmeber 1976--one year after the date

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[19] L. CHEN, supra note 4,at 12-13; D. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW vi (1967); Kunz, Identity of States under International Law, 49 AM. J. INT'L L. 68, 71 (1955).

[20] Radical changes in state ideological perspectives may be indicative of state succession. McDougal & Goodman, Chinese Paricipation in the United Nations: The Legal Imperative of a Negotiated Solution, 60 AM. J. INT'L L. 671 (1966).

[21] Compare bilateral treaty, supra note 1, art. 18(2) with Paris Convention, supra note 2, art. 26.

of denunciation.

B. Even assuming arguendo that both accords were binding upon Justia, their provisions requiring national treatment were honored in good faith.

Both accords impose two general obligations on signatory states. First, each party is required to extend national treatment to alien firms and their property.[23] Second, each party is bound to assure protection against unfair competition and restrictive business practices.[24] Each are equally important to the underlying aims and purposes of the accords. These two parallel duties are placed in tension when state regulatory measures must be targeted at non-national enterprises in order to approach free market conditions. Thus, what may appear to be a denial of national treatment is in reality the enforcement of an antitrust regulation promulgated pursuant to the solemn mandate of both accords. As will be seen in the following discussion, Justia's conduct can be largely justified on these grounds.

1. Justia's transfer of technology law does not offend the principle of national treatment.

The law applies with equal force to aliens as well as to "[i]ndividuals or corporations of Justian nationality."[25] The licensing agreements of Justians and Patrians must meet precisely the same criteria for registration. De jure equality before the law is achieved. As long as the agreement contains no restrictive, anti-competitive provisions, it

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[23] Compare bilateral treaty, supra note 1, art. 14 with Paris Convention, supra note 2, art. 2.

[24] Compare bilateral treaty, supra note 1, art. 11 with Paris Convention, supra note 2, art. 10bis.

[25] A Law to Regulate the Transfer of Technology, art. 3(I), July 14, 1975.

will be registered.[26]

2. The increase in import duties did not offend the principle national treatment.

Although nationals escape payment of the duty while aliens do not, the imposition of differing obligations in these circumstances entails no denial of national treatment. Under the terms of the bilateral treaty, national treatment of Pharmaca's property was required only after the property came "within the territories" of Justia.[27] Since the import duty reached Pharmaca's property before it entered the country, that levy is entirely consistent with the national treatment provisions of the treaty.

3. Justia's law regulating industrial property did not offend the principle of national treatment.

a. The dual-trademark requirement is consistent with the principle of national treatment.

The requirement applies to both nationals and aliens alike. Under the terms of the new law, any trademark of "foreign origin," that is, any trademark initially registered abroad, must be used in conjunction with a trademark initially registered in Justia. Since both Justian nationals and foreigners might legally hold patents initially registered abroad, the law reaches both classes of persons without discrimination.[28]

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[26]It is interesting to note that the provisions of Pharmaca's licensing agreement not only violate Justian law but also the law of the United States. See, e.g., Davidow, United States Antitrust Laws and International Transfer of Technology--The Government View, 43 FORDHAM L. REV. 733 (1975).

[27]Bilateral treaty, supra note 1, art. 14.

[28]The Mexican Law on Invention and Trademarkds, art. 127, Diario Official, Feb. 10, 1976, is practically identical to Justia's industrial property law and has been defended as entailing no denial of national treatment. Medina, Significant Innovations of the New Mexican Law on Inventions and Trademarks, 7 GA. J. INT'L & COMP. L. 5, 13 (1977).

b. The patent life reduction is consistent with the principle of national treatment.

The reduction of the life of patents held by foreign enterprises is vindicated as an antitrust measure sanctioned by both accords.[29] Patents held by foreign firms are unconscionably employed as a means of consolidating monopolistic market power at the expense of the less developed countries.[30] The shortening of foreign patent life has the salutary effect of equalizing competition between foreign monopolists and struggling national firms.[31]

Alternatively, even assuming that the patent life reduction constitutes a technical violation of the national treatment principle, it is de minimis. Since Justian patents held by foreign firms can be renewed upon expiration of the initial eight year term, no cognizable injury results from the reduction of the patent life.

C. Justia has satisfied any legal duty it might have had to extend national treatment.

1. The international minimum standards of justice do not require national treatment.

Under the international minimum standards, "the treatment accorded a state's own nationals is irrelevant so far as aliens are concerned, since aliens have a claim to a minimum standard of legal treatment that is not less than that promised by the 'universal' standards of 'civilized'

[29] See note 24 supra; 5 EUROPEAN PATENT LAW AND PRACTICE 709-710 (M. Stiefel ed. 1971)(discussing how the EEC has reconciled the same tension between patent rights and antitrust regulation).

[30] See, e.g., UNCTAD, The Role of the Patent System in the Transfer of Technology for Developing Countries, supra note 9, ECAFE, The Role of Patents and Trademarks in Industrial Development with Particular Reference to the Transfer of Technology, September 18, 1973, WIPO Doc. BS/5, at 10; Joelson & Griffin, International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis, 8 INT'L LAW. 5, 18-20 (1977).

[31] Kunz-Hallstein, supra note 9, at 450.

states."[32] In other words, customary international law requires only that the treatment accorded be consistent with an international minimum, not that the treatment of aliens be identical to that of nationals. It is well-established that the host state may treat aliens differently than nationals in ways which "bear a reasonable relation to differences in their obligations and loyalties."[33] Further, the international minimum standards have historically been invoked only to protect fundamental human rights affecting the liberties of natural persons,[34] not to secure domestic economic privileges for alien corporations.[35]

2. Even assuming national treatment is required, Justia'a action is consistent with that requirement.

As established earlier, the new laws promulgated by the Justian legislature apply with equal force to nationals and aliens alike.[36]

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

A. Since Pharmaca failed to exhaust local remedies, Patria is precluded from challenging the invalidation of the licensing agreement before this Court.

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[32] F. DAWSON & I. HEAD, INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS 10 n. 28 (1971). See also, Borchard, The "Minimum Standard" of the Treatment of Aliens, 38 MICH. L. REV. 445, 450-56 (1940); Sohn & Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 AM. J. INT'L L. 545 (1961).

[33] McDougal, Lasswell & Chen, The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights, 70 AM. J. INT'L L. 432, 444 (1976).

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

[35] N. LEECH, C. OLIVER, J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 586-87 (1973).

[36] See text accompanying notes 23-31 supra.

1. All local remedies must be exhausted.

As Judge Lauterpacht noted in the Norwegian Loans Case,[37] an attempt ought to be made to exhaust all available remedies "however contingent and theoretical these remedies may be...."[38] Every avenue of municipal appeal must be exhausted.[39] One arbitral tribunal has emphasized that "[i]t is the whole system of legal protection as provided by municipal law, which must have been put to the test before a state, as protector of its nationals, can prosecute the claim on the international plane."[40]

2. Pharmaca failed to exhaust all available remedies.

Pharmaca failed to pursue a special action for abuse of authority or for bias against the Minister of Industry before a special panel of the Supreme Court of Justia. In neglecting an avenue of appeal which might have provided the desired relief, Pharmaca did not exhaust local remedies. Thus, Patria's claim on Pharmaca's behalf is not yet ripe for review by this Court.

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[37] Norwegian Loans Case (France v. Norway), [1957] I.C.J. 9 (separate opinion of Lauterpacht, J.).

[38] Id. at 39.

[39] Interhandel Case (Switzerland v. United States), [1959] I.C.J. 6, 27; Electricity Co. of Sofia and Bulgaria (Belgium v. Bulgaria), [1939] P.C.I.J., ser. A/B, No. 77. See also, 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. 452, 457-58 (1954); Head, A Fresh Look at the Local Remedies Rule, 5 Can. Y.B. INT'L L. 142, 152 (1967); Meron, The Incidence of the Rule of Exhaustion of Local Remedies, 36 BRIT. Y.B. INT'L L. 83 (1959).

[40] Ambatielos Claim (Greece v. United Kingdom), 12 R. Int'l Arb. Awards 82, 120, 23 I.L.R. 306, 336 (1956). See also Lipstein, The Ambatielos Claim Last Phase, 6 INT'L & COMP. L.Q. 643 (1957).

B. Retroactive invalidation of contracts to which the state is not a party is entirely consistent with international law.

Under international law, Justia's sovereign authority to regulate contractual relationships is plenary.[41] As long as the state is not party to the contract, it may exercise its discretion in voiding agreements which it deems inimical to the public interest.[42] There is no general prohibition against retroactive application of non-penal laws recognized by the community of civilized nations.[43] Thus, Justia's retroactive invalidation of the licensing agreement entailed no violation of international procedural justice.

C. The proceedings resulting in the invalidation of the licensing agreement were consistent with the demands of procedural justice.

1. Justia satisfied any legal duty it might have had to provide Pharmaca with free access to national tribunals.

The free access doctrine requires only that aliens be allowed to present their claim before some sort of national tribunal, administrative or judicial.[44] The doctrine evolved in response to the practice of

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[41] Henry, Protection Against Non-Commercial Risks in Patent Licensing, 10 J. WORLD TRADE L. 421, 425 (1976); Sohn & Baxter, supra note 32, art. 12(4).

[42] C. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 100-05 (1967); Sohn & Baxter, supra note 32, art. 12.

[43] Wesley, A Compensation Framework for Expropriated Property in the Developing Countries in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 30 (R. Lillich ed. 1975) [hereinafter cited as LILLICH]. The author states that there is "neither hard principle of international law nor developed consensus of municipal law prohibiting the use of retroactively applied civil rules." Id.

[44] F. DAWSON & I. HEAD, supra note 32, at 109-57; A. ROTH, THE MINIMUM STANDARDS OF INTERNATIONAL LAW APPLIED TO ALIENS 185-86 (1961); 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).

certain states of absolutely excluding aliens from any national tribunal. Where there are adequate avenues of administrative appeal available, the free access doctrine does not require appellate judicial review as of right.[45] But even if it did, Pharmaca was provided with an opportunity to press its claim before a special panel of the Supreme Court of Justia. There has been no denial of free access.

2. Pharmaca received an impartial hearing before the Ministry of Industry.

The record is devoid of any indication that the hearing before the Ministry of Industry was anything but impartial. The Ministry, acting in a quasi-judicial capacity, must be held to have decided the appeal on the merits, fully cognizant of its duty of objectivity. Pharmaca indisputably received independent, unbiased review of its claims.

III. JUSTIAN LEGAL PROCEDURES RELATING TO THE NATIONALIZATION OF SUBPHARM WERE CONSISTENT WITH INTERNATIONAL LAW.

A. Since the nationalization of Subpharm was for a bona fide public purpose, this Court is precluded from further examination of the domestic juristic basis of the expropriation.

Subpharm was nationalized pursuant to a comprehensive program of economic reform which reached both national and foreign firms alike. The nationalization of Subpharm was deemed to be in the best interest of the people of Justia, a determination which only Justia can make.[46] Once it is clear that the taking was activated by an appropriate public purpose, this Court's inquiry into the domestic juristic basis of the expropriation is at an end.[47] The particular domestic legal

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[45] Dawson, International Law, National Tribunals and the Rights of Aliens: The Latin American Experience, 21 VAND. L. REV. 712, 716-26 (1968).

[46] Domke, Foreign Nationalizations, 55 AM. J. INT'L L. 585, 590 (1961); Note, Expropriation of Alien Property, 109 U. PA. L. REV. 245, 260 (1960).

mechanisms relied upon to effect the taking become irrelevant to this adjudication, once a legitimate public purpose is discernible. In short, the domestic juristic basis of the expropriation, standing alone, is without international legal significance.[48]

B. Alternatively, since the acceleration of the nationalization decision was consistent with the demands of procedural justice, the expropriation was lawful.

1. The acceleration of the nationalization decision did not constitute an abuse of discretion cognizable under international law.

The Nationalization Board may have erred in deciding to nationalize Subpharm for non-compliance with the law regulating foreign investment before the one year grace period had expired. As the Lotus Case[49] makes clear, however, an an error in the application of domestic law does not give rise to an international right of action absent some collateral deprivation of justice.[50] De minimis departures from the letter of municipal law do not concern international tribunals unless some grievous ancillary harm flows therefrom. No collateral deprivation of justice resulted from the Board's action. Hence, the premature nationalization per se raises no internationally cognizable claim.

2. Alternatively, even assuming that the injury was cognizable under international law, the claim for relief is nonjusticiable since Pharmaca failed to exhaust local remedies.

Every avenue of municipal appeal must be exhausted before the

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[47] Christie, What Constitutes a Taking of Property Under International Law?, 38 BRIT. Y.B. INT'L L. 307, 336-38 (1962); Domke, supra note 46, at 590-91; G. WHITE, NATIONALISATION OF FOREIGN PROPERTY 5-8 (1961).

[48] See authorities cited at note 47 supra.

[49] Lotus Case (Turkey v. France), [1927]P.C.I.J., ser. A, No. 1o.

[50] Id. at 24.

international claim becomes ripe for review.[51] Pharmaca could have brought a special action for abuse of authority or for bias before a special panel of the Supreme Court of Justia. Such an appeal might very well have provided effective relief, since it prima facie appears that Board exceeded its statutory authority. In any event, the failure to pursue that remedy estops Patria from asserting the claim of Pharmaca's behalf before this Court.

C. Since the nationalization and compensation proceedings conformed to the requirements of procedural justice, the expropriation of Subpharm was lawful.

1. The administrative proceedings were impartial.

Both the Nationalization Board and the special panel of experts on compensation were sufficiently autonomous and immune from prejudicial political cross-currents to conduct unbiased proceedings. Expert panels have often been relied upon by this Court in determining the proper compensation for an expropriation.[52] The record is devoid of any evidence suggesting that the administrators were unduly prejudiced against Pharmaca.

2. No appellate judicial review was required.

Justia was under no duty to guarantee appellate judicial review of the determinations of the Nationalization Board and the special panel of experts on compensation. Administrative review of the Board's decision by the Ministry of Industry and the Premier of Justia provided Pharmaca with the minimum international remedy to which it was entitled

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[51] See text and authorities accompanying notes 37-40 supra.

[52] Anglo-Iranian Oil Co. Case, [1955]I.C.J. Pleadings 360; Nottebohn Case (Second Phase), [1955]I.C.J. Pleadings 8, 9, 11-12. Experts were also used extensively by the Permanent Court of International Justice. See, e.g., Chorzow Factory Case, [1928]P.C.I.J., ser. A, No. 17, at 51-52; Oscar Chinn Case, [1934]P.C.I.J., ser. A/B, No. 63.

under international law.[53] Similarly, the determinative finality of the special panel's compensation determination is completely acceptable under international law.[54] Judicial review of every administrative determination would calamitously overburden the Justian legal system with a backlogue of filed appellate actions.

D. The lawfulness of the original expropriation of Subpharm is unaffected by the adequacy of the compensation subsequently tendered by Justia.

It is sometimes mistakenly asserted that the failure to pay just compensation renders the original taking unlawful ab initio. Two lines of analysis expose the fallacy of such as ill-conceived assertion in the present case. First, since the compensation tendered by Justia was fair, the lawfulness of the original taking remains unimpaired.[55] Second, the validity of the original taking cannot be determined by subsequent events like the payment of compensation.[56] If that were the rule, a cloud would remain over the title of the expropriated property until "just" compensation had been tendered. Title to the expropriated property could only be perfected after years of needless delay. Thus, the theory is juristically and commercially untenable.

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[53] F. DAWSON & I. HEAD, supra note 32, at 109-57; Dawson, supra note 45, at 716-20.

[54] Id. See also Wesley, supra note 43, at 38.

[55] See text and authorities accompanying notes 58-64 infra.

[56] AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 185, Comment c (1965).

IV. JUSTIA TENDERED JUST COMPENSATION FOR THE NATIONALIZED ASSETS OF PHARMACA AS REQUIRED BY INTERNATIONAL LAW.

A. Justia satisfied any duty it might have had under the bilateral treaty to tender equivalent compensation.

1. The equivalent compensation standard is not binding.

As established earlier, the bilateral treaty has unequivocally lost its binding legal effect. Thus, the equivalent compensation standard[57] is inapplicable and irrelevant.[58]

2. Even assuming that the standard is binding, it has been satisfied by Justia's compensation award.

The bilateral treaty no where defines the term "equivalent" compensation. Thus, it is entirely appropriate for Justia to define equivalent compensation as the difference between market value and unjustified excess profits. The excess profits deduction results in a more realistic determination of equivalent value by discounting market value by the externalized costs which Pharmaca has inflicted upon the Justian people. Thus, Justia has satisfied the equivalent compensation standard.

B. In the present case, the appropriate standard of compensation must be determined by municipal law.

1. There is no clear international standard of compensation.

The dramatic increase in the incidence of foreign nationalization in the last half century has not been accompanied by an orderly development of the law of compensation.[59] The old standard, which is usually formulated in terms of prompt, adequate and effective

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[57] Bilateral treaty, supra note 1, art. 4(3).

[58] See text and authorities accompanying notes 1-22 supra.

[59] Rood, Compensation for Takeovers in Africa, 11 J. INT'L L. & ECON. 521, 528 (1977).

compensation, emerged at a time when capital-exporting countries could shape international law to their needs.[60] Today the law is in a state of flux. The world community is unable to agree upon a controlling standard. Neither state practice nor judicial opinions significantly clarify the question. None of the traditional sources of international law reveal any dispositive standard of compensation that is binding upon the world community.[62]

2. Justia possesses the sovereign right to determine the appropriate standard of compensation.

Absent a universally binding international standard, each state is left to establish such compensation guidelines as justice may require. The right of states to determine the appropriate standard of compensation has been repeatedly recognized in a long line of U.N. resolutions.[63] The emerging norm allows expropriating

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[60] R. ANAND, NEW STATES AND INTERNATIONAL LAW 5, 41 (1972); W. FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 226, 318 (1964); S. SINHA, NEW NATIONS AND THE LAW OF NATIONS 11, 91 (1967); Castenada, The Underdeveloped Nations and the Development of International Law, 15 INT'L ORGANIZATION 38 (1961).

[61] Pugh, Legal Protection of International Transactions against Non-Commercial Risks in A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 316 (W. Surrey ed. 1962).

[62] Rood, supra note 59, at 534; Baxter, Forward in 2 LILLICH, supra note 43, at ix (no international conventions establishing standard); I. BROWNLIE, supra note 18, at 519-20 (customary international law establishes no binding standard).

[63] See, e.g., G.A. Res. 626, 7 U.N. GAOR, Supp. 20, at 18, U.N. Doc. A/2361 (1952); G.A. Res. 3171, U.N. Doc. A/RES/3171 (1974), reprinted in 68 AM. J. INT'L L. 381 (1974); G.A. Res. 3201, supra note 13; G.A. Res. 3202, supra note 13. On the binding legal force of General Assembly resolutions see R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 5 (1965)(resolutions indicate customary international law) and Falk, On the Quasi-Legislative Competence of the General Assembly, 60 AM. J. INT'L L. 782 (1966).

states to tender only such compensation as is required by municipal law.[64] Thus, the excess profits standard is consistent with international law.

3. Even assuming that a controlling international standard exists, it is inapplicable since Justia's nationalization was pursuant to a comprehensive program of economic reform.

The nationalization of Subpharm was not an isolated event. Rather, it was an integral part of a comprehensive program of technology transfer and industrial development currently being implemented in Justia. Under such circumstances, international law permits the nationalizing state to set the appropriate standard of compensation.[65] Only partial compensation need be awarded.[66]

C. Justia's payment of 2% interest is consistent with international law.

The same sovereign powers which enable Justia to set the standard of compensation, confer the authority to establish an interest rate commensurate with Justia's national interest.[67] There is no internationally sanctioned interested rate which must be paid.[68]

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[64] O. LISSITZYN, supra note 18, at 78-79; Takayanagi & Tanaka, The First Session of the Asian Legal Consultative Committee, 2 JAPANESE ANN. INT'L. L. 110 (1958).

[65] I. BROWNLIE, supra note 18, at 522-23; K. KATZAROV, THE THEORY OF NATIONALIZATION 349-57 (1964); Dawson & Weston, "Prompt, Adequate, and Effective": A Universal Standard of Compensation?, 30 FORDHAM L. REV. 727, 735 (1962); Girvan, Expropriating the Expropriator: Compensation Criteria from a Third World Viewpoint in 3 LILLICH, supra note 43, at 165-68; Kuhn, Nationalization of Foreign Owned Property in Its Impact on International Law, 45 AM. J. INT'L L. 709 (1951).

[66] 1 OPPENHEIM'S INTERNATIONAL LAW 352 (8th ed. H. Lauterpacht ed. 1955) (Where "far reaching social reforms entail interference, on a large scale, with private property . . . . the granting of partial compensation . . . ." does not offend international law.)

[67] See authorities cited in notes 63-66 supra.

[68] Id.

D. Independent compensation for the use of industrial property formerly belonging to Pharmaca is not required.

1. There has been no unauthorized use of Pharmaca's industrial property requiring compensation.

First, it is clear that Pharmaca's patents are no longer protected by Justian law. The patent rights of the Calmian production process expired in 1976 by operation of the Justian industrial property law. Second, since the entire licensing agreement is in conflict with the transfer of technology law, its royalty provisions are without binding legal effect. Third, to the extent that a legally protected residuum of proprietary or contractual interests was expropriated by Justia, adequate compensation for the taking was made in the one million dollar award of the special panel of experts on compensation.

2. Alternatively, even assuming that Pharmaca is entitled to compensation, any claim for relief is presently nonjusticiable.

a. Subpharm's unauthorized use of Pharmaca's industrial property is not attributable to the Justian state.

Subpharm is a discrete corporate entity, a separate juristic person which enjoys no sovereign immunity. As such, it is legally accountable for its actions.[69] Liability for any breach of contract claim properly rests with the corporation, not with its equity owner. Thus, Justia is not legally responsible for any unauthorized use which might have occurred.

b. Since Pharmaca did not exhaust local remedies, any compensation claim against Subpharm is not ripe for review.

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[69] Sohn & Baxter, supra note 32, art. 17(2); Draft Articles on State Responsibility, 2 INT'L L. COMM'N Y.B. 276, 282 (1974) (These articles have been adopted by the International Law Commission.)

Even assuming that Subpharm is liable for unauthorized use and breach of contract, Patria is precluded from asserting those claims before this Court since Pharmaca did not first exhaust local remedies in Justia by instituting an action against Subpharm.[70] The compensation claim is simply nonjusticiable at this time.

V. THE JUSTIAN LAW REQUIRING THAT TRANSFER OF TECHNOLOGY DISPUTES BE SETTLED IN JUSTIAN COURTS IN ACCORDANCE WITH JUSTIAN LAW IS FULLY CONSISTENT WITH INTERNATIONAL LAW.

A. Justia has the sovereign power to enact legislation regulating contracts, including the power to establish the applicable law and jurisdiction in contract disputes.

Contracts entered into with Justian nationals and performed in Justian territory fall within the "territorial jurisdiction" of Justia and are subject to domestic laws.[71] As a sovereign state, Justia enjoys broad authority to affect contractual relationships between foreign nationals and its own private nationals, even to the extent of denying legal effect to any agreement that infringes upon the moral and economic welfare of its citizens.[72] Justia's sovereign powers of contract regulation thus include the right "to exercise [exclusive] legal jurisdiction over the settlement of disputes pertaining to transfer of technology agreements."[73]

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[70] See text and authorities accompanying note 37-40 supra.

[71] D. SHEA, THE CALVO CLAUSE 3 (1955).

[72] Garcia-Amador, (Fifth) Report on State Responsibility for Injuries to Aliens, 2 Y.B. INT'L COMM'N 41, 60 (1960); Henry, supra note 41, at 425; Pugh, supra note 61, at 322; Sohn & Baxter, supra note 32, art. 12(4), Comment at 547.

[73] UNCTAD, REVISED TEXT OF DRAFT OUTLINE OF AN INTERNATIONAL CODE OF CONDUCT ON TRANSFER OF TECHNOLOGY: SUBMITTED ON BEHALF OF THE EXPERTS FROM THE GROUP FROM THE GROUP OF 77, § 8.2, Annex I, UNCTAD Doc. TD/AC.1/4 (1976).

B. Because of Justia's significant public policy interests in technology transfer disuputes, Justia's limitation of party autonomy is a reasonable exercise of sovereign powers.

The only proposed limitation upon a state's absolute powers within its sovereign sphere is that state acts be reasonable and not "clearly arbitrary".[74] The Justian jurisdictional requirements easily satisfy any test of reasonableness.

Numerous studies by agencies of the United Nations have shown that transfer of technology agreements have a signifiicant impact upon the economic development and well being of developing countries.[75] Vital Justian national interests are therefore at stake in each technology transfer agreement affecting the Justian economy.

The protection of these national interests constitutes compelling reason for state action. Only by restricting the adjudication of technology transfer disputes to Justian courts can Justia be assured full and impartial consideration of the complex Justian public policies that may affect the resolution of such disputes. The different conceptions of property and social ownership and different notions of equity in the fora and laws of other states do not assure full protection of Justia's vital economic interests outside of its own legal system. Justia's sovereign action based on grounds of compelling public policy cannot be considered "clearly arbitrary".

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[74] See, e.g., Garcia-Amador, supra note 72, at 60; Sohn & Baxter, supra note 32, art. 12(4), comment at 547. But see, G. SCWARZENBERGER & E. BROWN, A MANUAL OF INTERNATION LAW 85 (6th ed. 1976) (for the proposition that no general prohibition of the abuse of sovereign rights is postulated by international customary law).

[75] See, e.g., UNCTAD, The Role of the Patent System in the Transfer of Technology to Developing Nations, supra note 9; UNCTAD, Report of the Group of Governmental Experts on the Role of the Patent System in the Transfer of Technology, U.N. Doc. TD/B/C.6/8 (1975).

C. The Justian law is consistent with Justia's obligations under the U.N. Arbitral Convention.

Under the U.N. Arbitral Convention[76] each contracting state is empowered to determine the validity of arbitral agreements and awards which are submitted to its courts for enforcement. Each state may determine according to its domestic laws whether the specific subject matter of a dispute is "capable of settlement by arbitration,"[77] whether the parties lack capacity to contract,[78] or whether the agreement is "null and void, inoperative or incapable of being performed."[79] In addition, the Convention expressly recognizes the right of each state to refuse recognition of arbitral agreements and awards "contrary to the public policy of that country."[80]

Because of the compelling reasons of public policy involved, Justia is fully justified in invoking each of the above grounds to limit the validity of agreements ousting Justian jurisdiction in transfer of technology disputes. Justia is within its recognized sovereign discretion in denying legal effect to only that single class of contractual agreements involving the trasfer of technology. In all other legal relationships the autonomy of the parties to choose arbitration is unaffected. The Justian

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[76] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature, June 10, 1958, 21 U.S.T. 2518, T.I.A.S. No. 6997 [hereinafter cited as Convention].

[77] Convention, art. II(1), art. V(2a), supra note 76; Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 YALE L.J. 1049, 1064 n. 70 (1961)

[78] Convention, art. V(1a), supra note 76.

[79] Convention, art. II(3), supra note 76; Quigley, supra note 77, n. 71 at 1065.

[80] Convention, art. V(2b), supra note 76; Auigley, supra note 77, n. 71 at 1065.

law is consistent with both the spirit and the letter of Justia's treaty commitments.

D. The Justian law is consistent with current state practice and customary international law.

The right of a state to refuse recognition of a contractual choice of law agreement, on grounds of public policy, is well accepted in customary international law.[81] Party autonomy has been excluded or circumscribed by many states in many sectors of economic activity.[82] In most states the exclusive jurisdiction of local courts is mandated, for example, in labor relations and employment contract disputes. In transfer of technology disputes exclusive domestic jurisdiction is mandated by Mexico, Argentina and all the members of the Andean Common Market.[83] The Justian law is thus consistent with customary law and current state practice.

E. Justia's exercise of exclusive jurisdiction over the substantive issues in technology transfer disputes does not infringe upon the exercise of any international rights.

Transfer of technology disputes involve industrial property rights and contractual obligations created and regulated under municipal law.[84] The substantive rights in such disputes, being of a limited territorial

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[81] A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 468 (1962); AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187(2) (1965); Jansky, Choice of Law and Trademark License Agreements, 16 INT'L & COMP. L.Q. 393, 397 (1967).

[82] G. DELAUMÉ, TRANSNATIONAL CONTRACTS: APPLICABLE LAW & SETTLEMENT OF DISPUTES §3.06 (32) (1975).

[83] Dessemontet, Transfer of Technology under UNCTAD and EEC Draft Conventions: A European View on Choice of Law in Licensing, 12 J. INT'L L. & ECON. 1, 10-13 (1977).

[84] See authorities notes 71 and 72 supra; "Any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country", Serbian and Brazilian Loans Case, [1928-30] P.C.I.J., ser. A, Nos. 20/21, at p. 41 (1928).

nature,[85] involve no issue for determination under international law.[86]

The Justian law simply requires the exhaustion of local remedies before an international claim may be adjudicated by an international tribunal. As such, it does not infringe upon any internationally protected right and is fully consistent with international law.[87]

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VI. CONCLUSION

It is respectfully requested that this honorable Court:

1. Declare that Justia has satisfied any duty it might have had under international law to extend national treatment to foreign licensors and investors.
2. Declare that the legal procedures relating to the invalidation of the licensing agreement and the nationalization of Subpharm were consistent with international law.
3. Declare that the one million dollar award adequately compensated Pharmaca for assets nationalized by Justia.
4. Declare that Justia's exclusive jurisdiciton requirements are consistent with conventional and customary international law.

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[85] Dessemontet, supra note 83, at 20.

[86] G. DELAUME, supra note 82, at §3.06 (37); A. NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 72 (1943).

[87] See text and authorities accompanying note 37-40 supra.

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