

THE 1979 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE

April, 1979 term

Between:

PATRIA
Applicant

and

THE REPUBLIC OF JUSTIA
Respondent

MEMORIAL FOR THE APPLICANT

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JURISDICTION

The states parties;

having regard to Articles 36 and 40 of the Statute of the International Court in submitting to the jurisdiction of the Court;

acceding to the settlement of all the questions presented in lieu of Articles 36 and 38 of the Statute;

have agreed to submit the present dispute for the resolution of the Court.

STATEMENT OF FACTS

The parties have agreed to the statement of facts and a restatement thereof is waived.

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 Justia 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 ARGUMENTS

The bilateral Treaty of Friendship and Commerce and the Paris Convention being both legally valid and binding govern the relationship between the bound

parties. By virtue of such treaties, Justia had the obligation to extend national treatment, and by passing the disputed and discriminatory municipal laws it failed in its treaty obligation and should be made answerable to Patria. Proper treaty interpretation also shows that the legal practices and procedures adopted by Justia with respect to the invalidation of the agreement and nationalization of Subpharm as well as the Justian compensation scheme violated the relevant and pertinent treaty clauses. The correct treaty interpretation likewise prohibits Justia from requiring technology disputes to be settled under Justian laws and courts. Manifestly, Justia is in breach of treaty.

The New International Economic Order, as evidenced by the Declaration and the Economic Charter cannot be applied, as United Nation's resolutions are not valid and binding documents and consequently cannot serve as a vehicle for the justification of the Justian laws, procedures, and practices now in dispute. And even granting arguendo, that said resolutions are binding, they do not operate to alter existing treaty obligations, much less terminate them.

Moreover, the bilateral treaty and Paris Convention have not been rendered inoperative by the Doctrine of Changed Circumstances on account of the Doctrine's inapplicability nor have the denunciations been effective as to affect treaty obligations. Even assuming that the said treaties have been rendered inoperative, nevertheless under the Minimum Standards of international law, Justia still incurred international breach by not providing for "adequate compensation", and not being able to guaranty the "non-denial of justice" to Patrian nationals.

This being so, Justia, incurred international breach entailing international liability on all four counts.

ARGUMENT AND AUTHORITIES

I. JUSTIA HAS BREACHED ITS INTERNATIONAL OBLIGATION TO EXTEND NATIONAL TREATMENT TO PATRIAN NATIONALS.

- A. PATRIA SUBMITS: That the Treaty of Friendship and Commerce 1/ and the Paris Convention for the Protection of Industrial Property 2/ are legally binding upon the disputants, Justia violated its treaty obligation to extend national treatment.

As both the bilateral treaty and the Paris Convention are legally binding upon the contracting states, 3/ the treaty commitment to extend to Patrian licensors and investors national treatment 4/ attaches to Justia as an obligation to be performed in good faith.

1. Justia is in breach of treaty.

The enactment of Justia's parliament of the New Law on the Protection of Industrial Property 5/ and the amendment to the Law on the Protection and Regulation of Foreign Investment 6/ are glaring examples of Justian acts diametrically anathema to her treaty obligation to extend national treatment. In this regard, the two mentioned pieces of municipal legislation shall be the focus of scrutiny.

1/ The textual reference is the Convention of Establishment between the United States and France, done November 25, 1959, [1960/ 11 U.S.T. 2398, T.I.A.S. 4625, 401 U.N.T.S. 75, hereinafter referred to as the bilateral treaty/.

2/ As revised at Stockholm on July 14, 1967, [1968/ 21 U.S.T. 1583, T.I.A.S. 6923, hereinafter referred to as the Paris Convention/.

3/ *Pacta sunt servanda* is a general principle of law, I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 595 (2nd ed. 1973), hereinafter cited as I. BROWNLIE/. See also L. OPPENHEIM, *INTERNATIONAL LAW*, 794 (7th ed. H. Lauterpacht, 1948), hereinafter cited as L. OPPENHEIM/; L. McNAIR, *THE LAW OF TREATIES*, 493 (2nd rev. ed. 1961), hereinafter cited as L. McNAIR/; B. CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS*, 112 (1953), hereinafter cited as B. CHENG/.

4/ Articles III, IV, V, VII, VIII, IX (1) and X of the Bilateral Treaty, and Article II of the Paris Convention.

5/ Hereinafter referred to as the Industrial Property Law.

6/ Hereinafter referred to as the Foreign Investment Law.

- a. The bilateral treaty and the Paris Convention according to general principles of international law denies any justification for the enactment of the Industrial Property and Foreign Investments Laws.

The Paris Convention by being subsequent, does not terminate the bilateral treaty, but both should be considered as two different sources of international obligations, mutually exclusive of each other. Even if we are to grant arguendo, that remedial measures 7/ under the bilateral treaty is an exception to the same treaty's national treatment clause, still it cannot be argued that such measures can also serve as an exception to the national treatment clause 8/ of the Paris Convention, for the reason that the latter speaks of a more specific matter, namely industrial property. On this score, generalia specialibus non derogant supports this interpretation. 9/ Moreover, the Paris Convention meets the test of lex superior 10/ considering that it has the character of a law-making treaty partaking of a degree of generality affecting members of the international community.

- (1) From the Textual Approach: The treaty must be interpreted as a whole. 11/

The plain and clear meaning 12/ of Article II of the Paris Convention has been manifestly breached by *Justia* when it reduced the lifetime of foreign

7/ Articles 11 and 12 of the bilateral treaty.

8/ Article II of the Paris Convention.

9/ H. Aufricht, Suppression of Treaties in International Law, 37 CORNELL L.Q. 698 (1952), hereinafter cited as H. Aufricht/.

10/ Dahl, The Application of Successive Treaties Dealing on the Same Subject Matter, 17 IND. Y.B. INT'L. AFF'S, 279 (1974); Advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations [1949/ I.C.J. 185.

11/ G. Fitzmaurice, The Law and Procedures of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points, 33 BRIT. Y.B. INT'L. L. 203, 218 (1957), hereinafter cited as G. Fitzmaurice/; Merills, Two Approaches to Treaty Interpretation, 55 AUSTL. Y.B. INT'L. L. 55-56 (1969).

12/ G. Fitzmaurice, id., at 204; B. CHENG, supra, note 3 at 107.

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patents without a corresponding reduction for local patents via the Industrial Property Law.

The plain and clear meaning of Article V of the bilateral treaty states:

"1. . . . companies of either . . . Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial . . . and other activities for gain . . . Accordingly, such . . . companies shall be permitted:

(b) . . . to acquire majority interests in companies"

(c) to control and manage the enterprise which they have established"

manifestly evidence Justia's breach in enacting the Foreign Investments Law. The only exception to the above quoted provision is Article V(2) thereof, which neither Pharmaca nor Subpharm falls under, and hence cannot be availed of.

Likewise, the plain and natural meaning of Article VIII states:

"1. . . . companies of either . . . Party shall be accorded . . . national treatment with respect to obtaining and maintaining patents . . . and . . . trademarks"

similarly evidence Justia's liability if backgrounded against its municipal law on Industrial Property.

Article XI of the said treaty while it affords remedial measures, can only be availed of if the same measures were equally applied to both foreign and local companies, not derogating against the national treatment obligation. Moreover, Justia's Industrial Property Law cannot be covered by Article XI, as the registration and maintainance of a patent does not by itself "restrain competition, limit access to markets or foster monopolistic control" What Article XI contemplates are commercial practices with predatory intent and resultant competitive injury 13/ as distinguished from ordinary business

13/ Notes on Unlawful Primary Line Price Discriminations: Predatory Intent and Competitive Injury, 68 COLUM. L. REV. 138 (1968).

contract restrictions. Neither can Justia argue that she can subjectively determine or expand the scope of predatory commercial practices. To argue otherwise is to encourage a pattern where "capital importing countries could be reluctant to commit themselves to subscribe to any standards of conduct good or otherwise, regarding the treatment of foreign investments". 14/

(2) The Teleological Approach: In support of the textual interpretation.

The objective and purpose of a treaty should prevail and its spirit should not be thwarted. 15/ The dominating purpose of the bilateral treaty is to foster" . . . mutually advantageous investments and mutually beneficial commercial relations . . ." 16/ The pretext of enacting the disputed regulatory Justian laws accrues one-sidedly in favor of Justia, and availing of Article XI as a justification must fail.

Facta sunt servanda is the keystone of all treaties both in its context and purpose whether in difficulty or facility, and its observance shall continue until its suspension or termination. Accordingly, the interpretation that renders the treaty effective, and not restrictively should be sustained. 17/ To overstretch the meaning of Article XI of the bilateral treaty, is to make the exception the general rule, which anomalously reduces the primary consideration of reciprocal benefits due to the other party. This would confer unusual rights to Justia in the form of near-absolute regulation which in the

14/ G. SCHWARZENBERGER, FOREIGN INVESTMENTS AND INTERNATIONAL LAW, 191 (1969).

15/ L. McNAIR, supra, note 3 at 114, 366; B. CHENG, supra, note 3 at 107; G. Gottlieb, The Interpretation of Treaties by Tribunals, AM. SOC. INT'L. L. PROC. 126 (1969).

16/ See the Bilateral Treaty's ratificatory paragraph.

17/ H. Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 33 BRIT. Y.B. INT'L. L. 67, 82 (1949).

first place, she agreed to limit by concluding the bilateral treaty. 18/

- B. PATRIA SUBMITS: That the so-called New International Economic Order cannot be applied.

The Declaration on the Establishment of a New International Economic Order 19/ and the Charter of Economic Rights and Duties of States 20/ do not fall under the province of Article 38(1) of the Statute of the International Court of Justice. 21/

1. The New Economic Order is neither customary law nor general principles of law.

Justia should not confuse the concept of such resolutions being merely functionally operative 22/ among states with the concept of normativeness erga omnes.

- a. At most, the Economic Charter and Declaration are merely emerging rules of customary International Law.

The basic tests for an emerged customary law has not been met. The invoked U.N. resolutions are neither general states practices, nor constitutive of opinio juris.

The World Court has refrained from pronouncing the emergence of a custom involving state practices of a limited duration nor of practices which are

18/ L. McNAIR, supra, note 3 at 458-61; Wimbledon Case (1923) P.C.I.J. 36.

19/ G.A. Res. 3201, U.N. Doc. A/9559 (1974) reprinted in, 68 AM. J. INT'L L. 799 (1979), hereinafter referred to as the Declaration/.

20/ G.A. Res. 3281, U.N. Doc. A/9631 (1974) reprinted in, 14 INT'L. LEGAL MATS. (1975).

21/ Done June 26, 1945, Acts and Documents Concerning the Organization of the Court, /1977/ I.C.J. 77.

22/ R. Falk, On the Quasi-legislative competence of the General Assembly, 60 AM. J. INT'L. L. 783 (1966), hereinafter cited as R. Falk/.

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inconsistent and non-uniform. ^{23/} It is doubtful whether the Declaration and Economic Charter can be considered general practice and opinio juris at the same time. Neither can merely related resolutions partake the nature of uniform practices over the same subject matter. The required identity over the same subject matter cannot be equated with mere relativity.

A glimpse of phraseology of both the Declaration and Economic charter shows that both resolutions evidence merely the future goals of states, a theoretical concept which does not constitute actual general state practices. At the most the resolutions only have moral or social force. ^{24/}

State consensus on the resolutions do not constitute opinio juris creating instant customary law considering that the language in both U.N. resolutions is couched in futurity. The Declaration states:

" . . . international economic order shall be one of the most important bases of economic relations between all peoples and all nations . . ."

and the Economic charter's preamble in stating that:

"Firmly convinced of the urgent need to evolve a substantially improved system of international relations . . ."

believes opinio juris, as an intent to create customary law out of such resolutions in so short a time, ^{25/} considering the implications of disrupting the foundation of international economic relations.

^{23/} Fisheries Jurisdiction Case (1974) I.C.J. REP., 3, 9, 59. North Sea Continental Shelf Cases (1969) I.C.J. REP., 3, 43; Also see Judge Wellington Koo's separate opinion in the Barcelona Traction Case (1964) I.C.J. REP., 6, 63: "There exists always the possibility of a difference of opinion as to the degree of uniformity . . . necessary to establish a customary rule."

^{24/} F. Sloan, The Binding Force of a Recommendation of the General Assembly of the United Nations, 25 BRIT. Y.B. INT'L. L. 31 (1948).

^{25/} M. Akehurst, Custom as a Source of International Law, 47 BRIT. Y.B. INT'L. L. 18 (1974-75); Z. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF, 47 (1968).

Neither is there substantial proof to show that subsequent to their adoption but prior to the enactment of the questioned Justian laws, said resolution has been molded into customary law.

- b. The Economic Charter and the Declaration are not interpretations of general principles embodied in the United Nations Charter.

Even conceding that the principle in the United Nations Charter reflect recognized general principles of law, it cannot be argued that all General Assembly resolutions are interpretations thereof. Of materiality is the fact that General Assembly resolutions are merely recommendatory unless it covers such subjects as membership and expulsion, membership in the ECOSOC and non-permanent members of the Security Council, and in the approval of an agreement between the Economic and Social Council with specialized agencies, 26/ in which case they are mandatorily binding upon all U.N. members. But the U.N. Economic Charter and Declaration do not fall under any of these instances. As a consequence, they remain merely recommendatory under Article 10 of the U.N. Charter. This is the essential difference between a recommendatory and a binding resolution.

Granting arguendo that resolutions are interpretations of its own charter the invoked resolutions must not only refer to the general principles it so interprets, but that specific provisions of the resolutions must refer to specific principles 27/ before such provisions can be invoked as a charter interpretation. To argue otherwise would mean that all resolutions and all

^{26/} R. Falk, supra, note 22 at 784; M. Magallona, Some Remarks on the Legal Character of United Nations General Assembly Resolutions, 5 PHIL. Y.B. INT'L. L. 86-87 (1976), hereinafter cited as M. Magallona/.

^{27/} S. Rubin, The Charter of Economic Rights and Duties, AM. SOC. INT'L. L. PROC. 226-227 (1975).

provisions are the interpretation of all the general principles of the Charter. Considering the vast underlying implications, neither can references to principles be lightly implied. Vividly, General Assembly resolutions cannot serve as judicial decisions and legislation 28/ at the same time.

c. The Economic Charter and the Declaration are of a moral or political character.

United Nations resolutions of a moral or political character cannot serve as a basis for their being raised to the status of customary law or general principles of law. 29/ The language of both resolutions being couched in the future tense refutes its emerged status and merely evidence its moral force. 30/ The intensity of debates prior to and subsequent to their adoption, between industrialized states and developing nations supported by the socialist countries, evidence the underlying political implications.

2. Assuming that the New Economic Order is a supervening customary law or general principles of law it is without prejudice to existing international obligations.

Treaties maybe merely declaratory of contemporary or concurrent international law. However, states may conclude a treaty to create new international obligations as between the contracting parties with the intent to exclude norms of customary law or general principles. 31/ In such cases the intent of the parties should prevail.

28/ HUDSON, 1 INTERNATIONAL LEGISLATION, Introduction, xiii (1931).

29/ Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa, [1955] I.C.J. REP. 67, 85, opinion of Judge Klaestad.

30/ M. Magallona, supra, note 26 at 94.

31/ J. BRIERLY, THE LAW OF NATIONS, 52 (1963).

- a. Based on the Doctrine of contemporaneity, the bilateral treaty and Paris Convention cannot be deemed inoperative.

When *Justia and Patria* agreed in reciprocally extending to each other national treatment, they concluded as between themselves a new obligation. It must be noted that national treatment was not an international norm then fifty years back at the conclusion of the treaty nor is it presently an international norm. ^{32/} In the light of the parties' contemporaneous intent ^{33/} the national treatment clauses of both the bilateral treaty and the Paris Convention should remain in force regardless of any change in concurrent international law.

Moreover, even if the said treaties are to be adjudged as declaratory of the then existing customary law, any fundamental change in customary law cannot ipso jure abrogate treaties unless therein provided for. In the event of such change, both obligations under the treaty or customary law should subsist, under the principle that international obligations entered into between lesser number of states prevail over similar obligations binding among a much larger number.

(1) Lex posteriori is not applicable.

There has never been an instance where the principle of lex posteriori ^{34/} has been applied outside of conflicting successive treaties. Moreover, the principle generally applies only to treaties of the same subject matter with the same number of parties. Furthermore, as has been stated, the contracting

^{32/} A. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW AS APPLIED TO ALIENS, 115 (1949), hereinafter cited as A. ROTH; E. Borchard, The Minimum Standard of Treatment of Aliens, 38 MICH. L. REV. 445 (1940).

^{33/} G. Fitzmaurice, supra, note 11 at 223.

^{34/} G. SCHWARZENBERGER, 1 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 509 (1957), hereinafter cited as G. SCHWARZENBERGER.

states agreed on the national treatment obligation exclusive of the then customary law.

(2) The doctrine of implied conditions is non-prejudicial.

Ordinarily, treaty performance in conformity with international law may be an implied condition. ^{35/} But such is not the present case. Their clear intent was to observe the national treatment obligation exclusive of existing customary law or general principles.

It would be stretching the intent of the framers of the United Nations Charter to make U.N. resolutions a means of terminating binding treaties.

Neither can Justia claim that it would be shortchanged by a fundamental change in law as it could avail of the denunciation clauses in both treaties.

b. The New Economic Order as evidenced by the invoked United Nations resolutions has no interpretative force.

Assuming the New Economic Order applies, it cannot serve as a rule for treaty construction for the simple reason that there is a distinction between interpretative rules and positive international obligations.

If ever it is to serve as an interpretative rule, its effect should be restrictively binding between U.N. members only, and not extendible to treaties entered into between non-member states.

3. Consequently, the New International Economic Order cannot legally justify Justian laws enacted in breach of treaty.

Since the treaties are not impaired by the invoked resolutions, all treaty obligations subsist and no justification exists for all Justian treaty contraventions.

C. PATRIA SUBMITS: That both the bilateral treaty and the Paris Convention have not been rendered inoperative, by any mode of treaty termination or suspension.

^{35/} L. McNAIR, *supra*, note 3 at 448-51.

1. Improper denunciations by Justia cannot be the basis for the in-operation of such treaties.

Justia cannot attempt to escape state liability on the basis of improper denunciations. Both the Paris Convention and bilateral treaty provides for a specific and detailed mode of denunciation, clearly implying the exclusion of any other mode.

Apropos of the Paris Convention, there is no showing of both the actual receipt and time of receipt by the Director-General of the Justian denunciation. The onus probandi lies with Justia. Neither can Patria's acquiescence 36/ be inferred. Patria's protest notes over the span of three years is sufficient to rebut acquiescence notwithstanding the non-mention of the Paris Convention. Acquiescence must be strictly interpreted and confined to long periods of inaction. 37/

Apropos of the bilateral treaty, no written notice was made to Patria, clearly evidencing both non-compliance with the denunciation clause and the absence of good faith on the part of Justia. The ineffectivity of a prior valid treaty cannot be lightly inferred.

- a. Assuming a proper denunciation, still the Industrial Property Law and Foreign Investment amendment were enacted when both treaties were subsisting during the one year rule.

The unequivocal language of the questioned local laws is manifestly in treaty breach.

The propriety of Justia's denunciation, does not heavily matter, as the disputed laws were passed during the one-year adjustment rule as provided in

^{36/} I. BROWNLIE, supra, note 3 at 48.

^{37/} L. Macgibbon, The Scope of International Acquiescence on International Law, 31 BRIT. Y.B. INT'L. L. 144-8 (1954); D. Bowett, Estoppel Before International Tribunals and its Relations to Acquiescence, 33 BRIT. Y.B. INT'L. L. 201 (1957), hereinafter cited as D. Bowett/

the treaties' denunciation clauses. The non-implementation of said municipal laws so as to affect Patrian investors is not significant because Justia's breach, is founded on a direct 38/ injury to Patria and not on a vicarious one.

2. Neither can the Doctrine of Changed Circumstances be invoked to render the Paris Convention or the bilateral treaty inoperative.

a. No uniformity on the scope of the doctrine.

The doctrine is known by many other names, and its requisites just as varied as its critics and proponents. 39/ Its application has always been challenged and the World Court has never leaned in favor of its application. 40/

If ever it is to be applied, its utility must be confined within narrow limits or strictly interpreted. 41/

b. The doctrine is not applicable.

The doctrine does not automatically apply upon the existence of certain events, since one of the parties must specifically invoke the doctrine. Justia never invoked the doctrine, and neither can Justia's denunciations substitute for the doctrine's invocation, for even termination requires good faith. Moreover, a party may not unilaterally revoke the treaty considering the risk to security of treaties. 42/ Furthermore, the doctrine has little

38/ C. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS, 174 (1967), hereinafter cited as C. AMERASINGHE/.

39/ H. LAUTERPACHT, PRIVATE LAW SOURCE AND ANALOGIES OF INTERNATIONAL LAW, 170 (1927); Hill, The Doctrine of Rebus Sic Stantibus in International Law, 9 U. MO. STUDIES 7 (1934).

40/ Free Zones Case, [1932] P.C.I.J. Ser. A/B, No. 46, at 156-58.

41/ Int'l. L. Comm'n. Reports, [1966] 2 Y.B. INT'L. L. COMM'N. 233, U.N. Doc. A/6309/Rev. 1 (1966), where the Commission considered " . . . that the very nature of the legal relations established by a treaty requires that every party should be consulted in regard to any amendment or revision of the treaty."

42/ Id., at 257.

relevance for treaties which are terminable by valid denunciations. 43/

c. The test of the Doctrine has not been satisfied.

The yardstick of the doctrine rests on three factors:

(1) the basis of consent, (2) the effect of an unforeseen fundamental change in circumstances, and (3) the onerousness of the treaty obligations to be performed.

(1) With respect to the bilateral treaty.

The basis of consent is reciprocity to ensure mutually beneficial commercial relations and not to ensure equally beneficial commercial relations. While Justia invokes the former, she means the latter. Moreover, while the basis for the Doctrines invocation is non-mutuality in benefits, Justia plays blind to the consequential effects of the treaty's termination as being not mutually beneficial, and definitely adverse to Patria.

There is no unforeseen fundamental change. The rise and fall of the economy was not an unforeseen eventuality even during the mid-twenties. On the other hand, a change in multinational corporate practices is not a fundamental change. Moreover, there is no proof that all or most of Patrian corporations, amongst foreign corporations, have been engaged in repugantly assiduous practices to justify the treaty's inoperation.

There is no onerous treaty performance. If the test of onerousness is what Justia claims to be then almost all commercial treaties might as well be deemed terminated as of now, considering the facility in which the Doctrine has been inferred by Justia.

(2) With respect to Paris Convention.

The nature of the Convention as a law-making treaty 44/ makes the

43/ Id., at 258.

44/ L. McNAIR, supra, note 3 at 739.

Doctrine less invocable. Moreover, the non-fulfillment of the test of the Doctrine is much more manifest.

The basis of consent is reciprocity to ensure full protection for the registration and maintainance of industrial property. Not a scintilla can be seen from the facts to evidence the frustration of such treaty object.

As per above discussions, the alleged change in circumstances is neither unforeseen nor fundamental

Moreover, a change of corporate practices has no materiality to the onerousness of the Paris Convention's obligation to extend national treatment to Patrian owned patents. Except thru speculative justifications, a proportionate life reduction of local patents or even a non-reduction of the foreign patent's duration cannot be deemed as an onerous obligation to justify the Convention's inapplicability to Justia, considering the restrictive interpretation of the Doctrine.

Above all, there seems no cogent reason why Justia could not wait for the lapse of the one-year period after properly complying with the Convention's denunciation clause.

II. THE LEGAL PROCEDURES AND PRACTICES ADOPTED BY JUSTIA IN THE INVALIDATION OF THE AGREEMENT BETWEEN PHARMACA AND SUBPHARM AND IN THE NATIONALIZATION OF SUBPHARM IS IN VIOLATION OF INTERNATIONAL LAW.

A. PATRIA SUBMITS: That as the bilateral treaty is legally binding, Justia's procedures and practices are in contravention thereof.

Even if we are to assume that Justia has complied with the treaty's national treatment obligation under Articles III, IV and V thereof, Justia cannot be exonerated from liability being in breach of the equitable treatment and full legal and judicial protection clauses of Article I therein.

1. Treaty breach based on Article I.

The opening Article imposes two treaty obligations: (1) the equitable treatment obligation "as to their property, enterprises and other interests",

(2) and the full legal and judicial protection obligation.

a. On the invalidation of the License.

The Justian practice of passing license invalidating laws, of adjudicating for the subsequent invalidation of licenses and the acquisition and utilization of the patents and trade secrets therein does not speak well of compliance with the equitable treatment.

Accordingly, the Supreme Court's decision of April 30, 1978, should have adjudged both the license as binding between the Pharmaca and Subpharm on the basis of estoppel, 45/ as supported by equitable considerations.

b. On the nationalization of Subpharm.

The Justian President's declarations in 1975, the Premier's declaration in 1978, the systematic enactment and nature of Justian laws, the composition of the adjudicating power on nationalizations, does not speak well on an independent tribunal. 46/

Moreover, the accelerated nationalization and denial of access to courts from the decision of the compensation panel belies Justia's dispensation of the full legal and judicial protection of the laws.

B. PATRIA SUBMITS: That the supervening Economic Charter cannot serve as a justification.

As per above discussions, the Economic Charter does not fall under any of the enumeration of Article 38 of the Statute. Moreover, as has been discussed, the Economic Charter in Article 2(2) states that regulation of foreign investment and transnational corporations should be in accordance with its laws, treaties inclusive as being part of the laws of the state.

Furthermore, it should be discerned that the phrase "its laws and

45/ D. Bowett, supra, note 37 at 177; L. McNAIR, supra, note 3 at 485.

46/ C. AMERASINGHE, supra, note 38 at 238, 259.

regulations" pertains only to positive laws and does not justify procedural irregularities of Justice officials.

C. PATRIA SUBMITS: Assuming the bilateral treaty as having been rendered inoperative, still Justia violated the Minimum Standards of International Law.

The minimum standards is a recognized general principle of law. 47/ Narrowed down to the procedural rights of aliens, any situation below the minimum standards shall constitute "denial of justice". 48/

1. On the burden of proof and presumptions.

It is a general principle of law that the claimant must prove his contention. 49/ Direct proof, however, is not always necessary. The World Court has held that the "taking of all circumstances into account" would be sufficient to decide a fact in issue. 50/

Neither do the presumptions of regularity and good faith 51/ apply, as in this case it is the act itself which is in issue. In all of the cases adjudicated by the World Court, the presumptions were made to apply only to collateral government acts.

2. On the merits of the issue.

a. The license invalidation entailed breach.

(1) The character of the decision.

47/ A. ROTH, supra, note 32 at 111; E. Borchard, supra, note 32 at 48; R. Jennings, Rules governing Contracts between States and Foreign Nationals, SYMPOSIUM PRIVATE INVESTORS ABROAD, 129 (1965).

48/ A. ROTH, id., 121.

49/ B. CHENG, supra, note 3 at 306.

50/ Corfu Channel Case, [1949] I.C.J. REP. 119-120.

51/ B. CHENG, supra, note 3 at 306.

Substantial is the charge that the decision of the Registry and Minister of Industry is manifestly unjust. 52/ Since the facts show a possibility of the said decisions being rendered in excess of the required 80 and 45-day periods in Article 7 and 11 of the Technology law, the onus probandi shifts to Justia to prove otherwise. Failure to do so under the law means that the license should have been deemed automatically registered pursuant to law.

(2) The special panel of the Supreme Court is not a regular nor normal court. 53/

The fact that the Supreme Court panel is a special one controverts its being a regular court. The burden of proof shifts to Justia to prove otherwise. Neither is the World Court competent to take judicial notice of all the various municipal judicial organizations set-ups. At any rate local appellate courts have been divided only to constitute regular divisions but not special ones.

(3) On the Supreme Court's decision of April 30, 1978.

The Supreme Court in rendering a four-line affirmation considering the international implications and complexity of the issues, is a manifestly irregular procedure evidencing hostility to Pharmaca's cause. For the same above reason, judicial notice has no application.

b. The nationalization procedures entail a denial of justice.

(1) On the composition of the adjudicating power.

Considering that the recommendatory power are under the executives control and that the executive himself who makes the final decision on all nationalization cases is an incipient evidence of an abnormal atmosphere under

52/ C. AMERASINGHE, supra, note 38 at 142 who states that ". . . violation of the municipal law . . . would apparently amount to a violation of the forms required by international law."

53/ A. ROTH, supra, note 32 at 203.

which the tribunal is forced to operate.

No one can be a judge of his own cause. ^{54/} But in this case, the Premier was virtually the policy maker, accuser, jury and judge all at the same time.

(2) The irregularity of the nationalization procedures.

The decision to accelerate the nationalization of Subpharm is a transparent showcase of irregularity. The Investment Law provided for a one-year period for Subpharm to exercise its option but was not respected at all by Justian law enforcers. Clearly, the President of Pharmaca could not exercise the option in behalf of Subpharm. Neither is there showing that Pharmaca's President could speak in behalf of Pharmaca's Board of Directors on policies determinations. Moreover, Pharmaca's President was merely "thinking" aloud, and not asserting a fact.

The local remedies rule is of no application considering that Subpharm religiously followed the appeals procedure. ^{55/} Moreover, all arguments on appeal to the Minister of Industry and Premier were outrightly rejected.

(3) On the decision of the Special Panel on compensation.

Both the 6 million U.S. dollar assessment and appropriable rewards argument of Pharmaca in its special appearance were outrightly rejected by the special panel on compensation. Nothing from the facts show that the arguments of Pharmaca was given a consciencious consideration. While Pharmaca was given an opportunity to be heard, it was just as efficiently denied thru a superficial consideration and outright rejection. Due process was denied.

^{54/} B. CHENG, supra, note 3 at 256.

^{55/} C. LAW, L. DROZ, and L. MINARD, THE LOCAL REMEDIES RULE IN INTERNATIONAL LAW, 52-3 (1961)- [hereinafter cited as C. LAW, L. DROZ and L. MINARD].

(4) Pharmaca had no access to the courts.

Pharmaca clearly had no judicial recourse whatsoever. ^{56/} Neither can *Justia argue that Pharmaca should have attempted to further press reviewability in the courts. No international norm imposes such obligation, as it is sufficient that competent officers of the state in the performance of their functions have led them to believe that the avenues for judicial appeal have been closed.*

This is a patent obstruction, even made official by the panel itself, for Pharmaca's recourse to the courts. At the most, to test reviewability in face of a contrary admonition is an unnecessary extraordinary procedure ^{57/}. To argue otherwise would mean that Pharmaca should always try all possible avenues for fear that they may after all be necessary leading to a loss of their claim.

III. THE COMPENSATION SCHEME FOR THE EXPROPRIATION OF ASSETS BELONGING TO PHARMACA OR SUBPHARM IS VIOLATIVE OF INTERNATIONAL NORMS.

The World Court, in its famous dictum, echoed:

" . . . the principle of respect for vested rights . . . forms part of generally accepted international law . . . ^{58/}

A. PATRIA SUBMITTS: That as the bilateral treaty is subsisting, Justia's compensation scheme was in clear treaty breach.

Article IV(3) of the treaty controls for the compensation dispute:

1. Article IV(3): The treaty concept of compensation.

Three compensation criteria stand-out. Article (3) states:

^{56/} A. ROTH, *supra*, note 32 at 112; C. AMERASINGHE, *supra*, note 38 at 239.

^{57/} C. LAW, L. DROZ, and L.-MINARD, *supra*, note 55 at 181; HAESLER, *THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS*, 47-8 (1968), also states " . . . there is, in substance no difference between ordinary and extraordinary legal means from a lower to a higher court."

^{58/} *Certain German Interests in Polish Upper Silesia* [1930] P.C.I.J. Ser. A No. 7, 42.

"Property of nationals and companies of either . . . Party shall not be expropriated . . . except for a public purpose and with payment of a just compensation. Such compensation shall represent the equivalent of the property taken (the equivalence criterion), it shall be accorded in an effectivity realizable form (the effectivity criterion) and without needless delay (the promptness criterion).

a. The Treaty criterion of Equivalence.

The plain and ordinary meaning of the phrase "equivalent of the property taken" is to compensate by paying the equal value of what has been taken without profit deductions.

The intent of the parties in deliberately employed the phrase so as to render it unmistakably distinguishable from the concept of "adequate 59/ or equitable 60/" compensation. On this score, the parties in creating a new treaty obligation, intended to honor it, exclusive of customary law or any change thereof. The sanctity of this new obligation receives support from the fact that at the treaty's conclusion, private property was considered almost inviolate. 61/

The object and purpose of the compensation clause was to seemingly avert a replication of the contemporary historical occurrences of large-scale, industry-wide expropriations 62/ as well as limited deprivations 63/ which resulted to unsatisfactory compensation schemes.

^{59/} A. Fachiri, Expropriation and International Law, 6 BRIT. Y.B. INT'L. L. 159, 171 (1925).

^{60/} K. KATZAROV, THE THEORY OF NATIONALISATION, 339 (1964) [hereinafter cited as K. KATZAROV/].

^{61/} Id., at 107.

^{62/} Id., at 83; G. WHITE, NATIONALIZATION OF FOREIGN PROPERTY, 19-24 (1961).

^{63/} R. Wesley, Establishing Minimum Compensation Criteria for Use in Expropriation Disputes, 25 VAND. L. REV. 942 (1922) [hereinafter cited as R. Wesley/].

Excess profits. Above premises considered, excess profit reductions are diametrically anathema to the concept of equivalence.

Neither may Justia contend that "excess profits" do not rightfully belong to Subpharm predicated upon the social function attribute of property, unjust enrichment or unconscionability, for the simple reason that these concepts are either recently evolved property concepts or civil and common law extensions into the realm of international law which were totally unknown to the contractants. Accordingly, these new-fashioned concepts cannot evict the treaty criterion of equivalence as the parties precisely intended such to withstand outside changes.

Retroactive application. A reflection of Justia's disregard of the treaty criterion of equivalence is made manifest by her claiming excess profits which retroacts for 20 years. On its face it is in direct contravention with the treaty, and the onus for its justification shifts to Justia.

Assuming that excess-profit deductions are valid, it should have been applied prospectively. There appears to be no cogent reason for retroaction except evasion of compensation.

Assuming further, that the profit deduction retroactions are conceptually sound, still the 20-year retroaction is too long to adequately parry the arguments of laches and fair play. Moreover, the good faith element in pacta sunt servanda would be prominently missing.

b. The Treaty criterion of Effectiveness.

Considering that Justia invokes as one of its justifications, its declining economy, and considering further that no mass nationalizations are entailed, there appears to be no cogent reason why Justia could not pay in any other circulable currency other than Justian currency, in compliance with the treaty's mandate for an "effectively form". This would be in conformity

with the Court's enunciation requiring payment in stable or hard currency. 64/

c. The Treaty criterion of Promptness.

The treaty impliedly allows only necessary but no unnecessary delay. Considering the absence of mass nationalizations the relatively smallness of the award, and the absence of proof of Justia's inability to effect full payment, the five-year staggered compensation scheme entailed unnecessary delay.

B. PATRIA SUBMITS: That the New International Order does not apply.

The above arguments under the first issue suffices to show that the Economic Charter is a non-binding document. Neither can Article 2(c) thereof be specifically raised as being merely declaratory of international law on expropriation, considering that it has adopted the subjective standard and explicitly rejects any objective standard, whatever its content. 65/

Even granting that the Economic Charter is binding between the disputants, still Justia in providing for excess profit deductions retroacting 20 years back, never did conscienciously take into consideration all circumstances, specially the pertinent circumstance: that such profits then were legal and under its law and guaranteed under the bilateral treaty.

C. PATRIA SUBMITS: Granting that the bilateral treaty is inoperative, Justia's compensation scheme is in contravention of the Minimum Standards.

1. Adequate or just compensation as a standard is a general principle of law.

Adequate compensation or even equivalent compensation is embodied in numerous bilateral commercial treaties of friendship, commerce and navigation

64/ Wimbleton Case [1923] P.C.I.J. Ser. A, No. 1, 32; J. MADDEN and M. NADLER state, that broadly, the terms "hard" or "stable" refer to currencies in which a relatively high degree of confidence aids in resisting exchange rate changes resulting wide swings in capital transactions flow. J. MADDLER and M. NADELER, THE INTERNATIONAL MONETARY MARKETS, 37-38 (1968).

65/ C. Brower, Remarks, AM. SOC. INT'L. L. PROC. 233 (1975).

and multilateral investment treaties. 66/

The World Court 67/ and arbitral bodies have always held that a government must pay for the just price of what has been expropriated. The international consensus among publicists is restitutio in integrum 68/, the traditional standard. This has been religiously adhered to by the U.S. and Western European nations. 69/ Even communist and socialist countries do recognize equitable compensation as the standard. 70/

Recognized principles of law support this standard such as: respect for acquired rights, unjust enrichment 71/ and even equity. 72/

2. Justia's compensation scheme violates such standard.

The 20-year retroactive excess profit deductions clearly offends the compensation standard.

In the face of the standard of adequacy, profit deductions are clearly in contravention thereof. At the most, such deduction can serve as an exception to restituto in integrum, and the validity of the concept under international must be shown by the availing state. At the present it has no basis in law;

66/ R. Wesley, Expropriation challenge in Latin America: Prospects for accord on Standards and Procedures, 46 TULANE L. REV. 255 (1971); H. Walker, Modern Treaties of Friendship, Commerce and Navigation, 42 MINN. L. REV. 805 (1958).

67/ Chorzow Factory Case [1928] P.C.I.J., Ser. A, No. 17, 461.

68/ E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD, 792-816 (1928), R. Wesley, supra, note 66 at 941. Literally, it means restitution to the prior condition implying fair, just and entire compensation. BLACK'S LAW DICTIONARY 1477 (4th ed. 1968).

69/ G. HACKWORTH, DIGEST OF INTERNATIONAL LAW, 655-57 (1942).

70/ K. KATZAROV, supra, note 60 at 330-32.

71/ B. CHENG, supra, note 3 at 236.

72/ R. Jennings, General Course on Principles of International Law, 121 RESCUEIL DES COURS 343 (1967).

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probably, only as an emerging norm.

At any rate, assuming its validity, still it must have a narrow index of confinement: as to the maximum limits, the retroactivity allowance and its range of application. ^{73/}

The Justian law concerning compensation does not show the maximum limits and range of application of the deductions. It impliedly shows, that its determination by the compensation panel was purely subjective in this regard. Moreover, there is no cogent reason for the 20-year retroaction. Moreover, 20 years is unconscionably too long.

There is an added consideration. Even if we were to grant, that the bilateral treaty was rendered subsequently inoperative, it must be noted that it was valid and binding for 50 years prior to the enactment of the 1975 laws. Article X(3) thereof allowed the free "movement of investment capital and . . . returns thereof . . . "without being . . . unnecessarily hampered . . ." Therefore to Patrian investors and to the Justian government profits from their investments were absolutely legitimate and vested vis-a-vis the treaty. It therefore cannot be argued that for the past 20 years, Subpharm and its Patrian investors legally owned something to Justia. This calls for the illegality of the 20-year retroacting deductions, being confiscatory in character.

The traditional standard of adequacy is "prompt, adequate and effective" compensation. ^{74/} It is the fair basis for a lasting peace and a reasonable safeguard against intervention or even intrusion by the industrialized states.

^{73/} R. Wesley, supra, note 63 at 968.

^{74/} R. Wesley, id., at 942-945; G. Ray, Law and the Perfecting Process: World Needs and the Development of Law, SYMPOSIUM PRIVATE INVESTORS ABROAD, 12, 15, 63 (1965); R. JENNINGS, Rules governing contracts between States and Foreign Nationals, SYMPOSIUM PRIVATE INVESTORS ABROAD, 135 (1965).

Appurtenantlly, the Justian compensation scheme violates the "stable and hard" currency criterion as well as the "speedy compensation" rule. ^{75/} At any rate, even under signular criterion of "equitable compensation", Justia cannot justify a 20-year profit deduction as equitable.

D. PATRIA SUBMITS: Additionally, the shortening of Pharmaca's patent is a confiscatory act.

1. The reduction of the patent is indirect expropriation.

Although the Industrial Property Law is regulatory inform, it is expropriating in substance. Although, not dramatic as outright expropriation, is nevertheless expropriation of the "creeping" or indirect kind. ^{76/}

2. Accordingly, patents are rested rights requiring compensation.

It irresistably follows, that adequate compensation is called for. This is not so in this case.

3. Exhaustion-of-local-remedies argument is not tenable.

Pharmaca honestly attempted to secure its remedies within the Justian procedural context. In its special appearance before the compensation panel it presented its claim for its "invention", and that it be set off with the excess profit deductions. Its claim was, however, ignored. Neither could it had seeked redress to the courts, considering that the panel officially declared that there was "no appeal" therefrom. There were no longer any procedures to exhaust.

IV. JUSTIAN LAW REQUIRING TRANSFER OF TECHNOLOGY DISPUTES TO JUSTIAN COURTS, TO BE SETTLED ACCORDING TO JUSTIAN LAW IS VIOLATIVE OF INTERNATIONAL LAW.

A. PATRIA SUBMITS: That the bilateral treaty has been contravened.

Article 6(B) of the disputed Technology law, which refuses registration of technology agreements having either the purpose, inter alia of:

^{75/} R. Wesley, id. at 942.

^{76/} V. Folsom, The taking by a state of the Property of a Foreign National, When no Contract is Involved, SYMPOSIUM PRIVATE INVESTORS ABROAD, 303 (1965).

- "21. Requiring that disputes be settled in courts of a foreign country.
- "22. Requiring that a law other than that of Justia govern the . . . agreement . . ."

directly transgresses Article III(2) of the bilateral treaty which states:

"Contracts entered into between companies of either ... Party ... that provide for the settlement by arbitration of controversies shall not be deemed unenforceable ... merely on the ground that the place designated for the arbitration proceedings is outside such territories.

Article III (2) is a much more specific treaty proviso than Article XI of the same treaty, as it specifically prohibits the unenforceability of valid contracts merely on the ground that the designated arbitration is outside of Justia. Otherwise stated, Article XI should respect Article III(2). Article XI should be restrictively interpreted, lest the exception becomes the general rule.

- B. PATRIA SUBMITS: That the New International Economic Order is of no avail.

As has been elaborated on, the said U.N. resolutions have no binding effect on the disputants. Moreover, even if they were binding nothing in both resolutions directly bear on the right of developing states to invalidate existing arbitral agreements merely on the ground of alienage. 77/

- C. PATRIA SUBMITS: Granting the bilateral treaty is inoperative, Justia is still breach.

- 1. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards enjoins the enactment of the disputed technology law provisions.

Article II of the New York Convention declares:

"Each . . . State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship . . ."

The plain and natural meaning of the abovesited provision is to clearly make an initially valid arbitral agreement mandatorily recognized and

^{77/} T. Firth, *The Finality of a Foreign Arbitral Award*, 25 ARB. J. 3 (1970).

enforceable. The intent of the framers of the convention is to increase " . . . the effectiveness of arbitration in the settlement of private law dispute and to make such recommendations as it may deem desirable." ^{78/} The object and purpose of the parties was to suppress state jealousy over an expected "ouster of jurisdiction of the courts carried into contemporary common law and civil law." ^{79/}

All these circumstances point out that states parties are strongly enjoined from revoking at any time, prior valid arbitral clauses either by legislative enactments or by judicial pronouncements, merely on the grounds that it ousts its courts and application of its laws.

2. Article 38 (1), (b) and (c) of the Statute does not authorize unbridled state power to regulate arbitral agreements.

Contractual rights have raised itself to a revered status. All facts of life are regulated by contracts, which by imperative necessity must be given due respect considering its underlying vital importance. This reasoning applies with more force to arbitral clauses which stipulate for foreign arbitration where the intent of the parties is precisely to seek fairer redress and competent arbitration over highly technical matters.

Accordingly, while the police power of states is recognized, its utility in derogation of arbitral rights despite the presence of a public purpose, entails compensation for any causative injury suffered. That it refers to a future arbitration does not mean it is not a vested right, for the right to invoke the arbitral clause inures from the very start, as the very safeguard of the contract.

^{78/} U.N. ECOSOC Res. 604 (XXI). U.N. ECOSOC OFF. REC. SUPP. No. 1 (1956).

^{79/} L. 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 (1961).

V. PREMISES CONSIDERED, JUSTIA IS IN CLEAR BREACH OF ITS INTERNATIONAL OBLIGATION ON ALL FOUR ISSUES, AND IS ENTITLED TO RELIEF.

Justia having intentionally abandoned its duties, alternatively, under the bilateral treaty and the Paris Convention or under general principles of law, Patria is entitled to the full reparation for the restoration of a status quo ante ^{81/} owing to the moral injuries ^{82/} suffered by her vis-a-vis the derogation of her sovereign status before the international community.

PRAYER

WHEREFORE, it is respectfully implored that this Honorable Court:

(1) GRANT PATRIA A DECLARATION that the bilateral treaty and Paris Convention entitles Patrian investors and licensors national treatment; that the bilateral treaty additionally entitles Patrian nationals equitable treatment for all Justian procedures and processes; nor gives Justia the right to enact such disputed laws.

(2) DECLARE that the compensation scheme as well as the appurtenant Justian adjudication were unjustified and illegal under international law.

(3) ORDER REPARATION vis-a-vis a realisable and equivalent compensation to be paid to Pharmaca without needless delay, in conformity with Pharmaca's property valuation without excess profits deductions.

(4) GRANT PATRIA REPARATION for the full restoration of the status quo ante, and such other reliefs as may be just and equitable.

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HERMO T. PAGTAKHAN
Agents for Patria

^{81/} I. VASARHELYI, RESTITUTION IN INTERNATIONAL LAW, 74 (1964).

^{82/} W. FRIEDMAN, O LISSITZYN, and R. PUGH, CASES AND MATERIALS ON INTERNATIONAL LAW, 389 (1969).