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

COUNTER-MEMORIAL FOR THE RESPONDENT

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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 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 accordingly to Justian Law are consistent with international law.

SUMMARY OF ARGUMENTS

The bilateral Treaty of Friendship and Commerce and the Paris Convention being both valid and binding govern the relationship between the bound parties. By virtue of such treaties, Justia had the obligation to extend national

treatment to Patrian nationals. Proper treaty interpretation shows Justia was legally justified in enacting the disputed laws and consequently did not transgress the national treatment clauses. The proper interpretation of the bilateral treaty further demonstrate that the legal procedures and practices adopted by Justia with respect to the invalidation of the agreement and nationalization of Subpharm as well as the Justian compensation scheme did not contravene the pertinent clauses of said treaty. The correct treaty interpretation likewise does not inhibit Justia from requiring technology disputes to be settled under Justian laws and courts.

<u>In the alternative</u>, the supervening New International Economic Order as evidenced by the Declaration and Economic Charter are internationally legally binding and should be applied either as a vehicle of interpretation or termination of economically linked treaties between developed and developing states, consequently justifying all Justian enactments and procedures, in dispute.

<u>As a further alternative</u>, both the bilateral treaty and Paris Convention have been rendered inoperative by effective denunciations and by the Doctrine of Changed Circumstances. Accordingly, Justia was no longer obligated to extend national treatment to Patrian nationals as neither customary law nor general principles of law impose such duty on Justia. Absent a treaty, the Minimum Standards of international law govern, and under such standards, the legal procedures and practices as well as the compensation scheme adopted by Justia were respectively in full compliance with the Minimum Standards of "non-denial of justice" and "adequate compensation". Moreover, no norm of international law bars Justia to require technology disputes to be settled under Justian laws and courts.

This being so, Justia was legally justified in exercising its sovereign powers within its own domain.

ARGUMENT AND AUTHORITIES

I. *JUSTIA HAS COMMITTED NO BREACH OF ANY INTERNATIONAL OBLIGATION TO EXTEND NATIONAL TREATMENT TO PATRIAN NATIONALS.*

A. *As a FIRST ALTERNATIVE ARGUMENT, considering that the Treaty of Friendship and Commerce 1/ and the Paris Convention for the Protection of Industrial Property 2/ are both legally binding upon the disputants, Justia's obligation to extend national treatment under such treaties has not been violated.*

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 incurred no breach of treaty.*

With the exception of the Justian laws on the Protection and Regulation of Foreign Investment 5/ and on the Protection of Industrial Property, 6/ all other acts of municipal legislation of Justia clearly accord national

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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. 1969), [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 Foreign Investment Law. See Statement of Facts at 4.

6/ Hereinafter referred to as the Industrial Property Law. See Statement of Facts at 3.

treatment to Patrian nationals. In this regard, the two mentioned pieces of municipal legislation shall be the focus of scrutiny.

a. *Under the bilateral treaty as interpreted according to general principles of international law, Justia was legally justified in enacting the Industrial Property Law and Foreign Investments Law Amendment.*

The Paris Convention by being subsequent, does not terminate the bilateral treaty. The latter, being a treaty inter se should specially govern the relationship between Justia and Patria. 7/ In as much as the national treatment clause 8/ of the Paris Convention is merely declaratory of the bilateral treaty's national treatment clause 9/ on patents and industrial properties, both treaties should be read together, only as far as Justia and Patria are concerned. The remedial measures provided for in the bilateral treaty, can therefore, serve as an exception to the national treatment clauses of both the bilateral treaty and Paris Convention, being a subject matter in pari materia.

(1) *From the textual approach: The treaty must be interpreted as a whole. 10/*

The clear and plain import of providing for remedial measures in Article XI of the bipartite treaty is for it to serve as an exception to the general provisions, amongst them - the national treatment clauses under the principle

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7/ H. Aufricht, Suppression of Treaties in International Law, 37 CORNELL L. Q. 656 (1952) /hereinafter cited as H. AUFRICHT/ who also states that the prior treaty inter se having lesser number of parties must in in pari materia and at variance with the subsequent multilateral treaty in order to be repealed.

8/ Article II of the Paris Convention.

9/ Article VII (1) and (2) of the bilateral treaty.

10/ G. Fitzmaurice, The Law and Procedure 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).

of generalia specialibus derogant. 11/ Article XI states:

> "Each High Contracting Party will take the measures it deems appropriate with a view to preventing commercial practices or arrangements . . . effected by one or more private commercial enterprises, which restrain competition, limit access to markets or foster monopolistic control. Whenever such practices, or arrangements have or might have harmful effects on the trade between the two countries."

Being the contracting parties' own concept of self-help, Article XI reserves to either party the power to protect itself from inimical commercial practices. Justia merely availed of this measure, in enacting the said Foreign Investment Amendment and Industrial Property Law.

Justia deemed it appropriate to enact the Industrial Property Law to supplement the Technology Law. It was with a view amongst others, to prevent the creation of "dominant market" positions 12/ by both licensors and patentors, largely foreigners, specifically multinationals. The Foreign Investment Law was with a view to prevent inimical corporate vertical and horizontal trade restriction 13/ in their dealings with developing countries. 14/ The Licensing Agreement between Pharmaca and Subpharm is a glaring and typical example of such restrictions. Similar undesirable corporate

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11/ G. Fitzmaurice, id., at 236; L McNAIR, supra, note 3 at 219.

12/ K. Market, Recent Developments in German Antitrust Law, 43 FORDHAM L. Rev. 711 (1975); L. Ebb, Transfers of Foreign Technology in Latin America: The Birth of Antitrust Law?, 43 FORDHAM L. Rev. 724 (1975); J. Davidson, United States Antitrust Laws and International Transfers of Technology - The Government View, 43 FORDHAM L. Rev. 734 (1975).

13/ D. MUMMERY, THE PROTECTION OF INTERNATIONAL PRIVATE INVESTMENT 106 (1968), /hereinafter cited as D. MUMMERY/; C. Hilado, The Legal and Administrative Regulation of Transfer of Technology: The Philippine Setting, 51 PHIL. L. J. 81, 90 (1976), /hereinafter cited as C. HILADO/.

14/ P. Barrett, The Role of Patents in the Sale of Technology in Mexico, 22 AM. J. COMP. L. 261 (1974) who states that "a. . . Study . . .trade for UNCTAD by the Secretariat of Industry and Commerce in 1969 showed that over 97% of the agreements surveyed included some kind of restriction on exports by the licensee.

practices in other developing countries 15/ as well as those documented in the UNCTAD reports clearly evidenced this situation. The intensity of the detriment caused by such practices is pictures by the Economic index of our balance of payments, from a bad to a still further aggravated situation. That such practices "might have harmful effects on the trade between the two countries," cannot be rationally denied.

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

The objective and purpose of a treaty should prevail and its spirit should be thwarted. 16/ The dominating purpose of the bilateral treaty is to:

> ". . . foster . . . mutually advantageous investments and mutually beneficial commercial relations . . ." 17/

The resultant deterioration of Justia's economy largely from foreign restrictive practices and technology problems evidence non-mutual advantages.

There is an added consideration: it is an unequal treaty, the contractants being a developing and a developed state. This, plus the change in the international economic order evidenced by the Economic Charter 18/ and the Declaration 19/ clearly imply an interpretation in favor of the developing

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15/ Id., A. Hyde and L. dela Corte, Mexico's Transfer of Technology and Foreign Investment Laws - To what extent have the Rules changed? 10 INT'L. L. 233 (1976), /hereinafter cited as A. HYDE and L. DELA CORTE/.

16/ L. McNAIR, supra, note 3 at 114, 366; B. CHENG, supra, note 3 at 116.

17/ See the bilateral treaty's ratificatory paragraph.

18/ Charter on Economic Rights and Duties, U.N.G.A. Res. 3281, U.N. Doc. A/9631 (1974), reprinted in 14 INT'L. LEGAL MATS. (1975), /hereinafter referred to as the Economic Charter/.

19/ The Declaration on the Establishment of a New International Economic Order, U.N. G.A. Res. 3201, 3 U.N. Doc. A/9559 (1974), reprinted in 68 AM. J. INT'L. L. 799 (1974).

states as a guaranty to protect the very core of equality. 20/

Moreover, under the principle of in dubio mitius 21/ in case of ambituity in the interpretation of a treaty, the meaning that should be preferred is that which is less onerous to the obligated party, causing less interference with its personal and territorial supremacy.

Article XI of the bilateral treaty should be construed as an exception to Article V thereof. To argue otherwise would mean that multinationals may indulge in any kind of business they want, perpetually hold majority interests, control and manage such established corporations in any manner they desire to, regardless of the detriment to Justia. This creates unusual and absolute rights for Patrian multinationals, an interpretation which should be leaned against. 22/ Moreover, Article XI, would be rendered virtually nugatory were it so interpreted as to deprive Justia of the right to take effective remedial measures.

B. As a SECOND ALTERNATIVE ARGUMENT, the supervening New International Economic Order should be applied.

The character and extent of the changes in classical international law are now reflected in the " . . . emergence of what we may call the international law of development . . ." 23/

20/ I. Detter states, " . . . One could compare the situation with that under Civil Law when a party to a contract is specially protected by law, as his position, for one reason or another, is much weaker than that of the other party . . ." I. Detter, The Problem of Unequal Treaties, 15 INT'L. COMP. L.Q. 1070 (1966).

21/ G. SCHWARZENBERGER, 1 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 681 (1957) /hereinafter cited as G. SCHWARZENBERGER/; H. Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 BRIT. Y.B. INT'L. L. 48 (1949).

22/ L. McNAIR, supra, note 3 at 458-61.

23/ M. Magallona, Some Remarks on the Legal Character of the United Nations General Assembly Resolutions, 5 PHIL. Y.B. INT'L. L. 86 (1976).

1. *The New Economic Order is an emerged customary law and reformulated general principle of law effective erga omnes.*

The World Court is well cognizant that it:

" . . . must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law." 24/

a. *The Economic Charter and Declaration are widely recognized as an emerged rule of customary international law.*

Well-settled is the binding and legal effect of some United Nations General Assembly Resolutions. 25/ The Declaration and Economic Charter together form the basis of an emerged customary law fulfilling both the basic requisites of (1) generality of state practices, and (2) opinio juris. 26/ Various repetitive state declarations, 27/ prior related U.N. resolutions 28/ both from its Organs and from the General Assembly both the Declaration and Economic Charter are in themselves clear pieces of evidence constitutive of general state practices.

24/ The Legal Consequence for States of Continued Presence of South Africa in Namibia (South West Africa), /1971/ I.C.J. REP. 31.

25/ G. Lande, The Changing Effectiveness of General Assembly Resolutions in the U.N., AM. SOC. INT'L. PROC. 162 (1963) /hereinafter cited as G. Lande/; A. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS, 4-5 (1963); H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATIONS, 5-6 (1972), /hereinafter cited as H. THIRLWAY/.

26/ M. Akehurst, Custom as a Source of International Law, 47 BRIT. Y.B. INT'L. L. 53 (1974) /hereinafter cited as M. Akehurst/.

27/ A. Robles sums it up: " . . . the Group of 77 producing among other resolutions, the declarations of Algiers and Lima. . . . The President of Mexico, in addressing the third UNCTAD in Santiago de Chile ' . . . urged . . . to establish . . . an international economic system . . . for all countries." A. Robles, Remarks, AM. SOC. INT'L. L. PROC. 229 (1975).

28/ UNCTAD Res. 45 (III) of May 18, 1972; G.A. Res. 3037 (XVII) of December 19, 1972; G.A. Res. 3082 (XXVIII) of December 6, 1973; and G.A. Res. 3201 (S-VI) of May 9, 1974.

Considering (1) the overwhelming vote taken 29/ which are the resultants of the concerted efforts of the states (2) the manifest expectation of states (3) the fundamental issues involved, and (3) the rejection of amendatory proposals by the United States, both declaratory resolutions were intended to be the institutional means for registering consensus 30/ operating as opinio juris. 31/ It is to be assumed they fully knew what they were doing in terms of opinio juris 32/ when they adopted the Declaration as:

> "7) . . . international economic order shall be one of the most important bases of economic relations between all peoples and all nations."

The Economic Charter's preamble in declaring that they are:

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

bolsters the strong presumption for opinio juris in treating the Charter as the international basis for such system.

At any rate, such resolutions evolved as customary law prior to the questioned Justian laws by the subsequent consistent adherences by international organizations such as the 1975 Lima Declaration of UNIDO, the March, 1975 OPEC Declaration with the added sustenance from the Group of 77 and

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29/ The Declaration was adopted by consensus but reservations were entered by the Federal Republic of Germany, France, Japan, V.K. and the U.S. The Economic Charter was adopted by a roll call vote of 120 to 6, with 10 abstentions. Belgium, Denmark, Federal Republic of Germany, Luxemburg, U.K. and the U.S. voted against.

30/ R. Falk, On the Quasi-Legislative Competence of the General Assembly, 60 AM. J. INT'L. L. 782 (1966).

31/ O. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS, 117 (1966); R. Walden, Customary International Law: A Jurisprudential Analysis, 13 ISRL. L. REV. 86, 93 (1978); M. Akehurst, Custom as a Source of International Law, 47 BRIT. Y.B. INT'L. L. 31 (1974-75).

32/ M. Magallona, Some Remarks on the Legal Character of U.N. General Assembly Resolutions, 5 PHIL. Y.B. INT'L. L. 89 (1976) /hereinafter cited as Magallona/.

various state declaration. 33/

b. The Economic Charter and the Declaration are authoritative interpretations of the general principles of international law as embodied in the United Nations Charter.

The United Nations Charter may be considered as a law-making treaty creating International Public Law. Anent to this, a resolution of the General Assembly may be regarded as an interpretation of its own Charter 34/ as it:

> " . . . embodies . . . any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions . . . ,

or it expresses

> " . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." 35/

The adoption of the Economic Charter seeks to interpret the declared general principle 36/ of the United Nations Charter and its progressive but nevertheless intended authoritative interpretation, constitutive of the articulated coordinated wills of States, become in themselves, part of the stated general principles of law. 37/

c. The Economic Charter and Declaration are not of a moral nor of a political character.

The preponderance of subsequent corollary resolutions and the conscientious implementation of its economic programs of actions are supportive of the

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33/ S. Rubin, The Charter of Economic Rights and Duties of States, AM. SOC. INT'L. L. PROC. 226 (1975); D. Guertin, Remarks, AM. SOC. INT'L. L. PROC. 235 (1975).

34/ L. Sohn, The Development of the Charter of the United Nations: The Present State, in BOS (ed.), THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS, 39, 53-55 (1973); J. Castaneda, The Underdeveloped Nations and the Development of International Law, 15 INT'L. ORG. 38, 47 (1961).

35/ Article 31 (3) (a) and (b) Vienna Convention on the Law of Treaties.

36/ Chapter I, (a) to (o), Economic Charter as related to Article II and the Preamble of the United Nations Charter.

37/ M. Magallona, supra, note 26 at 90.

genuine legal character of the two said resolutions. The fundamental issues involved, the vote taken, the methods and means used by the Assembly, the language of the resolutions, the time at which the resolutions were passed, the expectations of the States, denies its political or moral coloration.

2. The New Economic Order creates underlying determinative effects in international economic rights and obligations.

a. The bilateral treaty and Paris Convention should be deemed inapplicable based on a supervening incompatibility.

The Economic Charter and Declaration as a supervening incompatible customary law serves to terminate the said treaties vis-a-vis a fundamental change of law. Inasmuch as they are part of the U.N. Charter and considering that the U.N. Charter is lex superior, 38/ a treaty inconsistent to it cannot prevail. Moreover, considering that they interpret general principles contained in Article II of the U.N. Charter which are concededly jus cogens, 39/ then similarly, treaties inconsistent with such principles are invalid.

(1) On the basis of lex posteriori. 40/

The substantive provisions of both the bilateral treaty and Paris Convention was declaratory of customary law and general principles of law. Both are observed not because it has been consented to, but because it is believed to be binding and are not dependent on the approval of the State to which it is addressed. 41/ It irresistibly follows that a fundamental change in the

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38/ Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations /1949/ I.C.J. 185.

39/ A. Vedross, Jus Dispositivum and Jus Cogens in International Law, 60 AM. J. INT'L. L. 59-60 (1966).

40/ G. SCHWARZENBERGER, supra note 24 at 510.

41/ J. BRIERLY, THE LAW OF NATIONS, 52 (1963); Z. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF, 5 (1968).

law to which treaties subscribe to, severs their effectivity.

(2) On the doctrine of implied conditions.

A condition which has been implied in a treaty is that performance of its obligations shall continue to be in conformity with international law. 42/ Since the treaties merely declared adherence to customary law, an incompatible change vis-a-vis the new international Economic Order cracked the foundation of the treaties and operated as a resolutory condition 43/ resulting to the inapplicability of such treaties to developing States, the preferred objects of the present economic order.

b. Nonetheless, the New Economic Order occasions the interpretation of economically linked treaties in favor of developing countries.

Customary law and general principles of law have been rich sources of treaty interpretation. The New Economic Order, being either emerged customary law or reformulated general principles, should in the same light warrant an interpretation of economically linked treaties in favor of developing countries in pursuit of the goal of economic equality.

3. The disputed Justian Laws are legally justified under the Economic Charter and the Declaration.

A perusal of the Economic Charter would suffice. Article 2 declares:

"1. Every State has and shall freely exercise full permanent sovereignty . . . over . . . its economic activities."

"2. Each State has the right:

(a) To regulate and exercise authority over foreign investment . . . in accordance with its laws and regulations and in conformity with its national objectives and priorities.

42/ L. McNAIR, supra note 3 at 448-51, by analogy. He also states, " . . . for instance, a lawful act authorized by a treaty to be committed by State A and on the territory of State B in time of peace might, if committed when State A was a belligerent and State B a neutral, involves State B in breach of its obligation as a neutral."

43/ Id., at 437.

(b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies."

Article 14 likewise states:

"Every State has the duty to co-operate in promoting . . . the improvement in the welfare and living standards of all peoples, in particular those of the developing countries. . . ."

Vividly, Justia merely exercised its rights under international law and Patria had the duty to co-operate.

C. As a THIRD ALTERNATIVE ARGUMENT, considering that both the bilateral treaty and the Paris Convention were rendered inoperative, Justia had no obligation to extend national treatment.

1. Both the Paris Convention and the bilateral treaty were properly denounced by Justia.

Apropos of the Paris Convention, the required notification to the Director-General can be reasonably deduced from the presumption of regularity. Nonetheless, Patria noticeably acquiesced 44/ or even affirmed the propriety of the Paris Convention's denunciation. Her diplomatic notes merely sought for the enforcement of the bipartite treaty, but all the while kept mum on the applicability of the Paris Convention, when the circumstances required a similar positive reaction of invocation.

Apropos of the bilateral treaty, the written notice requirement was no longer mandatory, as Patria had actual notice of the "developments in Justia since . . . the 1975 laws". Moreover, Justia's denunciation, as a state declaration, should serve as sufficient constructive notice to Patria.

a. The Paris Convention and the bilateral treaty during the remaining one year, were equally unimpaired by the enactment of the disputed local laws.

44/ I. BROWNLIE, supra, note 3 at 163; I. Macgibbon, The Scope of Acquiescence in 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).

Justia adheres to the principle of treaty superiority over municipal law. Such adherence should be presumed of all states. Consequently, Justia's parliament passed both the Industrial Property Law and the Foreign Investment Amendment, with the intention of preserving treating obligations while they are subsisting. This should be the interpretation of the disputed laws. This is supported by the absence of proof that Justia sought to implement the disputed laws contrary to its treaty obligations during the remaining one year period.

2. In any event, the bilateral treaty is rendered inoperative by virtue of the Doctrine of Changed Circumstances.

a. The Doctrine of Changed Circumstances in an acknowledged international principle.

Conventional law embodies the Doctrine 45/ has been frequently invoked in state practice, 46/ and is recognized "as necessary for international law and international intercourse as the very rule of pacta sunt servanda". 47/ It has received the peremptory affirmation of the World Court as a means of treaty termination or suspension. 48/

b. The Test of the Doctrine has been fully 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 performance of treaty obligations.

45/ Havana Convention of Treaties, done on February 20, 1928, Article 10, reprinted in 22 AM. J. INT'L. L. SUPP. 39 (1928), and Article 62 of the Vienna Convention.

46/ O. Lissitzyn, Treaties and Changed Circumstances, 61 AM. J. INT'L. L. 895 (1965).

47/ L. OPPENHEIM, supra, note 3 at 844.

48/ Fisheries Jurisdiction Case (1973) I.C.J. 3, 18.

The basis of consent. Reciprocity and mutuality in beneficial commercial relations and development easily stands out as the common objective which runs throughout the treaty in its entirety. This was the essential basis of consent. Fifty years back at the conclusion of the treaty, economic prosperity was generally experienced the world over. This consequently resulted to the sprouting of factories, the development of communication and transportation in both the European and American continents. 49/ Influenced by such events, it is not surprising that mutuality in development dictated the terminology of the treaty. Without this as the realizable purpose, there existed no reason for the conclusion of the bilateral treaty.

The effect of the unforeseen fundamental change. Although the rise and fall of the economy was a reasonable expectancy during the mid-twenties, what was unforeseen was the cause of the economy's decline. This came in the form of assidious and complex manipulations and practices of varying degrees by aliens, largely by multinational corporation. The cumulative effect of such multifarious practices over which foreigners had control, determined Justia's balance of payments, capability to export, employment opportunities, use of Justian materials and components, price levels, 50/ and makes it a most fundamental change which exerted an obstructive force to a volatile end point. Justia had to restructure its economy or suffer a slow death.

The onerous performance of treaty obligations. Reality bared that the holders of corporate powers whose allegiance belonged to another state behaved as a different breed. Foreign domination of the economy and technology was the

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49/ C. STARR, C. NOWELL, BY. LYON, R. STEARNS and T. HAMERON, 2 A HISTORY OF THE WORLD 1500 TO THE PRESENT, 548 (1960); F. LEOGARDO, V. CALALANG and G. FABELLA, THE WORLD HISTORY 326 (1975).

50/ A. Hyde and L. dela Corte, supra, note 16 at 233; C. Hilado, supra, note 14 at 81, 90.

evil and not local control. Blind compliance to the treaty's national treatment clause would compel Justia to eradicate local control if it were to eliminate foreign control. Unprepared, the new Republic could not do this. Weakened, it could not wait further. 51/ A sterile position was an abandonment of its interlaced, economic, political and even military security.

c. The state's declaration is the operative act for the Doctrine.

Patria had actual notice of the Justian President's declaration of March and September, 1975, when he consistently affirmed the treaties' "inconsistence or incompatibility". Since a state declaration is necessary to parry the attack of acquiescence or tolerance on the past of the availing state, it becomes the operative act for the Doctrine to operate.

3. Both treaties being inapplicable and assuming the New Economic Order does not obtain, Justia had no obligation to extend national treatment to Patrian nationals under customary law or general principles of law.

Customary law does not impose on the host state the national treatment obligation. General principles of law call for the minimum standards, not for national treatment. Non-existent obligations cannot be violated.

II. JUSTIA COMMITTED NO VIOLATION OF INTERNATIONAL LAW EITHER IN THE INVALIDATION OF THE AGREEMENT BETWEEN PHARMACA AND SUBPHARM OR IN THE NATIONALIZATION OF SUBPHARM.

A. As a FIRST ALTERNATIVE ARGUMENT, considering that the bilateral treaty is legally binding, the legal procedure and practices adopted by Justia was legally justified.

The interaction of Articles III, IV, and V of the bilateral treaty uniformly dictate that national treatment must be accorded. Under the national treatment doctrine, for as long as the host country extends to aliens a treatment no less favorable than the treatment accorded to the nationals of the host state, the latter is relieved of any international delinquency or

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51/ J. Stone, Realistic Compliance Goals, AM. SOC. INT'L. L. PROC., 25 (1966).

liability. 52/ Justia fulfilled such obligation with respect to license invalidation and nationalization procedures.

1. No treaty breach based on Article I.

Article I imposes the obligation to extend equitable treatment as to "the property, enterprises and other interests" of Patrians as well as full legal and judicial protection. The treaty, however, does not define equitable treatment. An examination of the treaty discloses that the parties could not have meant a higher standard than the national treatment clause nor could it have referred to the minimum standards, for it could have been easy to phrase it so. This being the case, equitable treatment should be appropriately measured according to municipal determinations or be treated as mere surplusage.

a. On the invalidation of the license.

Material is the presumption against abuse of rights and in favor of good faith 53/ as a consideration in the determination of breach of the equitable treatment clause. Accordingly, the Supreme Court's decision of April 30, 1978 could not have adjudged the disputed license as binding between the direct parties on the basis of estoppel, as estoppel under both civil or common law systems, only holds true when public considerations are not affected nor impinged.

b. On the nationalization of Subpharm.

As discussed below, under the third alternative argument of the second issue, the sub-issues of accelerated nationalization and denial of access to courts as being contrary to full protection of the laws shall be disposed of.

52/ A. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS, 111 - 22 (1949) /hereinafter cited as A. ROTH/.

53/ B. CHENG, supra, note 3 at 305.

B. As A SECOND ALTERNATIVE ARGUMENT, the Economic Charter should be applied as the justification.

Article 2 of the Economic Charter declares:

"2. Each State has the right:

"(a) To regulate . . . foreign investment in accordance with its laws and regulations . . .

(b) To regulate the activities of transnational corporations . . . and take measures to ensure that such activities comply with its laws, rules and regulations . . ."

Justia in adopting such procedures in invalidating the agreement and nationalizing Subpharm merely exercised its rights under said Charter. Nonetheless, even if the minimum standards were to be applied, still no breach can be inferred.

C. As a THIRD ALTERNATIVE ARGUMENT, considering the bilateral treaty as having been rendered inoperative, Justia committed no breach under the Minimum Standards of International Law.

The minimum standards is a recognized general principle of law. Narrowed down to the procedural rights of aliens, any situation below the minimum standards shall constitute "denial of justice". 54/

1. On the burden of proof and presumptions.

It is a general principle of law that the claimant must prove his contention under penalty of having his case refused. 55/ The international liability of states cannot be decided on speculations nor presumed.

International tribunals have applied a number of presumptions founded on general principles of law. They had recourse to the rebuttable presumption of the regularity and validity of acts and recognize this as a general principle of law. 56/ Another general principle of law is that good faith is to

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54/ A. ROTH, supra, note 52 at 182.

55/ B. CHENG, supra, note 3 at 327.

56/ Id., at 305; Corfu Channel Case (1949) I.C.J. Reports, 119-20, 127, 129.

be presumed, whilst an abuse of right is not. 57/ The burden of proof and presumptions argue in favor of the position of Justia's non-liability.

2. On the merits of the issue.

a. The invalidation of the Agreement entailed no breach.

(1) The character of the decision.

Unfounded is the charge that the decisions of both the Registry and Minister of Industry is manifestly unjust. There was no "automatic registration" of the Agreement on account of the lapse of the required 80- and 45-day periods in Articles 7 and 11 of the Technology Law, as compliance is a reasonable possibility from the facts, considering that the 80-day period runs from the submission of evidence. Regularity is to be presumed.

At any rate, there was no exhaustion of local remedies to make this claim inadmissible.

(2) The special panel of the Supreme Court is a regular or normal court.

The Court may take judicial notice of the fact that appellate courts in almost all civilized countries, have been divided to form divisions, or panels in deciding cases. Moreover, to show abnormality there is no proof that at any other time this was never previously adopted in Justia. Special Courts do not amount to a denial of free access to the courts. 58/

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

The Supreme Court in affirming the lower court's decision in a four-line judgment is no denial of justice and the honorable court may take judicial notice of the practice of municipal courts in rendering minute resolutions.

57/ Id.; Lighthouses Case (1934) PCIJ Series A. No. 62, 47.

58/ C. AMERASINGHE, STATE RESPONSIBILITY FOR INJURY TO ALIENS 91 (1967).

b. The nationalization procedures entailed to breach.

(1) On the composition of the adjudicating power.

That the chief executive decides whether or not to nationalize upon the recommendation of men of his confidence does not mean that the Premier or the recommending power are incapable of deciding fairly and independently.

Nemo debet esse judex in propria sua causa 59/ is not applicable as it applies only where the state is herself a party to a contract. This is not so here and should not tie the quasi-judicial hands of the executive.

(2) The regularity of the nationalization procedures.

The decision to accelerate the nationalization of Subpharm is not a show case of irregularity. The Investment Law provided the one-year period for corporations and their stockholders to observe. When the Pharmaca's president publicly stated that it would not change its 80% share ownership policy, there no longer existed any reason for the observance of the one-year period proviso.

Moreover, the local remedy was not complied with. Inadmissibility of a claim by an international tribunal on the ground of non-exhaustion of local remedies may be suspensive or definitive. It is definitive when the condition can no longer be fulfilled that would enable the claim to be brought back to the international tribunal again. 60/ Here, all Subpharm should have done was to show a change of corporate policy which conformed to the Investment Law. This was essential and necessary to lift the accelerated nationalization, but it did not. Such remedy can no longer be reopened under the local law. By not availing this remedy, it has lost his right to use it again under the

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59/ B. CHENG, supra, note 3 at 256.

60/ C. LAW, L. PROZ and L. MINARD, THE LOCAL REMEDIES RULE IN INTERNATIONAL LAW, 52-3 (1961) /hereinafter cited as LAW, PROZ and MINARD/; Ambatielos Arbitration Award, 1956, H.M.S.O., 27.

definite effect of the exhaustion rule. 61/

(3) On the decision of the special panel on compensation.

A denial of justice is incurred if the decision is shown to be manifestly unjust. The expert assessment of 3 million US dollars in the face of the 6 million US dollar claim of Pharmaca does not prove a palpably unjust decision contrary to law. Moreover, Pharmaca's claim that profits were appropriate rewards for its invention and large research programs was a subject not within the jurisdiction of the special panel. Its jurisdiction was limited to the assessment of the properties of Subpharm, not Pharmaca's.

(4) No-access-to-the-courts-argument is not tenable.

For denial of justice, Pharmaca must have been denied such recourse by the courts themselves, where despite its patent reviewability, it was still denied judicial recourse.

Pharmaca was free to challenge the reviewability of the compensation panel's decision before our courts. Neither was it futile to do so, considering that Justia, being a Republic, clearly adheres to the principle of separation of powers. The special panel was not a constitutional body over whose decisions the courts could not review. Patria cannot seek reparation based on damage caused by Pharmaca on itself, otherwise reparation would be a fertile soil for enrichment. Neither can it considered as an extraordinary remedy 62/ because such action becomes essential and necessary in the light of the nature of the claim, allegedly being one of deprivation of free access to the courts.63/

61/ G. SCHWARZENBERGER, supra, note 3 at 608; C. LAW, L. DROZ and L. MINARD, supra, note 55, 53.

62/ C. LAW, L. DROZ and L. MINARD, supra, note 60 at 80.

63/ T. HAESLER, THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS, 47-8 (1968), he also states, " . . . there is, in substance no difference between ordinary and extraordinary legal means from a lower to a higher court."

III. THE COMPENSATION SCHEME FOR THE EXPROPRIATION OF ASSETS BELONGING TO PHARMACA OR SUBPHARM IS NOT INCONSISTENT WITH INTERNATIONAL LAW.

A. As a FIRST ALTERNATIVE ARGUMENT, the bilateral Treaty was fully complied with by Justia's compensation scheme.

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 IV (3) states:

> "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); is shall be accorded in an effectively realizable form (the Effectivity criterion), and without needless delay (the Promptness criterion).

a. The Treaty criterion of Equivalence.

As mirrored from the phraseology of the treaty, only property rightfully belonging to subpharm can be taken and compensated for.

Excess profits. Profits are the outputs of business concerns. To put profit in its place, it is imperative to be cleared of any misconception that a business system is an absolute right but rather a revocable privilege, 64/ with a "social function" attribute, 65/ which it owes to the state it thrives on. Excessive profits necessarily resulting from an abandonment of its social obligation, is a debt of any business concern, collectible by the State and its deduction find justification as valid set-offs.

Another supportive basis for excess profit deductions is unjust enrichment. 66/ Excessive or predatory profit is enrichment at the expense of State which results to an obligation to reimburse or return.

64/ J. Adam, Put Profit in its Place, 51 HARV. BUS. REV. 150-51 (1973).

65/ K. KATZAROV, THE THEORY OF NATIONALIZATION, 176 (1964).

66/ W. Friedman, General Course in Public International Law, RECUEIL DES COURS, 154 (1969); G. SCHWARZENBERGER, supra, note 18 at 577.

Still another basis, is the concept of unconscionableness 67/ of contracts in both common and civil law systems, where courts have been explicitly empowered to rule adversely against unconscionable clauses to prevent oppression and unreasonableness.

A radical basis would view excess profits deductions as a punitive measure for the seduction of state's capacity and sovereignty, which takes into account those policies and practices of the nationalized companies which infringe upon the welfare of the Justian community.

These different bases, more than reasonably supports the proposition that excess profit do not rightfully belong to Subpharm. Subpharm cannot raise the point of deprivation of property which in the first place did not rightfully belong to it.

Retroactive application. Although there is ample justification for excess profit deductions, it has nevertheless been argued that it should work prospectively. Such a proposition is thoroughly faulty. First, because it presupposes that excess profits are rightfully owned by nationalized corporations; second, deductions does not extend to all profits, but only those which have been found to be manifestly inequitable; third, "the prospective utilization of the deductions would in reality be of no use once the properties have been nationalized". 68/

b. The Treaty criterion of Effectiveness.

The test of an "effective realizable form of compensation is not met," if a local currency payment is of no use to the foreign owner for new investments

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67/ A. Heiben, The Chilean Copper Nationalization: The Foundation for a Standard of "Appropriate" Compensation, 23 BUFFALO L. REV. 774 (1974) /hereinafter cited as Heiben/.

68/ Id. at 777.

within the country. 69/ In this case, no evidence points to this extent.

c. The Treaty criterion of Promptness.

The treaty phrase "without needless delay", implies it allows necessary delay. The fiscal incapacity of Justia is a necessary delay under the impossibility of performance doctrine. To interpret otherwise, is to presume the irrationality of the parties.

Prompt compensation is normally understood to imply payment as soon as it is reasonable under the circumstances, although a promise should be made at the outset. 70/ This does not necessarily mean immediate payment, nor for that matter, lump sum payment. Moreover, to grant the corporate insistence to receive immediate and full compensation is in reality to deprive Justia's right to expropriate.

B. As a SECOND ALTERNATIVE ARGUMENT, the New Economic Order justifies the compensation scheme.

Article 2 of the Economic Charter declares:

> "(c) To nationalize, expropriate . . . foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent."

The President's inaugural speech is a mature reflection of the diverse circumstances attendant to Justia's economy. It was virtually a policy which the Justian parliament took serious notice of. The special panel on compensation should be accorded the presumption that it took pains in taking into account all relevant laws and event. Definitely, the Justian compensation scheme is well within the Economic Charter's context.

69/ J. Fleming, The Nationalization of Chile's Large Copper Companies in Contemporary Interstate Relations, 18 VILL. L. REV. 608 (1973).

70/ Id. at 608-9.

C. As a THIRD ALTERNATIVE ARGUMENT, the treaty being inoperative and assuming the New International Economic Order does not obtain, under the Minimum Standards, Justia incurred no breach.

Although compensation, in cases of nationalization, is a well established standard in international law, the degree or extent of compensation is hotly contested.

1. Adequate compensation is not a general principle of law.

a. Publicists have not agreed on the scope of this Standard.

The basic test of this standard vary from one publicist to the other that despite superficial similarities, that one may safely say there is nothing upon which a clear cross-sectional majority of writers agree.

b. State Practices manifest no uniformity in the acceptance of the doctrine.

The United State's position is for an adequate, prompt and effective compensation, third world states espouse national treatment, while communist countries hold for rock-bottom compensation. 71/

These factors strongly argue that there is no such general principle of law recognized by civilized nations on adequacy.

2. Nonetheless, Justia has complied with such Minimum Standard.

Compliance with the minimum standard of adequate or equitable compensation should be decided according to the circumstances on a case to case basis. Otherwise, if extensive nationalizations were rigidly governed by the U.S. standard, the "dominant capital exporting powers would have a powerful veto over the legitimate attempts of developing nations to accomplish essential economic and social reforms". 72/

71/ A. Heiben, supra, note 67 at 765-69.

72/ A. Rafat, Compensation for Expropriated Property in Recent International Law, 14 VILL. L. REV. 199, 258 (1969).

Even applying the standard of an adequate, prompt and effective payment, Justia has complied with such standard as shown under the first alternative argument.

D. *ADDITIONALLY, the shortening of Pharmaca's patent period is not compensable expropriation.*

1. *No exhaustion of local remedies.*

As has been previously argued, non-exhaustion does not entitle diplomatic intervention nor the admissibility of a claim. Pharmaca should have properly pursued its remedies thru the courts not thru the compensation panel.

2. *There was no expropriation.*

The Industrial Property Law which shortened the Patent's period is a regulatory law not an expropriatory one. Even if it were, none of the international cases on direct or indirect expropriation is at all analogous to his point. This is not surprising because it was the lapse of the patent's remaining period that operated to render the grant ineffective.

Moreover, the facts do not conclusively show that the Justian Patent Office cancelled the registration of Pharmaca's patent on "Calmian". Speculation cannot permitted to hold Justia guilty.

3. *In any event, it is not compensable.*

The nature of a patent is a contractual one. Well-established is the rule that contracts may be unilaterally terminated without violating the non-retroactivity of laws if founded on the rules of public policy. 73/

At any rate, the patentee is himself in breach. By using the patent to create a "dominant market", Pharmaca has violated the patent's implied condition of "non-derogation against public interests".

73/ *G. WHITE, NATIONALIZATION OF FOREIGN PROPERTY, 42 (1961).*

IV. THE JUSTIAN LAW REQUIRING TRANSFER OF TECHNOLOGY DISPUTES TO BE SETTLED UNDER JUSTIAN LAWS AND COURT IS NOT INCONSISTENT WITH INTERNATIONAL LAW.

A. As a FIRST ALTERNATIVE ARGUMENT, the bilateral treaty justifies the technology law requiring technology disputes to be settled in Justian Courts and according to Justian Law.

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

> "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 . . ."

does not contravene Article III (2) of the bipartite treaty. The Technology law was enacted in pursuance with Article XI of the bipartite treaty, and of which serves as the exception to Article III (2) thereof. To argue otherwise would imply permission to circumvent the measures taken pursuant to Article XI of the treaty, by the availing State.

B. As a SECOND ALTERNATIVE ARGUMENT, the validity of the technology law provisions is affirmed by both the Declaration and Economic Charter.

Both the Declaration and the Economic Charter supports Justia's position. The Declaration provides for the principle of:

> "(p) . . . giving to the developing countries access to the achievements of modern science and technology and promoting the transfer of technology . . . for the benefit of developing countries in forms and in accordance with procedures which are suited to their economies."

The Economic Charter, Article 13 (1) also provides that:

> "Every State has the right to benefit from the advances and developments in science and technology for the acceleration of its economic and social development."

Concommitantly, Justia passed the technology law. Realizing that contractual stipulations transferring the jurisdictional situs of technology disputes under foreign laws and courts would render ineffective such rights accorded to her Justia merely sought to counter such circumvention by mandating Justian jurisdiction over technology disputes.

C. *As a THIRD ALTERNATIVE ARGUMENT, the bilateral treaty being inoperative, and assuming the New Economic Order does not obtain, Justia did not violate any international norm.*

1. *The New York Convention does not prohibit the enactment of the disputed technology law provisions.*

Although the New York Convention declares that foreign awards must be recognized and enforced, it does not bar Justia's parliament from requiring technology disputes to be settled under Justian courts and laws in pursuance of a public policy. If under Article V(2), (a) and (B) thereof, enforcing courts are authorized to refuse recognition and enforcement of arbitral awards on non-arbitrable matters and violative of the public policy of the forum, then it impliedly recognizes that the legislature of the enforcing state may determine the scope of such grounds.

2. *Under Article 38 (1), (b) and (c) of the Statute, Article 6 (B), (21) and (22) of the technology law is not outlawed.*

The World Court has enunciated:

> *" . . . 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 . . ." 74/*

Neither are vested rights impaired, for contractual rights to a future arbitration negates the very concept of its being vested.

Well known is the rule that police power may regulate private contractual rights without violating the "non-retroactivity of law" and entailing no resultant compensation, if done for a public purpose. 75/

V. *THEREFORE, ON ALL FOUR ISSUES, JUSTIA HAS BEEN LEGALLY JUSTIFIED UNDER INTERNATIONAL LAW AND IS ENTITLED TO RELIEF.*

While Justia cannot be held in breach, Patria should be considered to have intentionally abandoned its duty to extent cooperation, alternatively,

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74/ *Serbian Loans Case* /1929/ P.C.I.J. 19.

75/ *WHITE, supra, note 73 at 42.*

under the Economic Charter, 76/ under the bilateral treaty 77/, or under the general principle of international economic and social cooperation 78/ when Justia needed it so. The lack of adequate measures or standards of conduct which Patria could have imposed on her nationals in their intercourses with Justia, implies and involves a prior Patrian breach.

At the least, this involves reparations for moral injuries 79/ suffered by Justia and necessary for the full restoration of the status quo ante. 80/

PRAYER

WHEREFORE, it is respectfully implored:

(1) That this Honorable Court, GRANT JUSTIA A DECLARATION that the New International Economic Order and the Economic Charter, presently subsists and is binding between the disputants, that all disputed Justian laws and procedures are in conformity with the Economic Charter as interpreted.

(2) In the alternative, that this Honorable Court GRANT JUSTIA A DECLARATION to the effect that the bilateral treaty and the Paris Convention authorize Justia to enact the disputed regulatory laws relating to foreign licensors and investors without being unduly limited by the obligation to extend national treatment; that the

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76/ Article XIV thereof.

77/ Article VIII (2) thereof.

78/ Article 1 (3) and Article 55 of the United Nations Charter

79/ W. FRIEDMANN, O. LISSITZYN and R. PUGH, CASES AND MATERIALS ON INTERNATIONAL LAW 389 (1969)

80/ I. VASARHELYI, RESTITUTION IN INTERNATIONAL LAW 74 (1964).

adopted invalidating and nationalization practices and procedures conform with international law; that the bilateral treaty does not preclude the adoption of the Justian compensation scheme, that the bilateral treaty authorizes Justia to demand that technology disputes be settled in Justian courts and according to Justian laws.

(3) As a <u>further alternative</u>, that this Honorable Court, as a consequence of Justia's denunciations or of the doctrine of change circumstances, GRANT JUSTIA A DECLARATION that the bilateral treaty and Paris Convention are inoperative and declare Justian laws and procedures consistent with customary international law and general principles of law.

(4) That this Honorable Court GRANT JUSTIA REPARATION for the full restoration of the <u>status quo ante</u>, and such other and further relief as may be just and equitable under the premises.

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