1999 Philip C. Jessup International Law Moot Court Competition

BENCH MEMORANDUM

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FOR JUDGES EYES ONLY

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I. INTRODUCTION

(1) The purpose of this bench memorandum is to provide judges in the Philip C. Jessup International Law Moot Court Competition with a basic outline of the factual and legal issues relevant to the 1999 Compromis. This memorandum is not intended to be an exhaustive or a detailed discussion of the Compromis. It is primarily directed to those judges that have little or no experience with the substantive areas of law that are the subject of the Compromis. It is intended to give those judges a sufficient level of comprehension of the issues to allow them to evaluate the basic issues raised in a memorial (brief), and to ask relevant legal and factual questions of the competitors during oral argument.

(2) As the memorandum is intended to give only as basic outline of the issues, it should not be surprising that a judge, in evaluating either a memorial or an oral argument, will encounter arguments and authorities that are not discussed in this memorandum. Obviously, the omission of those arguments and authorities from this memorandum does not make such arguments and authorities irrelevant *per se*.

(3) While there are a number of sub-issues which might be raised on these facts, the following questions **must** be addressed by the teams:

A. What are Pagonia's obligations under international law with respect to foreign investors?

B. To the extent that Pagonia breached such obligations, was it entitled to do so for the purpose of protecting its cultural identity?

C. Is protection in Pagonia afforded to copyright owners sufficient to satisfy the requirements of international law, if any?

D. Is Bretoria entitled to compensation for the losses suffered by its citizens as a result of alleged copyright infringement in Pagonia?

(4) There are certain tangential issues present in the problem. The teams should not be penalized for missing them nor credited unduly for noticing them. Some of the tangential issues are discussed *infra*. Judges should regard unfavorably any issues raised by competitors that are remote from the fact pattern in the Compromis.

II. SOURCES OF INTERNATIONAL LAW

A. General

(5) The International Court of Justice ("ICJ") may consider the following sources of international law in order to decide disputes before it:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59,[1] judicial decision and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice ("ICJ Statute"), Art. 38(1)(a)-(d). There is some dispute among commentators as to whether these four sources of international law are listed in order of importance.

B. Treaties

(6) Only Bretoria is a party to international conventions that deal with the issues of expropriation and copyright. For example, Bretoria is a member of the World Intellectual Property Organization and the Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971 ("Berne Convention"). Compromis at ¶ 29. Also, Bretoria is a party to the General Agreement on Tariffs and Trade ("GATT"), has acceded to the World Trade Organization ("WTO") and all of the multilateral Uruguay round agreements. *Id.* Apparently, neither nation is a party to any treaty dealing with cultural identity. Generally, treaties are not binding on non-parties. Vienna Convention on the Law of Treaties, Art. 34. Therefore, no relevant convention would be binding on Pagonia *qua* treaty,[2] and there would therefore be no relevant authority coming within Article 38(1)(a).

(7) Thus, sources of international law in this case would need to come from one of the other three categories of Article 38(1). Most probably, the competitors will focus their attention on international custom under Article 38(1)(b), with Bretoria arguing that there are customary norms controlling here, and Pagonia arguing the contrary. However, the competitors may also discuss general principles and writings as well.

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[1] Article 59 provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case." ICJ Statute, Art. 59.

[2] As discussed *infra*, conventions may be evidence of international custom in this case.

C. International Custom

(8) International custom is comprised of two elements – state practice and *opinio juris.* Military and Paramilitary Activities (*Nicar. v. U. S.*), 1986 I.C.J. ¶ 183 (June 27)(*citing* Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. ¶ 27). Evidence of international custom may be in the form of "treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, practice of international organizations." Mark E. Villiger, *Customary International Law and Treaties* 4 (1985) (citation omitted). Therefore, Bretoria's success on its claim regarding copyright protection rests, in part, on whether it can show the requisite state practice and *opinio juris.*

(9) State practice simply means that a sufficient number of states behave in a regular and repeated manner that establishes a customary norm. As such, Bretoria's objective is to show common and widespread practice among many developed and lesser-developed states that have adopted and enforce domestic legislation pertaining to expropriation and copyrights. *See North Seas Cases*, 1969 I.C.J. ¶ 75. State practice may also be evidenced by a sufficient number of States signing, ratifying, and acceding to a convention. *Customary International Law and Treaties, supra,* at 10.

(10) The second element of customary international law, *opinio juris*, requires that the subject state action be taken out of a sense of *legal obligation*, as opposed to domestic expediency. Put another way, *opinio juris* is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it." *Id.* at 26. By way of contrast, many nations have domestic taxation laws. However, it is clear that such laws were not adopted out of a sense of legal obligation. In other words, these laws would not evidence a customary norm requiring a nation to tax its citizenry.

(11) In the *North Seas Cases,* the ICJ stated:

> There is no evidence that [the Parties] so acted because they felt legally compelled to draw [the boundary lines] in this way by reason of a rule of customary law – especially considering that they might have been motivated by other obvious factors.

North Seas Cases at ¶ 78.

(12) In order to establish a customary norm regarding copyright protection, Bretoria will need to establish that relevant domestic legislation has been adopted out of a sense of legal obligation. As an example, Bretoria can point to states that have acceded to relevant international conventions in addition to implementing domestic legislation on the same subjects.

(13) Pagonia may argue in opposition, for example, that nations have adopted relevant domestic legislation, such as copyright laws, only to promote the creative arts within their borders, and not out of a sense of international legal obligations. Therefore, there would be the requisite *opinio juris* to establish a customary norm.

III. OBLIGATIONS UNDER INTERNATIONAL LAW WITH RESPECT TO FOREIGN INVESTORS

A. Pagonia's Right To Regulate Property And Business Within Its Borders

(14) Absent an affirmative duty under international law, Pagonia has permanent sovereignty over all of the natural resources, economic activities and wealth within its boundaries. Pursuant to this sovereign right, Pagonia may restrict, or regulate entry into its internal markets, may regulate or restrict the conduct of commerce within those markets, and may, subject to certain limitations discussed *infra*, exclude private actors from those markets.

(15) It is incumbent upon Bretoria to identify an affirmative international obligation that Pagonia fails to satisfy. If Bretoria is unable to identify such a duty, Pagonia carries the day. The chief obligation which will be raised by Bretoria concerns Pagonia's duties to foreign investors. Although not expressly stated in the prayer for relief, Bretoria 's claim is principally one for illegal expropriation. Pagonia will argue first that no such expropriation occurred, and will argue in the alternative that such expropriation is legally justified.

(16) Bretoria may urge that other obligations exist, either under treaties, or under customary international law. Pagonia is not a party to any treaty on point. Therefore, if Bretoria attempts to argue that a duty exists because it is contained in a treaty, Pagonia may correctly point out that Pagonia is not ordinarily bound by treaties to which it is not a party. As discussed above, however, such treaties, alone or in aggregate with other treaties, international instruments and State domestic laws and practices, may be evidence of customary international law.

B. Pagonia's Duties To Foreign Investors

(17) In order to succeed on the expropriation point, Bretoria must prove that: (1) Pagonia has committed an expropriation; (2) international law recognizes one or more limitations on Pagonia's right to expropriate; and (3) Pagonia has failed to abide by such limitations.

1. Expropriation Generally

(18) Expropriation is the deprivation by a state of private property. The Bench may wish to ask Bretoria to present a definition of expropriation and to demonstrate how each alleged instance of expropriation meets this definition. Expropriation is an action by a state which has the effect of depriving an individual of the individual's property. The action need not be an outright confiscation of the property; many states and international tribunals have recognized that discriminatory regulation by a state which has the effect of denying an individual effective use or enjoyment of property is also expropriation. Furthermore, regulation by a state which requires foreign investors to sell property at significantly below market has been held by several tribunals to constitute expropriation.

(19) In the present case, Bretoria may point to several potential acts of expropriation by Pagonia, including: the passage and enforcement of Civil Law No. 51, which necessitated emergency divestment by foreign owners of their property at below book value; the minimum content regulations of the Pagonian Communication Commission, which restrict the full enjoyment by owners of broadcast stations of their property interests; the same regulations, which forced the cancellation of contracts held by foreign investors; and the Pagonian Culture Ministry's language regulations on periodicals, which increases the cost of doing business. In each case, Pagonia and Bretoria will differ on the issue of whether the actions rise to the level of an expropriation.

(20) The U.N. General Assembly recognized in the Charter of Economic Rights and Duties of States ("CERDS") that each state has the right to expropriate or transfer ownership of foreign-owned property within its borders.[3] This right is also recognized in many of bilateral investment treaties between particular States. However, this right is arguably subject to several limitations. To the extent that Pagonia has not met these limitations, it has violated a duty under international law.

a. "Public Purpose" Limitation

(21) First, the property must be taken for a "public purpose." Pagonia may argue and find support among scholars that Pagonia in its sole discretion may determine whether a public purpose exists. However, Bretoria may raise the apparent conflict of interest of Ms. Crispell, the Member of Pagonian Parliament who led the drive for expropriation and who owns a publishing house which benefits from the expropriation, and may question whether the expropriation was in fact for a good faith public purpose. However, Ms. Crispell is but one legislator, and this law was passed by the full Parliament of Pagonia. Moreover, the ICJ, like many courts with review power over state actions, has traditionally been loathe to inquire into the secret motivations of individual legislators or entire legislatures.

b. "Compensation" Limitation

(22) The second limitation is that the state must compensate individuals from whom it has expropriated property. There is considerable disagreement under international law as to the standard for compensation. Investor countries (*i.e.,* the developed countries) typically argue that compensation should be "prompt, adequate and effective." This means that compensation must be made without undue delay, must equal the full value of the expropriated company, and must be made in a form that is of practical use to the recipient (for example, payment in a non-convertible currency is not acceptable). On the other hand, host countries (*i.e.* developing countries) argue that compensation must merely be "appropriate." According to CERDS, expropriating States must make "appropriate compensation . . . taking into account [the State's] relevant laws and regulations and all circumstances that the State considers pertinent."

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[3] Resolutions of the U.N. General Assembly do not have binding force but are recommendations and evidence of customary law. *See Customary International Law and Treaties, supra,* at 142-5.

(23) Resolving whether Pagonia has met the compensation requirement requires the ICJ to first determine which standard it will use. In support of the "appropriate" standard, Pagonia may cite the U.N. General Assembly's endorsement of the "appropriate" compensation standard in CERDS, as well as the adoption of the standard in a number of domestic court decisions and international tribunal awards. Bretoria will argue that the "prompt, adequate and effective" standard appears more frequently in bilateral and multilateral investment treaties. Alternatively, Bretoria may argue that Pagonia's compensation does not even meet the lower "appropriate" standard. Pagonia may respond that the terms of bilateral investment treaties - especially those of older treaties - are frequently dictated by investing countries, and therefore are not an accurate representation of the will of the developing world.

c. "National Treatment" Limitation

(24) Bretoria may argue that a third limitation on Pagonia's right to expropriate is the "national treatment" (or non-discrimination) requirement, which requires generally that host states treat foreign investors as they would their own citizens.

(25) Bretoria will argue that national treatment is a rule of customary international law because it appears in GATT (at Article III), in the North American Free Trade Agreement ("NAFTA") (at Articles 301 and 1203), in a considerable majority of investment treaties, and in a number of other international law documents. Pagonia will respond that, although these documents all use the words "national treatment," there is considerable disagreement between the developed and developing world as to what national treatment means. For example, the U.N. General Assembly, in CERDS, and the Organization for Economic Cooperation and Development ("OECD"), in its National Treatment Instrument, have adopted the national treatment requirement. CERDS states that "[n]o State shall be compelled to grant preferential treatment to foreign investment." However, according to the OECD document, a host State is to afford foreign investors "treatment under their laws . . . consistent with international law and no less favorable than that accorded in like situations to domestic enterprises." Pagonia may argue that the lack of consensus on even the broad definition of "national treatment" suggests that there is in fact no customary international law norm on the matter.

2. Rights Of States Under International Law To Take Action To Protect Cultural Identity

(26) Obviously, if Pagonia prevails in proving that no illegal expropriation has occurred, then the issue of cultural identity becomes moot. However, all competitors and the Bench should be prepared to discuss the cultural identity issue assuming *arguendo* that Bretoria has been able to prove that illegal expropriation has taken place.

(27) If Pagonia has violated some rule of international law relating to expropriation, the burden shifts to Pagonia to prove that it had a right to take steps to protect its cultural identity. Pagonia must prove that: (1) there exists a rule of customary international law which allows a state to take otherwise illegal measures to protect its cultural identity; and (2) the facts of this case warrant such measures.

a. International Law On Protection Of Cultural Identity

(28) Pagonia may argue that a State can take actions to protect its cultural identity despite contrary obligations under international law. For example, Canada successfully negotiated a cultural identity exception to its obligations under the Canada-United States Free Trade Agreement ("FTA"). Specifically, Article 2005(1) of the FTA states, "Cultural industries are exempt from the provisions of this Agreement . . ." Article 2106 of NAFTA incorporates this provision by reference and applies it to Canadian-Mexican trade as well. (The Canadian law implementing the FTA contained substantially the same definition of "cultural sector" as the Pagonian law in the Problem.)

(29) Bretoria may reply that the existence of the cultural identity exception in NAFTA does not support such an exception in international law, since the exception does not immunize Canadian actions taken to protect its cultural identity. The exception merely states that NAFTA and the FTA do not impose restrictions upon Canada's rights in this sector. The United States expressly reserved the right under NAFTA to take retaliatory actions when Canada's actions to protect its cultural identity harm U.S. interests. The United States was therefore successfully able to challenge a Canadian action taken under the NAFTA exception before a WTO Panel (Certain Measures Concerning Periodicals (1997)) by alleging that the action breached the GATT (which does not contain a cultural identity exception).

(30) Pagonia may also point to domestic laws of various states as evidence of state practice. Examples include Canada, which has a number of statutes and regulations in place to protect Canadian cultural identity against trade-based encroachment, including quotas for work containing significant Canadian content, rules regulating foreign ownership of cultural industries, and restrictions on the importation and distribution of cultural materials produced outside Canada. In addition, Canada subsidizes its cultural industries in a number of ways. However, Canada is a Member of GATT/WTO and some of its subsidies and restrictions were determined in 1997 to be in violation of GATT.

(31) Although the United States has a very liberal regime regarding foreign direct investment, Section 310 of the Federal Communications Act of 1934 broadly prohibits any foreign government, any representatives of a foreign government or any alien or alien-affiliated foreign entity from owning more than 25 percent of U.S. broadcast stations. This Act applies to both passive "common carriers" and active "content-based" broadcasting entities. In late 1997, in light of WTO obligations and the new Basic Telecom Agreement, the foreign-ownership cap was eliminated for applicants and investors whose home markets are in WTO Member countries. The 25 percent foreign-ownership cap remains in place for applicants whose home markets are not members of the WTO. However, with respect to "content-based" broadcasting entities, while the issue is currently under discussions, there has been no liberalization effected and the 25 percent cap on foreign-ownership remains. Bretoria should argue, however, that the legislative history of § 310(b) suggests that alien control of then-limited broadcast information outlets, particularly in time of war, was a principal consideration in adopting the restrictions. The rationale for this law

Bretoria should argue, is strictly grounded in national security concerns, not for the purpose of protecting U.S. culture.

(32) France has passed a number of "la Langue" language laws which prevent English terms from creeping into the French language. France has laws mandating French-only signs and advertisements in public places. In addition, France has passed a law requiring World-Wide Web pages located within France to be published in French. There are significant civil penalties for violation of these French laws, as well as criminal sanctions.

(33) In 1989, the European Community ("EC") adopted the "Television Without Frontiers" Directive, intended to create a single EC broadcasting market by harmonizing Member States' broadcasting laws. The Directive included a "local content requirement," which required each broadcaster within the EC to reserve fifty percent of airtime for "European works." Bretoria may argue that, taken in its full context, the Directive is merely hortatory and does not have the force of law. However, the Directive states that the flexible nature of the wording does not in any way affect the binding nature of the local content requirement.

b. Applying The Law To The Facts

(34) Pagonia faces a number of challenges in defining the precise scope and nature of the "culture" it is seeking to protect. International law provides little guidance on this aspect of the issue.

(35) There is very little authority in international law concerning application of the cultural identity exception to specific State actions. However, Bretoria may compare the cultural identity exception to similar rules of international law, and may attempt to impose similar limitations by analogy. One such limitation might be that Pagonia's actions must be "necessary and proportionate" to the threat to its cultural identity. This limitation appears in ICJ decisions concerning the use of military force in self-defense, and in arbitral decisions concerning the national security, public welfare, and environmental protection clauses of certain trade treaties (*e.g.* GATT and NAFTA).

(36) The strictest rendition of the "necessary and proportionate" rule would require Pagonia to prove that: (1) there was in fact a threat to Pagonia's cultural identity, (2) that Pagonia could not have effectively taken any less restrictive action, or any legal action, to prevent harm, and (3) that the damage resulting from Pagonia's action was proportionate to the harm which would have resulted from the threat.

3. Subsidiary Or Tangential Issues

a. Standing

(37) Pagonia may raise the question of Bretoria's standing to bring claims on behalf of private Bretorian citizens before the International Court of Justice, a tribunal established for resolution of disputes between states. The doctrine of "diplomatic protection" allows a state to raise claims that its citizens have against a second state. This doctrine has been codified in a number of

treaties and in U.N. draft codes. However, most definitions of diplomatic protection require the private citizens to exhaust all local remedies, including pursuing all appeals to the highest available court, before the first State may pursue the claims. The requirement of exhaustion of local remedies may be waived where pursuit of local remedies would be futile.

b. Compensation

(38) On the expropriation issue, teams may argue about the precise calculation of "appropriate" compensation for expropriated property. There is no consensus in the international community as to how the standard of "appropriate" compensation is defined. Most investment treaties mandate compensation "equivalent to" the expropriated property or refer to the "real," "full," or "fair" market value, *i.e.,* before the value was depressed by the specter of expropriation. A substantial minority of investment treaties refer simply to the market value of the enterprise.

c. Free Speech

(39) Bretoria may argue that Pagonia's cultural identity laws violate the rights of broadcasters and publishers to free speech and the rights of Pagonian audiences to free access to information. Bretoria will cite the Universal Declaration on Human rights and the International Covenant on Civil and Political Rights in support of this right. Bretoria will argue that there is a strong international consensus that it is the choice of private citizens, not government, to decide what they will hear, read and watch. If this freedom leaves Pagonians vulnerable to manipulation or undermining of their cultural values by clever foreign authors and broadcasters, this principle holds that this is still preferable to clever manipulation by government censors. Pagonia will respond that, in actual practice, free access to markets in fact undermines free speech. Without some protection for Pagonian culture, Pagonian bookshelves and airwaves will be so inundated with foreign products that there will be no Pagonian industry to provide competition. Therefore, Pagonia will argue, maintenance of true freedom of access to information requires some level of protection for Pagonian content.

IV. THE DISPUTE REGARDING THE SUFFICIENCY OF COPYRIGHT PROTECTION IN PAGONIA

A. Jurisdiction

(40) Pagonia might argue that the Court has no jurisdiction to hear matters pertaining to copyright issues. However, as noted above, both Pagonia and Bretoria are members of the United Nations. Compromis at ¶ 29. The ICJ Statute provides the Court with jurisdiction to hear, *inter alia*, all cases which the parties refer to it. ICJ Statute, Article 36(1). Bretoria and Pagonia jointly submitted their Special Agreement to the ICJ pursuant to ICJ Statute Article 40.[4] This same exhaustion requirement discussed above would exist for the copyright issue.

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[4] "Cases are brought before the Court, as the case may be, either be the notification of the *special agreement* or by a written application addressed to the Registrar." ICJ Statute, Art. 40 (emphasis added).

However, unlike with the expropriation issue there may be a question of whether private Bretorian citizens exhausted their remedies in Pagonia, given the civil remedies for conversion in that country. See Compromis, Clarification No. 15.

(41) Further, certain major copyright conventions provide that the ICJ may resolve disputes regarding the interpretation of the conventions' terms.[5] However, Pagonia is not a signatory to those conventions. Further, no nation has sought relief from the ICJ regarding disputes involving copyright issues until now. H. Desbois, A. Françon, and A. Kéréver, Les conventions internationales du droit d'auteur et des droits voisins ¶¶ 197, 208 & 309 (Paris, 1976).

(42) The entities actually affected by copyright infringement here are the Bretorian copyright owners. Compromis at ¶ 25. However, only states may be parties in cases before the Court. ICJ Statute, Art. 34(1). Pagonia may therefore argue that this is not a proper dispute for the Court. Nonetheless, some authors state that a nation has the right to approach the ICJ regarding international copyright obligations at the behest of private citizens. S. Ricketson, The Berne Convention for the Protections of Literary and Artistic Works: 1886-1986 ¶¶ 14.86-89 (London, 1987).

B. The Applicability Of International Law Regarding The Protection Of Copyrights

1. Domestic Legislation As Evidence Of International Custom

(43) Bretoria should point to the many developed and lesser-developed nations that have adopted and enforce domestic copyright legislation. Examples include: Argentina, Australia, Belgium, Canada, China, France, Germany, Greece, Japan, Romania, the United States, and the United Kingdom. Bretoria should point out that the underground market in Pagonia for unlicensed copies of foreign language audio and video cassettes is the type of conduct that the majority of nations has sought to extinguish by enacting and enforcing domestic copyright legislation.

(44) Pagonia can also point to a group of nations, mostly undeveloped, that have not adopted domestic copyright legislation. Pagonia's argument will essentially be that, given this group of nations without copyright legislation, there is inconsistent state practice which precludes the establishment of a customary norm. Pagonia may also point to nations that simply fail to enforce their domestic copyright legislation. This is especially true in the lesser-developed countries, such as Pagonia, in which their are insufficient resources to enforce effectively their domestic legislation. For example, China has had difficulty enforcing its domestic legislation.

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[5] *See* Berne Convention, Art. 33(1) ("Any dispute between two or more countries of the Union concerning the interpretation or applications of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court . . ."); Paris Convention, Art. 28(1); Rome Convention, Art. 30.

(45) Finally, Pagonia may argue that among those States with domestic copyright legislation, there is inconsistent state practice regarding the specific rights provided for in that legislation. As an example, the United States and certain other nations draw a distinction between economic rights, such as the right to reproduce and disseminate a copyrighted work, from moral rights, such as the right to be identified as the author of a copyrighted work. 17 U.S.C. §§ 106, 106A. Further, the Copyright Act of Argentina does not contain a specific provision covering moral rights but the Argentinean courts have recognized and enforced moral rights in a large range of cases. Paul E. Geller and Melville B. Nimmer, International Copyright Law and Practice ARG-49, § 7[1].

(46) In contrast, nations such as France and Germany, treat moral rights as an integral part of all rights protected under copyright legislation. For example, in France, an author's exclusive rights include "attributes of an intellectual and moral nature, as well as attributes of an economic nature." Intellectual Property Code of France, Art. L.111-1.

(47) Pagonia might attempt to argue that treatment of moral rights is inconsistent among states. However, Bretoria can reply that moral rights are irrelevant to the facts of this case. Bretoria should point out that there is very little inconsistency among the nations on the salient issue, i.e., the economic protection of copyrights. For example, most states have legislation for protection against infringement (e.g. the United States, the United Kingdom, Canada, France, Hungary and Japan). Moreover, these countries provide legislation for civil remedies, such as damages and injunctive relief.

2. Treaties As Evidence Of International Custom

(48) Trade treaties may provide evidence of custom regarding certain minimum requirements of copyright protection. See, e.g. Agreement on Trade-Related Aspects of Intellectual Property Rights, 25 I.I.C. 209 (1994)("TRIPS"); NAFTA, ch. 17. Copyright conventions, such as the Berne Convention, to which Bretoria is a party but Pagonia is not, could also be evidence of state practice in the area of copyright if the treaty has been acceded to by a sufficient number of nations, or if there is some indication that the provisions of the treaty are an attempt to codify existing custom. See Customary International Law and Treaties, supra, at 11. For example, Bretoria should point out that over 100 countries are signatories to the Berne Convention.

(49) The Berne Convention has developed the most extensive and detailed set of minimum rights to protect the author of the copyright and his successors in title. See International Copyright Law and Practice, supra, at INT-174 §5[4][a][i]; Berne Convention, Art. 2(6). Essentially, the Berne Convention set forth certain economic and moral rights for the copyright owner and author. Berne Convention, Arts. 8-14. The economic rights include the right to control the compilation, translation, adaptation, arrangement, performance, broadcast and related retransmission, and other forms of public communication, public recitation, and film distribution. Id. Additionally, the most recent Act - the Paris Act - also includes the right to control "reproduction . . . in any form." Berne Convention, Art. 9(1). However, Article 9 also permits reproduction in "special cases" where the reproduction does not conflict with the normal exploitation of the work and the legitimate interests of the author are not prejudiced. Berne Convention, Art. 9(2).

(50) Under the Berne Convention, the copyright owner is entitled to enforce his/her rights and may institute infringement proceedings. Berne Convention, Art. 15(1). To this extent, Article 16 provides for seizure of infringing copies of a work. Berne Convention, Arts. 16(1) & (2).

(51) As suggested earlier, Bretoria may point to the TRIPS Agreement as evidence of custom, given that numerous countries have become parties to TRIPS. On the other hand, Pagonia may argue that TRIPS is not custom, as "the TRIPS Agreement fills many gaps left by prior treaties in the field of copyright and neighboring rights by incorporating the Berne provisions from the Paris Act and supplementing these with others, some modeled on Rome provisions." International Copyright Law and Practice, supra, at INT-64 § 3[3][a][i] (emphasis added). Essentially, TRIPS incorporates the economic rights set forth in the Berne Convention. TRIPS, Art. 9.

(52) Assuming that TRIPS is evidence of custom, and therefore binding on Pagonia, Article 41 of TRIPS sets forth the general obligations to ensure enforcement procedures are available to "permit effective action against any act of infringement." TRIPS, Art. 41(1). These measures include civil remedies, such as damages and injunctive relief. TRIPS, Arts. 44(1) & 45(1). TRIPS also sets forth the requirements related to border measures intended to assist a copyright owner in notifying the customs authorities of imported pirated copyright goods. TRIPS, Art. 51-59.

(53) NAFTA is another possible example of custom illustrating state practice. NAFTA is intended to foster " . . . creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights . . .". NAFTA, pmbl., 32 I.L.M. 247. NAFTA also incorporates and supplements the Berne provisions. NAFTA Arts. 1701 et seq.

(54) Support for a customary norm may be found in the Universal Copyright Convention, as revised at Paris, 1971 ("U.C.C."). The U.C.C. imposes minimum copyright terms, formulates broad standards for protection, but articulates no full system of minimum substantive rights such as Berne institutes. International Copyright Law and Practice, supra, at INT-72-3 §3[3][b][ii]. The U.C.C. sets forth basic economic rights, including the right to authorize reproduction by any means, public performance, and broadcasting. U.C.C., Art. IVbis. This right extends to derivative works as well as to the original. Other rights include the right to make, publish and authorize the making and publishing of translations of works. U.C.C., Art. V.

(55) Bretoria may also point to the Treaty of Rome ("EC Treaty"), which established the European Community. The EC Treaty does not expressly use the word "copyright," expressly restricting itself to "industrial and commercial property." However, it has been determined that copyrights fall within the scope of the EC Treaty. See Phil Collins v. Imtrat Handelsgesellschaft mbH, 3 C.M.L.R. 773 (1993). To this extent, the EC Treaty covers economic rights related to the commercial exploitation (e.g. the right to reproduce and distribute) and marketing of the protected work.

3. Applying The Law To The Facts

(56) If the above is evidence of custom, Bretoria can argue that Pagonia does not even have a law specifically proscribing copyright infringement. Compromis at ¶ 9. For example, there is no civil law that recognizes exclusive rights of the author to translate, reproduce or distribute a work. Pagonia's position should be that its criminal code protects copyright owners in that it criminalizes acts where a person has been deprived of his property, or of the right to use his property as he sees fit. Id. However, Pagonia's prosecutors ultimately decide when an action for theft will be brought. Id. In that circumstance, it seems likely that more violent crimes will take precedence over copyright infringement, leaving copyright owners without any remedy at all. Indeed, the prosecutor's offices in the majority of regions of Pagonia do not even have a functioning unit for the investigation of alleged thefts of intangible property.

(57) Bretoria may also argue that there are no proper civil remedies available to copyright owners. Pagonia may reply that infringers may be found liable under the common law tort of conversion. Compromis, Clarification No.15. However, no actions for conversion have been brought in Pagonia.

(58) Pagonia may argue that, as a least-developed country, even if the requirements set forth in the TRIPS Agreement constitute custom, Pagonia is entitled to a ten year grace period in which to comply pursuant to Article 66 of TRIPS because it is a least-developed country. Bretoria can argue that the grace period is a benefit provided to the signatories of the TRIPS Agreement, as Pagonia is not a signatory to TRIPS, it is not entitled to the ten year grace period.

(59) Alternatively, Pagonia should also argue that the issues of copyright protection are exclusively the domestic affairs of Pagonia. That is, the autonomy or sovereignty of Pagonia should be respected. Pagonia may point to the Charter of the United Nations which "is based on the principle of sovereign equality of all its Members." U. N. Charter, Art. 2(1). Also the ICJ has long recognized the principle of non-intervention, wherein every sovereign has the right to conduct its own affairs without outside interference. Nicaragua v. United States, ¶ 202. Bretoria can say in response that sovereignty can not be used to avoid international legal obligation. Ann Van Wynen Thomas and A.J. Thomas, Non-Intervention The Law And Its Import In the Americas 77 (1956).