

# International Court of Justice

## **Special Agreement**

Between the Republic of Bretoria and the Kingdom of Pagonia to  
submit to the International Court of Justice the Dispute between  
the two States concerning  
Cultural Identity and Intellectual Property

Jointly Notified to the Court on 14 November 1998

# Cour Internationale de Justice

## **Compromis**

Entre la Republique du Bretoria et le Royaume de Pagonia visant à  
soumettre à la Cour Internationale de Justice le differend qui  
oppose les deux etats concernant  
l'Identite Culturelle et la Propriete Intellectuelle

Notifié conjointement à la Cour le 14 Novembre 1998

**I. THE MINISTERS FOR FOREIGN AFFAIRS OF THE REPUBLIC OF BRETORIA AND THE KINGDOM OF PAGONIA TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE**

4 November 1998

**Re: Joint notification of the Special Agreement between the Republic of Bretoria the Kingdom of Pagonia to submit to the International Court of Justice the dispute between them concerning cultural identity and intellectual property.**

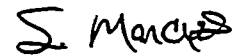
We, the undersigned, acting for and on behalf of our respective Governments, have the honor to inform you that the Republic of Bretoria and the Kingdom of Pagonia have jointly decided to submit their dispute concerning cultural identity and intellectual property to the International Court of Justice for a final and binding decision. In this regard, on 4 October 1998 in Summar, in the Republic of Bretoria, the two Governments signed a Special Agreement enabling them to bring said dispute before the Court for a peaceful settlement.

Instruments of ratification were exchanged between the Parties on 2 November 1998, and in accordance with the provisions of Article IV (1) of the Agreement, it entered into force on that date.

Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Special Agreement is hereby transmitted to you in order to enable the Court to set the proceedings in train.

A handwritten signature in black ink, appearing to read 'M. Theas', is written over a horizontal line that extends across the width of the signature.

Minister of Foreign Affairs,  
for the Republic of Bretoria

A handwritten signature in black ink, appearing to read 'S. Mancoske', is written in a cursive style.

Minister of Foreign Affairs,  
for the Kingdom of Pagonia

**II. SPECIAL AGREEMENT BETWEEN THE REPUBLIC OF BRETORIA AND THE KINGDOM OF PAGONIA TO SUBMIT TO THE INTERNATIONAL COURT OF JUSTICE THE DISPUTE BETWEEN THE TWO STATES CONCERNING CULTURAL IDENTITY AND INTELLECTUAL PROPERTY.**

The Republic of Bretoria and the Kingdom of Pagonia,

Considering that differences have arisen between them concerning cultural identity and intellectual property.

Recognizing that the concerned have been unable to settle these differences by negotiations;

Desiring that these differences should be settled by the International Court of Justice;

Desiring further to define the issues to be submitted to the International Court of Justice,

Therefore, the Republic of Bretoria and the Kingdom of Pagonia have concluded the following Special Agreement:

*Article 1*

The Parties submit the questions contained in the Statement of Facts to the International Court of Justice pursuant to Article 40(1) of the Statute of the Court.

*Article 2*

(a) The Court is requested to decide the Case on the basis of the rules and principles of general international law, as well as any applicable treaties.

(b) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions presented in the Case.

*Article 3*

(a) All questions of procedure and rules shall be regulated in accordance with the provisions of the Official Rules of the 1999 Philip C. Jessup International Law Moot Court Competition.

(b) However, the Parties request the Court to order that the written proceedings should consist of memorials presented by each of them not later than 11 January 1999.

*Article 4*

(a) The judgment of the Court on the dispute described in Article 2 shall be final and binding on the Parties.

(b) As soon as possible after the delivery of the Court's judgment, the Parties shall take steps necessary to carry out the Judgment.

In witness whereof; the undersigned, being duly authorized thereto, have signed this Special Agreement and have affixed thereto their seals.

Done in Summar, this 4th day of November 1998, in triplicate in the English language.

## **The Republic of Bretoria v. The Kingdom of Pagonia**

### **CONCERNING CULTURAL IDENTITY AND INTELLECTUAL PROPERTY**

The Kingdom of Pagonia is an agricultural nation. The vast majority of the Pagonian population is rural and uneducated. There is also a segment of the population that is well educated, primarily comprising younger residents of the major cities.

Throughout the last century, many citizens have emigrated from Pagonia. Today, there are discrete communities of ethnic Pagonians in many nations throughout the world. Expatriates in these communities still observe many Pagonian traditions, and use the Pagonian language, as well as the languages of their adopted countries. They also continue to observe Pagonian religious and traditional holidays. The Pagonian Government officially classifies these expatriates as Overseas Pagonians, although they are no longer citizens of Pagonia.

For almost 30 years, prior to its revolution, Pagonia was ruled by a totalitarian regime, which planned, managed, and controlled all aspects of the economy. During that time, imports were tightly restricted. The Pagonian Government also strictly limited the dissemination of foreign language material within Pagonia and anything other than incidental contact by Pagonians with foreigners was required by law to be reported to the police.

A revolution in 1975 overthrew Pagonia's totalitarian regime. The political and economic structure in Pagonia was changed significantly. A new government was established in democratic elections, and the economy moved toward privatization, primarily through foreign investment, which had been prohibited prior to the revolution.

One effect of the revolution was liberalization at Pagonian institutions of higher education. For the first time in decades, advanced foreign language and foreign literature courses were made generally available to students. According to statistics kept by the Ministry

of Education, these courses quickly became the most popular at Pagonian universities. Simultaneously, enrollment in Pagonian language and literature courses fell to one-half of pre-revolution levels.

Although prior to the revolution imported foreign language material was not generally available to Pagonians, they were able to listen to foreign popular music on short wave radio. Further, the few Pagonians who were able to travel overseas before the revolution generated an interest in foreign films by word of mouth upon their return. Another effect of the easing of pre-revolutionary restrictions in Pagonia was the increase in imports of books, audio and videocassettes. Some of the imported cultural works had been translated into Pagonian, but many of them had not.

The post-revolutionary demand for this imported foreign language material, whether translated or not, was significant. One result of this was the creation of an underground market for unlicensed copies of foreign language audio and videocassettes. A panel of experts from the World Intellectual Property Organization who visited Pagonia in 1996 published a report, which stated that “inexpensive, and obviously unlicensed copies of foreign movies and music cassettes are easily found throughout the streets of the large cities of Pagonia. It is possible to purchase a foreign language audio or videocassette for a small fraction of the price of a licensed copy thereof.” The panel concluded that \$100 million a year in revenue was being lost by copyright owners by virtue of these unlicensed sales in Pagonia.

In response, the Pagonian Government sent a letter to WIPO, stating that it “does not consider this matter to be of any legitimate concern to an international body of which Pagonia is not a member. In any event, the accuracy of the estimated loss is entirely speculative, as there is

neither a proper basis for calculating, nor accurate information available, to allow WIPO to reach the conclusions that it did.”

Pagonia has no law specifically proscribing copyright infringement. The Pagonian Criminal Code, however, provides for criminal penalties for theft, which is defined as: “depriving another of his property, or of the right to use his property as he sees fit, without his permission.” The decision on whether to bring an action for theft is left in the hands of regional prosecutors. In six out of the nine regions of Pagonia, there is no functioning unit in the prosecutor’s office for the investigation of alleged thefts of an intangible property. Statistics are not available in those regions to determine how many times individuals have been prosecuted on such charges. In each of the remaining three regions, over the last four years, an average of 150 individuals have been prosecuted for theft for having copied and disseminated the works of others -invariably Pagonian authors and composers- without authorization. They were punished by fines payable to the Pagonian government.

Although Pagonia itself has a rich cultural history, under its totalitarian government, it did not have a well-developed entertainment industry. As a result, according to Pagonian Ministry of Commerce statistics, by 1991, a majority of the annual net income of the cultural sector of the Pagonian economy was generated by sales of imported foreign language material.

In 1988, the Pagonian Cultural Watch Group was formed by Ms. Madeleine Crispell, a 35-year-old foreign-educated businesswoman. The Manifesto of the PCWG stated that the Group’s purpose was “to ensure the protection of Pagonian culture in the face of decadent foreign entertainment.” The PCWG became extremely vocal, attempting to focus debate on what is called the dilution of Pagonian culture.

In 1990, Ms. Crispell acquired a majority ownership interest in Grace Publications, a privately held company engaged solely in the publication of Pagonian language literature. It was Ms. Crispell's stated intention to make Grace Publications the largest publishing company in the nation, and thereby "to promote the glorious culture of Pagonia."

By 1991, Pagonia began to see significant foreign investment in its cultural sector, particularly in the areas of publishing and television broadcasting. Approximately 25 percent of this investment capital came from Bretorian investors. Bretoria is a developed nation with the largest entertainment industry in the world. Furthermore, Bretorian films and music are known throughout the world, enjoying significant market demand wherever they are available.

After the revolution, most Pagonian commercial entities in the cultural sector, whether foreign-owned or not, started selling imported foreign language material in addition to domestically-produced Pagonian language books, audio and videocassettes. The one notable exception was Grace Publications, which steadfastly refused to sell any imported foreign language material. Grace Publications also rebuffed several offers from foreign investors, remaining the only commercial entity of any size in the Pagonian cultural sector that had no foreign owners.

In 1994, Ms. Crispell announced her candidacy for the Pagonian Parliament. She ran on a platform of "preventing the pollution of Pagonian culture by foreign influences." She was elected to the Parliament later that year, and thereafter retained her ownership interest in Grace Publications, also remaining active in the PCWG.

Immediately upon becoming a Member of Parliament, Ms. Crispell introduced a number of draft laws directed to the Pagonian cultural sector. In September 1997, the Pagonian

Parliament adopted one such bill, which became Civil Law Number 51. That law provided, in relevant part, as follows:

Art.2) Foreign Ownership

- a) "Foreign Ownership," as used in this Chapter, shall mean any majority interest owned by a non-Pagonian natural or juridical person or any combination of such persons.
- b) "Regulated Entity," as used in this Chapter shall mean any Pagonian commercial entity providing goods and/or services in the cultural sector of the Pagonian economy.
- c) Foreign Ownership of a Regulated Entity shall be prohibited.
- d) As of the effective date of this law, persons having a Foreign Ownership interest in a Regulated Entity shall be required to divest themselves of that interest within a period of not more than ninety (90) days.
- e) In the event that a person having a Foreign Ownership interest in a Regulated Entity fails to comply with the requirements of Article 2(a) herein, such interest shall be acquirable by the Ministry of Culture for the book value of such interest, as determined by law.

\* \* \*

Art. 3) "Cultural sector," as used in this Chapter, shall mean a sector in which any of the following activities are carried out:

- a) The publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers;
- b) The production, distribution, sale or exhibition of film or video recordings;
- c) The production, distribution, sale or exhibition of audio or video music recordings;
- d) Radio communication in which the transmissions are intended for direct reception by the general public; any radio, television and cable television broadcasting undertakings; and any satellite programming and broadcast network services.

\* \* \*

Art. 10) Promotion of the Pagonian Cultural Sector

The Ministry of Culture shall endeavor to promote Pagonian culture in the cultural sector of the Pagonian economy, and is authorized to do so using any means not inconsistent with domestic or international law.

\* \* \*

Art. 21) Regulatory Agency Power

The Regulatory Agencies established by the Administrative Law of Pagonia shall have the authority to promulgate regulations necessary to implement the provisions of this Law.

\* \* \*

In response to the implementation of Civil Law No. 51, a number of foreign investors with majority ownership interests in Pagonian commercial entities immediately divested themselves of those interests. Some of these investors complained to the trade press that, the Civil Law No. 51 limitation of their maximum recovery to book value was arbitrary, and that because of the exigent circumstances surrounding their divestiture, they were unable to command even the book value, as calculated by their outside auditors, for the sale of their ownership interests.

Other foreign persons holding majority ownership interests in Pagonian commercial entities were unable or unwilling to divest themselves within the prescribed 90-day period. At the end of 90 days following implementation of Civil Law No. 51, the Pagonian Ministry of Culture instituted proceedings in various national courts to acquire the majority ownership interests remaining in the hands of these foreign investors.

The courts, following the applicable Pagonian rules of civil procedure, appointed independent experts to value the ownership interests to be acquired by the Ministry of Culture. The presiding judges of the respective courts had the option of adopting or rejecting the findings

of these experts. In all cases, the courts, over the objections of the foreign investors, adopted the experts' reports without modification.

Shortly after the effective date of Civil Law No. 51, the Pagonian Communication Commission ("PCC") adopted regulations "pursuant to Civil Law No. 51," which provided for minimum Pagonian content in radio and television broadcasts. Specifically, 75 percent of the content of programming aired by Pagonian broadcasters during prime listening and viewing hours was required to be Pagonian in origin. In its regulations, the PCC set forth a complicated formula for calculating and quantifying content.

In response to the PCC's content regulations, the four Pagonian television networks all canceled pre-existing contracts for the airing of a number of television programs and films, citing the doctrine of *force majeure*. Dozens of media distributors were affected by these cancellations, over half of which were Bretorian. Several Bretorian distributors exhausted their legal and equitable remedies in the Pagonian courts, which neither reinstated any contract nor awarded any monetary compensation, holding that the termination of the contracts was authorized under Civil Law No. 51.

Benjamin Publications, a large Bretorian publisher of periodicals, has published the newsmagazine *This Week* for a number of years. After the revolution in Pagonia, Benjamin Publications began selling its Bretorian-language version of *This Week* directly to retail establishments in Pagonia. A consortium of Pagonian publishers, including Ms. Crispell, sent a petition to the Ministry of Culture, asking the Ministry to force Benjamin Publications to sell a Pagonian-language version of *This Week* in Pagonia.

In a session between the Minister of Culture and the consortium of Pagonian publishers, a resolution was reached whereby Benjamin Publications and all other foreign publishers of

foreign-language periodicals would be required to sell bilingual versions in Pagonia. This regulation would not apply to domestic publishers. In the new format, these periodicals would be obligated to have Pagonian as the dominant language. The Pagonian Ministry of Culture notified Benjamin Publications of this requirement, stating that no imported periodicals exclusively in foreign languages would be allowed to be sold in Pagonia.

In June 1998, Benjamin Publications contacted the Bretorian Foreign Ministry, asking that an official protest be registered with the Pagonian Government in light of this new restriction on the sale of *This Week*. At around the same time, the Bretorian Association of Copyright Owners made a similar request to the Foreign Ministry, complaining of the allegedly uncontrolled copyright infringement occurring in Pagonia.

The Bretorian Foreign Ministry undertook its own investigation of the situation in Pagonia, contacting Bretorians who had divested themselves of ownership in Pagonian cultural-sector companies pursuant to Civil Law No. 51, and media distributors who had been parties to canceled contracts. Based upon that investigation, the Ministry sent an official communiqué to the Pagonian Government. The essence of the communiqué was that: 1) in the opinion of the Bretorian Government, Pagonia's acts taken in implementing Civil Law No. 51, allegedly to protect cultural identity, were in reality motivated primarily by Ms. Crispell, whose private financial interest was clearly served by them, and were contrary to international law, insofar as they created a preference for goods and services produced and sold in Pagonia by Pagonian citizens; 2) the forced divestiture of property and termination of valid contracts, constituted expropriation forbidden by international law; and 3) Pagonia was not providing even the minimum protections to copyright owners required by international law.

The Bretorian Foreign Ministry responded as follows: 1) Pagonia is not a signatory to the General Agreement on Tariffs and Trade, or to the Berne Convention and is not a member of the World Trade Organization; 2) “national treatment” as defined by Article III of the GATT is not a customary norm of international law; 3) if national treatment has become a customary norm, Pagonia’s acts taken to protect of its cultural identity come within a valid exception to the national treatment requirement; 4) Pagonia has violated no customary norm in requiring divestiture of foreign ownership in its cultural sector; 5) issues of copyright protection are exclusively the domestic affairs of Pagonia; and 6) the Pagonian Criminal Code provides adequate protection for copyright owners according to any internationally accepted measure.

Earlier in the decade, Pagonia had applied for membership in the Regional Association of Trading States (RATS), a loose geographically based affiliation of non-aligned countries moving toward establishment of a free-trade area. Bretoria is not a member of RATS. The RATS Secretariat, reporting on Pagonia’s candidacy, called attention to the traditional policy that all trade-related controversies with non-members be resolved, and strongly recommended that the dispute between Pagonia and Bretoria be settled by neutral adjudication before the Association acts on Pagonia’s admission to membership.

Pagonia thereupon indicated that it would consent to Bretoria’s request that this dispute be submitted to the International Court of Justice. Applicant, the Republic of Bretoria, asks this Court:

- 1) To declare the acts of the Kingdom of Pagonia assertedly taken to protect Pagonian cultural identity illegal under international law, and to order Pagonia to compensate Bretoria for the losses suffered by its citizens as a result of such acts; and
- 2) To declare that the protection afforded to copyright owners by the Kingdom of Pagonia is insufficient under international law, and to order Pagonia to compensate Bretoria for the losses suffered by its citizens as a result of copyright infringements in Pagonia.

Respondent, the Kingdom of Pagonia, asks this Court to declare that:

- 1) The acts taken by Pagonia to protect its cultural identity are consistent with international law, and Pagonia is not liable to pay compensation for any injury suffered as a result thereof; and
- 2) The level of protection afforded copyright owners in Pagonia is not inconsistent with international law, and Pagonia is not liable to compensate Bretoria for any injury occurring as a result of alleged copyright infringements in Pagonia.

Pagonia and Bretoria are both members of the United Nations. Bretoria is a party to the General Agreement on Tariffs and Trade and, has acceded to the World Trade Organization and all of the multilateral Uruguay Round agreements. Furthermore it is a member of the World Intellectual Property Organization and the Berne Convention. Pagonia is not a party to the GATT, the WTO, WIPO, or the Berne Convention. Pagonia and Bretoria have no relevant bilateral treaties between them. They have maintained diplomatic relations continuously since before the revolution in Pagonia.