

THE 1999 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

BEFORE THE
INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE REPUBLIC OF BRETORIA,

Applicant,

v.

THE KINGDOM OF PAGONIA,

Respondent.

The Case Concerning Cultural Identity and Intellectual Property

SPRING TERM 1999
ON SUBMISSION TO THE
INTERNATIONAL COURT OF JUSTICE

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

The Governments of the Republic of Bretoria and the Kingdom of Pagonia have submitted the present dispute by special agreement to the International Court of Justice pursuant to Article 36(1) of the Statute of the Court, for final resolution. There is no dispute as to the Court's jurisdiction in this matter.

STATEMENT OF FACTS

The Kingdom of Pagonia is an agricultural nation with the majority of the population uneducated and located in rural areas. Pagonia meets the criteria established by the United Nations to be considered a less-developed nation. Prior to 1975 Pagonia was ruled by a totalitarian regime, which controlled all aspects of the economy. In 1975 a revolution overthrew the totalitarian regime and a democracy was established. Earlier in this decade Pagonia applied for membership in the Regional Association of Trading States (RATS) which is moving towards the establishment of a free trade area.

Pagonia has a “rich cultural history” but an underdeveloped cultural sector. Prior to the revolution, the Pagonian Government severely restricted foreign imports and foreign investments. After the revolution, foreign investment was needed for economic reform. Approximately 25% of this investment capital came from Bretorian investors. Bretoria is a developed nation with the largest entertainment industry in the world.

Imported foreign language material became popular in the post revolution period. Most Pagonian cultural entities in the cultural sector started selling imported foreign language material in addition to domestically produced material. All but one commercial entity in the cultural sector was at least partly foreign owned. 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 1997 the Pagonian Parliament proclaimed Civil Law No.51. This bill was introduced by Madeleine Crispell, a well known proponent of Pagonian culture. In 1988 Ms Crispell formed the Pagonia Cultural Watch Group to focus debate on “the dilution of Pagonian culture”. In 1991, Ms Crispell purchased the majority shareholding of Grace Publications, which is the only fully Pagonian owned publisher. Grace Publications deals solely in domestically produced Pagonian language books, audio and videocassettes. In 1994, Ms Crispell ran for, and was elected to, Pagonian Parliament on the platform of “preventing the pollution of Pagonian culture by foreign influence”.

This law sought to protect the weakening Pagonian cultural from growing foreign influences. Civil Law No. 51 prohibited foreign majority interests in Regulated Entities in the Pagonian cultural sector. All foreign majority owners were given 90 days to negotiate favourable sales of their interests. Those majority interests not sold within the 90 day period, were acquired by the Pagonian Ministry of Culture and the owners paid the book value of such interests. The book value was determined by a panel of independent experts appointed by Pagonian Courts. The interests acquired by the Pagonian Government were subsequently auctioned off. The buyers were required to have a licence to operate in the cultural sector. Applicants for such a licence must satisfy the Pagonian Communication Commission that they are committed to and will operate the acquired business for “the promotion of Pagonian culture”.

Pursuant to Civil Law No.51, the Pagonian Communication Commission later adopted regulations providing for a minimum of 75% Pagonian content to be aired by Pagonian broadcasters during prime time television and radio hours. Subsequently, the

Pagonian television and radio broadcasters cancelled some contracts with Bretorian television and radio distributors. The Pagonian Courts found these cancellations to be lawful.

Pursuant to Civil Law No.51 the Minister of Culture proclaimed a resolution whereby all foreign publishers of foreign language periodicals would be required to sell bilingual versions in Pagonia.

Prior to the revolution the totalitarian regime strictly limited the dissemination of foreign language material within Pagonia. With the overthrow of the regime bans on foreign language material were lifted and there was significant demand for this material. One result of this demand was the creation of an underground market for unlicensed copies of foreign language audio and videocassettes. In 1996 a panel from the World Intellectual Property Organisation claimed that unlicensed copies of foreign movies and music cassettes were available in the large cities of Pagonia. The Pagonian Government refuted the legitimacy and accuracy of the report.

The Pagonian Criminal Code provides for criminal penalties for theft. Copyright infringement is prosecuted under this law. Each region of Pagonia has a prosecutors office which is able to prosecute for breaches of the criminal code. In addition three of those offices have a unit for the investigation of alleged thefts of an intangible property. Further, Pagonia's legal system recognises a private action similar to the common law tort of conversion.

In 1998 Pagonia received an official communique from the Bretorian Foreign Ministry alleging that Civil Law No.51 and official actions pursuant to that, breached

international law. Further the Bretorian Foreign Ministry alleged that Pagonia was not providing the minimum protection to copyright owners required by international law. Pagonia strongly protested to these allegations and stressed that it is not a signatory to the General Agreement on Tariffs and Trade, or to the Berne Convention on the Protection of Literary and Artistic Works and is not a member of the World Trade Organisation. Futhermore, Pagonia stated it had not breached any customary international law in relation to these matters.

Following the recommendation of the Regional Association of Trading States (RATS) Secretariat, Pagonia has agreed to submit to the jurisdiction of this Court on these matters.

QUESTIONS PRESENTED

1. Whether Civil Law No.51 and the regulations made pursuant to that law are consistent with international law.

2. If these acts are inconsistent with international law, whether Pagonia is liable to pay compensation and to what level.

3. Whether Pagonia is providing sufficient protection to copyright owners under international law.

4. If Pagonia is not providing sufficient protection, whether it is liable to pay compensation and to what level.

SUMMARY OF PLEADINGS

I. Pagonia is not liable for any losses resulting from expropriation of Bretorian property under Civil Law No.51 or the regulations made pursuant to that law. Bretoria has failed to exercise all adequate and effective local remedies and therefore does not have standing to bring an action. Civil Law No.51 lawfully expropriated foreign ownership interests in Regulated Entities. Pagonia's expropriations meet the requirements of a public purpose and non-discrimination. The principle that the appropriate level of compensation shall be settled under the domestic law of the nationalising State has become customary international law. Alternatively, if the level of compensation can be determined by international tribunals the correct international standard is the appropriate level of compensation in all the relevant circumstances and not market value. The compensation determined by the independent expert is appropriate and complies with this international standard. Even if the compensation paid was not sufficient under international law Bretoria is not entitled to *restitutio in integrum* because the payment of inadequate compensation does not make an expropriation unlawful.

The regulations made pursuant to Civil Law No.51 were not the proximate cause of the cancellation of the television contracts. Those terminations do not constitute an expropriation by Pagonia.

II. The local content regulation and Pagonian language regulation do not breach any customary international trade obligations. The local content regulation covers services and so does not need to comply with customary regulatory regimes for trade in goods. There is insufficient State practice and *opinio juris* for the establishment of "national treatment" or any other trade obligations contained in the GATT and the GATS as customary international law. Alternatively, Pagonia's regulations are justified by the film quota and developing nation exceptions to trade obligations.

III. Any purported breach of customary trade obligations by Pagonia is excused by the protection of cultural identity. Civil Law No.51 and the regulations are valid exercises of the customary right to self determination. Pagonia has acted in accordance with a customary international law obligation to protect the cultural rights of its citizens. International law recognises that the protection of cultural identity should prevail over trade obligations. Pagonia's regulations meet any requirement of proportionality between the breach of trade obligation and the perceived damage to cultural identity.

IV. Pagonia's regulations do not breach Bretorian's rights to freedom of expression. Freedom of expression may be limited where the restriction is proportionate to the fulfillment of a pressing social need. The regulations also do not breach the right of non-discrimination because they are proportionate to the legitimate purpose of the protection of cultural identity.

V. Bretoria does not have standing to bring an action on behalf of Bretorian copyright owners because they have failed to exhaust local remedies. The provisions relating to a minimum standard of copyright protection and national treatment contained in the Berne Convention have not become custom. Alternatively, Pagonia is not bound by any customary rule because it is a persistent objector. Even if customary law binds Pagonia, it currently provides sufficient copyright protection.

VII. If Pagonia has breached international law the appropriate remedy is a declaration by this Court recognising the breach. Any damages awarded must be fair and just in the circumstances. Compensation should be reduced to reflect the fact that Pagonia acted in response to a perceived threat to its cultural identity and the fact that a certain residual amount of copyright infringement can not be prevented by a State.

PLEADINGS

I. PAGONIA IS NOT LIABLE FOR ANY LOSSES RESULTING FROM EXPROPRIATION OF BRETORIAN PROPERTY UNDER CIVIL LAW NO.51 OR THE REGULATIONS MADE PURSUANT TO THAT LAW

A. BRETORIA DOES NOT HAVE STANDING

Bretoria does not have standing to bring an action because not all adequate and effective local remedies have been exhausted as required by customary international law.¹ The Bretorian investors who were forced to divest their ownership interests to the Pagonian government have failed to seek redress in the highest court of appeal. Bretorians who sold their interests to Pagonian citizens have failed to commence any proceedings at all.

B. THE EXPROPRIATION OF FOREIGN HOLDINGS IN REGULATED ENTITIES UNDER CIVIL LAW NO.51 WAS A LAWFUL EXPROPRIATION

Pagonia has a sovereign right to expropriate assets within its territory owned by foreign nationals.²

1. Any requirements of public purpose and non-discrimination have been met

There is little support for the application of the requirement of a public purpose to large scale expropriations.³ Even where this requirement does apply, international tribunals

¹ *Interhandel Case (Switzerland v. U.S.A)* [1959] I.C.J. Reports 6, p.27; *Elettronica Sicula (U.S.A. v. Italy)* [1989] I.C.J. Reports 15, p.42.

² U.N. Declaration on Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XXVII) (1962); U.N. Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX) (1975); U.N. Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (1974).

generally do not question the validity of a stated purpose.⁴ Civil Law No.51 and the regulations made pursuant to that law are for the stated public purpose of protecting Pagonia's cultural identity. This public purpose is evidenced further by the fact that the Pagonian Government only sold acquired foreign interests to Pagonian nationals who satisfied the Pagonian Communications Commission of their commitment to the promotion of Pagonian culture.⁵ Therefore any resulting expropriations comply with the public purpose requirement. The existence of the public purpose is not affected by the fact that Ms Crispell may consequently receive some financial benefits. Ms Crispell was elected on the platform of protection of Pagonian culture and she has a corresponding duty to take measures to implement that platform.

General Assembly Resolutions relating to expropriation do not support the existence of the requirement of non-discrimination.⁶ Even if this requirement exists, discriminatory large scale expropriations are not illegal if they are intended to serve an overriding public purpose.⁷ While Pagonia has only expropriated foreign shareholdings, this was done for the overriding public purpose of protecting Pagonia's cultural identity.

³ *Oscar Chin Case* (1934) P.C.I.J. Series A/B No. 63, p.79; *Libyan American Oil Company (Liamco) v. Libya* (1981) 20 I.L.M. 1, pp.58-59; Charter of Economic Rights and Duties of States, *supra* n.2.; Sornarajah, M, *The Pursuit of Nationalised Property* (1986) pp.174-183.

⁴ Weston, "The Charter of Economic Rights and Duties of States and the Deprivation of Alien Owned Property", (1981) 75 A.J.I.L. 427, pp.453-4.

⁵ *Clarifications*, para.12.

⁶ U.N. Declaration on Permanent Sovereignty over Natural Resources, *supra* n.2.; U.N. Charter of Economic Rights and Duties of States, *supra* n.2.; U.N. Declaration on the Establishment of a New International Economic Order, *supra* n.2.

⁷ Verwer, Schrijver, "The Taking of Foreign Property Under International law: A New Legal Perspective?" (1989) *Neth.Yr.Bk.Int'l.L.* 3, p.19; Asante, "International Law and Foreign Investment, A Reappraisal" (1988) 37 *I.C.L.Q.* 595, p.616.

2. Pagonia has provided sufficient compensation to Bretorian investors

The principle embodied in Article 2(c) of the Charter of Economic Rights and Duties (“CERDS”),⁸ that the appropriate level of compensation shall be settled under the domestic law of the nationalising State, has become customary international law. A rule becomes a customary law when there is widespread State practice and *opinio juris*.⁹ The frequent repetition and widespread support for the above principle is evidence of sufficient State practice.¹⁰ The existence of *opinio juris* is supported by the drafting history of CERDS¹¹ and the debates with respect to its implementation in the United Nations General Assembly.¹² Civil Law No.51 fulfils the compensation requirement by providing compensation equal to book value to foreign investors unable to sell their interests to private individuals.

Alternatively, if the level of compensation can be determined by international tribunals State practice does not support the establishment of a customary rule requiring market value compensation.¹³ International tribunals have indicated that less than market

⁸ U.N. Charter of Economic Rights and Duties of States, *supra* n.2.

⁹ *North Sea Continental Shelf Cases (West Germany v. Denmark; West Germany v. The Netherlands)* [1969] I.C.J. Reports 3, p.44.

¹⁰ U.N. Resolution on Permanent Sovereignty Over Natural Resources, *supra* n.2.; U.N. Declaration on the Establishment of a New International Economic Order *supra* n.2.

¹¹ United Nations Trade and Development Committee (“U.N.C.T.A.D.”), 3rd Sess. 92nd mtg., U.N.Doc. TD/180(1972) pp.185,186; U.N.C.T.A.D. Res. 45, U.N.C.T.A.D. Proceedings, 3rd sess., U.N.Doc. TD/180 (1972) p.58; U.N.C.T.A.D; Report of the General Assembly Second Committee, UN Doc. A/9946 (1974).

¹² Dolzer, “New Foundation of the Law of Expropriation of Alien Property” (1981) 75 A.J.I.L. 553, p563; Sornarajah, *supra* n.3, p.19.

¹³ Schacter, “Compensation for Expropriation” (1984) 78 A.J.I.L. 121, p.130; Weston, *supra* n.4, p.448.

value may be awarded¹⁴ and developing nations have consistently rejected the market value standard.¹⁵ Bi-lateral investment treaties that provide for market value compensation are motivated by “mutual interests”¹⁶ and lack the requisite *opinio juris* to form custom.¹⁷

The correct international standard, if any exists, is the appropriate level of compensation in all the relevant circumstances¹⁸ and Pagonia has complied with that standard. The relevant circumstances include the past relationship between the parties, the profits made by the investor and the harm suffered by the host economy as a result of the investment,¹⁹ the ability of the expropriating country to afford compensation,²⁰ and the existence of future markets for the asset.²¹ Given that the foreign investors had 90 days to recoup their investments, the detrimental effect of foreign investment on Pagonian culture,

¹⁴ *Libyan American Oil Co Arbitration supra* n.3.; *SPP Ltd v. The Arab Republic of Egypt* (1983) 22 I.L.M. 740; *Shahinn Shaine Ebrahimi* (1994) No. 560-44/46/47-3 para.88, in Brower, Brueschke, *The Iran-United States Claims Tribunal* (1998) p.532; *INA Corporation v. The Government of the Islamic Republic of Iran* (1985) 8 Iran-US CTR 373, p.378.

¹⁵ G.A. Res. 1803 *supra* n.2.; G.A. Res. 3201 *supra* n.2.; G.A. Res. 3281 *supra* n.2.

¹⁶ *Sedco Case (Second Interlocutory Award)* (1986) 10 Iran-U.S.C.T.R. 180, pp.184-185.

¹⁷ *INA Case* 8 Iran-U.S.C.T.R. 373, per Holtzmann p.399; *Barcelona Traction Power & Light Co. Case* [1970] I.C.J. Reports 3, p.40.

¹⁸ *Norwegian Shipowner's Claims, (Norway v. U.S.)* (1932) 1 R.I.A.A. 307, p.340; *Kuwait v. American Independent Oil Co.* (1982) 21 I.L.M. 976, p.1033; *Oil Field of Texas, Inc v. Iran*, (1982) Iran-U.S. C.T.R. 347, pp.356, 362; *Texaco Overseas Petroleum Co. and Californian Asiatic Oil Co. v Libya* (1978) 17 I.L.M. 3, p.29.

¹⁹ Sornarajah, “Compensation for Expropriation, The Emergence of New Standards” (1978) 13 J.World Trade L. 108, p.119.

²⁰ Amerasinghe, “Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Principle”, 41 (1992) I.C.L.Q. 22, p.48.

²¹ *Thomas Earl Payne v. Islamic Republic of Iran* (1986) 12 Iran-US C.T.R. 3, pp.15-16; *Motorola Inc v. Iranian National Airlines Corp* (1988) 19 Iran-US C.T.R. 73, p.91; *Sola Tiles v. Islamic Republic of Iran* (1987) 14 Iran-US C.T.R. 223, p.241.

and the potential difficulty that Pagonia, as a less developed country,²² would have in paying market value, the level of compensation determined by the independent expert is appropriate.²³

3. Even if compensation was not sufficient, Bretoria is not entitled to *restitutio in integrum*

Restitutio in integrum is only available where the expropriation is unlawful.²⁴ Unlike a failure to meet the public purpose or non-discrimination requirements, the payment of inadequate compensation does not make an expropriation unlawful.²⁵ Accordingly, Bretoria is not entitled to *restitutio in integrum*.

C. THE TERMINATION OF THE TELEVISION CONTRACTS DOES NOT CONSTITUTE AN EXPROPRIATION BY PAGONIA

The regulations made pursuant to Civil Law No.51 were not the proximate cause²⁶ of the cancellation of the television contracts and therefore the Kingdom of Pagonia is not responsible for those terminations. The regulations were directed at Pagonian television broadcasters and not foreign program distributors. They do not require a cancellation of

²² *Clarifications*, para. 1.

²³ *Compromis*, para. 9.

²⁴ *Chorzow Factory Case (Indemnity)* (1928) P.C.I.J. Ser.A No.17, p.47

²⁵ *Amoco International Finance Corporation v. The Islamic Republic of Iran* (1987) 15 Iran-US C.T.R. 189, pp.248-50; *Sedco Inc v. National Iranian Oil Company supra* n.16, pp.24-25.

²⁶ *Hoffland Honey Co v. National Iranian Oil Co.* (1983) 2 Iran-US CTR 41, pp.42-43; *Woodward-Clyde Consultants v Islamic Republic of Iran* (1983) 3 Iran-US C.T.R. 239, p.249.

contracts because the restrictions are limited to prime time hours and so the relevant parties could have simply renegotiated program screening times.

II. THE REGULATIONS MADE PURSUANT TO CIVIL LAW NO.51 DO NOT BREACH CUSTOMARY TRADE OBLIGATIONS

A. TELEVISION AND RADIO BROADCASTING IS A SERVICE

The local content regulation need only comply with international trade law for services because it only covers the services of television and radio broadcasting.²⁷ While the regulation does have an indirect effect on trade in the goods of television and radio programs,²⁸ it does not need to comply with the regulatory regime for the trade in goods. Widespread State practice supports the non-application of the goods trade regime to trade in television and radio programs.²⁹ This is also supported by the fact that the characteristics of television and radio programs are different from traditional goods regulated by the General Agreement on Tariffs and Trade³⁰ (“GATT”),³¹ and that the Uruguay Round of GATT negotiations treated broadcasting restrictions as a service issue.³²

²⁷ Case 155/173 *State v Sacchi* (1974) E.C.R. 409, p.427; affirmed Case 52/79 *Procureur du Roi v. Marc J.V.C. Debaue* (1980) E.C.R. 833, p.835.

²⁸ *Ibid.*

²⁹ For example: Australia, Burma, Canada, China, Colombia, European Union, Finland, Hungary, Indonesia, Kenya, Latvia, Malaysia, Nigeria, Poland, Taiwan, Slovenia, South Korea, Venezuela.

³⁰ General Agreement on Tariffs and Trade [“G.A.T.T.”] 55 U.N.T.S. 188 (1947).

³¹ W. Ming Shao, “Is there No Business Like Show Business? Free Trade and Cultural Protectionism” (1995) 20 *Yale J.Int’l.L.* 105, p.119-125; Owen et al., *Television Economics* 16 (1974).

³² *Ibid.* p.113.

B. THE GATT AND THE GATS DO NOT ESTABLISH CUSTOMARY TRADE OBLIGATIONS

The GATT does not establish the national treatment obligation or any other trade obligations as customary international law. For a treaty provision to become custom, there must be widespread State practice in the belief that the obligation is required by law (“*opinio juris*”).³³ There is insufficient *opinio juris* for the national treatment obligation in GATT to have become custom. Parties to the GATT specifically do not consider their obligations are owed generally, but merely to other contracting parties. Obligations are seen as having a “reciprocal basis”,³⁴ and the GATT is the equivalent of “a contract representing a bargain between contracting parties.”³⁵ This conclusion that GATT obligations are not custom is supported by eminent jurists.³⁶

The General Agreement on Trade and Services³⁷ (“GATS”) does not form customary rules for the trade in services. There is insufficient state practice for providing national treatment for audio-visual services³⁸ and the reciprocal nature³⁹ of GATS prevents the establishment of *opinio juris*.

³³ *North Sea Continental Shelf Cases supra* n.9, p.44.

³⁴ Agreement Establishing the Multilateral Trade Organisation (1994) 33 I.L.M. 13, p.15, Preamble.

³⁵ *Japan - Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8/B/R, WT/DS10/AB/R, WT/DS11/AB/R, p.9.

³⁶ Jackson, *The World Trading System*, (1989) p.23; D’Amato, *The Concept of Custom in International Law*, (1971) p.105; American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, (1986) p.261.

³⁷ General Agreement on Trade in Services [“G.A.T.S.”], 33 I.L.M. 44 (1994).

³⁸ For example: Australia, Canada, Chile, Brazil, European Union, India, Israel, Venezuela, Bolivia, Cyprus, Egypt.

C. ALTERNATIVELY, PAGONIA'S REGULATIONS ARE JUSTIFIED BY SPECIFIC EXCEPTIONS TO TRADE OBLIGATIONS

Television local content requirements come within the recognised exception of film quotas⁴⁰ to the national treatment obligations. The film quotas exception was included in the GATT to protect the culture of a State.⁴¹ It should extend to television broadcasts which were not as significant a cultural medium when this exception to the GATT was negotiated⁴² but which are now recognised as having a significant influence on cultural values.⁴³

Further, Pagonia's regulations fall within the recognised exception allowing less developed nations to deviate from trade obligations in order to promote the establishment of a particular industry. These deviations are allowed to the extent that compliance is not

³⁹ Agreement Establishing the Multilateral Trade Organisation *supra* n.34.

⁴⁰ G.A.T.T., *supra* n.30. Art. III:10, Art IV

⁴¹ *Application of GATT to International Trade in Television Programs: Report of the Working Party*, G.A.T.T. Doc. L/1741 (Mar. 13, 1962); Jackson, *World Trade and the Law of GATT*, (1989), p.293.

⁴² *Application of GATT to International Trade in Television Programs: Report of the Working Party*, *supra* n.41.

⁴³ UNESCO Declaration of the Principles of International Cultural Co-operation (1966), Art.4; U.N. General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135 (1992) Art.4; Intergovernmental Conference on Cultural Policies for Development Action Plan on Cultural Policies UNESCO CLT-98/COF.210/CLD.8 (1998) Principle 3; International Conference on Human Rights Proclamation of Tehran, (1968) Art.5.

practicable.⁴⁴ Pagonia is a less developed country⁴⁵ The regulations are necessary to promote the establishment of local audio-visual⁴⁶ and magazine industries.

III. THE PROTECTION OF CULTURAL IDENTITY EXCUSES ANY PURPORTED BREACH OF CUSTOMARY TRADE OBLIGATIONS BY PAGONIA

A. PROTECTION OF CULTURAL IDENTITY IS AN EXERCISE OF THE RIGHT TO SELF DETERMINATION

1. The right to self determination is a rule of customary international law

The right to self determination has been recognised by the International Court of Justice to be a rule of customary international law.⁴⁷ The customary right to self determination is further evidenced by international human rights conventions,⁴⁸ General Assembly Resolutions,⁴⁹ and its inclusion as one of the goals of the United Nations.⁵⁰ The

⁴⁴ G.A.T.T., *supra* n.30, Art XVIII:4, Art XVIII:13.

⁴⁵ *Clarifications*, para.1.

⁴⁶ Wildman, Siwek, *International Trade in Films and Television Programs* (1988) Ch. 4.

⁴⁷ *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* [1971] I.C.J.Reports 16, p.31; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Judgment on the Merits* [1986] I.C.J.Reports 14, p.108; *East Timor (Portugal v Australia) Judgment*, [1995] I.C.J.Reports 90, p.102; *Barcelona Traction, Light and Power Company Limited supra* n.17, p.311.

⁴⁸ International Covenant on Civil and Political Rights ["I.C.C.P.R."] U.N.T.S. Vol.999 171 (1966) Art.1(1); International Covenant on Economic, Cultural, and Social Rights ["I.C.E.S.C.R."] U.N.T.S. Vol.993 3 (1966) Art.1(1); African Charter of Human Rights ["Af.C.H.R."] O.A.U. Doc. CAB/Leg/67/3 Rev. 5 (1981) Art.20; Arab Charter on Human Rights ["Ar.C.H.R."], Resolution of the Council of the League of Arab States 5437 (1994) Art.1.

⁴⁹ Declaration on Granting Independence to Colonial Countries and Peoples, G.A.Res. 1514 (XV) (1960); Declaration on Principles of International Law Concerning Friendly Relations

right entitles peoples to “freely pursue their economic, social and cultural development.”⁵¹ “Peoples” includes the entire population of any independent State.⁵² The right may be freely pursued and is therefore able to be continuously exercised.⁵³

2. Civil Law No.51 and the regulations are valid exercises of the right to self determination

The right to self determination is validly exercised where the economic, social, and cultural system implemented within the state represents the will of the people.⁵⁴ This may be

and Co-operation among States in Accordance with the Charter of the United Nations, G.A.Res. 2625 (XXV) (1970).

⁵⁰ Charter of the United Nations, (1976) Y.B.U.N. 1043, Arts.1(2), 55.

⁵¹ I.C.C.P.R., Art.1(1); I.C.E.C.S.R., Art.1(1).

⁵² U.N. Human Rights Committee, General Comment 12(21), U.N.Doc. A/39/40 (1984), para.6; Helsinki Final Act, Section VIII, (1975) 14 I.L.M. 1292; German Objection to Indian Reservation to Art.1 of the I.C.C.P.R. and I.C.E.S.C.R., <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_3.html>; Netherlands Objection to Indian Reservation to Art.1 of the I.C.C.P.R and I.C.E.S.C.R., <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_3.html>; Cassese, *Self-Determination of Peoples* (1995) p.59; Donnelly, “Third Generation Rights”, in Brolman, Lefeber, Zieck (eds), *Peoples and Minorities in International Law* (1993) p.167; McCorquodale, “Self-Determination: A Human Rights Approach” (1994) I.C.L.Q. 857, p.861; Musgrave, *Self Determination and National Minorities* (1987) p.178.

⁵³ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A.Res. 2625 (XXV) (1970); Helsinki Final Act, Section VII *supra* n.52.; Alfredsson, “The Right to Self-Determination and its Many Manifestations” in Thompson (ed) *The Rights of Indigenous Peoples in International Law* (1987) p.54; Cassese, *supra* n.52. pp.54-55; Musgrave, *supra* n.53,100; Fursland (U.K.), Statement to the Third Committee of the U.N.General Assembly, (1984) 55 B.Y.I.L. 430, p.432;

⁵⁴ Helsinki Final Act, Preamble *supra* n.52. ; Musgrave, *supra* n.52, p.123; Young (U.K.), Statement to the Third Committee of the U.N. General Assembly (1986) 57 B.Y.I.L. 487 p.516.

evidenced by the acts of democratically elected governments.⁵⁵ Pagonia has held elections and is described as a democratic State.⁵⁶ Ms Crispell's sponsorship of Civil Law No.51 does not detract from the fact that it was approved by the Pagonian Parliament after three years⁵⁷ during which it can be assumed to have been subject to substantial debate. Further, the protection of Pagonian cultural identity was a policy on which Ms Crispell was originally elected. State practice supports the enactment of local content requirements⁵⁸ as a necessary mechanism for the protection of a State's cultural identity and therefore Pagonia's acts to protect cultural identity are valid exercises of the right to self determination.

B. PAGONIA HAS ACTED IN ACCORDANCE WITH CUSTOMARY INTERNATIONAL LAW OBLIGING STATES TO PROTECT CITIZENS' CULTURAL RIGHTS

1. Customary international law obliges states to protect the cultural rights of their citizens

The human right of individuals to freely participate in cultural life has become a rule of customary international law. This is evidenced by its widespread support in an extensive number of binding international instruments,⁵⁹ its frequent affirmation in non-binding

⁵⁵ Second Australian Periodic Report to the U.N. Human Rights Committee on the Implementation of the International Covenant on Civil and Political Rights, *Report of the Human Rights Committee to the General Assembly*, (1988) U.N.Doc.A/C.3/35/SR.34, para.14; Statement by the Federal Republic of Germany to the Third Committee of the General Assembly (1988) U.N.Doc.A/C.3/43/SR.7, paras.76-77; Casesse, *supra* n.52, p.287.

⁵⁶ Casesse, *supra* n.52, p.287.

⁵⁷ *Compromis*, paras.15, 16.

⁵⁸ For example: Australia, Burma, Canada, China, Colombia, European Union, Finland, Hungary, Indonesia, Kenya, Latvia, Malaysia, Nigeria, Poland, Taiwan, Slovenia, South Korea, Venezuela.

⁵⁹ Universal Declaration of Human Rights ["U.D.H.R."] G.A. Res. 217A (III) (1948) Art.27; I.C.E.S.C.R. Art.15; Af.C.H.R., Art.17; Additional Protocol to the American Convention on

declarations of States⁶⁰ and its inclusion in numerous State constitutions.⁶¹ To ensure that individuals are able to enjoy this right States are obliged to take positive steps to prevent breaches of the right.⁶²

2. Pagonia's acts ensure the cultural rights of its citizens are not breached

The broadcast mass media is recognised as being a significant agent for cultural homogeneity⁶³ with the capacity to undermine a society's cultural identity by subsuming its

Human Rights in the Area of Economic, Social, and Cultural Rights, O.A.S. Treaty Series No. 69 (1988) Art.14; American Declaration of The Rights and Duties of Man ["A.D.R.D.M."] O.A.S. Doc.OEA/Ser.L/V/II.65, Doc.6 19 (1948) Art.13; Ar.C.H.R., Art. 36; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX) (1965) Art.5; Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV) (1969) Arts.5,15.

⁶⁰ UNESCO Declaration of the Principles of International Cultural Co-operation (1966), Art.4; U.N. General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, *supra* n.43, Art.4; Intergovernmental Conference on Cultural Policies for Development Action Plan on Cultural Policies UNESCO *supra* n.43.; International Conference on Human Rights Proclamation of Tehran, *supra* n.43.

⁶¹ For example: Constitutional Law of the Republic of Angola (1992) Art.49; Constitution of China (1982) Art.22; Constitution of the Congo (1992), Art.35; Constitution of Croatia (1990) Art.68; Constitution of Eritrea (1996) Art.21; Constitution of Lithuania (1992), Art.42; Constitution of Madagascar (1992) Art.26; Constitution of Namibia (1990) Art.19; Constitution of the Slovak Republic (1992) Art.42(3); Constitution of South Africa (1996) Art.30.

⁶² Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights (1987) Hum.Rts.Q 122, p.131; Maastricht Conference 1997, "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights"(1988) 20 Human Rights Quarterly 691, p.695; *Velasquez Rodriguez Case*, Inter-Am Ct. H.R., OAS/seL/V/III 19, doc. 13, 172; *X and Y v The Netherlands*, European Court of Human Rights (1985) Ser.A 91, para 23; UN Human Rights Commission, General Comment 23, 50th Session, 1994, para 6(1); Dankwa, Flinterman, Leckie, "Commentary to the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights" (1998) 20 Hum.Rts.Q. 705, p713; Leckie, "Another Steps Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights" (1998) 20 Hum.Rts.Q. 81, pp.90-91.

⁶³ UNESCO World Conference on Cultural Policies Final Report (1982); Robins, Morley, "Euroculture: Communications, Community and Identity in Europe" (1993) 11 Cardozo Arts and Ent.L.J. 387, p.362; Peet, "The Destruction of Regional Cultures", in Johnston,

traditional values, language, and way of life.⁶⁴ Such a process will constitute a violation of the cultural rights of the citizens of that society by denying them the capacity to take part in their traditional culture.

Widespread demand for foreign material threatens to overwhelm Pagonian culture and therefore deny Pagonian citizens their cultural rights. This is illustrated by the increased importation of substantial foreign language material into Pagonia that has begun to dominate the Pagonian cultural sector.⁶⁵ There has been a simultaneous dramatic decline in interest in Pagonian language education.⁶⁶ Together these factors pose a serious threat to the continued capacity of Pagonian citizens to take part in Pagonian culture. Pagonia is obliged to prevent the breach of Pagonians' cultural rights from occurring.

Language is one of the most important elements of cultural identity.⁶⁷ The bilingual regulation on foreign magazine publishers ensures the continued access of Pagonians to

Taylor (eds), *A World in Crisis?: Geographic Perspectives*, p.169; Katz, "Cultural Continuity and Change: Role of the Media", in Nordenstreng, Schiller, *National Sovereignty and International Communication* (1979) p.66.

⁶⁴ Robins, Morley, *supra* n.63, 389; Stavenhagen, "Cultural Rights and Universal Human Rights", in Eide, Krause, Rosas (eds), *Economic, Social, and Cultural Rights a Textbook*, p.72; Fowler, *Report of the Royal Canadian Commission on Broadcasting* (1957), p.8; Katz, *supra* n.63, p.66.

⁶⁵ *Compromis*, para.10.

⁶⁶ *Compromis*, para.5.

⁶⁷ Kluscar, "Report Presented to the 8th International Colloquy on the European Convention on Human Rights" (1995) 38A Y.B.Eur.Conv.On Human Rights 77, p.78; Meyerhoff, "Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity" (1994) 9 Am.U.J.Int'l L.& Pol'y 913, p.964; Decaux, "Report Presented to the 8th International Colloquy on the European Convention on Human Rights" (1995) Y.B.Eur.Conv.On Human Rights 27, p.37; Shelton, "International Protection of Indigenous

material in their native language. In less developed countries television is the most influential medium for the transmission of cultural values.⁶⁸ By regulating television broadcast content Pagonia has acted in the most effective way to reach the majority of Pagonians.

There is insufficient widespread and uniform State practice to form a rule a custom prohibiting the imposition of local content requirements, at least to the level implemented by Pagonia. Local content requirements on the broadcast media exist throughout the world⁶⁹ with some countries requiring more than 80 per cent of television content to be of local origin.⁷⁰ Pagonia's actions are an effective mechanism for ensuring the cultural rights of Pagonian citizens are not infringed and Pagonian cultural identity is protected.

C. ACTS TAKEN TO PROTECT CULTURAL IDENTITY ARE PERMISSIBLE DEROGATIONS FROM TRADE OBLIGATIONS

Modern trade treaties have expressly⁷¹ or implicitly⁷² recognised that the protection of cultural identity should prevail over trade obligations. The aim of any international trade

Peoples' Culture and Cultural Property", in Thompson (ed), *The Rights of Indigenous People in International Law* (1987) p.47.

⁶⁸ Diaz-Casanueva (Chile), Statement to the First Committee (1972), cited in de Sola Pool, "Direct Braodcast Satellites ad the Integrity of National Cultures", in Nordenstreng, Schiller (eds), *National Sovereignty and International Communication* (1979), p.136; Beazley, Australian Minister for Communications (1990) cited in Collins "The Screening of Jacques Tati: Broadcasting and Cultural Identity in the European Community" (1993) 11 *Cardozo Arts and Ent.L.J.* 361, p.361

⁶⁹ *Supra* n.

⁷⁰ For example: South Korea, Taiwan.

⁷¹ North American Free Trade Agreement 32 I.L.M 605 (1992), Annex 2106.

⁷² G.A.T.S. *supra* n.37, Art XVII:1.

regime is not free trade per se but the provision of higher standards of living through the more efficient allocation of resources in the economy⁷³ This means that the conceptual underpinning of any trade regime is the improvement of allocative efficiency through the concept of comparative advantage.⁷⁴ For goods to be more efficiently allocated using comparative advantage, an objective value of the goods must be ascertainable.⁷⁵ As the dominant value of cultural goods such as television programs and magazines stems from the subjective value placed on the product by the State, the concept of comparative advantage is inappropriate. This is recognised by the limited exceptions to the GATT for cultural goods.⁷⁶

The reluctance of States to include in trade treaties human rights clauses relating to labour and the environment is due to the ability of States to meet both those human rights and trade obligations concurrently.⁷⁷ This is not possible for the human right of cultural identity because it is the trade in cultural products itself that leads to the human rights breach.

Pagonia's regulations meet any requirement of proportionality between the breach of trade obligation and the perceived damage to cultural identity The local content regulation is limited in scope as it only affects the broadcast of foreign programs during prime time

⁷³ Agreement Establishing the Multilateral Trade Organisation *supra* n.34; Jackson, *supra* n.41, p.53; Davey, "The WTO/GATT World Trading System: An Overview" in Pescatore, Davey, Lowenfeld, *Handbook of WTO/GATT Dispute Settlement* (1996), p.10.

⁷⁴ Leutwiler Report, *Trade Policies for a Better Future: Proposals for Action* (1985) p. 23.

⁷⁵ Brown, Jackson, *Public Sector Economics* (1978) p.27.

⁷⁶ G.A.T.T., *supra* n.38, Art IV, Art XX(f).

⁷⁷ Ward, "Common But Differentiated Debates: Environment, Labour and the World Trade Organization" (1996) 45 I.C.L.Q. 592, p.593.

hours. The bilingual requirements only affect one written medium, periodicals. These trade restrictions are small compared to the significant threat posed to Pagonian citizens cultural rights. Therefore the regulations made pursuant to Civil Law No.51 for the purposes of the protection of cultural identity are proportional derogations from any customary trade obligations.

IV. PAGONIA HAS NOT BREACHED BRETORIAN CITIZENS' HUMAN RIGHTS

A. THE REGULATIONS DO NOT BREACH THE RIGHT TO FREEDOM OF EXPRESSION

International law does not recognise an absolute right to freedom of expression.⁷⁸ Freedom of expression may be limited where the restriction is proportionate⁷⁹ to the fulfillment of a "pressing social need".⁸⁰ The protection of Pagonian cultural identity represents a pressing social need.⁸¹ Broadcast mass media⁸² and foreign languages⁸³ are

⁷⁸ I.C.C.P.R. *supra* n.48, Art.19(3); American Convention on Human Rights O.A.S. Treaty Series No.36 (1969) Art.13(2); A.D.R.D.M, Art.28; European Convention for the Protection of Human Rights and Fundamental Freedoms, Eur.T.S. 5 (1950) Art.10(2).

⁷⁹ *Handyside v. United Kingdom* (1979) 50 I.L.R. 150, p.172; *Barthold v. Germany* (1985) 81 I.L.R.204, p.255.

⁸⁰ *Handyside v. United Kingdom Series supra* n.79; *The Sunday Times v. The United Kingdom* (1979) 58 I.L.R. 491, p.529; *Compulsory Membership in an Association Prescribed for the Practice of Journalism* (1986) 25 I.L.M. 123; *Chaplinsky v New Hampshire* (1942) 315 U.S. 568; *Feiner v New York* (1951) 340 U.S. 315; *Patel v Attorney-General* (1968) 70 I.L.R. 152.

⁸¹ Magnet, "Collective Rights, Cultural Autonomy and the Canadian State" (1986-87) 32 McGill L.J. 170, p.171; Prime Minister of Guyana (1973) in de Sola Pool, *supra* n. p.128.

⁸² Diaz-Casanueva *supra* n.68, p.136; Pohl (El Salvador), Statement to the First Committee of the General Assembly (1972), in de Sola Pool, *supra* n.68. ,p.137; Peet "The Destruction of Regional Cultures", in Johnston, Taylor (eds), *A World in Crisis?: Geographical*

extremely powerful mechanisms for the undermining of local culture. The regulation of these industries represents the most effective way of preventing the further degradation of Pagonia's cultural identity.

The local content requirement does not limit the substance of broadcasts in Pagonia, it only restricts the quantity of foreign material that may be broadcast. State practice indicates that regulation of content is not of itself a breach of the right to freedom of expression.⁸⁴ States currently have content regulations greater than those imposed by Pagonia.⁸⁵ Therefore Pagonia has not breached the right to freedom of expression.

B. THE REGULATIONS DO NOT BREACH THE RIGHT OF NON-DISCRIMINATION

Discrimination is not illegal where it is undertaken in pursuit of a legitimate purpose and is proportionate to the achievement of that purpose.⁸⁶ Civil Law No.51 and the accompanying regulations aim to protect Pagonian cultural identity. The requirement for the Pagonian language to be given prominence in foreign periodicals will prevent the decline in the availability and use of the Pagonian language. Any increase in costs consequent to this regulation do not act as a burden on foreign publishers as they may be recouped by raising

Perspectives, p.169; Sauvant "Sociocultural Emancipation", in Nordenstreng, Schiller *supra* n.63, pp.12-13; Robins, Morley, *supra* n.63, p.388.

⁸³ Meyerhoff, *supra* n.67. p.964, *History, Language, Identity and Culture of Latvia*, <http://www.mta.bkc.lv/pub/history.htm#Language> (1997), Fowler, *supra* n.64, p.8.

⁸⁴ *supra* n.29

⁸⁵ *supra* n.70

⁸⁶ *Proposed Amendments to the Naturalisation Provisions of the Political Constitution of Costa Rica* (1984) 5 H.R.L.J. 161, para. 57; *De Deillustreerde Pers NV v The Netherlands* [1978]; *Belgian Linguistics Case* (1968) 45 I.L.R. 114, p.120.

the price charged for the publications. Given the pressing social need represented by the threat to cultural identity⁸⁷ the bilingual requirement is not disproportionate to the legitimate purpose being pursued.

While local content requirements are inherently discriminatory, their widespread use by States⁸⁸ indicates that they are considered to be consistent with international law. Accordingly, Pagonia's regulations do not breach the right of non-discrimination.

V. PAGONIA IS NOT LIABLE FOR LOSSES SUFFERED BY BRETORIAN COPYRIGHT OWNERS AS A RESULT OF COPYRIGHT INFRINGEMENT IN PAGONIA

A. BRETORIA DOES NOT HAVE STANDING

Bretoria has failed to exhaust all local remedies and therefore does not have standing. It is a rule of customary international law that all adequate and effective local remedies must be exhausted before international proceedings may be commenced.⁸⁹ There is no evidence of any attempts by Bretorian copyright owners to secure investigations or prosecutions of copyright infringers under the Pagonian Criminal Code or of any attempts to use the private cause of action similar to conversion.

⁸⁷ *Supra* n.29.

⁸⁸ *Supra* n.70.

⁸⁹ *Interhandel Case supra* n.1, p.27; *Electtonica Sicula supra* n.1, p.42; *Finnish Ships In Great Britain During the War (Finland v. UK)* (1934) 3 R.I.A.A. 1479; *Ambatieloss Claim (Greece v. UK)* (1956) 12 R.I.A.A. 83, p.119.

B. PAGONIA HAS NOT BREACHED ANY CUSTOMARY INTERNATIONAL LAW REQUIRING PROTECTION OF COPYRIGHT

1. There is no customary international law requiring protection of copyright

The law of copyright is based on the territorial principle.⁹⁰ Copyright protection in a State depends on its own domestic law and legal standards. Municipal courts have held that copyright only exists through legislative grant.⁹¹ The multilateral conventions on copyright constitute an acknowledgment by the international community that the law of copyright is governed exclusively by domestic law.⁹² The Berne Convention provides that “the extent of the protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the law of the country where protection is claimed”.⁹³

There is no customary international law requiring Pagonia to protect Bretorian copyright. The norms of a minimum standard of copyright protection and national treatment embodied in the Berne Convention have not become custom. A treaty norm will be custom

⁹⁰ Bogulslavsky, *Copyright in International Relations* (1979) p.18; Goldstein, *Copyright, Principles, Law and Practice, Volume II* (1989) p.682; Bradley, “Territorial Intellectual Property Rights in an Age of Globalism” (1997) 37 *Va.J.Int’l .L.* 499, p.505; *United Dictionary Co v. G & C Merriam Co* 208 U.S. 260 (1908) p.264 (United States Supreme Court); *Subafilms Ltd v MGM-Pathe Communications Co* 24 F.3d 1088 (9th Cir. 1994) (en banc) p.1090.

⁹¹ *Donaldson v Beckett* (1774) 98 E.R. 257; *Wheaton v Peters* 33 US (8 Pet.) 591 (1834); *Comp Co v. Blue Crest Music Inc.* [1980] 1 SCR 357, p.372.

⁹² The Berne Convention for the Protection of Literary and Artistic Works 1886 (as revised and amended) [“Berne Convention”] (1972) 828 U.N.T.S. 211, particularly Art.17; Universal Copyright Convention (as revised) [“U.C.C.”] 25 U.S.T. 1341 (1952); G.A.T.T. Multilateral Negotiations (The Uruguay Round) Agreement Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods [“T.R.I.P.S.”] 33 I.L.M. 81 (1994).

⁹³ Berne Convention, *supra* n.92, Art.5(1).

if it is a codification of existing customary international law⁹⁴ or if it is of a fundamental norm-creating character and ratified by a wide and representative group of States.⁹⁵ The Berne Convention did not codify an existing customary law rule because there was insufficient state practice prior to the Convention.⁹⁶

There is also insufficient *opinio juris* for the creation of custom. The multilateral conventions on copyright only require parties to protect copyright of nationals of other contracting States.⁹⁷ There is no obligation owed to the international community at large. The establishment of *opinio juris* is difficult where states are “acting actually or potentially in the application of the Convention.”⁹⁸ Municipal courts have recognised that without a relevant treaty obligation no international law exists to oblige countries to accept and protect copyright in works published or originating beyond their territorial boundaries.⁹⁹

2. Alternatively, Pagonia is a persistent objector

Pagonia is not bound by any customary international law requiring protection of copyright because it has been a persistent objector. A State which persistently objects to a

⁹⁴ *North Sea Continental Shelf Cases supra* n.9, p.38.

⁹⁵ *Ibid* p.41.

⁹⁶ Ricketson, *The Berne Convention on Literary and Artistic Works 1886 - 1986* (1987) p.5.

⁹⁷ Berne Convention, *supra* n.92, Arts.3, 5(1); U.C.C., *supra* n.92, Art.2; TRIPs, *supra* n.92, Art. 3.

⁹⁸ *North Sea Continental Shelf Cases supra* n.9, p.44.

⁹⁹ *Bodley Head v. Flegon* [1972] 1 W.L.R. 680, per Brightman J p.684; *Walt Disney Production v. Beijing Publisher & Co* (Decision of the Intellectual Property Bench of the Beijing Mediate Court, May 1995, upheld on appeal to the High Court of Beijing, December 1995), casenote in Chengsi, “First Major Copyright Case Involving a Foreign Party.” (1996) Iss 58 C.W. 19.

customary rule from its inception is not bound by that rule.¹⁰⁰ A State's decision not to enter a treaty relating to a customary rule may constitute an objection to that rule.¹⁰¹ Pagonia has not acceded to any multilateral, regional or bilateral agreements on copyright.¹⁰² It has consistently stated that issues of copyright protection are exclusively domestic affairs.¹⁰³

3. Alternatively, if Pagonia is bound by custom, the protection afforded copyright owners by Pagonia is consistent with international law

If there is a customary international law requiring the protection of copyright it is governed by the principles of conditional national treatment and formal reciprocity.¹⁰⁴ National treatment for copyright protection is afforded by a State to owners of copyright only where there is a connecting factor to the State.¹⁰⁵ The works must be initially or simultaneously published in the State or the author must be a national or permanent resident of the State.

¹⁰⁰ *Anglo-Norwegian Fisheries Case* [1951] I.C.J. Reports 116, pp.138-9.

¹⁰¹ *Asylum Case (Columbia v. Peru)* [1950] I.C.J. Reports 266, p.278

¹⁰² *Compromis*, para. 29.

¹⁰³ *Compromis*, para. 26.

¹⁰⁴ For example: Australia (Copyright Act 1968 ss 2, 32); United States of America (Copyright Act 1976 s104); South Africa (Intellectual Property Laws Rationalisation Act 1996, s15); Yemen (Law No 19 on Intellectual Property 1994, Art. 4); Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (1996) para 10-34; Ricketson and Richardson, *Intellectual Property, Cases, Materials and Commentary, Second Edition*, (1998) p. 89.

¹⁰⁵ *Ibid.*

Protection may be extended to nationals of other States through treaty obligations (“formal reciprocity”).¹⁰⁶ Pagonia is not a member of any copyright treaty and therefore is not obliged to extend copyright protection to foreign nationals unless the work is first published in Pagonia. Bretoria has the burden of proof to show the existence of this connecting factor in each case.¹⁰⁷ Given the Bretorian audio and video cassettes were imported into Pagonia it is unlikely that they were first published in that State. Therefore Pagonia is not obliged to protect the copyright belonging to Bretorian copyright owners.

Alternatively, if Pagonia is obliged to protect copyright belonging to Bretorian copyright owners, it has not breached this obligation because it is providing a “means of redress” for copyright infringement.¹⁰⁸ Pagonia provides copyright owners with a means of redress through their Criminal Code and the private cause of action similar to “conversion”. There is no evidence that this type of protection is any less effective than specific copyright legislation.¹⁰⁹

¹⁰⁶ Berne Convention, *supra* n.92, Art.5(1); U.C.C., *supra* n.92, Art.2; TRIPs, *supra* n.92, Art. 3; New Zealand (Copyright (Application to Other Countries) Order 1995); United Kingdom (The Copyright (Application to Other Countries) Order 1993); United States of America (Berne Convention Implementation Act 1988, Pub L 100 – 568).

¹⁰⁷ *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] I.C.J. Reports 6, pp.15 – 16; *Case Concerning the Legal Status of Eastern Greenland* [1933] P.C.I.J. Ser. A/B No.53, p.49.

¹⁰⁸ Berne Convention, *supra* n.92, Art.5(2).

¹⁰⁹ Copyright World, “United States of America: IIPA Identifies Forty Two Piracy Culprits”, Iss. No. 48, March 1998, p.13.

VI. BRETORIA IS NOT ENTITLED TO THE COMPENSATION CLAIMED

A. A DECLARATION IS SUFFICIENT IN THE CIRCUMSTANCES

A declaration that international law has been breached and the identification of the responsible State can constitute appropriate satisfaction for a breach.¹¹⁰ A declaration by this Court will be appropriate where the award of compensatory damages is inappropriate.¹¹¹ The payment of damages for any breach of international law arising either from the acts taken by Pagonia to protect cultural identity or the failure to protect Bretorian copyright is inappropriate.

Damages arising from the alleged breaches must be calculated by reference to lost profits suffered by Benjamin Publications and Bretorian commercial entities as a result of the enactment of Civil Law No.51 and by Bretorian copyright owners as a result of the failure to protect copyright. Awards for lost profits must be accurate.¹¹² An accurate calculation is not possible in these circumstances. Lost profits suffered as a result of the enactment of Civil Law No.51 would be entirely speculative. Bretoria presents no information on which to calculate the loss of profits by Bretorian copyright owners as a result of copyright infringement.

¹¹⁰ *Corfu Channel Case (Merits)* [1949] I.C.J. Reports 4, p.35; *Northern Cameroons Case* [1963] I.C.J. Reports 15, pp.36-38; *Manouba Case (France v Italy)* (1913) 11 R.I.A.A. 475; *Silvers Case* (1983) Euro.Ct.H.R. Ser.A. 67, para.10; American Law Institute, *Third Restatement of the Law of the Foreign Relations of the United States* (1986) Vol.2, p.358.

¹¹¹ Gray, *Judicial Remedies in International Law* (1987) p.100.

¹¹² *Dorner Claim* (1954) 21 I.L.R 164, p.165; *Libyan American Oil Co. v Government of the Libyan Arab Republic supra* n.3, p.134.

Further, the appropriate form of reparation for failure to protect copyright is not the payment of damages¹¹³ but rather for Bretoria to refuse to protect copyright of Pagonian nationals (“reprisal”).¹¹⁴

B. IF DAMAGES ARE AWARDED THOSE DAMAGES MUST BE REDUCED

The calculation of damages resulting from the acts taken by Pagonia to protect its cultural identity should take into account the severe threat to Pagonian citizens’ cultural rights which the acts were directed at preventing.¹¹⁵ All compensation must be fair and just in the circumstances.¹¹⁶ Damages should be reduced to reflect the fact that Pagonia acted in response to a perceived threat to its citizens’ cultural rights and its cultural identity.¹¹⁷

Damages must compensate the injured party for the loss suffered as a result of the breach of international law.¹¹⁸ The damages payable by Pagonia for any failure to protect copyright should be reduced to take into account the fact that a certain amount of copyright infringement cannot be prevented by a State. A residual level of copyright infringement

¹¹³ Hertz, “Shaping the Trident: Intellectual Property Under NAFTA, Investment Protection Agreements and at the World Trade Organization” (1997) 23 Can.-U.S.L.J. 261, p.270.

¹¹⁴ Berne Convention *supra* n.92, Art.4; TRIPs. *supra* n.92, Art. 9; UCC *supra* n.92, Art. IV(4).

¹¹⁵ Diaz-Casanueva *supra* n.68, p.136; Pohl (El Salvador), *supra* n.82, p.137; Peet *supra* n.82, p.169; Sauvart “Sociocultural Emancipation”, in Nordenstreng, Schiller *supra* n.63, pp.12-13; Robins, Morley, *supra* n,63, p.388.

¹¹⁶ *Union Bridge Company Claim (United States of America v Great Britain)* (1910) 6 R.I.A.A. 138, p.47.

¹¹⁷ Footnote

¹¹⁸ *Chorzow Factory Case*, *supra* n.24, p.47.

occurs even in countries that have substantial resources available for, and devoted to, the protection of copyright.¹¹⁹

VII. PRAYER FOR RELIEF

The Government of the Kingdom of Pagonia respectfully requests this Honourable Court:

1. DECLARE that the acts taken by Pagonia to protect its cultural identity are consistent with international law;
2. DECLARE that Pagonia is not liable to compensate Bretoria for any injury suffered as a result of those acts;
3. DECLARE that the level of protection afforded copyright owners in Pagonia is not inconsistent with international law; and
4. DECLARE that Pagonia is not liable to compensate Bretoria for any injury occurring as a result of alleged copyright infringement in Pagonia.

Respectfully submitted,
Agents for Pagonia.

¹¹⁹ Chile, Japan, South Korea in Report of the United States Trade Representative, National Trade Estimate 1998 (1999), pp 47, 217, 262.