
IN THE INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING
CULTURAL IDENTITY AND
INTELLECTUAL PROPERTY**

1999

Republic of Bretoria

v.

Kingdom of Pagonia

MEMORIAL FOR THE APPLICANT

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JURISDICTION

Bretoria and Pagonia have agreed to submit their dispute concerning cultural identity and intellectual property to the ICJ pursuant to Art.36(1) ICJ-Statute.

STATEMENT OF FACTS

Until 1975, Pagonia was ruled by a totalitarian regime, which planned, managed, and controlled all aspects of the economy and restricted imports. Pagonia also strictly limited the circulation of foreign language material. After the revolution in 1975, a democratic government was established. The economy moved towards privatisation, primarily through foreign investment, which had been prohibited by the totalitarian government. The easing of pre-revolutionary restrictions on imports allowed to satisfy an increased demand for books, audio- and videocassettes. Most of Pagonia's commercial entities in the cultural sector started selling imported foreign language material in addition to domestically produced Pagonian language books, audio- and videocassettes.

The demand for foreign language material led to the development of an underground market for unlicensed copies of foreign language material. In 1996, a WIPO-panel of experts visited Pagonia and published a report, which stated that "inexpensive and obviously unlicensed copies of foreign movies and music cassettes" can easily be obtained in the large cities of Pagonia, for the cost of "a small fraction of the price of a licensed copy thereof". The panel concluded that \$100 million a year in revenue was lost by copyright-owners.

Pagonia has no law specifically proscribing copyright infringement. Its Criminal Code penalises 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". In six out of nine regions, however, there is no functioning unit of the prosecutors office for the investigation of "theft of an intangible property". The decision whether to bring an action for theft is left entirely in the hands of regional prosecutors. Over the last four years in each of these regions only the violations of copyright belonging to Pagonian nationals have been

prosecuted for having copied and disseminated works of Pagonian authors and composers without authorisation.

Pagonia did not have a well-developed entertainment industry during the totalitarian regime. By 1991, a majority of the annual net income of the Pagonian cultural sector was generated by sales of imported foreign language material. At that time, Pagonia began to see significant foreign investment, particularly in the areas of publishing and television broadcasting. Approximately 25 per cent of this capital was raised by Bretorian investors.

In 1988, Ms.Crispell formed the Pagonian Cultural Watch Group to fight “decadent foreign entertainment.” In 1990, she acquired a majority ownership interest in Grace Publications, a company engaged in the publication of Pagonian language literature. Her stated intention was to make Grace Publications the largest publishing company in the nation whilst promoting the “glorious culture of Pagonia.” In 1994, Ms.Crispell was elected to the Pagonian parliament, remaining active in the PCWG. In September 1997, the Pagonian parliament adopted Civil Law No.51, a bill introduced by Ms.Crispell.

The law prohibited foreign ownership by natural or juridical persons of a “Regulated Entity”, *i.e.* any Pagonian Commercial entity providing goods and/or services in the cultural sector of the Pagonian economy. Persons holding a foreign ownership interest in a Regulated Entity are required to divest themselves of that interest within a period of 90 days. The interests of persons failing to comply would be acquirable by the Minister of Culture for the book value.

Subsequently, a number of foreign investors immediately sold their interests. Some of them complained to the press that because of the exigent circumstances surrounding their divestiture they were unable to command even the book value of their interests. After the 90-day period, the Pagonian Ministry of Culture instituted court proceedings to acquire

the majority ownership interests still belonging to foreign investors. To value the ownership interests, the courts appointed experts, whose findings could either be adopted or rejected. They were accepted in all cases without modifications.

The Pagonian Communications Commission (PCC) adopted regulations “pursuant to Civil Law No.51”, which provided that 75 per cent of the content of programming aired by Pagonian broadcasters during prime listening and viewing hours was required to be Pagonian in origin. Consequently, the four Pagonian television networks cancelled pre-existing contracts for the airing of television programs and films. Several affected Bretorian media distributors exhausted their legal remedies in Pagonian courts, which neither reinstated any contract nor awarded monetary compensation, holding that the termination of the contracts was authorised under Civil Law No.51.

After a petition made by a Consortium of Pagonian publishers, including Ms.Crispell, the Minister of Culture adopted a resolution requiring Benjamin Publications and all other foreign publishers of foreign-language periodicals to sell bi-lingual versions in Pagonia. No imported periodicals exclusively in foreign languages would be allowed to be sold in Pagonia. This regulation would not apply to domestic publishers. The dominant language would be Pagonian.

In response, the Bretorian Foreign Ministry sent an official communiqué to Pagonia, stating that (1) Pagonia’s acts taken under Civil Law No.51 were in reality motivated primarily by Ms.Crispell, whose private economic interest was clearly served, and were contrary to international law; (2) the forced divestiture of property and termination of valid contracts constituted forbidden expropriation under international law; (3) Pagonia was not providing even the minimum protection to copyright-owners required by international law.

Pagonia, although dismissing Bretoria's protests, consented to submit this dispute to the International Court of Justice.

QUESTIONS PRESENTED

Bretoria asks the Court:

1. whether Bretoria may afford diplomatic protection to its nationals;
2. whether the forced divestitures and the cancellations of contracts constituted expropriations;
3. whether the expropriations were illegal under international law and Pagonia is responsible to restitute the property taken or compensate for actual and future losses;
4. whether Pagonia is liable to pay appropriate compensation even if the expropriations were lawful;
5. whether the principle of national treatment as defined by Art.III GATT forms part of customary international law and whether Pagonia violated this principle;
6. whether the Pagonian screen quotas violate Art.19 of the Universal Declaration of Human Rights;
7. whether the protection afforded to copyright-owners by Pagonia is insufficient under international law;
8. whether the deficiencies of the Pagonian judicial system amount to denial of justice;
9. whether Pagonia must compensate Bretoria for the losses suffered by its citizens as a result of copyright infringements in Pagonia.

SUMMARY OF ARGUMENTS

(1) As Pagonian courts are bound by Civil Law No.51, they could not have awarded appropriate compensation under international law to the Bretorian investors whose direct rights were infringed. Several Bretorian media distributors exhausted their remedies; the courts, however, neither reinstated any contracts nor awarded any compensation. Thus, the remedies were obviously futile and Bretoria may exercise diplomatic protection.

(2) Expropriation encompasses cancellation of valid contracts, taking of shares and so-called forced sales made under the threat of impending expropriation. Thus, the divestiture of foreign ownership interests in Regulated Entities and the termination of valid contracts with Bretorian media distributors constitute expropriations. Since these expropriations were discriminatory and lacked public purpose, they are illegal under international law and entail the responsibility to restate the property taken or, if impossible, to compensate for the actual and future losses suffered by Bretorian citizens.

In the alternative, Pagonia is obliged to pay appropriate compensation based on fair market value. The book value does not meet the requirement of appropriate compensation under international law. Thus, Pagonia is obliged to pay compensation up to the fair market value.

(3) As the principle of national treatment is of fundamentally norm-creating character and currently observed by 170 States from all regions of the world, it is a norm of customary international law. The PCC regulation and the Ministerial Resolution distort the competition between Pagonian and Bretorian products, thus violating the principle of national treatment. No customary law exception for the protection of cultural identity exists. Thus, the Pagonian measures are not justified by the alleged aim of protecting Pagonia's cultural identity.

(4) The quota system violates Art.19 of the Universal Declaration of Human Rights.

(5) The right to copyright protection is laid down in Art.27(2) of the Universal Declaration of Human Rights and must therefore, in observance of Arts.55 and 56 of the UN-Charter, be respected by all UN-Member States, including Pagonia.

(6) Core principles of international copyright law as contained in the Berne Convention for the Protection of Literary and Artistic Works, in particular the copyright-owners' right to reproduction and the principle of national treatment, have evolved into customary law binding upon all States. This custom derives from quasi-universal State practice witnessing a general consensus on the obligation to, and need of, protection of copyright.

(7) Pagonia does not afford to copyright-owners the minimum standard of protection required by international law. It does not prohibit the large scale infringements of copyrights belonging to Bretorian nationals, and moreover, contravenes the principle of national treatment.

(8) The international standard of copyright protection demands that copyright-owners be protected against infringements of their copyrights in an effective manner by making available remedies which give them the possibility of obtaining redress. Mere criminal procedures and the making available of an action for conversion are not sufficient.

(9) Due to the gross inefficiencies of the Pagonian legal system, and the failure to prosecute Pagonians copyright infringers, Bretorian copyright-owners are denied justice.

(10) Pagonia is responsible for these copyright infringements since it does not comply with the obligation to adequately protect copyright-owners. It incurs the duty to put an end to these infringements amounting to copyright piracy and to compensate Bretoria for the losses suffered by its citizens.

I. BRETORIA ASKS THE COURT TO DECLARE THE ACTS 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.

A. BRETORIA MAY AFFORD DIPLOMATIC PROTECTION TO ITS NATIONALS.

The right to exercise diplomatic protection is “an elementary principle of international law” under which “a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.”¹ The last-mentioned requirement of exhaustion of local remedies, however, is “subject to the important condition that the local remedy sought [...] is effective in securing redress”.² Ineffectiveness of a remedy may either result from the municipal law itself, *e.g.* if “recourse to national courts offers the claimants no possibility of obtaining justice, these tribunals being bound on the matter by [...] national legislation”,³ or from the practice of courts, “when, by a settled course of decision, those remedies have been, as to a particular claim, rendered illusory, and it is known in advance that an appeal [...] would be fruitless and futile.”⁴ In any case, it is upon

¹ *Mavrommatis Palestine Concessions Case* (Greece v.UK), 1924 PCIJ(Ser.A), No.2, 12 (Judgm.of Aug.30); *Panevezys-Saldutiskis Railway Case*(Estonia v.Lithuania), 1939 PCIJ (Ser.A/B),No.76,16(Judgm.of Feb.28); E.M.Borchard, *Diplomatic Protection of Citizens Abroad* 817s(1922).

² Borchard, *supra* fn.1,821s; *Ambatielos Claim*(Greece v.UK), 3 RIAA 119 (Mar.6,1956); *De Wilde, Ooms and Versyp*, ECHR, 14 YECHR 806(Jun.18,1971); *Harvard Draft Articles on State Responsibility*, Art.19(2), 55 AJIL 577s(1961); I.Brownlie, *Principles of Public International Law* 497s(4thed.1990).

³ *Central Rhodope Forests* (1933), (Greece v.Bulgaria), 28 AJIL 788(1934); *Swiss Federal Political Department (Legal Opinion of Jul.15,1976)*, 33 ASDI 239(1977); *Oppenheim's International Law* 525(R.Jennings/A.Watts 9thed.1992).

⁴ *Interocean Transportation Company of America v.USA*, Arb.Trib., 8 AD 273(Oct.5,1937); *Ambatielos Claim*, *supra* fn.2, 119; *Finnish Shipowners' Claim* (Finland v.GB), 3 RIAA 1503ss(May 9,1934); A.Verdross/B.Simma, *Universelles Völkerrecht*

the respondent State to show the existence of local remedies which the foreign national failed to employ.⁵ Finally, while it might be contended that international law does not allow for diplomatic protection on behalf of shareholders in foreign companies, in the *Barcelona Traction Case*, the ICJ stated that the "situation is different if the act complained of is aimed at the direct rights of shareholders as such."⁶ Thus, the national State may intervene on behalf of shareholders whenever their direct rights are infringed, particularly if their "individual shares, specifically as the property of [foreigners], should be unjustifiably confiscated".⁷

Civil Law No.51 is aimed at direct rights of Bretonian investors, as it requires them to divest themselves of their ownership interests in Pagonian commercial entities. Moreover, since Civil Law No.51 only provides for payment of the book value, higher Pagonian courts, being *ex lege* bound on this matter, could not have awarded appropriate compensation as required under international law and thereby rectified the injurious situation. Finally, it is unchallenged that several media distributors, whose contracts were terminated, exhausted local remedies. Yet not in a single case the courts reinstated any contract or awarded any monetary compensation, thus rendering recourse to local remedies

884(3rded.1984).

⁵ *Ambatielos Claim*, *supra* fn.2, 119; *Case concerning Elettronica Sicula S.p.A.(ELSI)* (USA v. Italy), 1989 ICJ 47, para.62(Judgm.of July 20).

⁶ *Case concerning the Barcelona Traction, Light and Power Company, Ltd. (Second Phase)*(Belgium v.Spain), 1970 ICJ 36, para.47(Judgm.of Feb.5); Ammoun(sep.op.), *ibid.*,296s; Caflisch, *The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case*, 31 ZaöRV 181(1971).

⁷ *Antioquia Case* (USA v.Colombia), 1865 in J.B.Moore, 6 *Digest of International Law* 644(1906); DeVisscher, *La protection diplomatique des personnes morales*, 102 RdC 463s(1961-I); Jiménez de Aréchaga, *International Responsibility*, in M.Sørensen, *Manual of Public International Law* 579(1968); Díez de Velasco, *La protection diplomatique des sociétés et des actionnaires*, 141 RdC 148ss(1974-I).

for other media distributors “obviously futile”. Therefore, Bretoria is entitled to exercise diplomatic protection on behalf of the investors and the media distributors.

B. THE ACTS TAKEN BY PAGONIA TO ALLEGEDLY PROTECT ITS CULTURAL IDENTITY CONSTITUTE UNLAWFUL EXPROPRIATIONS UNDER INTERNATIONAL LAW.

1. The forced divestitures and the cancellation of contracts constitute expropriations.

The term “expropriation” means the deprivation of a right of property by State organs,⁸ including courts and administrative agencies,⁹ and encompasses cancellation of valid contracts,¹⁰ taking of shares,¹¹ and so-called forced sales made under the threat of impending expropriation.¹² It is “well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to expropriation of such a property that is attributable to the State of that court”.¹³

⁸ Brownlie, *supra* fn.2, 531(4thed.1990); M.Akehurst, *A Modern Introduction to International Law* 95(6thed.1991).

⁹ Borchard, *supra* fn.1,183, 197; *Harvard Draft, supra* fn.2, Art.15s,576; *ILC-Draft Articles on State Responsibility*, Report of the ILC of its 48thSession, Art.6, GAOR, 51st Session(1996), Suppl.No.10(A/51/10).

¹⁰ *Norwegian Shipowners' Claims* (Norway v. USA) 1 RIAA 334(Oct.13,1922); *Phillips Petroleum Co. Iran v. The Islamic Republic of Iran*, 21 IRAN-USCTR 106(June 29, 1989); *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, 106 ILR 628 (May 20, 1992); Brownlie, *International Law at the Fiftieth Anniversary of the United Nations*, 255 RdC 143(1995).

¹¹ *Amoco International Finance Corp. v Iran*, 15 Iran-USCTR 189 (July 14, 1987); M.Shaw, *International Law*, 575 (4th ed.1997).

¹² *Fedorchak Claim*, USA, Foreign Claims Settlement Commission, 40 ILR 96, (April 11, 1962); Christie, *What Constitutes a Taking of Property under International Law?*, 38 BYIL 324(1962); Higgins, *The Taking of Property in International Law*, 176 RdC 267, 326(1982 III); *Oppenheim's, supra* fn.3,917 ; *Stadt Würzburg v. Institut der Englischen Fräulein*, BMV, III US.Ct.Rest.App. 753(1952); *Kapphan v. Steine und Erden GmbH*, V US.Ct.Rest.App. 487(1955).

¹³ *Oil Field of Texas, Inc. And Islamic Rep. of Iran*, 12 Iran-USCTR 318 (Oct.8,1986); *Décisions de la Commission de Conciliation Franco-Italienne, Décision No.196*, (France v. Italy) 13 RIAA 438 (Dec.7,1955); cf. Fitzmaurice (sep.op.), *Barcelona Traction Case*, →

Civil Law No.51 requires persons holding a majority ownership interest in a Regulated Entity, *i.e.* a Pagonian commercial entity providing goods and/or services in the cultural sector, “to divest themselves of that interest within 90 days” [Art.2(d)]; otherwise, their interest shall be acquirable by the Pagonian Ministry of Culture. Thus, Bretorian investors were forced to sell their ownership interests or their interests were acquired by the Pagonian Ministry of Culture through court proceedings. These forced sales and the takings carried out by the courts constitute expropriations. Moreover, the PCC, a Pagonian administrative agency acting under Civil Law No.51, adopted a regulation requiring TV-networks to broadcast 75 per cent of the content of programming aired during prime time to be Pagonian in origin. Consequently, valid contracts with Bretorian media distributors were cancelled. Pagonian courts declared this cancellation authorised by Civil Law No.51 and failed to reinstate the contracts or to award compensation. Thus, the court decisions, in effect depriving the Bretorians of their contractual rights, amount to expropriations.

2. The expropriations are illegal under international law

States may only expropriate foreign property in exchange for compensation, if the taking is carried out for a public purpose and is not discriminatory¹⁴.

a) Firstly, expropriations must be carried out for a public purpose, *i.e.* “based on grounds or reasons of public utility [...] recognised as overriding purely private or individual interests”.¹⁵ While, theoretically, the protection of cultural identity might serve

supra. fn.6,105s; Gros (*sep.op*), *ibid.*,274.

¹⁴ 2 ALI, *Restatement (Third) of the Foreign Relations Law of the US*, §712(1) 196s; *Oppenheim*, *supra* fn.3, 920; Akehurst, *supra* fn.8,92; Brownlie, *supra* fn.2, 538.

¹⁵ UNGA-Res.1803(XVII), *Permanent Sovereignty over Natural Resources*, para.4, 16 UNYB 503(1962); *Walter Fletcher Smith Claim*(Cuba v. USA) 2 RIAA 917s(May 2,1929); *cf. James and Others*, ECHR, 75 ILR 415(Feb.21,1986); *Case Concerning Certain German Interests in Polish Upper Silesia*, (Ger.v.Poland), 1926 PCIJ (Ser.A) →

as public purpose, the means applied must be proportionate and suitable to attain this purpose.¹⁶

The fact that the Pagonian people have a strong interest in foreign cultures and languages shows that restricting foreign cultural influences and expropriating foreign investment and contractual rights cannot be grounded on the Pagonian people's interest. Since even Pagonian expatriates use the Pagonian language, adhere to many Pagonian traditions and observe Pagonian religious and traditional holidays, the alleged danger to Pagonian cultural identity is not comprehensible. Rather, Civil Law No.51 was implemented to serve the private economic interest of Ms.Crispell, the majority owner of Grace Publications, a company engaged solely in the publication of Pagonian language literature. Her "stated intention to make Grace Publications the largest publishing company in the nation" and her personal efforts to introduce legislation directed against foreigners reveal her private interest, which is promoted by Civil Law No.51. Finally, the shareholders' nationality is no conclusive indicator of a company's policy and can, therefore, not be regarded as relevant to the protection of a country's cultural identity. Thus, the expropriations lacked public purpose.

b) Secondly, expropriations must not be discriminatory.¹⁷ Differential treatment is discriminatory, if it is based on unreasonable distinctions without objective justification,¹⁸

No.7, 22 (Judgm.of May 25); Higgins, *supra* fn.12,331.

¹⁶ *James and Others*, *supra* fn.15,419; *Lithgow and Others*, ECHR, 75 ILR 527(July 8, 1986); *Sporrong and Lönnroth*, ECHR, 68 ILR 108(Sept. 23, 1982); *Ashingdane Case*, ECHR, 28 YECHR 183(May 28,1985).

¹⁷ *LIAMCO Case*, 20 ILM 58s (Apr.12,1977); *BP v.Libya*, 53 ILR 329 (Oct.10,1973).

¹⁸ Burdeau, *La contribution des nationalisations Francaises de 1982 au droit international des nationalisations*, 89 RGDIP 24s(1985); *Restatement*, *supra* fn.14, §712 200; *Oscar Chinn Case*, (UK v.Belgium), 1934 PCIJ(Ser.A/B), No.63, 87(Judgm.of →

such as expropriations on the sole ground that the proprietors are aliens.¹⁹

As Civil Law No.51 explicitly provides that “Foreign Ownership of a Regulated Entity shall be prohibited”, the expropriations were carried out on the sole ground that the proprietors were aliens. Furthermore, it discriminates among foreigners *inter se*, as it does not take into account whether a majority interest is owned by one foreigner alone or together with others; even persons holding minority interests lost this interest if by chance the combined foreign interests amounted to more than 50 per cent. For these reasons Pagonia’s acts were discriminatory and, hence, illegal under international law.

c) Illegal takings incur, as the PCIJ held in the *Chorzów-Factory Case*, the duty to restitute the property taken or, if this is impossible, to pay a “sum corresponding to the value a restitution in kind would bear”.²⁰ The taking State has to compensate the actual damage and future losses.²¹

Since the expropriations were discriminatory and lacked public purpose, they are illegal under international law. Thus, Pagonia is obliged to restitute the property taken or, if

Dec.12); *Bank Indonesia v. Senembah Maatschappij and Twentsche Bank*, Neth.Ct.App.Amsterdam, 30 ILR 28(Jun.4,1959); cf. *Minority Schools in Albania*, 1935 PCIJ (Ser.A/B) No.64, 19(Adv.op.of Apr.6).

¹⁹ Brierly, *Règles Générales du Droit de la Paix*, 58 RdC 5, 171(1936-IV); *Affaire des Biens Britanniques au Maroc Espagnol* (Spain v.UK), 2 RIAA 647 (May 1,1925); G.White, *Nationalisation of Foreign Property*,119s(1961); Sørensen, *Principes de Droit International Public*, 101 RdC 178(1960-III); McNair, *The Seizure of Property and Enterprise in Indonesia*, 6 NILR 247(1959); Herz, *Expropriation of Foreign Property*, 35 AJIL 249(1941).

²⁰ *Case concerning the Factory at Chorzów* (Germany v.Poland), 1928 PCIJ (Ser.A) No.17, 46 (Judgm.of Sept.13); *TEXACO Arbitration*, 53 ILR 507 (Jan.19,1977).

²¹ *Chorzów Factory Case*, supra fn.20,47; *Shufeldt Claim*, 5 ILR 181s (July 24, 1930); *Sapphire International v.National Iranian Oil Comp.*, 35 ILR 186s (Mar.15,1963); *Norwegian Shipowners*, supra fn.10,339s; *Lighthouses Arbitration (France v.Greece)*, PCA, 23 ILR 300 (Jul.24,1956).

impossible, to compensate the actual loss and the loss of profits suffered by Bretorian investors and media distributors.

3. Even if the expropriations were lawful, Pagonia is still liable to pay appropriate compensation.

Lawful takings entail the liability to pay appropriate compensation for direct losses.²² Compensation is appropriate if it is “effective and adequate to compensate fully for the value of the property taken”²³. The amount due depends on the fair market value,²⁴ *i.e.* the “amount which a willing buyer would have paid a willing seller for the shares of going concern,”²⁵ at the time before an impending expropriation became publicly known,²⁶ including interests until the date of payment.²⁷ The book value does not meet the requirements of appropriate compensation: firstly, “financial statements of a company are not necessarily accurate indicators of the real value of the stock of a company”²⁸ since they account only imperfectly for intangible valuables, *e.g.* contractual rights, commercial

²² *AMINOIL Arbitration*, 21 ILM 1032s (Mar.24,1982); *Banco Nacional de Cuba v. Chase Manhattan Bank*, US Ct.App., 66 ILR 438 (Aug.4,1981); *TEXACO Arbitration*, *supra* fn.20,485,492; Brownlie, *supra* fn.2,538s.

²³ *ITT Industries, Inc. v.Iran*, 2 Iran-USCTR 352,354(May 26,1983); *Banco Nacional de Cuba v. Chase Manhattan Bank*, *supra* fn.22, 438s; *Amco Asia Corp. and Others v. Indonesia*, 24 ILM 1037(Nov.21, 1984); *Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran*, 6 Iran-USCTR 225(June 22,1984); *SEDCO, Inc. and National Iranian Oil Company v. Iran*, 10 Iran-USCTR 189(March 27,1986).

²⁴ *Restatement*, *supra* fn.14,§712,com.d; *Norwegian Shipowners*, *supra* fn.10,334; *Amoco Case*, *supra* fn.11,255.

²⁵ *INA Corporation v.Iran*; 8 Iran-USCTR 380(Aug.12,1985).

²⁶ *INA Corporation v.Iran*, *supra* fn.25,380; Guidelines for the Treatment of Foreign Direct Investment, Sept.21,1992, Ch.4, 31ILM 1363(1992); OECD-Draft of the MAI (Commentary), Ch.4, <http://www.oecd.org/daf/cm1s/mai/negtext.htm>.

²⁷ *Eastman Kodak Co. v.Iran*, 27 Iran-USCTR 23(Jul.1,1991).

²⁸ *ITT Industries*, *supra* fn.23,354.

prospects and goodwill.²⁹ Secondly, when calculating the book value, the application of the generally accepted accounting principle of conservatism leads to an underestimation of the assets in question.³⁰

Since the forced sales within the 90-day period constitute expropriations entailing the liability of paying compensation, and as the investors could not even command the book value for their interests, Pagonia is obliged to pay additional compensation up to the fair market value of their interests. Those Bretorian investors who were expropriated through court proceedings are consequently also entitled to claim compensation covering the difference between the book value and the fair market value of their interests. Finally, as the media distributors did not receive any compensation at all, Pagonia is obliged to pay full compensation.

C. THE PCC-REGULATION AND THE RESOLUTION BY THE MINISTRY OF CULTURE VIOLATE THE PRINCIPLE OF NATIONAL TREATMENT.

1. The principle of national treatment forms part of customary international law.

Under Art.38(1) of the Vienna Convention on the Law of Treaties nothing “precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law”.³¹ It is well established that a “series or a recurrence of treaties laying

²⁹ *International Accounting Standards* 98,313ss,445(1998); cf. *Amoco Case*, *supra* fn.11,270.

³⁰ R.Dent d’Almuano, *Accounting Principles and Concepts* 36(1996); McCosker, *Book Values in Nationalisation Settlements*, in 2 *The Valuation of Nationalised Property in International Law* 51(Lillich,ed.1973).

³¹ Art.38 VCLT, 8 ILM 694(1969); cf. also ILC-Commentary to Art.34 (now 38) VCLT, 2 YBILC 230s(1966); cf. *North Sea Continental Shelf Cases* (FRG v.Den.; FRG v.Neth.) 1969 ICJ 41, para.71(Judgm.of Feb.20); R.Roxburgh, *International Conventions and Third States* 75(1917); A.D’Amato, *The Concept of Custom in International Law* 105(1971); M.E.Villiger, *Customary International Law and Treaties* 169ss(1997).

down a similar rule may produce a principle of customary law”.³² Moreover, as the ICJ held in the *North Sea Continental Shelf Cases*, a “very widespread and representative participation in [a] convention might suffice of itself, provided it included that of States whose interests were specifically affected”, to transform a treaty provision into customary law.³³ What is essential is the number and diversity of States having accepted the rule, that the very provision is of “fundamentally norm-creating character”, *i.e.* generalizable, and that it may not be subject to reservations.³⁴ Finally, practice outside the relevant treaty confirms the customary character of the provision in question.³⁵

Accordingly, the principle of national treatment as defined by Art.III GATT has become part of customary international law. This principle dates back to the 12th century, to the treaties concluded by the German Hansa and the Italian city States.³⁶ Ever since, the “inclusion of a national treatment clause has been a common feature in treaties of Commerce and Navigation”.³⁷ In 1947, the general requirement of national treatment was

³² Starke, *Treaties as a ‘Source’ of International Law*, 23 BYIL 344(1946); C.v.Bynkershoek, *Quaestionum Juris Publici, Libri Duo* (I.X) 77 (1737); H.Wheaton, 1 *Eléments du droit international* 25s (2nd ed.1852); *cf.* *Nottebohm Case* (Liechtenstein v. Guatemala), Second Phase, 1955 ICJ 22s(Judgm.of Jul.25); *Fisheries Jurisdiction Case* (FRG v. Iceland), 1974 ICJ 195, para.50(Judgm.of Jul.25); *Lauritzen et.al. v.Chile* (Sp.Ct. Chile) (Dec.19,1955), 23 ILR 730(1956).

³³ *North Sea Continental Shelf Cases*, *supra* fn.31,42,para.73.

³⁴ *Ibid.* 42,para.72; Baxter, *Treaties and Custom*, 129 RdC 62ss(1970-I); Villiger, *supra* fn.31,155, 177; A.D’Amato, *International Law: Process and Prospect* 130(1987); Scott/Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 Denv.JILP 79(1996).

³⁵ Villiger, *supra* fn.31,183s(1997).

³⁶ P.VerLoren van Themaat, *The Changing Structure of International Economic Law* 19(1981).

³⁷ J.S.Lambrinidis, *The Structure, Function and Law of a Free-Trade Area* 133(1965); *cf.* Treaty of Commerce and Navigation (Ger.-Uruguay) (Jun.20,1892), Art.1, 177 CTS 118s; Treaty of Commerce and Navigation (Austria-Brazil) (Jun.16, 1827), Art.XIV, 77

embodied in Art.III GATT as one of its key provisions.³⁸ Presently, 133 WTO-members and 31 observer States having applied for membership³⁹ adhere to the GATT. Additionally, six non-observer countries, *i.e.* the Bahamas, Equatorial Guinea, Kiribati, Sao Tomé and Príncipe, Tuvalu and Yemen, *de facto* apply the GATT.⁴⁰ In sum, 170 States from all regions of the world and representing all major legal systems observe the principle of national treatment. Finally, a great number of multilateral⁴¹ and bilateral⁴² trade agreements contain the national treatment principle, some of which even literally

CTS 257; Commercial Convention (France-Paraguay) (Jul.21,1892), Art.1, 177 CTS 242s; Treaty and Protocol between the US and Siam (Dec.16,1920), Art.1, 16 AJIL-Supp. 25(1922); Commercial Convention (UK *et.al.*-Turkey) (Jul.24,1923), Art.10s, 18 AJIL Supp. 80(1924); Treaty of Commerce and Navigation (UK-Ger.) (Dec.2,1924), Art.1, 43 LNTS 90; Treaty of Friendship, Commerce and Consular Rights (US-El Salvador) (Feb.22,1926), Art.1, 134 LNTS 208; Treaty of Friendship (Egypt-Persia) (Nov.28,1928), Arts.3s, 93 LNTS 381.

³⁸ J.H.Jackson, *The World Trading System* 30,189(1989); W.Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht* 53(1990); Fikentscher, *GATT Principles and Intellectual Property Protection*, in 11 IIC Studies 113(1996).

³⁹ See *About the WTO, Members (Status as at Dec.20,1998)*, URL: <http://www.wto.org/wto/about/organs6.htm>.

⁴⁰ See *Application of the General Agreement (Apr.1994)*, BISD, Supp.40 X(1992-94).

⁴¹ Art.301 NAFTA, 32 ILM 289(1993); Treaty on Central American Economic Integration Between Guatemala, El Salvador, Honduras and Nicaragua, Ch.II, <http://www.sice.oas.org/trade/camertoc.stm>; Southern Common Market (MERCOSUR), Art.7, <http://www.sice.oas.org/tradee.stm>; EFTA, Art.6, 370 UNTS 9; Treaty on Free Trade Between the Republic of Colombia, the Republic of Venezuela and the United Mexican States, Ch.III, <http://www.sice.oas.org/Trade/G3-E/G3Ec3.stm>.

⁴² Art.57 Treaty Establishing the Common Market for Eastern and Southern Africa, 33 ILM 1084(1994); Canada-Chile Free Trade Agreement, Sec.1, <http://www.sice.oas.org/trade/chican-e/chcatoc.stm>; Mexico-Nicaragua Free Trade Agreement, Ch.III, <http://www.sice.oas.org/trade/menifta/indice.stm>; Central America- Dominican Republic Free Trade Agreement, Ch.III, <http://www.sice.oas.org/trade/camdrep/indice.stm>; Mexico-Bolivia Free Trade Agreement, Ch.III, <http://www.sice.oas.org/trademexbos/mbind.stm>; Costa Rica-Mexico Free Trade Agreement, Ch.III, <http://www.sice.oas.org/trade/mexcr-s/merind.stm>.

incorporating the wording of Art.III GATT.⁴³

Thus, the principle of national treatment is a norm of customary international law.

2. The measures taken by Pagonia violate the principle of national treatment.

The principle of national treatment requires States to treat goods originating in other States no less favourably than domestically produced goods. This principle applies to periodicals or films, which comprise several services, *i.e.* editorial content, advertising or acting, that combine to form a physical product.⁴⁴ The national treatment requirement covers “any laws and regulations which might adversely modify the conditions of competition between the domestic and imported products”.⁴⁵ This includes regulations affecting services that influence the competitiveness of a given product.⁴⁶ The comparison between the treatment afforded to foreign and that afforded to domestic products can be made “on the basis of a hypothetical import”.⁴⁷ Thus, internal measures adversely

⁴³ Arts. 301, 1102, 1202 NAFTA, *supra* fn.41,289,605; Arts.105,501 Canada-US Free Trade Agreement, 27 ILM 294,314(1988).

⁴⁴ WTO-Appellate Body Report, *Canada-Certain Measures Concerning Periodicals*, AB-1997-2, WT/DS31/AB/R, Sec.IV; *Sacchi-Case*, ECJ-Rep.409, para.7 (Apr.30,1974); Bogdandy, *Europäischer Protektionismus im Medienbereich*, 1 EuZW 16(1992); Hahn, *Eine kulturelle Bereichsausnahme im Recht der WTO*, 56 ZaöRV 328, 332(1996); Acheson/Maule; *Trade Policy Responses to New Technology in the Film and Television Industry*, 23 JWT 36(1989).

⁴⁵ Panel Report on: *Italian Discrimination against Imported Agricultural Machinery*, Oct.23,1958, BISD Supp.7, 60.

⁴⁶ Panel Report on: *Canada-Certain Measures Concerning Periodicals*, Mar.14,1997, WT/DS31/R; Panel Report on: *Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, Feb.18,1992, BISD Supp.39, 80; Panel Report on: *United States-Measures Affecting Alcoholic and Malt Beverages*, Jun.19,1992, BISD Supp.39, 295; Panel Report on: *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, Nov.7,1990, BISD Supp.37, 224.

⁴⁷ Panel Report on: *Canada-Certain Measures Concerning Periodicals*, *supra* fn.46,98; Cf. Panel Report on: *United States-Taxes on Petroleum and Certain Imported Substances*, adopted on Jun.17,1987, BISD Supp.34, 160.

modifying competition between domestic and foreign goods violate the principle of national treatment.

The PCC-regulation, providing that 75 per cent of programming aired by Pagonian broadcasters during prime listening and viewing hours must be of Pagonian origin, destroys a large portion of the market for Bretorian media distributors. Thereby, the PCC-regulation gravely distorts the conditions of competition between Pagonian and Bretorian products and, hence, violates the national treatment requirement.

In the Ministerial Resolution, foreign publishers are required to produce their magazines in Pagonian language or as bilingual versions with Pagonian as the dominant language. In contrast, this rule does not apply to Pagonian publishers, who therefore can satisfy the demand for foreign language products in Pagonia without foreign competition. Moreover, Bretorian publishers have to bear increased production costs particularly caused by translating. This considerably weakens their competitiveness. Thus, the said Resolution infringes the national treatment requirement.

3. The protection of cultural identity is no valid exception to the principle of national treatment.

The principle of national treatment is not subject to a general customary law exception for the protection of cultural identity.⁴⁸ Even the GATT in Art.IV and Art.XX(f) sets forth strict requirements for the implementation of protective measures for cultural reasons.⁴⁹ However, these provisions cannot justify Pagonia's violations of the national treatment requirement. In order to defend restrictions on foreign magazines and television programs

⁴⁸ Cf. Treaty on Central American Economic Integration, *supra* fn.41; Southern Common Market (MERCOSUR), *supra* fn.41; Treaty Establishing the Common Market for Eastern and Southern Africa, *supra* fn.43.

⁴⁹ Filipek, *Culture Quotas: the Trade Controversy over the European Community's Broadcasting Directive*, 28 Stanford JIL 349(1992).

under Art.XX(f) GATT, a State would have to demonstrate⁵⁰ that the regulation is no disguised restriction on international trade⁵¹ and that it is imposed for the preservation of a specific object of protection,⁵² which qualifies as a national treasure of artistic, historic or archaeological value.

Pagonia in fact has failed to demonstrate a specific object of protection. Moreover, the alleged purpose of the promotion of its cultural identity could be achieved by ways consistent with GATT through internal measures such as subsidisation. Finally, the impediment to broadcasting possibilities for Pagonian films and the language requirements imposed on foreign magazines restrict trade opportunities and therefore are disguised restrictions on international trade. Thus Art.XX(f) cannot be invoked to justify the violation of the national treatment requirement.

The PCC-regulation cannot be justified by Art.IV GATT either. The drafting history and the text of Art.IV, by explicitly referring to cinematograph films screened in theatres,⁵³ evidence that only quotas for cinema-films, not for television programs, are authorised.⁵⁴ As television programs are shown under different conditions, imported by means of different physical media and sold in a differently structured market, they cannot be

⁵⁰ WTO-Panel Report, *United States-Standards for Reformulated and Conventional Gasoline*, adopted on Jan.29, 1996, 35 ILM 298(1996).

⁵¹ Art.XX(f) GATT; Panel Report on: *United States-Section 337 of the Tariff Act of 1930*, Nov.7,1989, BISD Supp.36, 392.

⁵² Cf. UNESCO Convention on the Protection of the World Cultural and Natural Heritage(1972),http://www.unesco.org/whc/world_he.htm; Convention on Stolen or Illegally Exported Cultural Objects(1995), <http://www.city.ac.uk/artspol/unidroit.html>; Art.12(h) EFTA, *supra* fn.41,13s; Arts.36,296 EEC-Treaty, UNTS 43(1958); EEC-Directive 93/7(1993),OJ,L074,74ss; Jernigan, *Protecting National Treasures in a Single-Market EC*, 17 BC-ICLJ 153(1994).

⁵³ Art.IV(a) GATT.

subsumed under Art.IV.⁵⁵ The Pagonian regulation, being concerned with television broadcasting, thus cannot be justified by reference to Art.IV.

4. The Pagonian quota system impairs the freedom of information.

Art.19 of the Universal Declaration of Human Rights guarantees the “right to freedom of expression and opinion” and includes the right to “seek, receive and impart information and ideas through any media regardless of frontiers.”⁵⁶ The Pagonian quota system, however, impairs the basic freedom of Pagonian citizens to choose which audiovisual products they wish to access.

II. BRETORIA ASKS THE COURT TO DECLARE THAT THE PROTECTION AFFORDED TO COPYRIGHT-OWNERS BY 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.

A. BRETORIA MAY AFFORD DIPLOMATIC PROTECTION TO ITS NATIONALS.

The rationale of the local remedies rule is to give the injured alien the possibility of obtaining redress in the local courts.⁵⁷ Consequently, as shown above in Section I.A., ineffective local remedies need not be exhausted, especially if they are “plainly inadequate or unsatisfactory” or simply non-existent.⁵⁸

⁵⁴ Filipek, *supra* fn.49,349; Hahn, *supra* fn.44,330.

⁵⁵ Statement of the US Representative, Nov.21,1961, GATT-Doc. L/1646 Nov.24,1961.

⁵⁶ Universal Declaration on Human Rights, UNGA-Res.217(III)(Dec.10,1948); Endelman, *Regulating Culture: The Audiovisual Controversy in the GATT Accord*, 18 BC-ICLJ 454s(1995).

⁵⁷ Brownlie, *supra* fn.2, 495s; Freeman, *International Responsibility of States for Denial of Justice* 416s(1938, repr.1970).

⁵⁸ Freeman, *supra* fn.57,420s; DeVisscher, *Le déni de justice en droit international*, 52 RdC 423(1935-II); *Harvard Draft*, Art.19(2), *supra* fn.2; *DeSabra Claim*, 7 AD 243s(Jun.29,1933).

Since in Pagonia criminal procedures can only be instigated by public prosecutors, an injured alien cannot resort to them to seek redress. In six out of nine Pagonian regions, no functioning unit for the prosecution of theft of intangible property exists. Moreover, criminal procedures aim at punishing the wrongdoer, but do not give redress to injured persons. The Pagonian legal system recognizes conversion as a private cause of action. Conversion, however, comprises only the tort of wrongfully dealing with another person's goods, but is no cause of action applicable to intangible rights such as copyright.⁵⁹ As Pagonia does not provide for adequate remedies against copyright infringement, Bretoria may afford diplomatic protection to its nationals.

B. THE PROTECTION AFFORDED TO COPYRIGHT-OWNERS BY PAGONIA IS INSUFFICIENT UNDER INTERNATIONAL LAW.

1. Copyright protection is a human right.

All UN-Members shall promote universal respect for, and observance of, human rights,⁶⁰ and in particular, "shall observe faithfully and strictly [...] the Universal Declaration of Human Rights",⁶¹ which is considered an authoritative interpretation of the UN-Charter.⁶² Under Article 27(2) of the Universal Declaration "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary

⁵⁹ S.M.Speiser *et al.* (eds.), 7 *The American Law of Torts* §24:3 (1990); 98 CJS *Trover and Conversion* §11(1955); 45 *Halsbury's Laws of England* §1422(4th ed.1985).

⁶⁰ UN-Charter, Preamble, para.2, and Arts.1(3), 55 and 56; Cassin, *La Déclaration Universelle et la Mise en Oeuvre des Droits de l'Homme*, 79 Rdc 245(1951-II).

⁶¹ GA-Res.1514(XV)(Dec.14,1960), para.7, 15 GAOR, Supp.16, 67; GA-Res.1904(XVIII) (Nov.20,1963), Art.11, 18 GAOR, Supp.15, 37.

⁶² Brownlie, *supra* fn.2, 570s; L.B.Sohn/T.Buergenthal, *International Protection of Human Rights* 519(1973); Waldock, *General Course on Public International Law*, 106 Rdc 199(1962-II).

or artistic production of which he is the author.”⁶³ This right to copyright protection “forms part of commonly accepted standards of human rights today.”⁶⁴ Therefore, as a UN-Member, Pagonia is obliged to protect copyright.

2. The core principles of copyright form part of general international law.

As shown in Section I.C.1., generalizable treaty provisions may crystallize into customary international law if there is a recurrence of treaties on the same subject, or if the treaties in question enjoy widespread participation.

The core principles of copyright as embodied in the Berne Convention for the Protection of Literary and Artistic Works (BC), in particular the copyright-owner’s right to reproduction and the requirement of national treatment,⁶⁵ have passed into customary international law. Starting with the Vienna Congress of 1815 until today, these two core principles have been included in countless bilateral⁶⁶ and multilateral treaties⁶⁷. The 1886

⁶³ Universal Declaration of Human Rights, *supra* fn.56, Art.27(2); cf. also International Covenant on Economic, Social and Cultural Rights (Dec.19,1966), Art.15(1), 993 UNTS 3.

⁶⁴ Dietz, *The Artist’s Right of Integrity Under Copyright Law—A Comparative Approach*, 25 IIC 178(1994).

⁶⁵ Berne Convention for the Protection of Literary and Artistic Works [hereinafter BC], Arts.5 and 9, Paris Act(July 24,1971), 1161 UNTS 30.

⁶⁶ Prussia-Hanover(Sept.11,1827), 7 Martens 302; Prussia-Hesse (Sept.18,1827), 7 Martens 317; Prussia-Wurtemberg (Feb.19,1828), 7 Martens 562; Arts.1s France-Portugal(April 12,1851), 105 CTS 369; Art.I France-UK (Nov.3,1851), 107 CTS 1; Bolivia-Spain(Mar.13,1936) 170 LNTS 177; USA-Philippines(Oct.21,1948), 77 UNTS 197; USA-India(Apr.17, 1954), 234 UNTS 119; Brazil-Italy(Oct.2,1963), 842 UNTS 35; USSR-CSSR(March 18,1975), 1015 UNTS 123; Mexico-Denmark(July 12,1954), 1379 UNTS 41; Art.2004 US-CFTA (Jan.2,1988), 27 ILM 281(1988); China-USA Memorandum of Understanding(Jan.17,1992), 24 ILM 676(1995).

⁶⁷ Vienna Congress, General Treaty Act IX, Art.XVIII(D)(June 8,1815) 64 CTS 443; Arts.I, VI Austria-Sardinia *et al.* (May 22,1840), 90 CTS 151; Arts.II, III Montevideo Convention(Jan.11,1889), 171 CTS 453; Arts.III, V Pan-American Convention 1902, 190 CTS 391; Arts.2s, Caracas Convention(July 17,1911), 214 CTS 111; Arts.4s Havana Convention(Feb.18,1928), 132 LNTS 275; Arts.701, 1701ss NAFTA *supra* fn.41; Art.25

Berne Convention was the first major regulation of copyright protection on a universal level.⁶⁸ In 1994, Arts.1-21 BC were incorporated into the WTO/TRIPs-Agreement.⁶⁹

Already in 1930, when the BC had only 29 parties, Arthur McNair referred to it as a law-making treaty “creating more than mere legislative rules binding upon the parties.”⁷⁰ Currently, the BC has 133 parties, including the largest exporters and importers of intellectual property.⁷¹ Another 24 States not parties to the BC are bound to observe Arts.1-21 BC due to their WTO membership or *de facto* adhere to the TRIPs-Agreement.⁷² Additionally, five States outside the BC and TRIPs are parties to the Universal Copyright Convention.⁷³ Even States not parties to any copyright convention, such as Afghanistan, Ethiopia, Iran, Iraq, Taiwan and Vietnam, provide for copyright protection in their national legislation. Thus, virtually all States, representing all major legal systems of the world, adhere to this obligation.⁷⁴ This quasi-universal State practice witnesses a general

Central European Free Trade Agreement(Dec.21,1992), 34 ILM 13(1995).

⁶⁸ Cornish, *The Future of the Traditional Intellectual Property Conventions in the Brave New World of Trade-Related Intellectual Property Rights*, 26 IIC 873s(1995); Ulmer, *One Hundred Years of the Berne Convention*, 17 IIC 708(1986).

⁶⁹ Art.9(1) Agreement on the Trade Related Aspects of Intellectual Property Rights, [hereinafter TRIPs], 33 ILM 1197(1994).

⁷⁰ McNair, *The Functions and Differing Legal Character of Treaties*, 11 BYIL 117(1930).

⁷¹ See *Berne Convention (Status on Sept.22,1998)*, <http://www.wipo.org/eng/ratific-e.htm>.

⁷² *About the WTO, Members*, supra fn.39; Heath, *Intellectual Property Rights in Asia—An Overview*, 28 IIC 306ss(1997).

⁷³ Andorra, Kazakhstan, Laos, Saudi Arabia, Tajikistan, see UCC: *State of Ratifications, Acceptances and Accessions*(Jan.1,1995), UNESCO-Doc.IGC/(1971)/X/3 (1995).

⁷⁴ Press Act of Afghanistan(1950), Arts.39ss; Civil Code of Ethiopia(1960), Arts.1647ss; Copyright Act of Iran(1969); Copyright Act of Iraq(1971); Taiwan and Vietnam: see A.Gutterman/R.Brown(eds.), *Intellectual Property Laws of East Asia* 404ss, 519ss(1997); Australian Copyright Act(1968); Copyright Act of Germany(1965); Copyright Act of France(1992); Copyright Act of Ivory-Coast(1978); Copyright Act of Nepal(1966);

consensus on the obligation to, and need of, protection of copyright. Therefore, the above-mentioned core provisions of the BC form part of general international law.

3. Pagonia fails to provide sufficient protection for Bretorian copyright-owners.

Under international law, States have to provide for effective protection of the rights of copyright-owners,⁷⁵ e.g. authors of literary and artistic works and their successors in title, film-makers and producers of phonograms.⁷⁶ Firstly, all copyright-owners enjoy the exclusive right of authorizing the reproduction of their protected works.⁷⁷ This basic right, which encompasses the right to distribution (e.g. by sale),⁷⁸ was “so much taken for

Copyright Act of Russia(1993); Copyright Act of Sudan(1974); Copyright Act of Syria (1924); Copyright Act of the USA(1976); Constitution of the USA(Sept.17,1787), Art.I, Sec.8, Clause 8; Constitution of Honduras(Jan.11,1982), Art.108; Constitution of Paraguay(June 20,1992), Art.110; Constitution of Tajikistan(Nov.6,1994), Art.40; cf. S.M.Stewart, *International Copyright and Neighbouring Rights* 43(1989); Nimmer, *Remarks on the Panel “What’s going on in Intellectual Property Law?”*, 84 ASIL-Proc.258(1990).

⁷⁵ Preamble to the BC, Art.2(6) BC, *supra* fn.65; Art.I Universal Copyright Convention (Sept.16,1955),943 UNTS 178; Art.1701 NAFTA, *supra* fn.41; Arts.41, 46, 61 TRIPs, *supra* fn.69; Preamble and Art.14(2) WIPO-Copyright Treaty(Dec.20,1986), 36 ILM 65ss(1997); Art.5 Memorandum of Understanding (USA-China), 24 ILM 683(1995); Art.3(3.1)(a) ASEAN-Framework Agreement on Intellectual Property Cooperation (Dec.15,1995), 35 ILM 1075(1996); *Decision 351 of the Commission of the Cartagena-Agreement*(Dec.17,1993), Art.2, <http://www.sice.oas.org/trade/junac/dec351s.stm>.

⁷⁶ Arts.2(1) and (6), 14^{bis}(1) BC, *supra* fn.65; Art.I UCC, *ibid.*; Art.1 Rome Convention (Oct.26,1961), 496 UNTS 43; Art.2 Geneva Convention(Oct.29,1971), 866 UNTS 67; cf. C.Masouyé, *Guide de la Convention de Berne pour la protection des oeuvres littéraires et artistiques* [hereinafter WIPO-Guide], para.2.22(1981); A.Bogsch, *The Universal Copyright Convention* 6(1958).

⁷⁷ Arts.9(1) and 14^{bis}BC, *supra* fn.65; Art.IV^{bis}(1) UCC, *supra* fn.75; Art.10 Rome Convention, *supra* fn.76; Art.2 Geneva Convention, *ibid.*; Arts.9(2) and 14(2) TRIPs, *supra* fn.69; Arts.11s WIPO-Performances and Phonograms Treaty(Dec.20,1996), 36 ILM 76ss(1997).

⁷⁸ WIPO-Guide, *supra* fn.76, para.9.4; J.A.L.Sterling, *Intellectual Property Rights in Sound Recordings, Film and Video* 101s(1992); Stewart, *supra* fn.74,62.

granted that it was not even mentioned” in the original text of the 1886 BC.⁷⁹ While, in special cases, *e.g.* for purposes of teaching,⁸⁰ limited reproduction without the copyright-owners’ authorization may be permitted by national legislation,⁸¹ copyright piracy, *i.e.* the deliberate infringement of copyright on a commercial scale, such as the manufacture, distribution and sale of unauthorized copies of protected material, is illegal.⁸²

Secondly, the requirement of national treatment, a “main pillar” of the BC,⁸³ demands that each country must afford to foreign copyright-owners the same protection that is granted to its own nationals.⁸⁴

In Pagonia there is a large underground market for unlicensed copies of foreign language audio- and videocassettes. Unlicensed copies can easily be found throughout the streets of the large cities. As the infringements take place on a commercial scale and entail substantial losses for foreign copyright-owners, they amount to copyright piracy and are

⁷⁹ Stewart, *supra* fn.74,103; A.Nordemann *et al.*, *International Copyright* 107(1990).

⁸⁰ Art.19 Copyright of Russia; Stewart, *supra* fn.74,122.

⁸¹ Art.9(2) BC, *supra* fn.65; Art.13 TRIPs, *supra* fn.69.

⁸² Sterling, *supra* fn.78, 188; IFPI-homepage, *What is piracy?*, <http://www.ifpi.org/piracy/index.html>; DeFreitas, *Piracy of Intellectual Property and the Measures needed to counter it*, 26/3 Copyright Bulletin 8(1992); *cf.* UCC, 10th IGC-Ordinary Session, UNESCO-Doc.CLT-95/CONF.205/LD.17 (1995); *Hong Kong proposes tougher Measures to fight Piracy*, Reuters News Service(May 1, 1998); *China: Tung stresses firm Line against Copyright Piracy*, BBC Monitoring Service Asia-Pacific (June 4,1998); *Sale of Pirated Films “Out of Control” in China*, New York Times (Mar.28,1998).

⁸³ Stewart, *supra* fn.74, 105; Vaver, *The National Treatment Requirement of the Berne and Universal Copyright Conventions*, 17 IIC 578(1986); *cf.* UK and Uruguay: UNESCO-Doc.WS/119.116, No.2, 7s.

⁸⁴ Art.5 BC, *supra* fn.65; Art.II UCC, *supra* fn.75; Art.3 TRIPs-Agreement, *supra* fn.69; Art.2 Rome Convention, *supra* fn.76; Art.2 Geneva Convention, *ibid.*; Art.3 WIPO-Copyright Treaty, *supra* fn.75; Art.4 WIPO-Performances and Phonograms Treaty, *supra* fn.77.

illegal under international law. Moreover, since only individuals having violated copyright belonging to Pagonian authors and composers have been prosecuted, Bretorian copyright-owners do not even enjoy the scarce protection of the Pagonian criminal code and are treated less favorably than Pagonian nationals. Therefore, Pagonia not only fails to sufficiently protect Bretorian copyright-owners against infringements of their right to reproduction and distribution, but also contravenes the principle of national treatment.

4. The international standard of copyright protection demands adequate remedies for copyright-owners.

In any institutionalized legal system “a right means to have the legal possibility of instituting a lawsuit, *i.e.*, of putting in motion by an action brought before the competent tribunal the procedure which ultimately leads to the execution of the sanction.”⁸⁵ Thus, the right to copyright protection entails that copyright-owners must be granted remedies to enforce their rights.⁸⁶ They must be given the legal possibility of instituting proceedings in order to sue the infringer for damages or account of profits,⁸⁷ and to demand the prohibition of further infringing actions, *e.g.* through injunctions.⁸⁸

⁸⁵ H.Kelsen, *Principles of International Law* 9(1952).

⁸⁶ Art.15(1) BC, *supra* fn.65; Art.42ss TRIPS, *supra* fn.69; Sec.15(1) Tunis Model-Law.

⁸⁷ Art.XV Austria-Sardinia *et al.*, *supra* fn.67; Art.9 France-Portugal, *supra* fn.66; Art.XIII Pan-American Convention 1902, *supra* fn.67; Art.13 Pan-American Convention 1910, 211 CTS 374; Art.45 TRIPs; *cf.* Sec.115(2) Copyright Act of Australia; Art.43 Copyright Act of Burundi; Sec.34(1) Copyright Act of Canada; Art.45 Copyright Act of Egypt; Art.1674(2) Copyright Act of Ethiopia; §97 Copyright Act of Germany; Art.28 Copyright Act of Iran; Art.44 Copyright Act of Iraq; Art.33 Copyright Act of Jordan; Arts.49(1)(3) and 49(1)(4) Copyright Act of Russia; Art.20 Copyright Act of Sudan; §504(b) Copyright Act of the USA.

⁸⁸ Sec.9(1) Model-Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; Sec.115(2) Copyright Act of Australia; Sec.34(1) Copyright Act of Canada; Art.1674(2) Copyright Act of Egypt; Art.29 Copyright Act of Iran; Art.49(1)(2) Copyright Act of Russia; Art.20(2) Copyright Act of Sudan; §502 Copyright Act of the USA.

Criminal procedures, however, which cannot be initiated by copyright-owners themselves and merely provide for penal sanctions such as fines payable to the State, neither are adequate remedies for the infringed copyright-owners, nor serve to indemnify them for the violations of their rights.⁸⁹

The protection afforded to copyright-owners under the Pagonian legal system falls short of the international standard, because it does not provide for adequate remedies for injured copyright-owners. As shown in Section II.A, the private cause of action of “conversion” generally does not apply to intangible rights such as copyright. Although under some copyright laws conversion is made applicable to copyright infringements by declaring the copyright-owner the hypothetical owner of the infringing copies or of the devices and materials used for making these copies,⁹⁰ conversion by itself is no pertinent remedy, since the injured copyright-owners may only claim for the delivery-up of the infringing copies and other materials, but not for compensation of their pecuniary losses.

As regards the criminal procedures, they can only be instigated by the public prosecutors, *i.e.* the infringed copyright-owners have no possibility of initiating the proceedings themselves. Moreover, the fines imposed on the convicted thieves of copyright are only payable to the Pagonian government and do not compensate the copyright-owners for their losses. Even if criminal procedures were considered adequate remedies for copyright-owners, the enforcement of the criminal code by Pagonia is grossly ineffective, since in six out of nine regions of Pagonia prosecutors totally fail to institute criminal proceedings in cases of copyright infringements, which therefore remain unpunished.

⁸⁹ Cf. Stewart, *supra* fn.74, 96.

⁹⁰ Cf. *e.g.* Sec.116 Copyright Act of Australia; Sec.58 Copyright Act of India.

For all these reasons, the remedies afforded to copyright-owners under the Pagonian legal system do not meet the international standard of copyright protection.

C. THE DEFICIENCIES IN THE PAGONIAN JUDICIAL SYSTEM AMOUNT TO DENIAL OF JUSTICE.

Intellectual property rights, such as copyright and the related rights, by definition, are rights of property.⁹¹ Under international law a State must comply with its international obligations to protect the rights of aliens, including their property, from injury committed by private persons within the State's jurisdiction.⁹² Whenever private individuals commit punishable offences against aliens, and the State then fails to prosecute and to adequately punish the offenders, the State is responsible for denial of justice.⁹³

In the majority of Pagonian regions, there is no functioning unit in the prosecutor's office for theft of intangible property. In the remaining regions, only the theft of Pagonian copyrights has been prosecuted over the last four years, while the regional prosecutors failed to take up the cause of any non-Pagonian copyright-owner whose copyrights had been infringed, although continuous and extensive violations of copyright belonging to foreigners had been well documented in the 1996 WIPO-report. This means that Pagonians

⁹¹ Stewart, *supra* fn.74, 4; Stanback, *International Intellectual Property Protection: An Integrated Solution to the Inadequate Protection Problem*, 29 VJIL 542 (1988/89); cf. e.g. *Phil Collins Case*, (Joined Cases C-92/92, C-326/92), ECJ-Rep. I-5145, para.22, (Oct.20,1993); Dietz, *supra* fn.64,179.

⁹² *DeSabra Claim*(US v. Panama), 7 AD 241, 243(Award of June 29,1933); *Lyndall Case* (US v. Haiti), M.Whiteman, 2 *Damages in International Law* 947(1937); *Mecham Case*, *ibid*, Vol.3,1987.

⁹³ *Affaire des Biens Britanniques au Maroc Espagnol*, *supra* fn.19, 615, 647; *Janes Case* (USA v.Mexico), 4 RIAA 82ss(Award of Nov.16,1925); *Kennedy Case*(USA v.Mexico), 4 RIAA 194ss(Award of May 6,1927); *Roper Case*(USA v.Mexico), 4 RIAA 145ss(Award of Apr.4,1927); B.Vitányi, *International Responsibility of States for Their Administration of Justice*, 22 NILR 131, 157(1975); E.deVattel, II*Droit de Gens*, §76 (1757); C.Calvo, 3 *Le Droit International* 136(4thed.1888); Salvioli, *Les règles générales de la paix*, 46 RdC 115(1933-IV); cf. Art. 13 *Harvard Draft*, *supra* fn.2.

who violated foreign copyrights are not only not punished adequately, they are not punished at all, which is denial of justice to Bretonian copyright-owners.

D. PAGONIA MUST COMPENSATE BRETORIA FOR THE LOSSES SUFFERED BY ITS CITIZENS AS A RESULT OF COPYRIGHT INFRINGEMENTS.

1. Pagonia is responsible for the copyright infringements and has to pay damages.

An internationally wrongful act, *i.e.* an action or omission in breach of an international obligation attributable to a State, entails the responsibility of that State.⁹⁴ The State incurs the obligation to “wipe out all consequences of the illegal act and re-establish the situation which would [...] have existed if the act had not been committed”.⁹⁵ If the wrongful act is of a continuing character, the State is obliged to cease that conduct.⁹⁶ Under international law, reparation takes the form of restitution which in case of copyright infringement requires the seizure, destruction or delivery-up of infringing goods, materials and production devices.⁹⁷ Where restitution is impossible or insufficient, the wrongdoing State must pay compensation, which covers any economically assessable damage and includes interest as well as lost profits.⁹⁸

As shown above, Pagonia violates international law by tolerating large-scale copyright piracy. Therefore, Pagonia must not only cease its illegal conduct but, moreover, must

⁹⁴ Arts.1, 3 and 5, *ILC-Draft Articles*, *supra* fn.9.

⁹⁵ *Chorzów-Factory Case*, *supra* fn.20.

⁹⁶ Art.41, *ILC-Draft Articles*, *supra* fn.9.

⁹⁷ Arts.13(3) and 16 BC, *supra* fn.65; Arts.46, 61 TRIPs, *supra* fn.69; Art.XVI Austria-Sardinia *et al.*, *supra* fn.67; Art.VII France-UK, *supra* fn.66; Art.XIII Pan-American Convention 1902, *supra* fn.67; *cf. Hong Kong makes record Seizure of pirated CDs*, Reuters News Service(May 2,1997); *Singapore: Enforcement Actions Impact On Copyright Piracy*, Singapore Trade News(Sept.21,1998); *China: Customs Raid Pirate Compact Disc Factory*, Hongkong Standard(Sept.4, 1998).

⁹⁸ *Central Rhodope Forests*, *supra* fn.3,1405; *Cape Horn Pigeon Case*, (USA v.Russia), 9 RIAA 51, 65(Nov.29,1902); Arts.42ss, *ILC-Draft Articles*, *supra* fn.994.

provide restitution by seizing any infringing material and either destroying it or delivering it up to the copyright-owner. Additionally, Bretonian copyright-owners suffer severe economic damage by not obtaining the royalties they would receive if piracy did not occur. Since these losses cannot be made good by restitution, Pagonia also has to pay compensation including interest and lost profits.

2. Pagonia is unjustly enriched by the copyright violations.

Even if the Court does not hold Pagonia responsible for the copyright infringements, Pagonia is unjustly enriched. The concept of unjust enrichment, which is recognized as a general principle of law,⁹⁹ is based on the idea that nobody should enrich himself at the expense of another without legal justification.¹⁰⁰ This doctrine may also be applied with respect to copyright infringements.¹⁰¹

The unauthorized reproduction of phonograms and videocassettes without payment of license fees and royalties due unjustly enriches the Pagonian society since it can make economic use of the illegally reproduced phonograms and videocassettes, while at the same time does not pay for these transfers of intellectual property. According to the WIPO-report, the unjust enrichment amounts to approximately \$30 million a year. As the copyright piracy has been occurring for roughly 20 years, the total amount lost by the

⁹⁹ *Lena Goldfields Arbitration*, 5 ILR 3s(Sept.2,1930); *Sudden & Christenson Inc.v. USA*, 34 AJIL 737(1940); G.Schwarzenberger, 1 *International law as applied by international courts and tribunals* 215(3rded.1957); Friedmann, *Some Impacts of Social Organization on International Law*, 50 AJIL 505(1956); G.C.Rodríguez-Iglesias, *El enriquecimiento sin causa como fundamento de responsabilidad internacional*, 34 REDI 387ss(1982).

¹⁰⁰ Cf. e.g. Friedmann, *General Course in Public International Law*, 127 RdC 155(1969-II); Fombad, *The principle of unjust enrichment in international law*, 30 CILSA 121 (1997); Schreuer, *Unjustified Enrichment in International Law*, 22AJCL 301(1974).

¹⁰¹ Cf. Stewart, *supra* fn.74, 3; Art.1674(3) Copyright Act of Ethiopia; *Sheldon v.Metro-GoldwynCorp.*, 309 US 390(Mar.25,1940), No.482-106F.2D45; *Stenograph LLC v. Bossard Associates Inc, et.al*, Dist.Ct.of Col.(Jun.2,1998), No.97-7049.

Bretorian economy amounts to *ca.* \$600 million plus interest.

In addition to what has been argued above, Bretoria respectfully asks the Court to bear in mind that Pagonia's position in the present dispute is incoherent. On the one hand, Pagonia invokes the protection of its cultural identity to justify the expropriations of foreign investors, the discrimination of foreign publishers and the introduction of TV-quotas. The protection of a country's cultural identity may well be a legitimate purpose capable of justifying such acts. On the other hand, however, Pagonia does not take any serious effort to combat the large-scale copyright piracy of foreign language films and phonograms, although piracy has the effect of rapidly disseminating foreign language material, and thus is contrary to Pagonia's purported intention to prevent its culture from being exposed to foreign influences.

May it therefore please the 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.