IN THE INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING CULTURAL IDENTITY AND INTELLECTUAL PROPERTY

1999

Republic of Bretoria

v.

Kingdom of Pagonia

MEMORIAL FOR THE RESPONDENT

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CASE CONCERNING CULTURAL IDENTITY

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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. The Court, however, is not competent to adjudicate the alleged copyright infringements.

STATEMENT OF FACTS

Pagonia is a less developed country. In 1975, a revolution overthrew Pagonia's totalitarian regime. A new government was established in democratic elections and the economy moved towards privatization, primarily through foreign investment which had been prohibited prior to the revolution. The easing of pre-revolutionary restrictions led to an increase in imports of books, audio- and videocassettes. A result thereof was the trading with unlicensed copies of foreign language audio- and videocassettes in the large cities. This was subject to a report published by WIPO which Pagonia regarded as an illegitimate concern of this international body to which it is no party; Pagonia stated that the amount of the loss estimated in the Report was entirely speculative. Although Pagonia has no law specifically prescribing copyright protection, its Criminal Code penalizes 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". Pagonia also provides a civil cause of action, namely conversion.

In 1988, Ms.Crispell formed the Pagonian Cultural Watch Group, whose purpose was to ensure the protection of Pagonian culture. She acquired a majority ownership interest in Grace Publications, a private publication company of Pagonian language literature. By 1991, Pagonia's cultural sector was swept by significant foreign investment, including approximately 25 percent Bretorian investors. Bretoria is a developed nation with the world's largest entertainment industry. In 1994, Ms.Crispell was elected to Parliament and introduced a draft law which was adopted as Civil Law No.51:

Accordingly, persons having a foreign ownership interest (*i.e.* any majority interest owned by a non-Pagonian person or any combination of such persons) in a Regulated Entity (*i.e.* any Pagonian commercial entity providing goods and/or services in the cultural sector of the Pagonian economy) shall be required to divest themselves of that

interest within a period of 90 days, and are free to do so at whatever price they can negotiate. If a person fails to comply, such interest shall be acquirable by the Ministry of Culture for the book value. The Ministry auctioned those interests off to Pagonian bidders, who had to qualify for licenses. "Cultural Sector" means a sector in which *i.a.* the following activities are carried out: publication, distribution or sale of books, magazines, periodicals or newspapers; production, distribution, sale or exhibition of film, video, audio or video music recordings; radio, television and cable television broadcasting; and satellite programming and broadcast network services.

Under Art. 10, the Ministry of Culture shall endeavor to promote Pagonian culture, and is authorized to do so using any means not inconsistent with domestic or international law. Regulatory Agencies established by the Administrative Law of Pagonia shall have the authority to promulgate regulations necessary to implement this Law.

Subsequently, a number of foreign investors with majority ownership interests in Pagonian commercial entities divested themselves of those interests. Some of them complained they were unable to command even the book value for the sales of their ownership interests. Majority interests not sold by their owners were acquired by the Ministry of Culture, after proceedings in national courts, where the judges could adopt or reject findings of independent experts, who valued the ownership interests.

Pursuant to Civil Law No.51 the Pagonian Communication Commission ("PCC") adopted regulations providing 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. Subsequently, private Pagonian television networks cancelled contracts with *i.a.* Bretorian media distributors, citing the doctrine of *force majeure*. Some of the media distributors exhausted legal remedies in Pagonian courts, without, however, reaching the aim sought.

The Minister of Culture and a consortium of Pagonian publishers passed a resolution requiring foreign publishers of foreign language periodicals, including Benjamin Publications to sell bilingual versions in Pagonia. The Ministry informed Benjamin Publications accordingly that no imported periodicals exclusively in foreign languages would be allowed to be sold in Pagonia. In June 1998, Benjamin Publications contacted the Bretorian Foreign Ministry concerning this resolution; a similar request was made by the Bretorian Association of Copyright Owners complaining of the alleged copyright infringements.

Subsequently, Bretoria sent a Communiqué to Pagonia, stating that: 1) Pagonia's acts taken under Civil Law No.51 would have been motivated by Ms.Crispell; 2) the divestiture of property and termination of contracts would constitute expropriations; 3) Pagonia would not provide sufficient protection to copyright owners. Pagonia responded that: 1) Pagonia is neither a signatory to the GATT/WTO nor to the Berne Convention; 2) "National Treatment" as defined by Art. III GATT is not a norm of customary international law; 3) even if national treatment were a customary norm, Pagonia's acts taken to protect its cultural identity come within a valid exception to the national treatment requirement; 4) Pagonia has violated no customary norm in requiring divestiture of foreign ownership; 5) copyright protection is exclusively a Pagonian domestic affair; 6) the Pagonian Criminal Code provides adequate protection for copyright owners.

Pagonia applied for membership in the Regional Association of Trading States (RATS), a loose geographically based affiliation of non-aligned countries moving towards establishment of a free trade area. Bretoria is not a RATS-Member. Pagonia and Bretoria are UN-Members, parties to the Vienna Convention on the Law of Treaties and have maintained diplomatic relations since prior to 1975. While Bretoria is a party to the

GATT, WTO, WIPO and the Berne Convention, Pagonia, however, is not. Pagonia and Bretoria have no relevant bilateral treaties between them.

On November 4, 1998, the parties signed a compromis to submit their dispute to the International Court of Justice.

QUESTIONS PRESENTED

Pagonia asks the Court:

1. whether Bretoria may afford diplomatic protection to its nationals;
2. whether the sales of ownership interest within the 90-day period are expropriations, and if so, whether they are lawful;
3. whether compensation based on the book value fulfills the requirements of international law;
4. whether the cancellation of contracts is consistent with international law;
5. whether the PCC content regulation and the Ministerial regulation are consistent with international law;
6. whether there is an obligation under general international law to provide copyright protection, and if so, whether Pagonia complies therewith;
7. whether the alleged copyright infringements are imputable to Pagonia, and if so, whether Pagonia must pay compensation;
8. whether Pagonia is unjustly enriched by the alleged copyright infringements.

SUMMARY OF ARGUMENTS

(1) As none of the Bretorian investors even attempted to exhaust local remedies, Bretoria may not afford diplomatic protection. Even if Bretoria was entitled to do so, it could only claim compensation for the infringement of Bretorian shareholders' direct rights, but not for any damages resulting from losses sustained by the companies.

(2) The sales of ownership interests did not constitute expropriations, because Bretorian investors could sell their interests at any price they could negotiate and thus received a realistic price. Investors who sold for less than the book value guaranteed by Civil Law No.51 are estopped from now claiming compensation. In the alternative, they were lawful, as they were carried out for public purpose and were not discriminatory. Takings should be accompanied by appropriate compensation, which particularly in cases of large-scale takings of recent investments, is to be based on the book value, paying due regard to the financial capacity of the State. Pagonia fulfilled this standard.

(3) Pagonia is not responsible for the cancellation of contracts, because they were cancelled by private individuals; furthermore, these terminations were neither prescribed nor necessitated by domestic law. Since the court decisions confirming the cancellations did not amount to denial of justice, Pagonia did not violate international law.

(4) Since Pagonia is not a member of the WTO, and the GATT/WTO principles do not form customary international law, Pagonia is not bound by these principles. Even if Pagonia were bound by the WTO provisions, its acts would be in conformity with international law on trade in services, as there is no general obligation of national treatment in the GATS. Moreover, as Pagonia is a developing country and a future member of the free trade area RATS, the acts fall within the scope of the exceptions to the principle of non-discrimination, and are thus lawful. In any case, Pagonia's measures to

protect its cultural identity come within applicable exceptions. The content and "periodical" regulations are justified by Art.XX.lit(f) GATT, because these measures are imposed for the protection of the Pagonian language. The PCC regulation is furthermore justified by Art.IV GATT, allowing for screen quotas. Even if it were held that there is no valid exception to the non-discrimination rule in international trade in goods, it would be consistent with customary international law for Pagonia to introduce content quotas to protect its cultural identity of foreign influence.

(5) International law does not oblige Pagonia to provide copyright protection. First, Pagonia is not a party to any copyright treaty. Second, the relevant rights in the few treaties concerning the protection of copyrights remain subject to unresolved controversies and are not supported by sufficient State practice. Moreover, the requirement of *opinio iuris* is not fulfilled. Hence, no rule of customary international law has arisen. Third, the wide divergences within national laws prevent copyright protection from having evolved into a general principle of law. Finally, the principle of copyright protection without discrimination is not at present generally accepted.

(6) Since no norm of general international law concerning copyright protection exists, the matter falls essentially within Pagonia's domestic jurisdiction and the ICJ is not competent to adjudicate the alleged copyright infringements.

(7) Even if protection were required under international law, Pagonia, which anyway enjoys preferential treatment as a developing country, complies with any prescribed standard, by providing for criminal as well as civil remedies for copyright infringements.

(8 As the purported copyright violations are not imputable to Pagonia, it is not obliged to pay compensation.

(9) Pagonia is not unjustly enriched by the alleged copyright infringements.

I. PAGONIA ASKS THE COURT TO DECLARE THAT THE ACTS TAKEN BY PAGONIA TO PROTECT ITS CULTURAL IDENTITY ARE CONSISTENT WITH INTERNATIONAL LAW, AND PAGONIA IS NOT LIABLE TO PAY COMPENSATION FOR ANY INJURY SUFFERED AS A RESULT THEREOF.

A. BRETORIA MAY NOT AFFORD DIPLOMATIC PROTECTION TO ITS NATIONALS.

In the field of diplomatic protection, "the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary law".[1] Accordingly, an injured individual must have sought redress through appeals in the highest municipal courts before diplomatic protection may be exercised.[2] This rule requires that, "however contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them".[3] While ineffective local remedies need not be exhausted, this exception only applies if such remedies have proved to be "obviously futile", which is to be "most strictly construed".[4] Thus, although under municipal law full compensation corresponding to the loss sustained could allegedly not have been recovered, in the famous *Finnish Shipowners' Claim* remedies by which at least substantial compensation could have been obtained were considered adequate and effective redress for the operation of the local remedies rule.[5] In any case, "it is for the plaintiff State to prove that there are no

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[1] *Interhandel Case* (Switz.*v.*USA),1959 ICJ 27(Judgm.of Mar.21); *Mavrommatis Palestine Concessions Case* (Gr.*v.*UK),1924 PCIJ (Ser.A),No.2,12 (Judgm.of Aug.30); *cf.* E.Borchard, *Diplomatic Protection of Citizens Abroad* 817ss(1922).

[2] *Finnish Shipowners' Claim* (Fin.*v.*GB), 3 RIAA 1503(May 9,1934); *Ambatielos Claim* (Gr.*v.*UK), 12 RIAA 118s(Mar.6,1956).

[3] J.Lauterpacht,(sep.op.) *Certain Norwegian Loans Case* (Fr.*v.*Norway),1957 ICJ 39 (Judgm.of Jul.6); cf. J.Gros,(sep.op.) *Case Concerning the Barcelona Traction, Light and Power Company, Ltd.(Second Phase)* (Belg.*v.*Spain),1970 ICJ 284(Judgm.of Feb.5).

[4] Borchard, *supra* fn.1,824; *Finnish Shipowners' Claim, supra* fn.2,1504; *Ambatielos Claim, supra* fn.2,119.

[5] *Finnish Shipowners' Claim, supra* fn.2,1496s.

effective remedies to which recourse can be had".[6] Finally, a State may only afford diplomatic protection to "its nationals whose *rights* are claimed to have been disregarded in another State in violation of international law."[7] Regarding shareholders in foreign companies, in the *Barcelona Traction Case* the ICJ stressed that in view of the separate personality of companies "a distinction must be drawn between direct infringements of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company".[8] Thus, a State may only claim compensation for damages resulting from acts infringing direct rights of shareholders.

Neither the Bretorian investors, nor Benjamin Publications, even attempted to exhaust local remedies in Pagonian courts. The burden of proof is upon Applicant to show that local remedies in Pagonia were ineffective or "obviously futile". Moreover, the mere fact that Civil Law No.51 provides for the payment of book value does not render Pagonian local remedies *a priori* inadequate or ineffective. Finally, even if Bretoria were entitled to afford diplomatic protection to Bretorian investors holding ownership interests in Pagonian companies, it could only claim compensation for the infringement of their direct rights, but not for any damages resulting from financial losses sustained by the companies.

[6] J.Lauterpacht, *supra* fn.3,39; *Application No.299/57* (Gr.*v.*UK), ECHR, 2 YECHR 192s(Oct.12,1957); *Velasquez Rodriguez Case*, IACHR, 28 ILM 305,para.60 (Jul.29,1988); Trindade, *The Burden of Proof With Regard to Exhaustion of Local Remedies in International Law*, 9 HRJ 88ss(1976); M.Kazazi, *Burden of Proof and Related Issues* 100s(1996).

[7] *Interhandel Case, supra* fn.1,27[emph.add].

[8] *Barcelona Traction Case, supra* fn.3,36,para.47; J.Padilla Nervo, *ibid.*,255s; Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RdC 289s(1978-I).

B. THE MEASURES TAKEN UNDER CIVIL LAW NO.51 ARE CONSISTENT WITH INTERNATIONAL LAW.

1. The sales of Bretorian ownership interests within the 90-day period are no expropriations.

A sale of property, even if involuntary, is not an expropriation when a realistic purchase price is received.[9] Moreover, foreign investors who sell their property to willing purchasers in anticipation of a divestiture despite the host State guaranteeing compensation to a fixed amount for those who do not sell, are estopped from later claiming that the freely negotiated receipts from the sales were lower than the compensation expressly promised by the State.[10]

Bretorian investors who sold their ownership interests within the 90-day period were free to do so at whatever price they could negotiate and thus received a realistic price. Consequently, these divestitures are sales, not expropriations. The Bretorian investors are estopped from now claiming that they have received less than the book value guaranteed by Art.2(e) of Civil Law No.51, because they accepted the purchase price they were offered. Hence, Pagonia is not liable to compensate these Bretorian investors.

2. Even if the sales and divestitures are considered expropriations, they are lawful.

The taking of property from aliens is a sovereign right of every State,[11] if the following prerequisites are met:

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[9] Cf. *Gowen and Copeland Case*, J.B.Moore, 4 *Int'l. Arbitrations* 3354ss(1898); *Ellerman v.Poland*, 5 TAM 457(Jul.29,1924); Weston, *"Constructive Takings" under International Law*, 16 VJIL 134ss(1975); Christie, *What Constitutes a Taking of Property under International Law*, 38 BYIL 329(1962).

[10] Christie, *supra* fn.9,328s; cf. I.Seidl-Hohenveldern, *International Economic Law* 122(1992).

[11] *AMCO v.Indonesia*, 25 ILM 1029(1985); *Certain German Interests in Polish Upper Silesia* (Ger.*v.*Pol.) 1928 PCIJ (Ser.A)No.7,21(Judgm.of May 25); M.Akehurst, *A Modern Introduction to International Law* 92ss(6thed.1987); Higgins, *The Taking of Property by the State*, 176 RdC 288(1982-III); Seidl-Hohenveldern, *supra* fn.10,137.

First, expropriations should be carried out for a public purpose.[12] However, only in one single case it was held that a certain measure was not for a public purpose.[13] Hence, this term "is broadly interpreted"[14] and every State has the right to determine for itself what "it considers useful or necessary for the public good".[15] As all peoples have the inalienable right to pursue their "economic, social, cultural and political development",[16] States may freely choose their cultural systems.[17] Measures taken to protect cultural identity, *e.g.* by encouraging participation of nationals in the economy and by reducing dominance of foreign investment,[18] fall within the scope of this inalienable right and therefore lie in a public purpose to be pursued by States.

The divestitures in the cultural sector were necessitated by Pagonia's need to protect its cultural identity from foreign dominance and to encourage its nationals to participate actively in Pagonia's economic and cultural development. This concerns the community as a whole and therefore lies in the public purpose of Pagonia and not merely in the private

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[12] UNGA-Res.1803(XVII), Permanent Sovereignty over Natural Resources, Para.4, 16 UNYB 504(1962); Verwey/Schrijver, *The Taking of Foreign Property under International Law: A New Legal Perspective?*, 15 NYIL 15(1984) G.White, *Nationalization of Foreign Property* 145s(1961).

[13] *Walter Fletcher Smith* (Cuba *v.*US), 2 RIAA 915ss(May 2,1929).

[14] *AMOCO Case* (US *v.*Iran), 15 Iran-USCTR 233(1987-II); *Shufeldt Claim* (Guatem.*v.*US), 2 RIAA 1095(Jul.24,1930); cf. ALI, *Restatement (Third) of the Foreign Relations Law of the US*, Vol.2, §712,200(1986).

[15] *LIAMCO Case* (Apr.12,1977), 20 ILM 58(1981); *Lithgow and Others*, ECHR, 75 ILR 527 (Jul.8,1986).

[16] UNGA-Res.41/128, Right to Development, 40 UNYB 717ss(1986).

[17] UNGA-Res.2625(XXV), Friendly Relations, 24 UNYB 788ss(1970); *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicar.*v.*USA)1986 ICJ 133(Judgm.of Jun.27).

[18] Beveridge, *Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria*, 40 ICLQ 310(1991); cf. Nwogugu, *Legal Problems of Foreign Investments*, 153 RdC 184(1976-V).

interest of Ms.Crispell. Moreover, ownership interests could only be acquired by qualified Pagonian citizens who guaranteed to promote Pagonia's culture. Thus, the measures were taken for a public purpose.

Second, expropriations should not be discriminatory.[19] Discrimination implies unreasonable distinction.[20] However, not even takings that individually single out property of persons of one particular nationality are necessarily discriminatory.[21] Under international law States may distinguish between nationals and aliens: For example, the UN-Covenant on Economic, Social and Cultural Rights, although providing for the duty to ensure its rights without discrimination, allows developing countries to differentiate according to their national economy between non-nationals and nationals.[22] Similarly, the Convention on the Elimination of All Forms of Racial Discrimination stipulates that "this Convention shall not apply to distinctions [...] made [...] between citizens and non-citizens".[23] Thus, particularly developing countries may treat foreigners and nationals differently.

Since Civil Law No.51 does not distinguish between Bretorian nationals and others, it does not draw any unreasonable distinction. Pagonia is a developing country. Differential treatment of nationals and foreigners, an unavoidable consequence of protecting Pagonia's

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[19] *AMOCO Case, supra* fn.14,231s; *Oscar Chinn Case* (UK *v.*Belg.),1934 PCIJ(Ser.A/B) No.63,87 (Judgm.of Dec.12); I.Delupis, *Finance and Protection of Investments in Developing Countries*,71(1973); M.Sornarajah, *The International Law on Foreign Investment* 318s(1994).

[20] *Restatement, supra* fn.14,200.

[21] *N.V. Verenigde Deli-Maatschappijen and N.V. Senembah Maatschappij v. Deutsch-Indonesische Tabak-Handelsges.m.b.H.*, 28 ILR 36s(Aug.21,1959).

[22] Art.2(3) International Covenant on Economic, Social and Cultural Rights (Dec. 16,1966), 993 UNTS 3.

[23] Art.1 International Convention on the Elimination of all Forms of Racial Discrimination (Mar.7,1966), 660 UNTS 195.

cultural identity and reducing foreign dominance in its cultural sector, is permitted by international law. Moreover, it cannot be argued that the measures taken are especially directed against Bretorian investors, only because they happen to be frequently affected. This merely results from the dominance of these investors, as 25 per cent of the capital in Pagonia's cultural sector stems from Bretoria, which has the largest entertainment industry in the world. Thus, Civil Law No.51 is not discriminatory.

Non-discriminatory takings carried out for a public purpose are lawful,[24] and appropriate compensation for the actual loss should be provided.[25] Since there is no indication in modern practice of full compensation ever having been paid,[26] it cannot be held as the current standard of customary international law.[27] Full compensation was also sharply contested by developing countries.[28] In order to determine appropriate compensation the beneficial gain obtained by the nationalizing State[29] and its financial

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[24] Sornarajah, *supra* fn.19,315; I.Brownlie, *Principles of Public International Law* 537s(4th ed.1994).

[25] Art.2(2)(c) UNGA-Res.3281(XXIX), 28 UNYB 401ss(1974).

[26] Sornarajah, *supra* fn.19,363.

[27] *Banco Nacional de Cuba v. Chase Manhattan Bank*, USA, S.Ct, 66 ILR 438s(Aug.4,1981); Becker, *Just Compensation in Expropriation Cases: Decline and Partial Recovery*, ASIL Proceedings 343(1959); Murphy, *Limitations upon the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalization*, in 3 *The Valuation of Nationalized Property in International Law*,52s(R.Lillich,ed.1975); Schachter, *Compensation for Expropriation*, 78 AJIL 124(1984); Wölker, *Die Nationalisierungen in Frankreich 1981/82*, 43 ZAÖRV 274(1983); Cheng, *The Rational of Compensation for Expropriation*, 44 Grotius Transactions 294(1958-59).

[28] Asante, *International Law and Foreign Investment: A Reappraisal*, 37 ICLQ 596s(1988).

[29] Aréchaga, *Application of Rules of State Responsibility to the Nationalization of Foreign-Owned Property*, in *Legal Aspects of the New International Economic Order*, 222(K.Hossain ed.1980); Francioni, *Compensation for Nationalisation of Foreign Property*, 24 ICLQ 272(1975).

capacity have to be taken into account.[30] Moreover, in cases of large-scale takings in connection with a modification of the economic or social structure of a State less compensation is due.[31] Thus, particularly in cases of recent investments,[32] the book value method fulfills the standard required by international law.[33]

The takings are lawful, as they were neither discriminatory nor lacked public purpose. The book value as determined by Art.2(e) of Civil Law No.51 is appropriate, bearing in mind Pagonia's financial capacity and its status as a less developed country, and that the takings formed part of a larger reform plan in its cultural sector. Moreover, as foreigners started their investment in Pagonia's cultural sector most recently in 1991, the utilization of the book value method is in accordance with international law. Therefore, Pagonia is not obliged to pay any further compensation.

In any case, irrespective of whether the expropriations were lawful, as was shown above in Section I.A., a State may only afford diplomatic protection to shareholders in foreign companies if their direct rights are infringed. Consequently, the national State may only claim compensation for damages resulting from acts infringing direct rights of shareholders, *e.g.* the taking of shares, but not any financial losses sustained by the companies. Therefore, under the law of diplomatic protection Bretoria may only claim

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[30] Verwey/Schrijver, *supra* fn.12,20; cf. A.Akinsanya, *The Expropriation of Multinational Property in the Third World*,237(1980); Sohn/Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AJIL 560(1961); Art.2(2)(c) UNGA-Res. 3281 (XXIX), *supra* fn.25.

[31] Cf.S.Friedman, *Expropriation in International Law*,206s(1953); N.Schrijver, *Sovereignty over Natural Resources* 293s(1997).

[32] *AMINOIL Arbitration* (Kuwait *v.*AMINOIL), 21 ILM 1038s(Mar.24,1982).

[33] Goldman R.K./Paxman J.M., *Real Property Valuations in Argentina, Chile, and Mexico*, in 2 *The Valuation of Nationalized Property in International Law*, 162(R.Lillich ed.1975); Muller, *Compensation for Nationalization: A North-South Dialogue*,19 CJTL 44(1981); Art.15 Venezuelan Nationalization Law (Aug.29,1975),14 ILM 1492.

compensation for direct losses of Bretorian investors, but not for any financial losses sustained, or speculative future profits earned, by the Pagonian commercial entities.

C. THE CANCELLATION OF CONTRACTS IS CONSISTENT WITH INTERNATIONAL LAW.

Under international law the conduct of private persons not acting on behalf of the State does not constitute an act of the latter.[34] The alleged damage to Bretorian media distributors was caused by private television networks, and thus their acts cannot be attributed to Pagonia. In addition, a foreign investor must submit to the municipal law of the host State and "must take the risk of unfavorable amendments to that law, just as he takes the benefit of favorable amendments".[35] This is particularly true in case of regulatory measures by which the State does not receive any beneficial gain.[36]

Since Bretorian investors took advantage of operating in the new Pagonian market, they also have to bear the risk of being confronted with unfavorable amendments affecting the cultural sector. Pagonia does not obtain any beneficial gain by the cancellation of the contracts between private Pagonian networks and Bretorian media distributors. Moreover, the PCC regulation, based on Civil Law No.51, neither prescribes nor necessitates the cancellation of the contracts. The requirement that 75 per cent of the content of programming must be of Pagonian origin applies only to the prime listening and viewing hours, whereas there are no limitations during the remaining time. The Pagonian private

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[34] Art.11(1) *Draft Articles on State Responsibility*, Report of the ILC of its 27th session, YBILC,Vol.2,70(1975); *Case concerning United States Diplomatic and Consular Staff in Teheran*, (US *v.*Iran) 1980 ICJ 28ss(Judgm.of May 24).

[35] Akehurst, *supra* fn.11,96; cf.*Standard Oil Company Tankers*, (USA *v.*Reparation Commission) 2 RIAA 794(Aug.5,1926); Sornarajah, *supra* fn.19,300.

[36] A.Watts/R.Jennigs, *Oppenheim's International Law* 912(9th ed.1992); Brownlie, *supra* fn.24,535; Dolzer, *Expropriation and Nationalization*, in 2 EPIL 322 (R.Bernhardt ed.1995); Higgins, *supra* fn.11,330; *Elettronica Sicula Case* (US *v.*Italy) 1989 ICJ 65(Judgm.of Jul.20); *Too v.Greater Modesto Insurance Associates*, 23 Iran-USCTR 387(1989-III).

TV-networks were not obliged to cancel the contracts, but in fact might have upheld them.

While it might be argued that the invocation of *force majeure* was not justified and the Pagonian courts erred in confirming the terminations, nevertheless Pagonia cannot be held responsible for these decisions. It is a general principle of law that "a State is [...] not responsible for acts committed by judicial functionaries [...] in their official capacity" because "they are almost entirely independent of their government".[37] Besides, as the PCIJ confirmed in the *Lotus Case*, misapplication of municipal law by domestic courts cannot lead to a violation of international law, unless it amounts to a denial of justice.[38] This requires that the judicial organ acted in bad faith which, however, can never be presumed.[39]

Although Pagonian courts might have erroneously applied Civil Law No.51, there is no indication whatsoever that they did so in bad faith to prejudice Bretorian investors. Therefore, the court decisions do not amount to denial of justice. For all these reasons, the cancellation of contracts is not a violation of international law attributable to Pagonia.

D. THE PCC CONTENT REGULATION AND THE MINISTERIAL REGULATION ARE CONSISTENT WITH INTERNATIONAL LAW.

1. Pagonia is not bound by GATT/WTO principles.

Under Art.34 of the Vienna Convention on the Law of Treaties a treaty does not create either obligations or rights for third States without their consent.[40] While certain provisions of a multilateral treaty might be transformed into customary law, this process, however, must satisfy several conditions. First, as the ICJ affirmed in the *North Sea Continental Shelf Cases*, only specific provisions of a "fundamentally norm-creating character [...]

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[37] J.Tanaka,(sep.op.), *supra* fn.3,155.

[38] *The Lotus Case*, (Fr.*v.*Tk.),1927 PCIJ (Ser.A),No.10,24(Judgm.of Sept.7).

[39] *Putnam Case,*(US *v.*Mexico), 4 RIAA 153(Apr.15,1927); *Lac Lanoux Case*, (Sp.*v.*Fr.), 12 RIAA 305(Nov.16,1957); Vitányi, *International Responsibility of States for Their Administration of Justice*, 22 NILR 131,156(1975).

could be regarded as forming the basis of a general rule of law." The ICJ continued that provisions whose exact meaning and scope are controversial "raise [...] doubts as to the potentially norm-creating character of the rule".[41] Second, since State practice must be extensive and virtually uniform, only "a very widespread and representative participation" in a multilateral convention might support the formation of customary law.[42] It follows that any number of parties below quasi-universality hardly enables the assumption of extensive State practice.[43] Third, State practice must be accompanied by *opinio iuris*.[44] The presumption of *opinio iuris* is rebutted if a treaty allows for reservations and denunciations, or attracts amendments.[45] Finally, the mere fact of identical provisions in bilateral treaties does not offer conclusive evidence of customary law, as States may be concluding such treaties precisely because they believe that no customary rules exist on the subject-matter.[46] In any event, the party relying on a custom bears the burden of proving

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[40] Art.34,Vienna Convention on the Law of Treaties, 8 ILM 679(1969).

[41] *North Sea Continental Shelf Cases* (FRG *v.*NL/DK),1969 ICJ 42,para.72(Judgm.of Feb.2).

[42] *Ibid.*,42s,para.72; cf. *Legality of the Threat or Use of Nuclear Weapons*,1996 ICJ 258(Adv.Op. of Jul.8); Danilenko, *The Theory of International Customary Law*, 31 GYIL 28(1988); Baxter, *Treaties and Custom*, 129 RdC 73(1979-I).

[43] Cf. M.E.Villiger, *Customary International Law and Treaties* 157(2nd ed.1997).

[44] *North Sea Continental Shelf Cases*, *supra* fn.41,44; Akehurst, *Custom as a Source of International Law*, 47 BYIL 43(1974/75); cf. Marek, *Le problème des sources du droit international dans l'arrêt sur le plateau continental de la mer du nord*, 6 RBDI 63(1970).

[45] *North Sea Continental Shelf Cases*, *supra* fn.41,43,para.72; J.Padilla Nervo,(sep.op), *ibid.*,87; J.Petrén,(sep.op.), *Nuclear Tests Case* (Australia *v.*Fr.),1974 ICJ 305(Judgm.of Dec.20); Villiger, *supra* fn.43,156.

[46] Villiger, *supra* fn.43,189; cf.*Memorandum of US-Secretary of State Lansing*, Dec.1,1916, in G.Hackworth, 1 *Digest of Int'l.Law* 18s(1940); *The State (Duggan) v. Tapley*, Eire, S.Ct,18 ILR 338s(Dec.12,1950); A.Verdross/B.Simma, *Universelles Völkerrecht* 336(3rd ed.1984).

the existence of the customary norm.[47]

As Pagonia is not a member of the WTO, it is not bound by GATT/WTO provisions. Currently the WTO has 133 members which is clearly below the level of quasi-universality required by the ICJ. The possibility of making waivers or withdrawing from the GATT[48] evidences the lack of a norm-creating character of the GATT provisions.[49] The link between substantive provisions and structural exceptions in the GATT itself points to the high importance of the negotiated equilibrium of concessions and advantages between the parties. To vest the obligations of the GATT in Pagonia without providing its participation in the advantages of GATT schedules would ignore the core principle of reciprocity of the GATT. Thus, the principles of the WTO cannot be applied to Pagonia as customary international law.

2. Pagonia acts in conformity with international law on trade in services.

Even if the ICJ held the basic GATT/WTO principles applicable, the PCC regulation is in conformity with them. State practice confirms that broadcasting of films is a service[50] and thus regulated by the GATS. In this agreement the national treatment principle is not generally obligatory, but requires an additional commitment by each contracting party.[51] A

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[47] *Asylum Case*, (Columbia *v.*Peru),1950 ICJ 276s(Judgm.of Nov.20); *Case Concerning Rights of Nationals of the United States of America in Morocco*, (France *v.*USA),1952 ICJ 200(Judgm.of Aug.27); Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BYIL 296s(1965-66).

[48] Art.XXV GATT, 33 ILM 1154(1994);Art.XV WTO-Agreement,33 ILM 1144(1994).

[49] M.Hahn,*Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie*, 129(1996).

[50] *State v. Sacchi*, ECJ, 14 CMLRep.201(Apr.30,1974); *Procurateur du Roi v.Debauve*, ECJ, 31 CMLRep.393(Dec.5,1981); EEC-Directive 89/552, 32 O.J.,L298,23(1989); Declaration on Trade in Service, annexed to the Israel-US-FTA(1985), 24 ILM 679(1985); cf.Wilkins, *Television Without Frontiers: An EEC Broadcasting Premiere*, 14 Bost.Coll.ICLRev.206(1991).

[51] Art.XVII GATS, 33 ILM 1167(1994); Hahn, *Eine kulturelle Bereichsausnahme im* →

member which does not accept the national treatment commitment remains free to differentiate between national and foreign services.[52] Important WTO members, such as the EC and Canada, did not accept such commitments with respect to their film industries. Thus, State practice indicates that there is no general obligation of national treatment in trade in services. Therefore, the PCC regulation is in conformity with international law.

3. Pagonia acts in conformity with international law on trade in goods.

Even if the Court decided to apply the GATT/WTO provisions for trade in goods, Pagonia acts in conformity with the relevant agreements. Although Arts.I and III GATT seem to establish a trade-specific principle of non-discrimination,[53] this principle is inseparably linked with possibilities to differentiate for purposes of regional integration and furthering of less developed countries. Under Art.XXIV:5 interim agreements leading to a free trade area may depart from the non-discrimination rule.[54] Pagonia, as a future member of the free trade area RATS, is entitled to differentiate between members and non-members of this association.

Moreover, the GATT parties have granted an exception to the principles of Arts.I and III for the "development, financial and trade needs" of developing countries.[55] As a less-developed country, Pagonia is exempt from the application of the principle of non-

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Recht der WTO?, 56 ZaöRV 343(1996); cf. Petersmann, *The Transformation of the World Trading System*, 6 ECIL 202(1995).

[52] Weiss, *The General Agreement on Trade in Services 1994*, 32 CMLRev.1209(1995).

[53] Cf. W.Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht,*62(1990).

[54] Cf. Association of Greece with the EEC,L/1829,BISD 11S/150; Schoneveld, *The EEC and Free Trade Agreements*,26 JWT No.5,59(1994); cf. J.H.Jackson, *The World Trading System,*141(1989).

[55] Differential And More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries,L/4903,BISD 26S/203s(Nov.28,1979); cf. Rom, *Some Early Reflections on the Uruguay Round Agreement as Seen from the Viewpoint of a Developing Country*,28 JWT No.6,8(1994); J.H.Jackson, *Restructuring the GATT System,*19(1990);

discrimination for its special development needs. Hence, Pagonia is not bound by the principle of non-discrimination in trade and market access.

4. Pagonia's measures taken to protect its cultural identity come within valid exceptions to free trade principles.

Even if the principle of non-discrimination were applicable to Pagonia, the screen quotas as well as the regulation of the consortium of Pagonian publishers and the Minister of Culture are justified. Art.XX(f) GATT allows for measures to protect national culture if "imposed for the protection of national treasures of [...] historic [...] value." Language is a very important component of cultural identity[56] and must therefore be considered a "treasure of historic value".[57] The PCC content regulation and the Ministerial regulation were necessary to protect the Pagonian language in view of the increasing influence of the Bretorian language in the cultural sector and in the media. Since these measures fall within the scope of Art.XX(f), Pagonia is not bound by the non-discrimination principle and has acted in conformity with international law.

Art.III(10) GATT explicitly stipulates that the national treatment requirement of Art.III does not prevent any State from providing for special regulation for films in accordance with Art.IV. This Article, explicitly allowing screen quotas for cinematograph films, also extends to television.[58] Thus, the PCC content regulation is justified according to Art.IV.

Tokyo Declaration, *GATT Activities 1973*,8(Sep.14,1973).

[56] J.M.Mitchell, *International Cultural Relations*, 161(1986).

[57] Agreement on the Importation of Educational, Scientific and Cultural Materials, GATT-Doc.GATT/CP/12,GATT/TN.1/C/1.

[58] v.Bogdandy, *Europäischer Protektionismus im Medienbereich*, EuZW 16(1992); Salvatore, *Quotas on TV Programmes and EEC Law*, 29 CMLRev.988s(1992); Application of GATT to International Trade in Television Programs, GATT-Doc.L/1741 (Mar.13,1962).

5. Even if Pagonia was bound by the national treatment requirement, the acts taken come within the exception of cultural identity.

Under international law every State has the sovereign right to protect its cultural identity from foreign dominance. This right is often endangered by the "impact of the industrialized culture purveyed by the mass media".[59] Thus, content quotas for the media are often prescribed as a "necessity to preserve the richness and diversity of [...] cultural heritage".[60] Cultural tradition and national sovereignty are seen to be gravely imperiled by direct television broadcast.[61] Therefore, free trade agreements usually exempt cultural industries from obligations to provide free market access.[62] According to NAFTA[63] and the US-CFTA[64], radio and television broadcasting falls within the scope of "cultural industry" and is generally exempted. The Canadian Radio-Television and Telecommunications Commission has issued broadcast licenses and administers content requirements to promote Canadian culture.[65] Quotas on TV-programs are also prescribed in EEC's Directive 89/552.[66]

Pagonia introduced radio and television quotas to ensure the protection of its cultural

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[59] UNESCO&Culture, *Forms of self-expression: the intangible heritage*, http://www.unesco.org/culture/ch/intangible/intangible/intangible112a.htm.

[60] Statement of Roberto Barzanti, News of the E.C., EUROPE, July/Aug.,50(1989); cf. Filipek, *"Culture Quotas": The Trade Controversy over the European Community's Broadcasting Directive*, 28 Stan.JIL 351(1992).

[61] Freeman, *Direct Broadcast Developments and Directions: The National Sovereignty and Cultural Integrity Positions*, 74 ASILProc. 308(1980); cf. Conklin/Lecraw, *Restrictions on Foreign Ownership during 1984-1994: Developments and Alternative Policies*, 6 Transn.Corp. No.1,17s(1997).

[62] Cf. Hahn, *supra* fn.51,325.

[63] Art.2107 NAFTA,32 ILM 605(1993).

[64] Art.2005 US-CFTA,27 ILM 396(1988).

[65] Maule, *Trade and Culture in Canada*, 20 JWT 620(1986).

[66] EEC-Directive 89/552, supra fn.50.

identity in the most important communication sector. Pagonia sees substantial need to provide these measures, as it is faced with steadily increasing foreign influence: 25 per cent of the investment capital stems from Bretoria, the nation with the world's largest entertainment industry and economic domination unavoidably leads to cultural imperialism. Since radio and television quotas are an adequate measure to protect Pagonia's cultural identity the PCC regulation is consistent with international law.

II. PAGONIA ASKS THE COURT TO DECLARE THAT THE LEVEL OF PROTECTION AFFORDED COPYRIGHT OWNERS IN PAGONIA IS CONSISTENT WITH INTERNATIONAL LAW, AND PAGONIA IS NOT LIABLE TO COMPENSATE BRETORIA FOR ANY INJURY OCCURRING AS A RESULT OF ALLEGED COPYRIGHT INFRINGEMENTS IN PAGONIA.

A. BRETORIA IS NOT ENTITLED TO EXERCISE DIPLOMATIC PROTECTION ON BEHALF OF ITS NATIONALS.

As shown in Section I.A., local remedies must be exhausted before international proceedings may be instituted. Since none of the Bretorian copyright owners has attempted to do so, Bretoria is not entitled to exercise diplomatic protection on behalf of its nationals.

B. THERE IS NO OBLIGATION UNDER GENERAL INTERNATIONAL LAW TO PROVIDE FOR COPYRIGHT PROTECTION.

Pagonia is not a party to any relevant treaty protecting copyright. Therefore, an obligation for Pagonia to protect copyright could only arise from general international law.

1. The copyright treaties do not reflect customary international law.

As shown in Section I.D.1., only provisions of a fundamentally norm-creating character may crystallize into customary international law, provided there is very widespread and representative participation in the treaty amounting to quasi-universality. This process must be accompanied by *opinio iuris*, which however is not the case if the treaty allows for denunciations and attracts amendments.

First, the Berne Convention for the Protection of Literary and Artistic Works protects

authors and film-makers from unauthorized reproduction or use of their works.[67] These rights to reproduction and distribution, however, are subject to far-reaching limitations and frequent references to national legislation[68]; yet national copyright laws display enormous differences.[69] Most importantly, Art.9(2) permits the reproduction of protected works "in certain special cases", which equally applies to the right to distribution.[70] However, the interpretation of this provision is characterized by "total disharmony among the parties" to the Berne Convention.[71] The Universal Copyright Convention[72] does not even recognize a separate right to distribution and, particularly with respect to the limitations of the reproduction right, grants wider discretion than the Berne Convention.[73] The rights of phonogram producers which are neither covered by the UCC[74] nor by the Berne Convention[75] are subject to equally far-reaching limitations by virtue of Art.15 Rome

[67] Arts.2(6),9,14bis(1), Berne Convention for the Protection of Literary and Artistic Works[Berne Convention], Sept.9,1886, last revised at Paris, Jul.24,1971(amended 1979), 1161 UNTS 30.

[68] Arts 2bis, 10(1) and (2), 11bis(2),(3), 13(1) and (2), 14bis(2),(3) Berne Convention,*ibid.*

[69] Dreier, *The Cable and Satellite Analogy*, in *The Future of Copyright in a Digital Environment* 63(P.B.Hugenholtz ed.1996); cf. Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlements?*, 29 International Lawyer 106(1995).

[70] A.Nordemann *et al.*, *International Copyright* 145(1990).

[71] Dreier, *supra* fn.69,63; cf. Nordemann, *supra* fn.70,108s; Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HarvardILJ 372(1998); *Cumulative Digest of United States Practice in International Law 1981-1988*,Vol.III, 2830(M.Nash ed.,1995); Lee/Lewinski, *The Settlement of International Disputes in the Field of Intellectual Property*,18 IIC Studies 282(1996).

[72] Universal Copyright Convention[UCC], Sept.16,1955, revised at Paris, Jul.24,1971,943 UNTS 178.

[73] Art.IVbis UCC *supra* fn.72; Nordemann, *supra* fn.70,263s.

[74] Vaver, *The National Treatment Requirements of the Berne and Universal Copyright Conventions, Part Two*, 17 IIC 722(1986);

[75] Franklin, *Pay to Play: Enacting a Performing Right in Sound Recordings in the Age of* →

Convention[76] and by Art.6 Phonogram Convention[77], respectively.[78] Finally, TRIPs[79], containing a mere reference to the Berne and Rome Conventions, explicitly incorporates the limitations and exceptions to the rights granted under these conventions.[80]

In view of their controversial as well as indeterminate meaning and scope, the rights to reproduction and distribution lack a fundamentally norm-creating character.

Second, none of these conventions meets the requirement of quasi-universality: The Berne Convention currently has 133 parties[81], whereas 95 States are parties to the UCC[82]. As regards the conventions providing for the protection of producers of phonograms, both the Rome and the Phonogram Conventions only have 58 parties.[83] The TRIPs Agreement,

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Digital Audio Broadcasting, in A.D'Amato/D.E.Long(eds.), *International Intellectual Property Law* 106(1997); Vaver, *The National Treatment Requirements of the Berne and Universal Copyright Conventions, Part One,* 17 IIC 594s(1986); Ulmer, *The 'Droit de Suite' in International Copyright Law,* 6 IIC 21(1975); S.P.Ladas, *The International Protection of Literary and Artistic Property,*425(1938).

[76] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations[Rome Convention], Oct.26,1961, 496 UNTS 43.

[77] Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms[Phonogram Convention], Oct.29,1971, 866 UNTS 67.

[78] S.M.Stewart, *International Copyright and Neighboring Rights,*250(1989); Ulmer, *The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms,* 3 IIC 324ss(1972).

[79] Agreement on Trade-Related Aspects of Intellectual Property Rights[TRIPs], Apr.15,1994, 33 ILM 1197.

[80] Arts.9, 13, 14(6) TRIPs, *supra* fn.79.

[81] Berne Convention, *supra* fn.67, Status as of Sept.22,1998, http://www.wipo.org/eng/ratific/e-berne.htm.

[82] UCC, *supra* fn.72, Status as of Feb.15,1995, IGC/(1971)X/3.

[83] Rome Convention, *supra* fn.76, Phonogram Convention, *supra* fn.77, Status as of Jan.1,1999, Multilateral Treaties Deposited with the Secretary-General, ST/LEG/SER.E, http://www.un.org/Depts/Treaty.htm.

which covers authors' as well as neighboring rights, has been ratified by 133 States.[84]

Third, the fact that all these conventions stipulate the faculty of denunciation[85] and that the Berne Convention has attracted several amendments[86] show the lack of *opinio iuris.* This deficiency is also evidenced by the recent Chinese-US dispute over intellectual property rights. In 1992, the US demanded the People's Republic of China to change its copyright law. The US Trade Representative pressured China to make concessions in order to avoid punitive tariffs under the "Special 301" provisions.[87] The US argued that the Chinese copyright law was unreasonable and constituted a restriction on US commerce; they, however, did not invoke their "international legal rights" as also stipulated in "Section 301".[88] Furthermore, the US acted similarly against Thailand, Taiwan and other states.[89] If there had existed any obligation under customary international law, the US would have relied on their international legal rights and not on reasonableness.

For all these reasons, no rule of customary international law has evolved as regards

[84] TRIPs, *supra* fn.79, Status of Dec.20,1998, http://www.wto.org/wto/about/organsn6.htm.

[85] Art.35 Berne Convention, *supra* fn.67; Art.XIV UCC, *supra* fn.72; Art.28 Rome Convention, *supra* fn.76; Art.12 Phonogram Convention, *supra* fn.77; Art.XV WTO-Agreement *supra* fn.48.

[86] Paris (1896), Berlin(1908), Berne(1914), Rome(1928), Brussels(1948), Stockholm(1967), Paris(1971) and Amendment of 1979.

[87] 19 USC Secs.2412,2242, http://www4.law.cornell.edu/uscode/19/2412.text.html; cf. Sik, *Sino-US Dispute Over Intellectual Property Rights*, 2 AsianYIL 318(1992); Feder, *Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, but You Can't Make it Drink*, 37 VJIL 239ss(1996).

[88] Section 301 of the US Trade Act 1974,19 USC Sec. 2411(a)(1)(B)(ii), (d)(4), http://www4.law.cornell.edu/uscode/19/2412.text.html.

[89] USTR, *Section 301 Table of Cases*, http://www.ustr.gov/reports/301reports/act301.htm; cf. *Report to Congress on Section 301 developments required by Section 309(a)(3) of the Trade Act of 1974* (Jan.1995-Jun.1996), http://www.ustr.gov/reports/301report/report.html; Getlan, *TRIPs and the Future of Section 301: A Comparative Study in Trade Dispute Resolution,* 34 CJTL 174(1995).

copyright protection.

2. Copyright protection is not a general principle of law.

A comparative study has revealed that due to a "wide divergence of approaches among domestic legal systems comprehensive and effective copyright protection is not given to authors [...] and producers in national laws" [90] Consequently, there is no general principle of international law requiring copyright protection.[91] States which are not parties to the relevant conventions are therefore not obliged to protect intellectual property.[92] Therefore Pagonia is not bound by general international law to provide copyright protection.

3. National treatment as defined by the copyright treaties is not a norm of customary international law.

The scope and application of the national treatment requirement has emerged as an issue on which there is considerable division between the parties to the Berne Convention.[93] In addition, it is subject to several exceptions[94] which have been widely resorted to.[95] The fact that Art.6 Berne Convention explicitly allows for discrimination of nationals of non-parties indicates that there is no obligation to national treatment outside the Convention. Similarly, most countries which protect recordings and cinematographic

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[90] J.A.L.Sterling, *Intellectual Property Rights in Sound Recordings, Film & Video*,408(1992); Helfer, *supra* fn.71,373.

[91] F.E.Skone James/E.P.Skone James, *Copinger and Skone James on Copyright*, 403(10th ed.1965); cf. Freedberg-Swartzburg, *Facilities for the Arbitration of Intellectual Property Disputes*, 8 HagueYIL70(1995).

[92] M.W.Haedicke, *Urheberrecht und die Handelspolitik der Vereinigten Staaten von Amerika*,180(1997).

[93] Lee/Lewinski, *supra* fn.71,282; Doane, *TRIPs and International Intellectual Property Protection In Age of Advancing Technology* in A.D'Amato/D.E.Long(eds.) *supra* fn.75,276.

[94] Arts. 2(7),7(8),14ter Berne Convention, *supra* fn.67; cf.Art.3 TRIPs, *supra* fn.79.

[95] Jehoram, *The EC Copyright Directives, Economics and Authors' Rights*, 25 IIC 826(1994).

works of foreigners do so only on the basis of reciprocity amounting to treatment differing from case to case. Lacking a fundamentally norm-creating character, at present, the national treatment requirement is not generally accepted as part of customary law.[96]

Consequently, Pagonia is not obliged to grant national treatment to foreign copyright owners.

4. The ICJ has no competence to adjudicate matters essentially belonging to a State's domestic jurisdiction.

In the present case no norm of general international law is applicable. Art.38(1) of the Statute of the ICJ and Art.2(a) of the Special Agreement, however, confine the powers of the Court to decide disputes "in accordance with international law". Consequently, the ICJ has no competence in matters to which no international norms apply.[97] Moreover, Art.2(7) of the Charter of the UN stipulates that no UN-Organ - including the ICJ - may intervene in "matters which are essentially within the domestic jurisdiction of any State."[98] Matters in which the State is not bound by international obligations belong to this reserved domain where "a State is free to adopt whatever policy it thinks best".[99]

The ICJ is therefore not competent to adjudicate the alleged copyright infringements.

C. EVEN IF THE COURT HOLDS THAT COPYRIGHT PROTECTION IS REQUIRED UNDER GENERAL INTERNATIONAL LAW, PAGONIA COMPLIES

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[96] Sterling, *supra* fn.90,383; cf. Katzenberger, *General Principles of the Berne and the Universal Copyright Conventions*, 11 IIC Studies 45(1989); *Liebeshändel in Chioggia*, Ct.App.Koblenz, 5 GRUR.Int. 164ss(Jul.14,1968); *Zauberflöte*, Ger.S.Ct., 1 GRUR.Int. 60ss(Nov.20,1986); *Game Boy*, Austr.S.Ct., 8-9 GRUR.Int.677ss(Dec.17,1991).

[97] J.Lauterpacht(diss.op.) in *Interhandel Case*, *supra* fn.1,122; S.Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*,24(1995).

[98] Ouchakov, *La compétence interne et la non-intervention dans le droit international contemporain*, 141 RdC 47(1974-I); Verdross/Simma, *supra* fn.46,160.

[99] Fawcett, *General Course on Public International Law*, 132 RdC 392(1971-I); Schachter, *International Law in Theory and Practice*, 178 RdC 242(1982-V); Waldock, *The Plea of Domestic Jurisdiction before International Legal Tribunals*, 31 BYIL 97(1954).

THEREWITH.

1. The international copyright regime grants preferential treatment to developing countries.

In international trade, developing countries generally enjoy "preferential and non-reciprocal treatment [...] in all fields of international economic cooperation."[100] Under the TRIPs, developing countries are thus granted discretion with respect to their economic problems, particularly within the framework of Arts.7 and 8.[101] Furthermore, Art.65(2) recognizes preferential treatment for developing countries by providing for an extended period of at least five years to implement its provisions.[102]

A higher level of copyright protection would be detrimental to the socio-economic development of Pagonia. Finally, if Pagonia were a party to TRIPs, it would as a developing country not be obliged to adhere to its stipulations for a period of five years as of January 1,1995. This, of course, is even more true as Pagonia is not a party to TRIPs. Therefore, Pagonia enjoys preferential treatment.

2. Criminal remedies are an appropriate means for copyright protection.

International conventions generally do not prescribe how protection of copyright owners should be enforced.[103] Thus, each State may determine itself the methods of protection.[104] Criminal proceedings to be initiated by public prosecution combined with the

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[100] UNGA-Res.3201(S-VI), Declaration on the Establishment of a New International Economic Order, Para.4(n), 28 UNYB 324(1974); cf. UNGA-Res.3281(XXIX) Art.18, *ibid.*, 403.

[101] Reichman, *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement*, 29 The International Lawyer 387(1995-II).

[102] Art.65(2) TRIPs, *supra* fn.79; cf. Preamble TRIPs, *ibid;* Arts.I,III Appendix Berne Convention, *supra* fn.67; Arts. Vbis, Vquater UCC, *supra* fn.72; Annex 1718.14 NAFTA, *supra* fn.63.

[103] Cf. Dreier, *TRIPs and the Enforcement of Intellectual Property Rights*,18 IIC Studies 249ss(1996).

[104] Cf.*eg.* Art.I UCC, *supra* fn.72; Nordemann, *supra* fn.70,217s.

possibility of penal sanctions constitute sufficient means of copyright protection.[105]

Hence, the Pagonian Criminal Code provides for adequate protection of the reproduction and distribution rights by defining theft not only as "depriving another of his property", but also as deprivation of the "right to use his property as he sees fit, without his permission". Pagonia also provides for fines and imprisonment up to seven years for "theft". Therefore, Pagonia affords adequate copyright protection.

3. Even if the Court considers that civil remedies should be available, Pagonia complies with this requirement.

Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.[106] Every kind of personal property can be the subject of conversion if it is tangible or tangible evidence of title to intangible property.[107] With regard to copyright, this evidence lies in the property in the work created. It is the particular manifestation making up a work which is protected, not the idea behind it.[108] The owner of goods may sue the taker or any person who has possession of them, in conversion, for an order for delivery of the goods and, alternatively or in addition, for damages.[109] Conversion for the protection of copyright owners is recognized by several States.[110] Moreover, conversion, having been considered too 'draconian' a remedy, was

[105] Art.3 Phonogram Convention, *supra* fn.77; Sterling, *supra* fn.90, 12.

[106] 89 CJS *Trover and Conversion* §1(1955); S.M.Speiser *et al.*(eds.), 7 *The American Law of Torts* §24:1(1990); 45 *Halsbury's Laws of England* §1422(4th ed.1985).

[107] N.Y.-Roystone *v.* John H. Woodbury Dermatological Institute, 122 N.Y.S. 444, 67 Misc. 265; Pieper, *Multistate Law – Law of Torts*, 37(1989-1990); CJS, *supra* fn.106, §11.

[108] Art.9(2) TRIPs, *supra* fn.79; cf. W.R.Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 8(3rd ed.1996).

[109] *Halsbury's Laws of England, supra* fn.106, §1452; cf. Pieper, *supra* fn.107, 42s.

[110] *E.g.*Sec.116(1A), Australian Copyright Act 1968,http://www.austlii.edu.au./au/legis/cth/consol_act/ca1968133/index.html; Sec.58 Indian Copyright Act 1957, →

repealed by the 1988 United Kingdom Copyright Act.[111]

Consequently, as Pagonia recognizes conversion as a private cause of action, it is in compliance with international law.

D. PAGONIA IS NOT OBLIGED TO PAY COMPENSATION.

A State is only responsible to pay compensation if it has breached an international obligation. Acts of private persons not acting on behalf of the State are not attributable to the latter.[112] Thus, an injury to an alien by private persons does not entail the responsibility of the State if the alien has the judicial possibility to remedy the wrong done.[113]

As shown above, Pagonia has not violated international law. In the alternative, it is submitted that the alleged copyright infringements were caused by private persons, who did not act on behalf of Pagonia. Finally, the Bretorian copyright owners who had free access to courts did not even attempt to remedy the alleged wrong before civil courts in Pagonia. Thus, Pagonia is not responsible to pay any compensation to Bretoria.

E. PAGONIA IS NOT UNJUSTLY ENRICHED BY THE ALLEGED COPYRIGHT INFRINGEMENTS.

The theory of unjust enrichment does not form part of general international law.[114] It is not a normative principle or general rule from which specific decisions can be logically

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http://caselaw.delhi. nic.in/cgi/nph-bwcgi/BASIS/indweb/all/actretr/SF.

[111] Cf. Stewart, *supra* fn.78,518.

[112] Art.11(1) *Draft Articles*, *supra* fn.34.

[113] C.F.Amerasinghe, *State Responsibility for Injuries to Aliens*, 98(1967); *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens,* 55 AJIL 550(1961); Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law*, 14 CanYIL 73ss(1976).

[114] *Dickinson Car Wheel Company (USA) v. United Mexican States*, 4 RIAA 676(Jul.1931); cf. Kunz, *Rechtshandlungen, Natürliche*, in K.Strupp,2 *WVR* 340(1925); Ripert, *Les règles du droit civil applicables aux rapports internationaux*, 44 RdC 631(1933-II).

derived, as the techniques by which reparation may be achieved are rudimentary.[115]

Even if the Court considers unjust enrichment to be a general principle, the compensation due has to reflect the enrichment of the State: Where the State has not been enriched, no compensation is payable at all.[116] Moreover, the extent of the enrichment must be ascertained at the time the action is brought; only benefits remaining at this date are to be restituted.[117]

Pagonia as a State is by no means enriched by the alleged copyright infringements. To the contrary: any underground market is, by its very nature, detached from the national economy. The profits are not covered by the national tax laws and flow into pockets of individual copyright infringers. Furthermore, cheap foreign audio- and videocassettes sold in the underground market attract buyers and lead to a decrease in demand for equivalent, but more expensive domestic products. Consequently, Pagonia is not enriched, but even harmed by the underground market.

However, even if Pagonia were enriched, the extent of the alleged "enrichment" is vague, as the accuracy of the estimated loss according to the WIPO report is entirely speculative, since there is neither a proper basis for calculating, nor accurate information available to allow WIPO to reach the conclusions it did. Therefore, Pagonia is not liable to compensate Bretoria for any injury as a result of alleged copyright infringements.

May it therefore please the Court to adjudge and declare that

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[115] Schreuer, *Unjustified Enrichment in International Law*, 22 AJCL 301(1974); *Second Report on succession in respect of matters other than treaties*, by the Special Rapporteur M.Bedjaoui, II YBILC 95(1969); C.Rousseau, I *Droit international public*, 380ss(1970).

[116] *Sea-Land Service, Inc. v.Iran*, (US v.Iran), 6 Iran-USCTR 169s(Jun.22,1984); *Lena Goldfields Arbitration*, 5 AD 3s(Sept.2,1930); Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RdC 299s(1978-I); Fombad, *The Principle of Unjust Enrichment in International Law*, 30 CILSA 125(1997).

[117] *Direction Générale des Ports et Voies de communication par eau v. A. Schwartz et Cie*, 7 TAM 741s(Mar.31,1927); *Didier v.Cohn et Pink*, 8 TAM 801(Jan.31, 929).

(1) The acts taken by Pagonia to protect its cultural identity are consistent with international law, and Pagonia is not liable to pay compensation for any injury suffered as a result thereof.

(2) The level of protection afforded copyright owners in Pagonia is consistent with international law, and Pagonia is not liable to compensate Bretoria for any injury occurring as a result of alleged copyright infringements in Pagonia.