Team 290 - R

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

CASE CONCERNING
CULTURAL IDENTITY AND INTELLECTUAL PROPERTY

REPUBLIC OF BRETORIA
APPLICANT

v.

KINGDOM OF PAGONIA
RESPONDENT

SPRING 1999

MEMORIAL FOR THE RESPONDENT

1999 PHILLIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION BRIEFS

MEMORIAL FOR RESPONDENT

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CASE CONCERNING CULTURAL IDENTITY AND INTELLECTUAL PROPERTY

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STATEMENT OF JURISDICTION

Pagonia and Bretoria have submitted the settlement of their dispute by special agreement to this Court, and both parties have accepted the jurisdiction of this Court. Accordingly, this Court has jurisdiction pursuant to art. 36(1) of the Statute of the International Court of Justice.

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STATEMENT OF FACTS

The Kingdom of Pagonia is a small, developing nation with a rich cultural, linguistic, and religious heritage. [Clarifications No. 1, 3; Compromis at 10, 2.] Prior to 1975, Pagonia was almost entirely isolated from the outside world. In 1975, Pagonia overthrew its totalitarian regime and took the first steps toward democratic government and a privatized market economy. [Compromis at 3-4.] Other than joining the United Nations in 1965 and expressing interest in membership in a regional trade association in recent years, Pagonia has steadfastly followed its own path – outside the agenda of international organizations. [Clarification No. 3, Compromis at 27, 29.]

Pagonia's cultural sector was not prepared for the foreign invasion that followed the overthrow of the old regime. After the revolution, foreign language and literature courses have become the most popular courses at Pagonian universities, while enrollment in Pagonian language and literature classes has fallen by half. [Compromis at 5.] There was a substantial influx of foreign language books, audio materials, and videocassettes, with significant sales through an underground market. [Compromis at 5-6.] And the cultural sector, especially in publishing and television broadcasting, came more and more under foreign domination. By 1991, a majority of the annual net income of Pagonia's cultural sector was from the sale of imported foreign language material, and soon thereafter, every Pagonian firm in the cultural sector but one had foreign owners. [Compromis at 10, 14.]

In 1988, Pagonians concerned with the threat to their culture and heritage formed the Pagonian Cultural Watch Group. This group aimed to prevent the dilution of Pagonian culture by the foreign invasion. [Compromis at 11.] Such concerns were apparently widespread among the Pagonian people – democratic elections in 1994 propelled the group's founder, Madeleine Crispell,

to Parliament with a mandate of preventing the pollution of Pagonian culture. [Compromis at 15.] Ms. Crispell proposed a number of bills directed at the Pagonian cultural sector. [Compromis at 16.] Although Ms. Crispell had inherited a majority interest in an entirely Pagonian-owned publishing company that devoted itself to the production of Pagonian language literature two years after founding the Pagonian Cultural Watch Group, her continued ownership interest in this company after her election to Parliament presented no problem under Pagonian law. [Compromis at 12, 14; Clarification No. 4.]

In 1997, other democratically elected members of the Pagonian Parliament joined with Ms. Crispell in passing a bill that became Civil Law No. 51. [Compromis at 16.] This law responded to the foreign invasion of Pagonia's cultural sector by prohibiting foreign majority ownership of companies operating in the cultural sector and by authorizing Pagonia's Ministry of Culture and regulatory agencies to take other steps to protect Pagonian culture. [Compromis at 16.]

With respect to foreign majority ownership, the law provided for voluntary sale by foreign majority owners within a given period, after which the Ministry of Culture could acquire remaining foreign majority interests for "book value" as shown on the companies' balance sheets and then auction these interests to Pagonian nationals with a proven commitment to Pagonian culture. [Compromis at 16; Clarification No. 12.] Some foreign investors arranged sales immediately after the law passed. Others waited out the prescribed period and received compensation as determined by Pagonian courts based on independent expert valuation reports. [Compromis at 17-19.]

With respect to the other provisions of the law, the Ministry of Culture enacted a regulation to ensure that imported periodicals could not publish exclusively in foreign languages. [Compromis at 23.] In addition, the Pagonian Communications Commission adopted regulations providing for

minimum Pagonian content in radio and television broadcasts based on a complicated formula to quantify content. [Compromis at 20.] In this new regulatory framework, the four Pagonian television networks, all privately owned, cancelled contracts for foreign television programs and films that they felt were no longer needed. [Compromis at 21; Clarification No. 6.]

The Republic of Bretoria, a developed nation of 46 million people, has the largest entertainment industry in the entire world. [Clarifications No. 1, 3; Compromis at13.] Bretoria has made a number of complaints to Pagonia on behalf of Bretorian corporations operating in Pagonia's cultural industry. Bretorian investment had constituted roughly one quarter of the foreign investment in the Pagonian cultural sector. [Compromis at 13.] Bretoria has alleged "expropriation" of this investment. [Compromis at 25.] Forty-two per cent of television programs broadcast in Pagonia in the last seven years have been Bretorian. [Clarification No. 17.] Bretoria has alleged "expropriation" of rights under television contracts. [Compromis at 25.] And a particular Bretorian publisher, Benjamin Publications, had taken exception to the requirement of selling bilingual products in Pagonia. [Compromis at 24.] Bretoria has alleged breaches of supposed international trade principles. [Compromis at 25.]

In addition, Bretoria has complained that some of its nationals have allegedly had unlicenced copies of their copyrighted materials sold on Pagonia's underground market. [Compromis at 25.] Despite its circumstances as a developing country, Pagonia has taken steps against the underground market. Pagonian criminal law provides for the prosecution of those who commit a theft of intangible property, and there have been many successful prosecutions of copyright pirates under this law. [Compromis at 9, Clarification No. 7.] Moreover, Pagonian civil law provides a possible remedy for copyright infringement via an action akin to "conversion". [Clarification No. 15.)

Nonetheless, Bretoria has also taken it upon itself to claim compensation for Bretorian copyright holders. [Compromis at 28.]

To settle the dispute by neutral adjudication, Pagonia consented to Bretoria's demand that the dispute be submitted to the International Court of Justice. [Compromis at 27-28.] The parties submitted a joint *compromis* pursuant to art. 40(1) of the Statute of the International Court of Justice.

QUESTIONS PRESENTED

Pagonia asks the Court:

1. Whether Pagonia's cultural policy was legal under international law;

2. Whether Pagonia's limitation of foreign ownership in its cultural sector was lawful;

3. Whether Pagonia is obligated to compensate Bretorian production companies whose contracts were cancelled by Pagonian television companies;

4. Whether Pagonia's actions violated any applicable standard of national treatment;

5. Whether Pagonia's copyright protection is consistent with international law.

SUMMARY OF THE PLEADINGS

Pagonia has the right to have a cultural policy. Pagonia's sovereignty and the Pagonian people's right of self-determination include the right to pursue cultural development. Pagonia's specific policies are consistent with the practice of numerous states that have developed similar or identical policies.

Pagonia's limitation of foreign ownership in its cultural sector is consistent with international law. Pagonia has an inherent right to expropriate or nationalize, and the Charter of Economic Rights and Duties of States identifies a principle of deference to an expropriating state's domestic law. In the alternative, because it acted lawfully by expropriating for a valid public purpose and without unacceptable discrimination, Pagonia did not have to provide a *restitutio* level of compensation. Rather, it had only to provide compensation that was appropriate considering all relevant circumstances. Pagonia's payment of book value met this standard and higher standards as well.

Pagonia is not obligated to compensate the Bretorian television companies whose contracts were cancelled. Contractual rights not tied to tangible assets have not been and are not now recognized as property for the purposes of the law of expropriation.

Pagonia is not liable for a breach of any applicable "national treatment" standard. Pagonia has not signed any treaty committing to this standard. There cannot be a customary norm of national treatment, because trade is about special economic relationships that do not give rise to custom. Further, even if custom could apply, Bretoria has failed to prove the *opinio juris* for national treatment being custom.

Even if there is a national treatment requirement, Pagonia's cultural policy is not subject to it. Pagonia is a persistent objector and thus outside any custom that exists. Further, there is no

consensus that national treatment applies to the cultural sector, so it is effectively outside any custom that exists. Moreover, when Pagonia protected its cultural sector, it protected an industry under grave threat, thus qualifying for a valid exception to national treatment.

Finally, Pagonia's protection of copyright complies with international law. First, Bretoria's complaint to this Court is inadmissible because Bretorian nationals have not exhausted their local remedies. Second, because it is bound neither by treaty nor by custom to a minimum standard of copyright protection, Pagonia is free to determine its own standard. Third, even if Pagonia is subject to international norms, it meets the most stringent standards. Pagonia has effective criminal and civil remedies that are available to nationals and non-nationals alike.

I. Pagonia has a right under international law to develop its own cultural policies to protect its cultural identity.

Pagonia is a sovereign state, and the people of Pagonia have a right to self-determination.[1] The International Court of Justice has recently strongly affirmed the principle of self-determination.[2] The special significance and universal acceptance of the right of self-determination have led to its recognition as a norm of customary international law and *jus cogens.*[3]

The Pagonian people's right of self-determination includes their right to "pursue their economic, social and cultural development."[4] The Pagonian people acted through the democratic process to pursue the cultural development flowing directly from their right of self-determination. The Committee on Economic, Social and Cultural Rights has interpreted art. 15 of the *International Covenant on Economic, Social and Cultural Rights* as implying that a state has both a right and a duty to promote and protect its culture from foreign cultural influences.[5] Pagonia's cultural policy promotes and protects Pagonian cultural identity by implementing changes in three areas. First, the policy brings Pagonia's cultural industry under the control of Pagonians who have committed themselves to promoting Pagonian culture in the operation of their businesses by mandating majority

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[1] *Charter of the United Nations*, 26 June 1945, art. 1, para. 2.

[2] *Case Concerning East Timor (Portugal v. Australia)*, [1995] I.C.J. Rep. 90 at 102.

[3] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein, Germany: N.P. Engel, 1993) at 7.

[4] *International Covenant on Civil and Political Rights,* 19 December 1966, 999 U.N.T.S. 171, art. 1, para. 1 [hereinafter *I.C.C.P.R.*]; *International Covenant on Economic, Social and Cultural Rights,* 19 December 1966, 999 U.N.T.S. 3, art. 1, para. 1 [hereinafter *I.C.E.S.C.R.*]; *Declaration on the Right to Development*, GA Res. 128, UN GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/41/925 (1986), pmbl., para. 6.

[5] See R. O'Keefe, "The 'Right to Take Part in Cultural Life' Under Article 15 of the ICESCR" (1998) 47 I.C.L.Q. 904 at 919-921.

Pagonian ownership of firms in Pagonia's cultural sector. Second, the policy takes back control of Pagonian airwaves by introducing cultural content requirements on radio and television broadcasts. Third, the policy ensures that Pagonians can read in their own language by requiring that foreign magazines be bilingual in format, with Pagonian as the dominant language.[6]

Pagonia's measures under Civil Law No. 51 are consistent with the practice of many states which have exercised their sovereign rights to protect their cultural identities. For example, with respect to foreign ownership, the United States, like Pagonia, has recognized the perils of foreign influences on the cultural sector and restricts foreign ownership of media corporations.[7] The United Kingdom's latest version of its *Broadcasting Act* maintains similar restrictions.[8] Many other OECD countries also have limits on foreign ownership in their cultural sectors.[9] South Africa has recently implemented restrictions on foreign ownership of television licensees.[10] Further, numerous states have enacted content requirements or other measures of cultural protectionism.[11] These specific examples of state practice show that Pagonia's acts, flowing directly from Pagonia's status as a sovereign state and the Pagonian people's right of self-determination, are legitimate.

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[6] Compromis at 16; Clarification No. 12; Compromis at 20, 23.

[7] 47 U.S.C. s. 310(b) (1994).

[8] *Broadcasting Act 1996* (U.K.), 1996, c. 55, s. 5(1)(a).

[9] Organisation for Economic Co-Operation and Development, *National Treatment for Foreign-Controlled Enterprises* (Paris: OECD, 1993) at 63-64 (Australia), 74 (Canada), 87-88 (France), 91 (Greece), 111 (Portugal).

[10] *Independent Broadcasting Authority Act, 1993* (Act 153 of 1993), as amended by *IBA Amendment Act, 1995* (Act 36 of 1995).

[11] T.W. Chao, "GATT's Cultural Exemption of Audiovisual Trade: The United States May Have Lost the Battle But Not the War" (1996) 17 U. Pa. J. Int'l. Econ. L. 1127 at 1148.

II. Pagonia has lawfully limited foreign ownership in its cultural sector.

A. Pagonia had a right to alter the ownership in its cultural sector based on its sovereignty and right to cultural self-determination.

Pagonia's sovereignty and the Pagonian people's right of self-determination imply a right to alter the ownership in Pagonia's cultural sector. Highly qualified legal publicists have stated that nationalization or expropriation measures are lawful exercises of state sovereignty.[12] International tribunal decisions have held that a state's right to nationalize or expropriate is both unquestionable and universally accepted and have asserted that this right is derived from a state's national sovereignty.[13] The right of states to expropriate or nationalize has been recognized in United Nations General Assembly Resolutions,[14] which provide persuasive evidence of international law.[15] Pagonia is entitled to expropriate foreign interests in its cultural sector.

United Nations General Assembly Resolution 1803 has been advocated by developed countries as a statement of the customary international law standard for a lawful expropriation, requiring a valid public purpose, non-discrimination, and a minimum standard of compensation,

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[12] E. Jiménez de Aréchaga, "State Responsibility for the Nationalization of Foreign Owned Property" (1978) 11 N.Y.U.J. Int'l L. & Pol. 179 at 180; I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990) at 532.

[13] *Texaco Overseas Petroleum Co. and California Asiatic Oil Co.* v. *Libya (Texaco v. Libya)* (1977),17 I.L.M. 1 at para. 59; *Amoco International Finance Corp.* v. *Iran (U.S. v. Iran)* (1987), 15 Iran-U.S.C.T.R. 189 at para. 22.

[14] *Resolution on Permanent Sovereignty Over Natural Resources*, GA Res. 1803 (XVII), UN GAOR, 17th Sess., Supp. No. 17, UN Doc. A/S217 (1962), 17; *Charter of Economic Rights and Duties of States*, GA Res. 3281 (XXIX), UN GAOR, 29th Sess., Supp. No. 31. U.N. Doc. A/9631 (1974), 50.

[15] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. The United States)*, [1986] I.C.J. Rep. 14; B. Sloan, "General Assembly Resolutions Revisited (Forty Years After)" (1987) 58 B.Y.I.L. 39.

referred to as "appropriate compensation".[16] Although this standard was once representative of customary international law on expropriation[17], this is no longer the case. These principles have been explicitly challenged and rejected by developing states.[18] There can be no custom where a substantial number of states do not accept the provisions and do not feel themselves bound by them.[19] Since Resolution 1803 has the support of only developed states with similar types of economic systems, it can no longer represent a statement of customary international law.

Extensive support among developing countries for the Charter of Economic Rights and Duties of States demonstrates a rejection of Resolution 1803's standards.[20] The Charter "is regarded by many states as an emergent principle, applicable *ex nunc*."[21] It asserts that every state has the right "[t]o nationalize, expropriate or transfer ownership of foreign property" while paying "appropriate compensation that takes into account all circumstances that the State considers pertinent."[22] It does not include any requirements for a valid public purpose or non-discrimination,

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[16] GA Res. 1803, *supra* note 14; *Texaco Case*, *supra* note 13; *Aminoil Case* (*Kuwait* v. *American Independent Oil Co.*) (1982), 21 I.L.M. 976; *Amoco Case*, *supra* note 13; *SEDCO Case* (1986), 25 I.L.M. 629.

[17] *Texaco Case*, *supra* note 13; *Aminoil Case*, *supra* note 16; *Amoco Case*, *supra* note 13; *SEDCO Case*, *supra* note 16.

[18] GA Res. 3281, *supra* note 14; GA Res. 3171 (XXVIII) (1973), 68 A.J.I.L. 381 (1974); *Declaration on the Establishment of a New International Economic Order*, GA Res. 3201 (S-VI) 6th Sess., UN Doc. A/9956 (1974), 13 I.L.M. 715 (1974); R. Wallace, *International Law*, 3rd ed. (London: Sweet & Maxwell, 1997) at 187.

[19] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, [1969] I.C.J. Rep. 3.

[20] Wallace, *supra* note 18 at 187.

[21] Brownlie, *supra* note 12 at 542.

[22] GA Res. 3281, *supra* note 14, art. 2, para. 2(c).

and it provides that any controversy over the amount of compensation payable for a nationalization should be resolved under the domestic law of the nationalizing state.[23]

As a sovereign state and a developing country, Pagonia claims the deference granted by the Charter of Economic Rights and Duties of States. Pagonia acted to regain control over its cultural sector by ensuring that its owners were committed to Pagonian culture.[24] Pagonia developed a compensation standard for cultural firms, and its courts carefully administered this standard, even to the extent of using independent valuations.[25] Pagonia acted within its sovereign rights.

B. In the alternative, Pagonia met stringent standards in altering the foreign ownership of its cultural sector.

1. Pagonia has altered the ownership in its cultural sector for a valid public purpose.

Some international judicial and arbitral decisions assert that for expropriation to be lawful, it must have a valid public purpose.[26] However, it has been held that:

> A precise definition of "public purpose" for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested. It is clear that, as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that states, in practice, are granted extensive discretion.[27]

Invalid public purposes include purely financial purposes (although financial considerations will not

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[23] GA Res. 3281, *supra* note 14.

[24] Clarification No. 12

[25] Compromis at 16, 19.

[26] *Amoco Case*, *supra* note 13; *INA Case* (1985), 8 Iran-U.S.C.T.R. 373; *Certain German Interests In Polish Upper Silesia Case* (1929), P.C.I.J. (Ser. A) No. 7; *Aminoil Case*, *supra* note 16; *BP Case* (1974), 53 I.L.R. 297.

[27] *Amoco Case*, *supra* note 13 at para. 145.

always be sufficient to negate a valid public purpose) and purely extraneous political purposes.[28] Even if a valid public purpose is necessary for a lawful expropriation, the test is easily satisfied.[29]

Pagonia has a valid public purpose: the critical need to protect and promote its distinctive cultural identity in the face of the serious threat posed by foreign cultural influences. The circumstances in Pagonia support this public purpose.[30] In the years since Pagonia has allowed foreign cultural products, demand for Pagonian cultural products has been displaced by an immense demand for foreign cultural products: by 1991, a majority of the annual net income of Pagonia's cultural sector was generated by sales of imported foreign language material. While foreign language and literature courses have become the most popular at Pagonian universities, enrollment in Pagonian language and literature classes has fallen to one-half of pre-revolution levels. Since 1991, massive foreign investment in Pagonia's cultural sector has resulted in increased foreign control over Pagonian culture. Pagonia's goal in altering this foreign ownership is to ensure that those controlling the companies are committed to the promotion of Pagonian culture.[31]

When assessing whether a state has a valid public purpose, it is not necessary to search for the "real" purpose or "some subjective purpose motivating the state or the persons who have supreme power in a state."[32] The facts reasonably support Pagonia's stated public purpose, making

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[28] *Amoco Case, supra* note 13 at para. 145; *BP Case, supra* note 26.

[29] *Amoco Case, supra* note 13 at para. 146.

[30] Compromis at 7, 10, 5, 13.

[31] Clarification No. 12.

[32] G. Christie, "What Constitutes a Taking of Property Under International Law?" (1962) 38 B.Y.I.L. 307 at 332.

a search for some other "real" reason unnecessary. Any consideration of whether Ms. Crispell stands to gain personally from Pagonia's regulation of its cultural sector is irrelevant and unnecessary.

2. Pagonia's cultural policy does not violate any non-discrimination requirement.

Although non-discrimination has been accepted as a requirement for a lawful expropriation[33], arguments on discrimination have not been predominant in expropriation cases.[34] Some degree of discrimination is acceptable if it relates to the public purpose.[35] In the *Amoco Case*, nationalization did not offend the non-discrimination requirement even though the policy was aimed at foreign owners in Iran's petroleum industry, because the discrimination fit closely with Iran's valid public purpose of preserving natural resource revenue for its own development.[36] In the *Liamco Case*, the arbitrator held that although Libya's policy discriminated against foreign owners, this was necessary for it to preserve ownership of its own petroleum resources.[37] To be unlawfully discriminatory, a measure must be a "purely discriminatory measure".[38] The non-discrimination requirement allows states the freedom to enact policies that have an element of discrimination.

Pagonia's policy does not discriminate against foreign owners in an unacceptable way. Under Pagonia's ownership policy, foreigners are prohibited only from holding majority interests

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[33] *Amoco Case, supra* note 13; *BP Case, supra* note 26; *Liamco Case (Libyan American Oil Company v. Libya)* (1981), 20 I.L.M. 1; *Aminoil Case, supra* note 16.

[34] Wallace, *supra* note 18 at 187.

[35] *Amoco Case, supra* note 13 at para. 145.

[36] *Ibid.*

[37] *Liamco Case, supra* note 33.

[38] *Ibid.* at 59.

in companies in the cultural sector.[39] Although this draws a distinction between nationals and non-nationals, it does not offend international law since it is inextricably linked with Pagonia's valid public purpose. At no point do the Pagonian measures target a specific group of foreigners, such as Bretorian nationals.[40] Pagonia's restrictions are simply necessary for Pagonia to ensure that those owning majority interests in cultural industries are committed to promoting Pagonian culture.[41]

C. Pagonia provided foreign owners who gave up their interests in Pagonia's cultural sector with appropriate compensation with regard to all circumstances.

1. The standard of compensation required under customary international law is appropriate compensation with regard to all circumstances.

Because it meets public purpose and non-discrimination requirements, Pagonia's alteration of ownership in its foreign sector was a lawful expropriation. The distinction between lawful and unlawful expropriation is important as "the rules applicable to the compensation to be paid by the expropriating state differ according to the legal characterization of the taking."[42] This follows the approach taken in the *Chorzów Factory Case*, and has been recently reaffirmed.[43]

For a lawful expropriation, a state need only provide compensation that equals the value of the undertaking at the time of the taking rather than *restitutio in integrum* (the value of the

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[39] Compromis at 16.

[40] Compromis at 16.

[41] Clarification No. 12.

[42] *Amoco Case*, *supra* note 13 at para. 192.

[43] *Chorzów Factory Case (Indemnity) (Merits) (Germany v. Poland)* (1928) P.C.I.J. (Ser. A) No. 17, 46; *Aminoil Case*, *supra* note 16.

undertaking plus a margin for lost profits).[44] The distinction between lawful and unlawful expropriations has been used when determining the standard of compensation required: "all awards which adopted the standard of *restitutio* relate to expropriation found unlawful."[45]

For a lawful expropriation, the traditional standard of "appropriate compensation" without regard to circumstances has been rejected.[46] The standard of appropriate compensation considering the circumstances "peculiar to the particular case" has been accepted even where tribunals have stated that "appropriate compensation" is the standard.[47] Highly qualified legal publicists acknowledge the general shift in the standard to this middle path, approaching the standard advocated by developing countries that maintains that equitable considerations must be taken into account.[48] The expropriating state may consider factors like an inequality of power between the expropriating country and foreign investors, the economic situation in the expropriating country, or past profits of the foreign investors.[49] Because Pagonia's expropriation of foreign interests in its cultural sector was lawful, Pagonia is only obligated to provide appropriate compensation considering all circumstances and does not have to include a measure for lost profits.

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[44] *Amoco Case*, *supra* note 13 at para. 197.

[45] *Amoco Case*, *supra* note 13 at para. 206, referring to: *Lighthouses Arbitration* (1956), 23 I.L.R. 299; *Sapphire Int. Petroleums v. NIOC* (1967), 35 I.L.R. 136; *BP Case*, *supra* note 26; *Texaco Case*, *supra* note 13; *AGIP Case* (1982), 21 I.L.M. 726.

[46] See *supra* note 18.

[47] *Aminoil Case*, *supra* note 16 at para. 144.

[48] Wallace, *supra* note 18 at 188; Brownlie, *supra* note 12; Jiménez de Aréchaga, *supra* note 12.

[49] B. Claggett, "Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal" in R. Lillich, ed., *The Valuation of Nationalized Property in International Law*, vol. 4 (Charlottesville: University Press of Virginia, 1987) 31.

2. Pagonia's payment of book value met the standard of appropriate compensation in all circumstances.

Pagonia compensated Bretorian nationals who gave up their interests in cultural sector industries according to the standard of "book value", or the value of assets carried on the company's balance sheet – cost less accumulated depreciation – which is consistent with the definition of book value according to the World Bank.[50] Book value is the standard of compensation advocated by developing countries such as Pagonia.[51] It represents an appropriate standard considering the circumstances such as Pagonia's critical need to protect its culture. A standard of compensation like book value is justifiable based on principles of sovereignty and self-determination and particularly where a state acts for legitimate aims of public interest.[52]

Book value does not include a margin for lost profits. Industrialized countries advocate the Discounted Cash Flow (DCF) method, which takes into account future profitability.[53] Book value has an advantage over DCF in that it is "easily and objectively assessed".[54] Further, compensation for a lawful expropriation does not require compensation for future profits.[55]

A recent economic study has shown that the net book value advocated by developing

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[50] Clarification No. 13; *World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment* (1992), 31 I.L.M. 1363 at 1383.

[51] T. Stauffer, "Valuation Of Assets In International Takings" (1996) 17 Energy L. J. 459.

[52] Brownlie, *supra* note 12 at 536-37; *James* v. *United Kingdom* (1986), 8 E.H.R.R. 123 at 147 (Eur. Ct. H.R.).

[53] Stauffer, *supra* note 51.

[54] *Amoco Case*, *supra* note 13 at para. 249.

[55] *Amoco Case*, *supra* note 13; *Chorzów Factory Case*, *supra* note 43; *Aminoil Case*, *supra* note 16.

countries and the discounted cash flow method advocated by developed countries are equivalent except in circumstances where profits are either exceptionally low or exceptionally high.[56] Bretorian investors in Pagonia did not face such extreme situations, so book value unequivocally met the standard of appropriate compensation considering all circumstances.

III. Pagonia is not obligated to compensate Bretorian television companies whose contracts were cancelled by Pagonian television firms.

Pagonia's content regulation of television and radio broadcasts has not resulted in an unlawful expropriation. The cancellation of contracts with Bretorian television companies did not result in a loss of property. Under the traditional definition of property for the purposes of expropriation, contractual rights that are not tied to tangible assets are not recognized.[57] Although there has been a move to recognize certain contractual rights as property rights,[58] this recognition has been only in special circumstances[59] and is not part of customary international law.

A long line of authority considers contractual rights expropriated only if they are "so closely related to the physical assets seized as to be useless without the physical assets themselves."[60] The cancelled television contracts relate only to a right to provide a service and are not connected with any physical property. Because expropriation law does not consider the cancellation of contracts a taking of property, Pagonia is not obligated to compensate the Bretorian television companies.

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[56] Stauffer, *supra* note 51.

[57] Wallace, *supra* note 18 at 185.

[58] *Starrett Housing Corp. v. Iran (Interlocutory Award) (U.S. v. Iran)* (1984), 23 I.L.M. 1090.

[59] *Texaco Case*, *supra* note 13; *Aminoil Case*, *supra* note 16.

[60] G. Christie, supra note 32 at 316; *Chorzów Factory Case*, *supra* note 43; *Norwegian Claims Case* (*Norway v. U.S.*) (1922), 1 R.I.A.A. 307; *Starrett Housing Case*, *supra* note 58 at 1117.

IV. Pagonia's acts did not violate any applicable norm of "national treatment."

A. Pagonia is not subject to any international norm of "national treatment".

1. Pagonia has exercised its sovereign right not to sign any international treaty committing it to national treatment.

Although there exist international treaties that impose national treatment obligations, these treaties create no obligations for non-signatories.[61] Pagonia's sovereign equality includes the right to choose its own path,[62] including the right not to be bound by treaties it has not signed.

2. No custom applies to Pagonia's special economic relations.

Pagonia, as a sovereign state, chooses whether and to what extent it wishes to trade with other states. Legal obligations on trade come from treaties rather than from custom.[63] National treatment applied to trade is an operational standard that Pagonia can choose whether or not to implement.[64] These are standards "referring to differential economic relationships."[65] Pagonia need not trade on particular terms or at all simply because it has done so in the past, as a choice not to trade is not subject to any customary legal rule.[66] Even a leading authority supporting the derivation

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[61] *Vienna Convention on the Law of Treaties,* 23 May 1969, 1155 U.N.T.S. 331, art. 34.

[62] *Charter of the United Nations, supra* note 1, art. 2, para. 1.

[63] B. Colas, "Acteurs, sources formelles et hiérarchie des normes en droit international économique" (1991) 22 R.G.D. 385 at 389.

[64] Z.A. Kronfol, *Protection of Foreign Investment* (Leiden, Netherlands: A.W. Sitjhoff International, 1972) at 16.

[65] A.A. D'Amato, *The Concept of Custom in International Law* (Ithaca, N.Y.: Cornell University Press, 1971) at 131.

[66] *Ibid.* at 105.

of custom from treaties acknowledges for these reasons that "[a] treaty such as the General Agreement on Tariffs and Trade that institutionalizes trade is...incapable of giving rise to rules of customary law binding upon nonparties."[67] Pagonia's cultural policies are not subject to customary international norms on trade because trade is about special economic relationships.

3. Even if custom could apply to Pagonia's special economic relations, there is no customary norm of national treatment.

Pagonia cannot be subject to a customary norm of national treatment because no such norm exists. To establish a customary norm, Bretoria must conclusively prove both widespread state practice and *opinio juris*: a subjective acceptance of the practice as legally obligatory.[68] Even if treaties including national treatment establish practice, there must be an "argument...from which it could be deduced that States recognize themselves to be under an obligation towards each other...".[69]

In the *North Sea Continental Shelf Cases*,[70] the International Court of Justice held against the formation of custom in the context of a norm enshrined in a multilateral treaty. The mere presence of a provision in a multilateral treaty does not show *opinio juris* – there must be solid evidence from outside the treaty.[71] For example, in the *Nicaragua Case*,[72] the International Court of Justice could find customary international law equivalent to the principles contained in treaties only by finding,

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[67] *Ibid.* at 105-106.

[68] *The Steamship Lotus (France v. Turkey)* (1927), P.C.I.J. (Ser. A) No. 9 at 26, 28; *North Sea Continental Shelf Cases, supra* note 19 at 44.

[69] *The Steamship Lotus, supra* note 68 at 23.

[70] *Supra* note 19.

[71] *Ibid.* at 43-44.

[72] *Supra* note 15.

in United Nations resolutions, formal statements of *opinio juris*. This principle applies analogously in the present context. Bretoria has failed to put forward any such evidence.

B. If Pagonia is subject to a national treatment requirement, then Pagonia's acts taken to protect its cultural identity are not subject to this requirement.

1. Pagonia has acquired the status of a persistent objector to national treatment.

This Court must not assume that Pagonia has acquiesced to any custom of national treatment.[73] Pagonia's choice not to sign any treaty requiring national treatment is a clear sign of its objection to the national treatment principle.[74] Although Pagonia has expressed interest in joining the Regional Association of Trading States, this does not indicate support for national treatment in general, as there is no evidence that this is a principle of the association at all, and even if it were, it would be a special privilege within the region.[75]

The objection of a single state matters precisely because international law rests on consensual foundations: "It results from [the perfect equality of nations] that no one can rightfully impose a rule on another."[76] A state that dissents from a developing custom is not bound by the customary rule.[77]

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[73] *Fisheries Jurisdiction (United Kingdom v. Iceland)*, [1974] I.C.J. Rep. 3 at 58 (sep. op. Dillard); D'Amato, *supra* note 65 at 98-102.

[74] Affirmed in *Asylum Case (Colombia v. Peru)*, [1950] I.C.J. Rep. 266 at 277-78.; M.E. Villiger, *Customary International Law and Treaties* (Dodrecht: Martinus Nijhoff Publishers, 1985) at 15.

[75] Compromis at 27.

[76] *The Antelope*, 23 U.S. 66 at 122 (1825) (Marshall C.J.); See M. Akehurst, "Custom as a Source of International Law" (1974-75) 47 B.Y.I.L. 1 at 26; Villiger, *supra* note 74 at 17; D.A. Colson, "How Persistent Must the Persistent Objector Be?" (1986) 61 Wash. L. Rev. 957 at 957-58.

[77] *Restatement of the Law (Third): Foreign Relations Law of the United States*, s. 102, comm. d (1987); Brownlie, *supra* note 12 at 10; T.L. Stein, "The Approach of the Different Drummer: The

The International Court of Justice has affirmed that a customary rule does not apply to a state that has always opposed the rule.[78] Since Pagonia, as a sovereign state, has objected to the national treatment principle, any custom of national treatment would not apply to Pagonia.

2. Pagonia's cultural protection measures are not subject to national treatment.

Pagonia remains acutely aware of the connection between national memory and national independence.[79] When the cultural sector that preserves national memory had only one fully Pagonian firm left,[80] when 42% of Pagonian television programming came from a single foreign country,[81] and when even the Pagonian power to read Pagonian language and Pagonian memories was threatened by a drastic fall in the study of Pagonian literature and an influx of foreign literature and magazines,[82] the Pagonian people acted democratically to preserve their national independence.

Pagonia's cultural policy is legitimate in international law because there is no consensus for requiring national treatment in the cultural sector. Treaties implementing national treatment contain exceptions for specific cultural products,[83] commitments to the development of programs and

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Principle of the Persistent Objector in International Law" (1985) 26 Harv. Int'l L.J. 457 at 460.

[78] *Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. Rep. 116. Affirmed in the diss. op. of Sørensen in *North Sea Continental Shelf Cases, supra* note 19 at 247.

[79] L.G.C. Kaplan, "The European Community's 'Television Without Frontiers' Directive: Stimulating Europe to Regulate Culture" (1994) 8 Emory Int'l L. Rev. 255 at 263.

[80] Compromis at 14.

[81] Clarification No. 17.

[82] Compromis at 5-7.

[83] *Canada – Chile Free Trade Agreement*, 5 December 1996, 36 I.L.M. 1067, Annex C-01.3, s. 3(a) (exempting measures in Schedule VII of *Customs Tariff*, R.S.C. 1985, c. 41 (3d Supp.), which include measures on cultural products).

regulations to promote social and cultural development,[84] and general exemptions for the cultural industry.[85] The idea of incorporating cultural services into the GATT framework has been set aside due to European Union opposition.[86] France indicated that it would not sign a GATT that included the cultural industry.[87] Numerous other states have also indicated their opposition to trade commitments without cultural exemptions, including Australia, Canada, Egypt, India, Norway, Sweden, and most Third World states.[88] A significant portion of the world denies any *opinio juris* for the application of trade rules to cultural industries.

Moreover, Pagonia's cultural policy is specifically grounded in state practice. Article IV of the original GATT endorsed the notion of screen quotas on cinemas, the dominant mass media of the time.[89] Since then, states have implemented the same policy of cultural content quotas with

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[84] *Common Market for Eastern and Southern Africa: Treaty Establishing*, 5 November 1993, 33 I.L.M. 1067, art. 143; *Economic Community of Western African States (ECOWAS): Revised Treaty*, 24 July 1995, 35 I.L.M. 660, art. 62; *Organization of African Unity Member States: Treaty Establishing the African Economic Community*, 3 June 1991, 30 I.L.M. 1241, art. 69.

[85] *Canada – Mexico – United States: North American Free Trade Agreement*, 17 December 1992, 32 I.L.M. 605, art. 2106, entrenching art. 2005 of *Canada – United States: Free Trade Agreement*, 22 December 1987, 27 I.L.M. 281; *Canada – Israel Free Trade Agreement*, 31 July 1996, art. 10.5.

[86] See Yves Mamou, "L'Accord Sur Le Commerce International, L'Exclusion du Secteur de la Culture et ses Conséquences, Les Européens Gardent Leur Liberté Pour l'Audiovisuel" *Le Monde* (16 December 1993).

[87] Statement of French Culture Minister Jacques Toubon in David Buchan, "Lights, Camera – Reaction!" *[London] Financial Times* (18 September 1993) 7.

[88] M. Braun & L. Parker, "Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul" (1993) 22 Denv. J. Int'l L. & Pol. 155 at 177.

[89] *General Agreement on Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 194, art. IV [hereinafter GATT 1947].

respect to television. Even such an advocate of cultural commercialization as the United States requires that cable services carry local content, and the United States Supreme Court has recently upheld this as *inter alia* "promoting the widespread dissemination of information from a multiplicity of sources."[90] Content quotas for television and/or radio exist in numerous states, including Canada, the European Community as a whole, the United Kingdom, virtually every other European state, Australia, and South Africa.[91] Pagonia claims the same right to defend its airwaves.

Pagonia's magazine regulation serves a related purpose of ensuring that writing is available to Pagonians in their own language. Foreign publishers flooding Pagonia's magazine market with their wares are dangerous to Pagonian culture. Moreover, any influence that could affect literacy in the Pagonian language when Pagonia already struggles with education[92] is a particular threat. Pagonia reacted to this threat to preserve its language, memory, and independence.

Pagonia's policy is based on cultural criteria. Pagonia's radio and television content requirements use a complex formula to determine cultural content[93] that could potentially include works by overseas Pagonians. Although the magazine regulation draws a distinction between nationals and non-nationals, Pagonia underlines that the regulation is part of a larger cultural policy

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[90] *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, 114 S. Ct. 2445 (1994).

[91] *Television Broadcasting Regulations*, S.O.R./87-49, ss. 2, 4(6) and *Radio Regulations*, S.O.R./86-982, s 2.2, as am. by S.O.R./91-517 (Canada); EC, *Council Directive 89/552 on Television Without Frontiers*, [1989] O.J. L. 298/23; *Television Act*, 1954 (U.K.), 2 & 3 Eliz. 2, c. 55, s. 3(1)(d); Kaplan, *supra* note 79 at 294-301 (European states), 327 (Australia); *Independent Broadcasting Act, 1993* (South Africa), *supra* note 10.

[92] Compromis at 1.

[93] Compromis at 20.

designed to achieve the objectives of cultural preservation. The European Court of Justice has held, on an analogous public morality exception, that on matters going to the deepest values of a society, there must be a margin of appreciation given to restraints on trade; each state must act in the context of its particular sociocultural situation.[94] Pagonia has acted in the context of a culture under threat. Its cultural policy fell within an area not subject to national treatment.

3. Pagonia's protection of an industry in jeopardy is not subject to national treatment.

Pagonia's cultural industry as a whole was under grave threat before Pagonia implemented its cultural policy. Income in the cultural sector came predominantly from sales of foreign language material, and every firm in the cultural sector but one was under foreign ownership.[95] Although Pagonia's acts might benefit one individual, Ms. Crispell, this does not make Pagonia's acts corrupt, but illustrates the serious situation in which just one Pagonian was left in control of a cultural sector firm. Pagonia faced a very real threat of losing this industry entirely to foreign control.

Treaties that include national treatment requirements also include exceptions ranging from general exceptions for public policy reasons[96] to GATT's specific provision allowing the suspension of a GATT obligation like national treatment where a product is being imported "in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers...of like or directly competitive products."[97] Bretoria cannot hold Pagonia to national treatment standards

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[94] *R.* v. *Henn & Darby* (1979), [1980] 1 C.M.L.R. 246 (E.C.J.).

[95] Compromis at 10, 14.

[96] *Czech Republic – Hungary – Poland – Slovak Republic: Central European Free Trade Agreement (CEFTA)*, 21 December 1992, 34 I.L.M. 3.

[97] *General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, 15 April 1994, 33 I.L.M.

without letting Pagonia use the exceptions that accompany national treatment. Pagonia's acts to preserve a threatened industry were justified under a valid exception to national treatment.

V. Pagonia complies with international law on its protection of copyrights.

A. Bretoria's complaint about copyright infringements is inadmissible before this Court since there has been no exhaustion of local remedies.

A fundamental precept of international law states that "there can be no question of denial of justice...as long as justice has not been appealed to...".[98] Local remedies must be exhausted prior to adjudication of a dispute before an international body.[99] The plaintiff state must prove that there are no effective local remedies before it takes a claim to the International Court of Justice.[100] Bretoria has failed to meet this fundamental requirement for the admissibility of a claim.[101]

Brownlie notes that "it is not possible to *assume* that no remedy exists in municipal law"[102] where there is any reasonable possibility of a remedy.[103] The duty to exhaust local remedies extends even to a duty to advance novel causes of action.[104] Pagonia's law includes a cause of action similar

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1125, Annex 1A, adopting GATT 1947, *supra* note 89, art. XIX:1(a) [hereinafter GATT 1994].

[98] *Mexican Union Railway (Limited) (Great Britain) v. United Mexican States* (1930), 5 R.I.A.A. 115 at 122 (Br.-Mex. Cl. Comm.).

[99] *Interhandel Case (Switzerland v. United States of America)*, [1959] I.C.J. Rep. 6.

[100] *Case of Certain Norwegian Loans (France v. Norway)*, [1957] I.C.J. Rep. 9 at 39 (sep. op. Lauterpacht).

[101] *Interhandel Case, supra* note 99 at 26.

[102] Brownlie, *supra* note 12 at 497.

[103] *Ibid.* at 497. *Cf.* the sep. op. of Lauterpacht in *Norwegian Loans, supra* note 100 at 41 (possibilities "not so absolutely remote as to deserve to be ruled out altogether").

[104] *Ambatielos Arbitration (Greece v. U.K.)* (1956), 12 R.I.A.A. 83 at 123.

to the common law tort of conversion,[105] which provides a remedy for an unlawful dealing with property. No Bretorian national has used this tort to make a claim for copyright infringement. By bringing their claims immediately to the International Court of Justice, Bretoria puts its citizens above the Pagonian rule of law and asserts for them a special privilege of going immediately to the highest court in the world.[106] In international law, however, there is no breach and thus no admissible claim where there has been no exhaustion of local remedies.[107]

B. Pagonia's decisions about copyright protection represent an exercise of its domestic jurisdiction.

1. The lesser developed country exceptions to international norms of copyright protection imply that no international norm binds Pagonia.

Pagonia qualifies under United Nations definitions as a less developed country.[108] As such, if it were party to the major international conventions on copyright protection, it would qualify for substantial exceptions. The *Berne Convention* exempts states that declare themselves to be developing countries from duties to provide full copyright protection.[109] Under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), developing countries and states in transition from command to free market economies have the right to delay their compliance with

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[105] Clarification No.15.

[106] M. Sørensen, *Manual of Public International Law* (London: Macmillan, 1968) at 584 (rejecting such tactics as "an affront to the independence of the local sovereign and to the authority of its laws and tribunals over all persons subject to it.")

[107] *International Law Commission: Draft Articles on State Responsibility*, 1996, 37 I.L.M. 440, art. 22.

[108] Clarification No. 1.

[109] *Berne Convention for the Protection of Literary and Artistic Works*, as revised at Paris, 24 July 1971, 828 U.N.T.S. 221, art. 21 and Appendix.

most provisions of the agreement for five years, a period of time that had not even expired for these states at the time of the complaint against Pagonia, and least developed countries have the right to delay their compliance by ten years or longer.[110]

If Pagonia were a signatory to conventions on the protection of intellectual property, it would have a legal right to make a reservation from requirements to protect intellectual property. The International Court of Justice has held that an ability to make a reservation from requirements suggests that these requirements cannot have crystallized into customary law.[111] Pagonia asserts that a state choosing not to sign intellectual property treaties should not be subject to more onerous obligations than if it had signed these agreements.

2. There is no customary international norm of copyright protection.

The nature of agreements on copyright protection and the circumstances of their negotiation suggest that there is no customary international norm of copyright protection. The opening article of the *Berne Convention* makes clear that its intent is to create a "Union" rather than to enunciate general norms.[112] The TRIPS Agreement, as part of the Uruguay Round of GATT, embodies only a set of negotiated mutually beneficial concessions.[113]

To bind Pagonia by custom, Bretoria must establish widespread practice by states and that

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[110] Annex 1C to GATT 1994, *supra* note 97, arts. 65, 66(1), 66(2) [hereinafter TRIPS].

[111] *North Sea Continental Shelf Cases, supra* note 19 at 39-40, 42.

[112] *Berne Convention, supra* note 109, art. 1.

[113] J.S. Thomas & M.A. Meyer, *The New Rules of Global Trade: A Guide to the World Trade Organization* (Scarborough: Carswell, 1997) at 258-60, 294-95.

this practice flows from *opinio juris*, a belief that the practice is obligatory.[114] But there is no widespread *opinio juris* for copyright protection. Developing countries in general were unenthusiastic participants in the TRIPS negotiations.[115] Major states often practice copyright protection only in response to threats rather from any *opinio juris*.[116] For example, although China has signed and started implementing memoranda agreeing to protect intellectual property,[117] it agreed to do so only hours before threatened American trade sanctions[118] would otherwise have gone into effect.[119] Moreover, even after the TRIPS Agreement, Southeast Asian nations have specifically qualified the implementation of intellectual property arrangements as having to be "in a manner conducive to social and economic welfare."[120]

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[114] *North Sea Continental Shelf Cases, supra* note 19 at 44.

[115] Thomas & Meyer, *supra* note 113 at 259.

[116] K. Newby, "The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas" (1995) 21 Syracuse J. Int'l L. & Com. 29 at 47.

[117] *People's Republic of China–United States of America: Memorandum of Understanding on the Protection of Intellectual Property Rights*, 17 January 1992, 34 I.L.M. 676; *China–United States: Agreement Regarding Intellectual Property Rights*, 26 February 1995, 34 I.L.M. 881.

[118] Under "Special 301" of the 1974 Trade Act, 19 U.S.C. s. 2411 (1988) as strengthened by the 1988 Omnibus Trade and Competitiveness Act, 19 U.S.C. ss. 2101-2495 (1988).

[119] Intellectual Property Rights Protection Under Special 301: Hearings Before the Subcomm. on International Trade of the Comm. on Finance, 102d Cong., 2d Sess. 50 (1992) (testimony of Robert W. Holleyman II, Managing Director, Business Software Alliance).

[120] *Association of Southeast Asian Nations: Framework Agreement on Intellectual Property Cooperation and Framework Agreement on Services*, 15 December 1995, 36 I.L.M. 1072, art. 2, para. 3.

3. Pagonia has the right to make its own determinations on copyright protection.

Sovereign states and self-determining peoples have the right to choose the kind of society they wish to develop.[121] International law enunciates the duty to respect a state's sovereign right to govern its own domestic jurisdiction.[122] Pagonia's choices about how to protect intellectual property and how to treat it as compared to other property reflect Pagonian traditions and values. Developing nations often have different understandings of private property and visions of how to foster creativity,[123] as well as different implications for their societies from their recognition of copyright.[124] Countries that are now developed did not have the same intellectual property protections when they were developing.[125] The duty at international law to respect sovereign states implies a duty to respect Pagonia's right to make its own determinations on copyright protection.

C. Even if a minimum standard of copyright protection exists, Pagonia has provided adequate and effective copyright protection that meets the most stringent norms of international law.

The most stringent international legal norms of copyright protection are embodied in the TRIPS Agreement,[126] a convention that Pagonia has not signed. These norms require the protection

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[121] *I.C.C.P.R.*, *supra* note 4, art. 1, para. 1; *I.C.E.S.C.R.*, *supra* note 4, art. 1, para. 1.

[122] *Charter of the United Nations*, *supra* note 1, art. 2, para. 7.

[123] R.L. Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" (1995) Denv. J. Int'l. L. & Pol. 109 at 115-16, 139-41.

[124] N.W. Netanel, "Asserting Copyright's Democratic Principles in the Global Arena" (1998) 51 Vanderbilt L. Rev. 217.

[125] F. Benech, "La place du droit de la propriété intellectuelle dans le droit international économique" (1991) 22 R.G.D. 423 at 427.

[126] TRIPS, *supra* note 110.

of authors' rights from copyright infringement in certain ways.

The TRIPS Agreement indicates that there is no obligation to develop a special judicial system for intellectual property nor is there an obligation concerning the distribution of resources to intellectual property protection.[127] With prosecutorial departments with some specialization in intellectual property protection in three of its nine regions,[128] Pagonia rises well above international norms.

The most stringent norms of international law require only that states provide criminal remedies to provide a deterrent against wilful copyright piracy on a commercial scale, that states' civil judicial procedures be available to those alleging copyright infringement, and that states treat non-nationals in a non-discriminatory fashion.[129]

Pagonia meets the first requirement. Under its theft laws, Pagonia has successfully prosecuted hundreds of persons guilty of copyright infringement and not necessarily just those involved on a commercial scale.[130] The theft laws provide for both fines and substantial prison terms as deterrents, and some of those who committed more serious acts of piracy have been imprisoned.[131]

Pagonia meets the second requirement. Pagonia's civil judicial procedures are available to those alleging copyright infringement. The country's legal system has a private cause of action

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[127] *Ibid.*, art. 41(5).

[128] Compromis at 9.

[129] TRIPS, *supra* note 110, arts. 61, 42, 3.

[130] Compromis at 9; Clarification No. 7.

[131] Clarification No. 14

similar to what is called "conversion" in common law regimes,[132] thus allowing a civil suit where there has been a misappropriation of someone's intellectual property.

Pagonia meets the third requirement. Pagonia's legal system provides standing to non-nationals, as the facts show that non-nationals have argued in Pagonian courts.[133] Although there is little evidence of Pagonian criminal prosecutions for thefts of non-nationals' copyrights, there is also no evidence of any discrimination against non-nationals.

Pagonia, despite its difficult circumstances as a developing country, meets stringent requirements of international law that it is not required to meet, providing adequate and effective copyright protection.

PRAYER FOR RELIEF

For the foregoing reasons, the respondent Government of Pagonia asks that this Honourable Court:

1. DECLARE that Pagonia's cultural policy was legal under international law, and in particular that Pagonia's cultural policy did not unlawfully expropriate and did not breach any applicable norm of national treatment; and
2. DECLARE that Pagonia cannot be held liable for a breach of international law on its protection of copyrights.

Respectfully Submitted,

Agents for Pagonia
Team 290 - R

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[132] Clarification No.15.

[133] Compromis at 19.