

TEAM 604 A

**1999 PHILIP C. JESSUP
INTERNATIONAL LAW MOOT COURT
COMPETITION**

Case concerning Cultural Identity and Intellectual Property

THE REPUBLIC OF BRETORIA
APPLICANT
V.
THE KINGDOM OF PAGONIA
RESPONDENT

SPRING TERM 1999
On Submission to the International Court of Justice

BRIEF FOR APPLICANT

**1999 PHILLIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION BRIEFS**

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I. STATEMENT OF JURISDICTION

The Government of the Republic of Bretoria and the Kingdom of Pagonia have agreed to submit by Special Agreement the present controversy for final solution to the International Court of Justice pursuant to Article 36, paragraph 1 of the Statute of the International Court of Justice, in relation to Article 40, paragraph 1, of the Statute of the Court. In accordance with Article 36, the jurisdiction of the Court comprises all cases which the parties refer to it. Neither party has entered any reservation.

II. QUESTIONS PRESENTED TO THE COURT

1. Whether Civil Law No. 51 constitutes an expropriation.
2. Whether customary international law requires a minimum standard for the treatment of aliens when the State expropriates their property.
3. Whether Civil Law No. 51 lacks a public purpose or is discriminatory, and therefore constitutes an unlawful expropriation.
4. Whether appropriate compensation as the equivalent of full compensation should be regarded as customary international law.
5. Whether the fair market value method is required as the most recommendable standard under international law.
6. Whether the principle of non-discrimination on grounds of national origin, translated in economic terms as national treatment, has been crystallized into customary international law, or should at least be seen as a recently emerged principle of international law.
7. Whether the Acts taken in implementing Civil Law No. 51 violate the Principle of Free Flow of Information.
8. Whether free trade should allow a cultural exception.
9. Whether a lack of development may be invoked to justify the abridgment of internationally recognized human rights.
10. Whether the PCC Regulation constitutes an expropriation.
11. Whether The PCC is competent to enact the PCC Regulation.
12. Whether a mere regulation without a sanction can be the invoked as *force majeure*.
13. Whether international law requires a minimum standard of copyright protection.
14. Whether the afforded protection to copyright owners by Pagonia is sufficient under international law.
15. Whether the protection of intellectual property rights by Pagonia is discriminatory.

III. SUMMARY OF THE PLEADINGS

Applicant respectfully holds that Pagonian Civil Law No. 51 and its implementing Acts: the Regulation of the Pagonian Communication Commission and the Resolution of the Minister of Culture, are illegal under international law. Furthermore, the protection afforded to copyright owners by Pagonia is insufficient under international law. Applicant requests compensation for the losses suffered by its citizens as a result of these Acts and the copyright infringements.

Although Pagonia is not a member of the GATT, the WTO, WIPO, the Berne Convention, and other international agreements or treaties, except for the UN Charter and the Vienna Convention on the Law of Treaties, Applicant submits that many issues in the present case are in the realm of customary international law. The customary rules governing this dispute are binding upon Pagonia in accordance with article 38 of the Vienna Convention on the Law of Treaties.

As to the first claim, Civil Law No. 51 stipulates that “foreign ownership of a regulated entity shall be prohibited”. Expropriation of alien property is allowed under international customary law if a minimum standard is fulfilled. The requirements for the minimum standard are not met in the present case. First, Civil Law No. 51 lacks a public purpose. Second, there is discrimination between foreigners and nationals, as only foreigners are prohibited to hold a majority interest in the Pagonian cultural industries. In addition, the law creates a discrimination amongst foreigners, as overseas Pagonians are not citizens, but are excluded from the strict regime of Civil Law No.51. Third, the compensation for expropriation is not appropriate. The only appropriate compensation in accordance with customary international law is full compensation. Full compensation is to be calculated

according to the fair market value of a going concern. Therefore, Bretoria argues that Civil Law No.51 is an unlawful expropriation under international law, and that compensation is accordingly payable to Bretoria.

As to the second claim, the Regulation of the Pagonian Communication Commission and the Resolution of the Minister of Culture are contrary to international law, since they create a preference for goods and services produced and sold in Pagonia. The Acts run counter to the principle of non-discrimination between nationals and aliens, translated in economic terms as national treatment. In addition, the Acts are in violation of the Principle of Free Flow of Information, which is considered a basic human right and a rule of customary international law. These violations of international law cannot be justified by the cultural argument, invoked by Pagonia. On the contrary, the Acts seem to be inspired by economic rather than cultural purposes. The Acts are indeed not effective in preserving Pagonian Culture, and Bretoria submits that free trade is one of the best ways to foster a nation's cultural identity. At any rate, the protection of cultural identity cannot be invoked to deny fundamental human rights. Finally the PCC Regulation constitutes an unlawful expropriation and does not provide for any sanction. Therefore, *force majeure* cannot be invoked to justify the breach of contracts. For all these reasons compensation is due to Bretoria.

As to the third claim, the Kingdom of Pagonia does not provide effective copyright protection to foreign copyright owners, as required by the customary standards existing in international law. Additionally, in one third of Pagonia's regions there is a clear violation of the principle of non-discrimination on grounds of nationality by the judicial entities. Therefore, Applicant requests compensation as well as assurances and guarantees of non-repetition of the copyright infringements in Pagonia's underground markets.

IV. STATEMENT OF FACTS

Applicant, the Republic of Bretoria (“Bretoria”) is a developed nation with the largest entertainment industry in the world. Bretoria has furthermore demonstrated an interest in foreign investment, particularly in the cultural sector of Pagonia.

Respondent, the Kingdom of Pagonia (“Pagonia”) can be characterized as a developing country. The vast majority of its population is rural and uneducated. Until 1975 Pagonia was ruled by a totalitarian regime. The 1975 revolution overthrew this regime and established a new government by democratic elections. The political change had great effect in the social and economic field: society moved rapidly towards an overall liberalization of the country. The negative side-effects of this evolution were, amongst others, the creation of an underground market for unlicensed copies of foreign language audio and videocassettes. A WIPO Panel concluded that this resulted in a \$100 million losses in revenue a year, of which 30% would have gone to Bretorians. These copyright infringements lack specific sanctioning in Pagonian law.

After the revolution, Bretorian companies began to invest substantially in Pagonian cultural industries. In fact, many Bretorian media distributors concluded contracts with the four Pagonian television networks for the airing of television programs and films, and Bretorian publishers started selling Bretorian periodicals directly to retail establishments in Pagonia.

In 1988 Ms. Crispell, a native-born Pagonian citizen founded the Pagonian Cultural Watch Group in order to promote the “glorious culture of Pagonia”. She acquired a majority interest in a publishing company, engaged solely in the publication of Pagonian language literature. Finally, she became a member of the Pagonian Parliament and under her initiative,

Civil Law No. 51 was adopted by the Pagonian Parliament. It is precisely this law which has considerable consequences for Bretorian companies. The law provides that non-Pagonians shall not have a majority interest in commercial entities providing goods and/or services in the cultural sector of the Pagonian economy. Non-Pagonians who do must divest themselves of that interest within 90 days upon the effective date of the law. After that 90-day period the Government of Pagonia acquired the majority interests remaining in the hands of foreign investors and auctioned those interests off to bidders of Pagonian nationality.

Shortly after the Law came into force, the Pagonian Communication Commission adopted a regulation pursuant to Civil Law No. 51 which provided for a minimum Pagonian content of 75 % in radio and television broadcasts. As a result, the contracts between the Pagonian TV networks and the Bretorian media distributors were canceled without any compensation for the Bretorians on the grounds of the doctrine of *force majeure*.

Finally, the Minister of Culture adopted a resolution requiring that foreign language periodicals only be sold in bilingual versions. This Resolution applies only to foreign publishers. Benjamin Publications, a large Bretorian publisher of periodicals affected by the resolution, approached the Bretorian Government and requested an official protest against this policy. At the same time the Bretorian Association of Copyright Owners complained to the government about the uncontrolled copyright infringements occurring in Pagonia. At this point the Republic of Bretoria decided to contact the Government of Pagonia with a view to solving the problems facing Bretorian citizens in their dealings with Pagonians.

In order to resolve the dispute in a neutral manner, both States have decided to submit the dispute to the International Court of Justice.

V. PLEADINGS

Applicant respectfully requests that this *Honourable Court*

1. Declare Civil Law No. 51 illegal under international law, and order Pagonia to compensate Bretoria for the losses suffered by its citizens as a result of this act

1.1. Civil Law No. 51 is illegal under international law

1.1.1. Civil Law No. 51 constitutes an expropriation of alien property

Expropriation of alien property is described as the compulsory taking of property of foreign private persons by a State.¹ Civil Law No. 51 constitutes such a taking. Indeed, an individual may be deprived of his property by the transfer of the title directly to the state (article 2e), but also by a forced sale (article 2d).² Moreover, an expropriation may extend to any right which can be the object of a commercial transaction, *i.e.*, freely sold and bought, and thus having a commercial value.³ This includes shares in companies.⁴

Customary international law has laid down a *minimum standard* for the treatment of aliens⁵ which allows the expropriation of alien property only if it is for a public purpose, if it is non-discriminatory and if an appropriate compensation is paid.⁶ None of these

¹ R.WALLACE, *International Law*, 1997, p.184

² R.HIGGINS, 'The taking of property by the State', III *RdC* (1982), p.326

³ *Amoco case*, 15 *Iran-USCTR*, p.189(1987)

⁴ *Phelps Dodge Corporation case*, 10 *Iran-USCTR*, p.130(1986); M.N.SHAW, *International Law*, 1997, p.516; article 10(7) Harvard Draft Convention on the International Responsibility of States for the Injuries to Aliens, 55 *AJIL*(1961), p.548

⁵ I.BROWNLIE, *Principles of Public International law*, 1991, p.533; P.MALANCZUK, *Akehurt's Modern Introduction to International Law*, 1997, p.235; O.SCHACHTER, *International Law in Theory and Practice*, 1991, p.178; E.RIEDEL, 'Standards and Sources. Farewell to the exclusivity of the sources triad in international law?', 2 *EJIL*(1991), p.79.

⁶ *Chorzów Factory*, 1926 *PCIJ Publ.*, Series A. No. 7 (1926), p. 22; *Chilean Copper Case*, 12 *ILM*, p. 275-277 (1973)

requirements are satisfied by Civil Law No. 51.

1.1.2. Lack of public purpose

Expropriations in which foreign assets are taken for anything else than a public purpose are unlawful under international law.⁷ In the present case, the motive behind the Act is one of commercial interest and not one of "preservation of culture". The financial self-interest of Miss Crispell seems to have had a firm hand in the drafting of Civil Law No. 51. A valid public purpose cannot consist of purely financial motives.⁸ Besides, it is extremely hard to define culture,⁹ let alone to preserve or promote it. Regardless of this difficulty, Applicant questions to what extent Pagonian owned businesses will want to abandon the laws of supply and demand for the sake of their culture.

1.1.3. Discrimination

Civil Law No. 51 prohibits solely non-Pagonian natural or legal persons from holding a majority interest in the Pagonian cultural sector. If alien property is expropriated, while the property of nationals remains unaffected, then that act is discriminatory.¹⁰ Moreover, there is a discrimination between foreigners since overseas Pagonians, as non citizens and thus foreigners, still have the right to acquire a majority interest in the cultural sector under Civil

⁷ *Chorzów Factory*, *PCIJ Publ.*, Series A No. 7, p. 22 (1922); *Amoco case*, 15 *Iran-USCTR*, p.55(1985); I.BROWNLIE, *o.c.*, p.537; R.HIGGINS, 'The taking of property by the State', III *RdC*(1982), p.292; G.A. Resolution 1803 (XVII) of 14 December 1962, *GAOR*, 17th Sess., Suppl. 17, (1962), p.15

⁸ *Aminoil case*, 21 *ILM* 976, p.1025(1982); *BP case*, 53 *ILR*, p.297(1974)

⁹ W.MING SHAO, 'Is There No Business Like Show Business. Free Trade and Cultural Protectionism', 20 *YJIL* (1995), p.145.

¹⁰ V.WHITE, *The nationalisation of foreign property*, 1961, p.119; G.FITZMAURICE, 'The juridical clauses of the peace treaties', II *RdC*(1948), p.349; W.McKEAN, *Equality and Discrimination under International Law*, 1985, pp. 196-197; J.H.HERZ, 'Expropriation of

Law No.51. However, it is a well settled rule of customary international law that discrimination in the field of expropriation is unlawful.¹¹ If this Honourable Court would nonetheless not consider non-discrimination to be an absolute requirement, Applicant submits that differentiation should at least be reasonably related to the public purpose.¹² As outlined above, Applicant contests Respondent's public purpose.

1.1.4. Inappropriate compensation

The only appropriate compensation for the present expropriation is full compensation, *i.e.* the full value of the property taken. Applicant asserts that this compensation standard is part of international customary law.

State practice. United Nations General Assembly Resolution No. 1803 of 1962 declares that in case of expropriation of foreign property an *appropriate* compensation shall be paid in accordance with international law.¹³ According to extensive judicial and arbitral practice¹⁴ and legal scholars,¹⁵ appropriate compensation as defined in this GA Resolution is the equivalent of full compensation, at least as a starting point. General Assembly Resolutions

Foreign Property', 35 *AJIL* (1941), p.249 .

¹¹ *BP case*, 53 *ILR* 297, p.329 (1973); *INA Corporation case*, 8 *Iran-USCTR*, p.378 (1985); J.H.HERZ, *l.c.*, p.249; R.HIGGINS, *l.c.*, p.298.

¹² *Amoco case*, 15 *Iran-USCTR*, p.189 (1987); O.SCHACHTER, *o.c.*, p.319.

¹³ Art. 4 GA Resolution 1803 (XVII) of 14 December 1962, *GAOR*, 17th Sess., Suppl. 17, (1962), p.15; A.MOURI, *The International Law of Expropriation as reflected in the Work of the Iran-U.S. Claims Tribunal*, 1994, p.360

¹⁴ *Sedco case*, 9 *Iran-USCTR*, p.204 (1987); *AIG case*, 4 *Iran-USCTR* p.96, 105 (1983)

¹⁵ M.HERDEGEN, *Internationales Wirtschaftsrecht*, 1993, p.161; P.MALANCZUK, *o.c.* p.235; P.M.NORTON, 'Modern Tribunals and the Law of Expropriation', 85 *AJIL* (1991), p.503; O.SCHACHTER, *o.c.*, p.322; WORLD BANK, Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment, 34 *ILM* (1992), p.1376

that are adopted with a near unanimous vote are considered part of state practice.¹⁶ GA Resolution No. 1803 had the full support of both developed and developing countries. It was overwhelmingly adopted by 87 votes to 2, with 12 abstentions.¹⁷ The general practice is emphasized by the fact that a considerable number of recipients of foreign capital are willing to enter into treaties for the protection of investments which commonly contain a provision for the payment of full compensation.¹⁸

The adoption of GA Resolution No. 3281 of 1974¹⁹ has in no way disturbed this uniform and long²⁰ practice since it can only be regarded as a *de lege ferenda* formulation.²¹ The view expressed by GA Resolution No.3281 cannot at all be accepted as an expression of *opinio iuris* since it runs counter both to the interpretation given by some leading supporters of this Resolution²² and to the position taken by many of the developed countries.²³ Moreover,

¹⁶ M.E.VILLIGER, *Customary International Law and Treaties, A manual on the Theory and Practice of the Interrelation of Sources*, 1997, pp.181-182; *Advisory Opinion on Nuclear Weapons*, 35 *ILM*, p. 809 § 70 (1997)

¹⁷ D.J.HARRIS, *Cases and Materials on International Law*, 1998, p.549; A.MOURI, *o.c.*, 1994, p.360.

¹⁸ I.BROWNLIE, *o.c.*, p.545; B.M.CLAGETT, 'Just Compensation in International law: The issues before the Iran-United States Claims Tribunal', 4 *Valuation* (1987), pp.71-73

¹⁹ Charter of Economic Rights and Duties of States, General Assembly Resolution No. 3281 (XXIX) of 12 December 1974, 14 *ILM* (1975), p.251

²⁰ *Chorzów Factory case*, *PCIJ Publ*, Series A, (1928) No 13, p.47; *Hull Formula* (U.S. Secretary Cordell Hull), in G. HACKWORTH, *Digest of International Law*, Vol. 3, 1942, pp.655-665

²¹ *Texaco case*, 17 *ILM*, p.389 (1977); *Sedco case*, 9 *Iran-USCTR.*, p.186 (1987); C.TOMUSCHAT, 'Die Charta der wirtschaftlichen Rechte und Pflichten der Staaten', Vol. 36 *ZaöRV* (1976), p.470

²² J.CASTANEDA, 'La Charte des droits et devoirs économiques des Etats', *Ann. fr. de droit int.* (1974), p.54

judicial and arbitral decisions have continued to rely on the standard as set out in Resolution No. 1803 of 1962.²⁴

Opinio iuris. The corpus of international decisions involving expropriation is much greater than that involving any other issue of international economic law. By expressly agreeing to have these disputes determined *by law*, states have shown a persuasive evidence of a genuine *opinio iuris*.²⁵ The judicial and arbitral decisions relied on herein reflect the very great confidence of States in the rule of full compensation.²⁶ Furthermore, Third World countries have increasingly recognized foreign investment as vital to their economic development. A partial compensation could only be expected to deter such investment.²⁷

One may argue that large-scale expropriations might create some problems for a State's ability to pay full compensation, by causing "an overwhelming financial burden".²⁸ This is not so in the case at hand. The burden of full compensation will not be borne in its entirety by the Pagonian State alone. The Pagonian buyers of the expropriated interests will automatically pay a part of the total sum. The Pagonian State only has to provide the surplus in order to grant Bretorian owners a full compensation. Arbitrators indeed are not likely to

²³ O. SCHACHTER, *o.c.*, p.322

²⁴ P.B.GANN, 'Compensation Standard for expropriation', 23 *CJTL* (1985), pp.648-649.

²⁵ P.M.NORTON, *l.c.*, pp.503-505; D.J.HARRIS, *o.c.*, p.60.

²⁶ *Texaco case*, 17 *ILM*, p. 389 (1977); Judge Lagergren's opinion in *INA Corporation case*, *USCTR*, p.386 (1985); *Sedco case*, 9 *Iran-USCTR.*, p.186 (1987)

²⁷ B.M.CLAGETT, *l.c.*, p.31; R.DOLZER, 'Indirect Expropriation of Alien Property', Vol. 1 *ICSID Review* (1986), p.42; *Aminoil case*, 21 *ILM*, p.976 (1982).

²⁸ L.SOHN & R.BAXTER, 'Responsibilities of States for injuries to the economic interests of aliens', Vol. 55 *AJIL* (1961), pp.566-567

reduce the amount of an award because of the economic effects on the expropriating State.²⁹

Valuation. The fair market value method is recognized as the most recommendable standard.³⁰ This valuation method can best be defined as the price that a willing buyer and a willing seller would reasonably have agreed on as fair, at the time of the taking, and absent any coercion of either party.³¹ Applied to the instant case, this would be the amount which a willing buyer would have paid a willing seller for the shares of a going concern.³² A business enterprise is a "going concern" *when*, before the expropriation, it has reached a certain ability to earn revenues, and *when* it has the prospect of continuing that status by keeping such an ability in the future.³³ The entertainment industry is a typical "booming sector" in Pagonia. Furthermore, it is beyond dispute that there was a fair market until the day of the taking. Besides, this fair market does not have to exist in reality, but might also be purely hypothetical.³⁴

The value of a going concern encompasses not only the physical and financial assets of the undertaking, but also intangible valuables which contribute to its earning power, such as contractual rights, goodwill and commercial prospects.³⁵ Therefore, Bretoria cannot possibly accept the offered compensation, which was calculated on the basis of the net book value

²⁹ P.M.NORTON, *l.c.*, p.490

³⁰ C.BROWER & J.BRUESCHKE, *The Iran-United States Claims Tribunal*, 1998, p.539

³¹ *Sedco case*, 9 *Iran-USCTR*, p.182

³² *INA Corporation case*, 8 *Iran-US CTR*, p.380 (1985)

³³ *Amoco case*, 15 *Iran-USCTR*, pp.250 & 270 (1987)

³⁴ *Ebrahimi case*, Vol.7 No. 4 *WTAM* (1995), pp.205-299 (1994)

³⁵ *Amoco case*, 15 *Iran-USCTR*, p.264 (1987)

method. Many scholars³⁶ and judicial and arbitral decisions³⁷ have rejected the use of this method to value expropriated enterprises. Therefore, the value of the expropriated shares equals the fair market value of the "regulated entities" valued as a going concern in proportion to the percentage of the expropriated shares in the going concern.

1.2. Compensation

Summarizing, an expropriation is unlawful if it is not for a public purpose and if it is discriminatory. As these conditions are fulfilled in the present case Applicant claims³⁸ the restitution in kind or if impossible the fair market value of the undertaking plus the profits that would have been made had the taking not occurred, until the date of the judgment.³⁹

Subsidiary, if this Honourable Court were to consider the taking to be lawful, Applicant maintains that still an appropriate compensation *i.e.* the fair market value of the undertaking at the time of the dispossession, is due.⁴⁰ Since Bretonian citizens were only accorded the net book value or a lower price during the first 90 days, Applicant respectfully submits that the remainder is still to be paid.

³⁶ W. LIEBLICH, 'Determining the economic value of expropriated Income-producing Property in international Arbitrations', 8 *J. Int'l Arb.*, pp.66-69; B.M.CLAGGETT, *l.c.*, p.94; WORLD BANK, Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment', 34 *ILM* (1992), p.1377; R.SMITH, 'The United States Government Perspective on Expropriation and Investment in Developing Countries', 9 *Vand. J. T. L.* (1996), pp.519-520

³⁷ *Liamco Case*, 20 *ILM*, p.1 (1980); *Aminoil*, 21 *ILM*, p.976 (1982); *AIG Case 4 Iran-USCTR*, p. 96 (1983)

³⁸ D.J.HARRIS, *o.c.*,1998, pp.568-572; C.BROWER & J.BRUESCHKE, *o.c.*,1998,pp.507-513

³⁹ *Amoco Case*, 15 *Iran-USCTR*, p.189§193 (1987)

⁴⁰ *Amoco Case*, 15 *Iran-USCTR*, p.189§197 (1987)

2. Declare the Acts taken in implementing Civil Law No. 51 illegal under international law, and Order Pagonia to compensate Bretorian citizens for the losses suffered as a result of these Acts

2.1 The Acts taken in implementing Civil Law No. 51 are contrary to international law, insofar as they create a preference for goods and services produced and sold in Pagonia

Recent decades have shown an enormous liberalization of international trade. The primary multilateral trade agreement governing more than 80 per cent of world trade is the GATT.⁴¹ This agreement has been incorporated in the WTO in 1995 in order to help trade flow as freely as possible.⁴² As of December 20, 1998, 133 countries were members of the WTO, 31 countries have applied for membership, and among these (potential) members many developing countries.⁴³ Also, Pagonia itself is taking a stand on the international scene in favor of free trade, since it is making efforts to become a member of the Regional Association of Trading States (RATS), a union of countries moving towards the establishment of a free-trade area. Indeed, many free trade agreements have been and are being entered into between nations and international organizations.⁴⁴ This state practice has

⁴¹ J.E.HARDERS, *l.c.*, p.426.

⁴² Agreement establishing the World Trade Organization, 33 *ILM* (1994), p.1144; <http://www.wto.org/wto/about/facts0.htm>; J.H.JACKSON, *The World Trade Organization. Constitution and Jurisprudence*, 1998, p.10.

⁴³ <http://www.wto.org/about/organsn6.htm>.

⁴⁴ M. BLAKENEY, 'The Role of Intellectual Property Law in Regional Commercial Unions', 4 *JWIP* (1998), p.693.

been strongly supported by the UN, stating that multilateral trade liberalization and regional economic integration processes are important prerequisites for economic growth and development for all countries.⁴⁵ It is widely agreed today that liberalizing trade enhances welfare, attracts foreign investment, brings new jobs and that self-interested national economic policies often result in instability and conflict in international relations.⁴⁶

The principle of non-discrimination based on national origin is one of the basic pillars of the international economic order.⁴⁷ This principle is confirmed by the UN Charter. Although it only mentions the non-discrimination principle as to race, sex, language and religion, these grounds do not form an exhaustive list.⁴⁸ This is supported by the addition of other grounds, such as national origin in article 2 of the Universal Declaration of Human Rights (UDHR) and in other human rights instruments.⁴⁹ Moreover, article 26 of the Vienna Convention on the Law of Treaties, to which both Bretoria and Pagonia are parties, stipulates that every treaty has to be performed in good faith, *i.e.* not only according to its letter, but

⁴⁵ GA Resolutions A/Res/48/55 of 10 December 1993 and A/Res/49/99 of 19 December 1994 on international trade and development.

⁴⁶ OECD Report, *The benefits of trade and investment liberalization*, 1998, <http://www.oecd.org>; J.H.JACKSON, *The World Trading System. Law and Policy of International Economic Relations*, 1997, pp.11-13.

⁴⁷ J.E.HARDERS, *l.c.*, p.424; M.M. HART, 'The Mercantilist's Lament: National Treatment and Modern Trade Negotiations', *2JWTL* (1987), p.37; <http://www.wto.org/wto/about/facts0.htm>.

⁴⁸ Artt. 1(3), 13(1)(b), 55(c), 56, 62(2) and 76(c) UN Charter; M.S. McDOUGAL, H.D.LASSWELL, and L.C.CHEN, *Human Rights and World Public Order*, 1980, p. 766; J.DELBRÜCK, 'Disrimination' in R.WOLFRUM, and C.PHILIPP, *United Nations: law, policies and practice*, 1995, p. 420.

⁴⁹ Artt. 2 and 26 ICCPR; Art. 2(2) ICESCR; Art. 14 ECHR; Art. 2 African Charter; Art. 1.1 American Convention.

also according to its spirit.⁵⁰ As this Honourable Court has recognized in its Namibia Advisory Opinion a distinction based on grounds of national origin which constitutes a denial of fundamental human rights, is a flagrant violation of the purposes and principles of the Charter.⁵¹ Universal human rights are accorded to everyone, including to foreigners, except when they are explicitly excluded.⁵² It is widely agreed that the protection against discrimination, granted under the UDHR has become part of international customary law.⁵³

Since the principle of non-discrimination is applicable to every sector of human interaction,⁵⁴ Applicant submits that this includes the sector of international trade. Trade discrimination disturbs the development of international trade and economic growth and injures the friendly relations between States.⁵⁵ This principle of non-discrimination between nationals and aliens, translated in economic terms as national treatment, has been repeated in bilateral and multilateral trade agreements throughout the world.⁵⁶ Therefore, it has been crystallized into customary international law, or should at least be seen as a recently emerged

⁵⁰ B.SIMMA (ed.), *The Charter of the United Nations - a commentary*, 1994, p. 74.

⁵¹ *South West Africa/ Namibia* (advisory opinion), ICJ, *ICJ reports*, p.45§131 (1971)

⁵² M.S.McDOUGAL, H.D.LASSWELL, and L.C.CHEN, *l.c.*, pp.744-745 and pp.767-773.

⁵³ J.DELBRÜCK, *l.c.*, p.420; W.McKEAN., *o.c.*, p.276.

⁵⁴ M.S.McDOUGAL, H.D.LASSWELL, and L.C.CHEN, *o.c.*, 1980, p.778.

⁵⁵ K.HYDER, *Equality of Treatment and Trade Discrimination in International Law*, 1968, pp.4-7.

⁵⁶ H.VAN HOUTTE, *The Law of International Trade*, 1995, p.6; Art.3 GATT; Art.1703 NAFTA; Art.7 MERCOSUR, Art.17 CEFTA, Art.4 AFTA; See also OECD, Declaration by the Governments of the OECD Member Countries of 21 June 1976 on International Investment and Multinational Enterprises, <http://www.oecd.org>.

principle of international law.⁵⁷

Acts such as the PCC Regulation have the effect of a quantitative restriction.⁵⁸ The quota also affects the offering for sale, the sale and the purchase of foreign television programming in comparison with domestic programming. This is apparent from the fact that Pagonian television networks have terminated en masse the existing television contracts with Bretorians.

Since the Minister's Resolution is not applicable to domestic publishers, these persons have strictly speaking the opportunity to publish in the Bretorian language only, which could be an economic advantage. The demand of foreign language material in Pagonia is indeed quite high, and due to the bilingual requirement, the costs of foreign publishers will increase dramatically in comparison with those of the Pagonian publishers.

2.2. In addition, the Acts taken in implementing Civil Law No. 51 violate the Principle of Free Flow of Information

The Acts are in conflict with the principle of the free flow of information, because they violate the freedom of expression and the right to receive information.

The Universal Declaration of Human Rights was the first international instrument to recognize the freedom of expression. This right is deemed to include the "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers" and is generally accepted to cover the press and

⁵⁷ I.SHIHATA, 'The Role of Business Development', 20 *FILJ*(1997), p.1577; J.D.NOLAN, 'A Comparative Analysis of the Laotian Law on Foreign Investment. The World Bank guidelines on the Treatment of Foreign Direct Investment, and Normative Rules of International Law on Foreign Direct Investment', *ArizJICL*(1998), p.667.

⁵⁸ J.D.DONALDSON, "'Television without Frontiers": the Continuing Tension between Liberal Free Trade and European Cultural Integrity', 20 *FILJ* (1996), pp.119-120.

broadcasting.⁵⁹ The Declaration was enacted by the General Assembly of the UN on December 10, 1948. Of the 57 members, 48 voted in favor, none voted against, seven abstained, two were absent. At the time of adoption of the UDHR only few developing countries were members of the UN, but those countries did not vote against or abstain from voting on the Declaration. Quite a number of them even participated in the drafting process.⁶⁰ Although it is widely recognized that the Declaration originally did not intend to create binding obligations for member-states,⁶¹ the Declaration may today be regarded as reflecting international customary law.⁶²

The UN General Assembly reaffirmed its commitment to the free exchange of information and ideas by enacting the ICESCR and the ICCPR.⁶³ This principle was further repeated by the ECHR, the CCSE (Helsinki Accords, Copenhagen Document, Charter of Paris), the African Charter and the American Convention.⁶⁴ Many scholars and judges have furthermore shown an unqualified commitment to the idea of an unregulated "market place

⁵⁹ E.M. BARENDT, *Broadcasting Law*, 1995, pp. 32 and 221; T.G. KRATTENMAKER and L.A. POWE Jr., 'Converging First Amendment Principles for Converging Communications Media', Vol. 104 *YLJ* (1995), p. 1740.

⁶⁰ B.SIMMA (ed.), *o.c.*, p.782.

⁶¹ *ibidem*, p. 783.

⁶² B.CONFORTI, *The Law and Practice of the United Nations*, 1996, pp.282-285; M. COGEN, *Handboek Internationaal Recht*, 1998, pp. 315-316; M.N.SHAW, *o.c.*, 1997, p.207; J.GREENBERG, 'Race, Sex and Religious Discrimination in International Law' in T. MERON, (ed.), *Human Rights in International Law: Legal and Policy Issues*, 1984, pp. 313-317; L.B.SOHN, 'The New International Law: protection of the Rights of Individuals Rather than States', 32 *Am.U.L.Rev.* (1982), p.17.

⁶³ Article 15 ICESCR; Article 19 ICCPR.

⁶⁴ Article 10 ECHR; Article 9 African Charter; Article 13 American Convention.

of ideas".⁶⁵ The principle of free flow of information has thus achieved the status of a universally recognized human right, and may be enforceable and binding as customary international law.⁶⁶ Customary law is always applicable to non-signatory states pursuant to Article 38 Vienna Convention on the Law of Treaties.

Regulations such as the PCC, on its face, violate the free flow of information.⁶⁷ Restrictions of this principle generally require a *lawful act* of the State and must be *necessary*, implying a *rational relationship* between the restriction and the purported reason for the same.⁶⁸ Applicant first of all maintains that the Regulation should have been adopted by the Minister of Culture, who is the competent power to promote Pagonian culture in the cultural sector of the Pagonian economy. Furthermore, the Regulation is not *necessary* to protect Pagonian culture, as will be established below. Conversely, there are other means which would protect Pagonian cultural identity more effectively. Finally, it is highly questionable whether the quotas constitute a *proportionate* exception. Bretoria maintains that a lower quota, applied not just during prime time, but during the 24-hour day would have a

⁶⁵ *Abrams vs. US* (1919) 250 US 616, 630, dissenting opinion of Holmes J.; E.BARENDT, *The First Amendment and the Media*, in I.LOVELAND, (ed.), *Importing the First Amendment, Freedom of Speech and Expression in Britain, Europe and the USA.*, 1998, p.29; J.B.PROWDA, 'U.S. Dominance in the "Market Place of Culture" and the French "Cultural Exception"', 29 *N.Y.U. J. Int'l L.&Pol.* (1996-97), p. 208.

⁶⁶ L.DHOOGHE, 'No place for Melrose: channelsurfing, human rights, and the European Union "Television without Frontiers" Directive', 16 *N.Y.L. Sch.J.Int'l &Comp. L.* (1996), pp.283, 313 and 316.

⁶⁷ A.VON BOGDANDY, 'Europäischer Protektionismus im Medienbereich, zu Inhalt und Rechtmässigkeit der Quotenregelungen in der Fernsehrichtlinie', Heft 1 *EuZW* (1992), p.17; S.MAGIERA, 'Direct Broadcasting by Satellite and a New International Information Order' 24 *GYIL* (1981), p.304.

⁶⁸ Article 29(2) UDHR; Article 19(3) CP Covenant; Article 10(2) ECHR.

better chance of meeting the standard of proportionality.⁶⁹

The Resolution of the Minister of Culture clearly violates the freedom of the press. This view is supported by the French Constitutional Court, which ruled that an identical French law⁷⁰ violated the freedom of expression.⁷¹ Furthermore, the Resolution infringes upon the freedom to receive information: Bretonian publishers will have to balance the costs of translating their magazines into Pagonian, and the revenues they will earn from selling those magazines in Pagonia. As Pagonia is a small country with an estimated population of 10 million, and relatively few educated people, it is highly likely that the majority of Bretonian publishers will not undertake the difficulties of publishing bilingual magazines, but will simply eliminate Pagonia as an exporting partner.

2.3 The Cultural Argument is not a valid exception to free trade and the national treatment requirement, nor a justification for violating the principle of free flow of information

Applicant submits that, notwithstanding the general importance of culture, its preservation and development, these factors do not in the present case justify the conduct of Pagonia. The Acts seem to be inspired by economic rather than cultural motivations.

First, the Acts are *not effective* in encouraging and safeguarding Pagonian culture. National culture and the cultural content of audiovisual goods and services are so difficult to

⁶⁹ K.L.KESSLER, 'Protecting Free Trade in Audiovisual Entertainment: A Proposal for counteracting the European Union's trade barriers to the U.S. Entertainment Industry's Exports', 26 *Law & Pol'y Int'l Bus.* (1995), p.578.

⁷⁰ Loi n°94-665 du 4 août 1994 relative à l'emploi de la langue française, *J.O.*, August 5, 1994. See also Décret n°95-240 pris pour l'application de la loi n°94-665, *J.O.*, March 5, 1995; H.J.ALBERS and C.SWAAK, 'The Trouble With Toubon: Language Requirements for Slogans and Messages in the Light of Article 30 EC', *ELR* (1996), p. 78; N.McCARTHY and H.MERCER, 'Language as a Barrier to Trade: the Loi Toubon', 5 *ECLR* (1996), p.314.

⁷¹ Conseil Constitutionnel, 94-345, July 29, 1994.

measure, that regulations restricting the content based on the national origin of audiovisual material, provide only dubious cultural benefits. The PCC Regulation requires 75% of the content of programming aired by Pagonian broadcasters during prime time listening and viewing hours to be Pagonian *in origin*. Hence, the quota targets the origin of the program and not the cultural merit or social acceptability.⁷² Moreover, piracy⁷³ and new technologies such as satellites⁷⁴ are likely to undermine the alleged cultural effect of the PCC Regulation. With respect to the Resolution of the Minister of Culture, the “preservation of the Pagonian language” is not the *rationale* behind the law. This is obvious from the fact that Pagonian publishers still have the opportunity to publish solely in a foreign language, thus rendering the purpose of the Act meaningless.

Second, Applicant asserts that free trade in cultural products may be considered one of the best ways to foster a nation’s cultural identity. Governments have at times viewed free trade as a necessary condition of cultural development.⁷⁵ It is even arguable that such trends will build stronger bridges for mutual understanding and world peace.⁷⁶ Investment is

⁷² W.MING SHAO, *l.c.*, 20 *YJIL* (1995), p.140; P.PRESBURGER and M.R.TYLER, ‘Television without Frontiers: Opportunity and Debate Created by the New European Community Directive’, Vol.13 *HICLR*(1989-90), p.505.

⁷³ M.JUSSAWALLA, ‘Media Threat to Cultural Identity: Myth or Reality’, *The Third Channel*, (1986), p.383; T.A.LARREA, ‘Eliminate the cultural industries exemption from NAFTA’, 37 *Santa Clara L. Rev.*(1997), p.1127.

⁷⁴ R.L.VAN HARPEN, ‘Mamas, don’t let your babies grow up to be cowboys: reconciling trade and cultural independence’, 4 *Minn. J. Global Trade* (1995), p.181; C. UYTTENDAELE and J. DUMORTIER, ‘Free speech on the information superhighway: European perspectives’, Vol.16 *JMJCIL*(1998),p.907.

⁷⁵ UNESCO Agreement on the Importation of Educational, Scientific and Cultural Material (“Florence Agreement”), UNTS 1734.

⁷⁶ M.JUSSAWALLA, *l.c.*, p.387.

another means through which a country's cultural and economic development is stimulated. Many governments therefore encourage a policy of foreign investment, by creating a climate of stability where contractual obligations are honored.⁷⁷ Pagonian legislation has precisely the adverse effect.

Finally, even if the Court were persuaded by the Pagonian cultural argument, Bretoria strongly maintains that the protection of cultural identity in the name of sovereignty does not justify a denial of human rights, *in casu* the violation of the free flow of information.⁷⁸ The UN World Conference on Human Rights in 1993 decided by consensus that "the lack of development may not be invoked to justify the abridgment of internationally recognized human rights".⁷⁹

2.4 The PCC Regulation constitutes an unlawful expropriation

There is a virtual consensus that property encompasses contractual rights. This is confirmed by general principles of law,⁸⁰ arbitral and judicial decisions⁸¹, leading text

⁷⁷ I.SHIHATA, 'The Role of Business Development', 20 *FILJ*(1997), p.1577.

⁷⁸ A.EIDE, 'Equality, Nationalism and the Protection of Minorities: a Dilemma in Democratization', in G.ALFREDSSON and P.MACALESTER-SMITH, (eds.), *The Living Law of Nations*, 1996, p.158; L.HENKIN, 'The Mythology of Sovereignty', *American Society of International Law Newsletter*, March-May 1993 at <http://www.asil.org/pres.htm>.

⁷⁹ World Conference on Human Rights: Vienna Declaration and Programme of Action, 1993, para 1/10, 32 *ILM* (1993), p. 1663; A.ROSAS, 'The Right to Development' in A.EIDE, C.KRAUSE and A.ROSAS, eds., *Economic, Social and Cultural Rights*, 1995, p.249.

⁸⁰ H.LAWSON and B.RUDDEN, *The law of property*, 2nd edition, 1982, pp.110-113; R.DOLZER, 'Indirect expropriation of alien property', 1 *ICSID Review* (1986), p.58.

⁸¹ *Chorzów Factory*, *PCIJ Publ. Series A*, No. 7, p. 307 (1926); *Flexi Van-leasing, Inc. v. The Government of the Islamic Republic of Iran*, Award No. 54-36-1, 13 *Iran-U.S. CTR*, p.324.

books,⁸² and investment treaties.⁸³ Consequently, an expropriation may consist of the taking of contractual rights. It is generally accepted that interference with property, while still falling short of nationalization, may amount to a taking even if no such intention is asserted or is denied.⁸⁴ The intent of the Government is less important than the effect of the measures on the owner, and the form of the measures of control or interference is less important than the reality of the impact.⁸⁵ The issue is fairly clear: interference which significantly deprives the owner of (the use of) his property amounts to a taking of that property. *In casu* the Pagonian Government interferes to the extent that Bretorian contractors have lost their contractual rights to performance by the opposite party. The PCIJ has ruled in *Chorzów factory* that a governmental decision, causing a breach of contract between private parties was considered to be an expropriation of contractual rights.⁸⁶

Furthermore, the scope of expropriation evolves in time and follows the new developments in commercial transactions. The ICSID Convention protects investments which cover not only the traditional forms but also the more novel methods of investments

⁸² R.HIGGINS, 'The taking of property by the State', III *RdC* (1982), p.268; H.J.HERZ, 'Expropriation of foreign property', 35 *AJIL* (1941), p.243

⁸³ Treaty of Amity, Economic Relations, and Consular Rights, 8 U.S.T. 899, 284, UNTS No. 4132, p.311; ICSID Convention, 17 *UST* 1270, 575 *UNTS* 159 (1965)

⁸⁴ *Chorzów Factory*, *PCIJ Publ. Series A*, No. 7 (1926); *Saudi Arabia v. Arabian American Oil Company*, 27 *ILM*, p.117, *Barcelona Traction, Light and Power Company*, *ICJ, ICJ Reports*, p.106 (1970); R.DOLZER, 'Indirect expropriation of alien property', 1 *ICSID Review* (1986), p.56

⁸⁵ *Tippetts, Abbott, McCarthy, Stratton*, Award No. 141-7-2, *Iran-USCTR*, pp.225-226 (1984)

⁸⁶ *Chorzów Factory*, *PCIJ Publ. Series A*, No.7 (1926)

such as service contracts.⁸⁷ Indeed, expropriated contractual rights need not necessarily be connected to the expropriation of tangible property.⁸⁸

Finally, Applicant stresses that this expropriation, in analogy with Civil Law No. 51, has no public purpose and that it is discriminatory. Even more, the appropriateness of the compensation does not even come into question, since not one Pagonian Shuttle of compensation has been paid.

2.5. The breach of contracts is not justified by force majeure

Force Majeure is a general principle of law recognized by most peace loving countries and confirmed by judicial and arbitral decisions.⁸⁹ It is well settled that *force majeure* can be invoked only if the party breaching the contract cannot reasonably be required to expose himself to the risk of incurring the sanction provided for the compulsory regulation,⁹⁰ here the PCC Regulation. A mere Regulation without sanction does not release the contract party of his contractual performance.⁹¹ The PCC regulation does not provide for a sanction. Therefore, the decisions of Pagonian courts, are unlawful under international law.

⁸⁷ ICSID Convention, 17 *UST* 1270, 575 *UNTS* 159 (1965); C.LAMM, 'Jurisdiction of the ICSID', Vol.6 *ICSID Review* (1991), p.462; H. VAN HOUTTE, *The Law of International Trade*, 1995, p.247.

⁸⁸ *Amoco Case*, 15 *Iran-USCTR*, p.159 (1987)

⁸⁹ P.KINSCH, *Le Fait du Prince Etranger*, 1994, p.56; Y.DERAINS, *Les normes d'application immédiate dans la jurisprudence arbitrale internationale*, 1982, p. 38; J.CROOK, 'Applicable Law in International Arbitration', 83 *AJIL* (1989), pp. 281-299; Y.DERAINS, 'Introduction à la chronique des sentences arbitrales', *JDI* (1975), p.917; *Ananconda-Iran, Inc. v. Iran*, *Iran-USCTR*, pp.211-212; *Blount Brothers Corp. v. Iran and Iran Housing Co.*, pp.74-75 (1986)

⁹⁰ P.KINSCH, *Le Fait du Prince Etranger*, 1994, p.159; H.VAN HOUTTE, 'The impact of Trade Prohibitions on Transnational Contracts', *RDAI* (1988), p.147.

⁹¹ *L'Office National du Thé et du Sucre v. Philippine Sugar Trading, Ltd.*, 1 *Lloyd's Rep.*, p.89 (1983); *In re Japanese Electronic Products*, 723 F.2d, p.345 (3d Cir.) (1983)

2.6. Compensation

Applicant claims the restitution of the cancelled contracts. Subsidiary, Applicant claims the full compensation of the losses suffered by its citizens, *i.e.* the price agreed upon for the broadcasting contracts and the lost profits and additional costs for the bilingual requirement.

3. Declare the protection afforded to copyright owners by the Kingdom of Pagonia insufficient under international law, and Order Pagonia to compensate Bretoria for the losses suffered by its citizens as a result of copyright infringements in Pagonia

3.1. Pagonia does not provide the minimum protection to copyright owners

The unauthorized copying of copyright materials for commercial purposes, in short piracy,⁹² is a common phenomenon in Pagonia. Under the general rules of international law every state has the obligation to provide proper administration of civil and criminal justice with regard to aliens,⁹³ including apprehending and prosecuting those wrongfully causing injury to aliens.⁹⁴ It is widely accepted that a state's international responsibility is in issue if an alien's property is looted.⁹⁵ Denial of justice exists when a reasonable and impartial man would readily recognize the insufficiency of the activity of judicial entities.⁹⁶ Although Pagonia is not a party to any copyright convention, Applicant submits that *every* state is required by

⁹² WIPO (ed.), *o.c.*, 1997, p.166.

⁹³ B.VITANY, 'International Responsibility of States for their administration of Justice', *NILR* (1975), p.147; D.VAGTS, 'Minimum Standard', *EPIL* (1994), p.408.

⁹⁴ Art.9 Harvard Research draft 'The Law of Responsibility of States for the Damage Done in Their Territory to the Person or Property of Foreigners', 23 *AJIL* (1929) Spec Suppl., p.173; I.BROWNLIE, *o.c.*, p. 529; M.N. SHAW, *o.c.*, p.571.

⁹⁵ P.MALANCZUK, *o.c.*, pp.260-261.

⁹⁶ *Neer Claim*, United States-Mexican Claims Commission, *RIAA*, iv., p.61§4 (1926); *Janes Claim*, United States-Mexican Claims Commission, 3 *ILR*, p.218 (1926); R.Y.JENNINGS, 'General Course of International Law', II *RdC* (1967), p.487.

international customary law to provide effective legal protection for foreign copyright owners.

State Practice Numerous international copyright conventions show that an international framework of copyright protection has steadily developed. These conventions all contain provisions pursuant to which States are directly or indirectly obliged to provide adequate enforcement measures to protect copyrights.⁹⁷ Furthermore, the provisions on sanctions for violations of copyrights should be implemented properly by the enforcement authorities.⁹⁸ Intellectual property rights stimulate economic growth, increase revenues from international trade and promote private investment.⁹⁹ They are an essential tool for underwriting a democratic culture.¹⁰⁰ A majority of developed *and* developing States, have become party to one or more copyright conventions.¹⁰¹ More than half of the States party to the Rome Convention are developing countries, which is not surprising since it is in their interest to ensure protection and promotion for their rich cultural heritage.¹⁰²

⁹⁷ Artt. 15, 16, 36 Berne Convention; Artt. I and X Universal Copyright Convention, Art. 14 WIPO Copyright Treaty; Art. 23 WIPO Performances and Phonograms Treaty; Artt. 41-61 TRIPs. See also Artt. 1701, 1702 and 1714-1720 NAFTA.

⁹⁸ WIPO (ed.), *o.c.*, pp.334-335.

⁹⁹ E. CHIEN-HALE, 'Asserting U.S. intellectual property rights in China: Expansion of extraterritorial jurisdiction?', 44 *Copyright Society of the U.S.A.* (1996), pp. 201, 225-226; S.I. STRONG, 'Banning the cultural exclusion: Free Trade and Copyrighted Goods' 4 *Duke J. Comp. & Int'l L* (1993), pp.96-97.

¹⁰⁰ N.W.NETANEL, 'Asserting Copyright's Democratic Principles in the Global Arena', *Vand. L. R.*(1998), p.220.

¹⁰¹ WIPO (ed.), *o.c.*, pp. 394, 445 and 452.

¹⁰² S.I. STRONG, *l.c.*, p.97; WIPO (ed.), *o.c.*, pp. 444-445; F.EMMERT, 'Intellectual Property in the Uruguay round - negotiating strategies of the Western Industrialized Countries', *MJIL* (1990), pp.1366-1367.

Applicant submits that the fact that piracy may occur in some countries, is not detrimental to this general and uniform practice. As this Court ruled in the *Nicaragua Case* “it is sufficient that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule”.¹⁰³ Undoubtedly, the international framework of copyright protection has been developed in order to counter piracy in an ever more effective way.¹⁰⁴

Opinio Iuris Applicant maintains that the state practice of adequate copyright protection is supported by the *opinio iuris* necessary to constitute a rule of customary international law. First and foremost, copyright has been accorded the status of a human right in article 27 of the Universal Declaration of Human Rights.¹⁰⁵ This principle is repeated in article 15(c) of the ICESCR. Furthermore, according to article 8 of the UDHR everyone is entitled to protection by an *effective* remedy by the competent national tribunals for acts violating fundamental rights. As set out above, the UDHR is now widely accepted as a ‘Magna Charta of humankind’ and as customary international law. Moreover, the *opinio iuris* appears from the constant practice of UN organs¹⁰⁶ such as UNESCO and WIPO. In addition, the Berne safeguard clause, laid down in the UCC in order to prohibit an exodus from the Berne Convention to the lower standard of protection of the UCC,¹⁰⁷ is *not applicable* to developing countries. They are consequently allowed to choose between the Berne Convention and the

¹⁰³ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua Case)*, ICJ, *ICJ Reports* 1986, p.98 § 186 (1986)

¹⁰⁴ WIPO (ed.), *o.c.*, pp. 328-336 and pp. 485-487.

¹⁰⁵ G.MELANDER, ‘Article 27’ in A. EIDE, e.a. (eds.), *The Universal Declaration of Human Rights: A Commentary*, 1992, p.431.

¹⁰⁶ B.SIMMA, (ed.), *The Charter of the United Nations - a commentary*, 1994, p.784.

UCC. Nevertheless, *none* of the developing countries has opted to withdraw from the Berne Convention in favor of the UCC.¹⁰⁸ Bretoria maintains that this proves the recognition of these countries that the state practice of copyright protection reflects a legal obligation.

Bretoria asserts that the provisions of the Pagonian Criminal Code and their implementation do not meet the standard of an adequate protection of foreign copyright owners as required by this rule of customary international law. Assuming the lack of a functioning unit for alleged thefts of an intangible property as well as of any records of such prosecutions, and taking into account the huge piracy problem and the complexity of piracy prosecutions, Applicant questions the effective enforcement by the judicial organs. Moreover, in one third of Pagonia's regions there is no enforcement in favor of foreign copyright owners at all. Finally, Bretoria questions the effective possibilities to obtain compensation for piracy, which is at least equally important from the point of view of the copyright owners.¹⁰⁹

3.2. Alternatively, the protection of copyrights by Pagonia is discriminatory

Applicant maintains that in one third of Pagonia's regions, the provisions of the Pagonian Criminal Code for theft are effectively enforced with regard to intangible property only to protect Pagonian authors and composers. Applicant asserts that the conduct of the judicial entities in these regions violates the principle of non-discrimination on grounds of nationality. The principle of national treatment, according to which works originating in one country are to be accorded the same copyright protection abroad as granted to nationals, is

¹⁰⁷ Article XVII of the UCC and the Appendix Declaration Relation to Articles XVII.

¹⁰⁸ D.LANGE, M.LAFRANCE, G.MYERS, *Intellectual Property, Cases and Materials*, 1998, p.1066.

¹⁰⁹ WIPO (ed.), *o.c.*, p. 333.

one of the basic principles of the numerous copyright conventions,¹¹⁰ thus, supported by a general and uniform state practice. Furthermore, it is generally recognized that aliens should be entitled to equal protection of the law and equal protection against any discrimination in violation of the Universal Declaration of Human Rights.¹¹¹ As outlined above, copyright is recognized as fundamental right in Article 27(2) UDHR.¹¹² Indeed, the principle of non-discrimination on grounds of national origin is violated indeed if a distinction is made on such grounds, thereby constituting a denial of fundamental rights.¹¹³ The applicability of the principle of non-discrimination on grounds of nationality related to copyrights has recently been explicitly confirmed by the European Court of Justice.¹¹⁴

The non-discrimination principle demands both equality in law and equality in fact.¹¹⁵ Although the latter can be excluded if different treatment is necessary, this exception has to

¹¹⁰ Art. 5(1) Berne Convention; Art. II UCC; Art. 3 WIPO Copyright Treaty; Art. 4 WIPO Performances and Phonograms Treaty, Art. 3 TRIPS; M.M.HART, 'The Mercantilist's Lament: National Treatment and Modern Trade Negotiations', 21 *JWTL* (1987), p.58; WIPO (ed.), *Introduction to Intellectual Property*, 1997, p.386.

¹¹¹ Preamble and Art. 5.c GA Resolution A/Res/40/144 of 13 December 1985, Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live; J. DELBRÜCK, 1995, p.420

¹¹² G.MELANDER, 'Article 27' in A.EIDE e.a. (eds.), *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press, 1992, p.431.

¹¹³ *South West Africa/ Namibia* (advisory opinion), ICJ, *ICJ rep.*, p.45 §131 (1971)

¹¹⁴ ECJ, 20 October 1993, Joined Cases C-92/92 and C-326/92 *Phil Collins v. Imrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v. EMI Electrola GmbH*, I ECR, p. 5145 (1993); H.J.COHEM, 'Het Phil Collins-arrest: een aardverschuiving in het (inter-) nationale auteursrecht', *Info Recht* (1994), pp. 83-87 and pp. 91-93.

¹¹⁵ M.N.SHAW, *o.c.*, p.214.

be objectively and reasonably justified.¹¹⁶ There is no reasonable justification why Pagonia should in reality solely protect Pagonian authors and composers, the more so since Bretorian authors and composers primarily have to seek relief in the Pagonian Courts, thereby recognizing the exclusive jurisdiction of Pagonia within Pagonian territory.¹¹⁷

3.3 Compensation for the losses suffered by Bretorian citizens as a result of copyright infringements

Every internationally wrongful act of a State, including a violation of customary law, entails the international responsibility of a State.¹¹⁸ Although Respondent will certainly claim that the Pagonian Criminal Code provides adequate protection, the lack of *effective* legal protection¹¹⁹ of foreign copyright owners and the discriminatory conduct of the judiciary entails Pagonia's responsibility.

The reparation must as far as possible wipe out all the consequences of the illegal act.¹²⁰ First and foremost, Applicant claims a compensation to the amount of the revenue lost by Bretorian copyright owners the past three years, an estimated amount of \$100 million. In addition, Applicant requests assurances and guarantees of non-repetition by the set up of special enforcement units in all Pagonian regions, as well as by a non-discriminatory conduct of the prosecutors.

¹¹⁶ *Minority Schools in Albania*, *PCIJ Publ.*, Series A/B, No. 64, p.19 (1935); American Law Institute's Restatement of Foreign Relations Law, 1987, section 722 (2), comment c); O. SCHACHTER, *o.c.*, p.316; M.N.SHAW, *o.c.*, pp.205-206.

¹¹⁷ J.COMBACAU et S.SUR, *Droit International Public*, 1997, p.373.

¹¹⁸ ILC, Artt. 1 and 3 Draft Articles on State Responsibility, 37 *ILM* (1998), p.440; B.VITANY, 'International Responsibility of States for their administration of Justice' *NILR* (1975), p.132-135.

¹¹⁹ Art 9 Harvard Research Draft 'The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, Vol. 23 *AJIL* (1929), Spec. Suppl., p. 173; I. BROWNLIE, *o.c.*, p.529.

¹²⁰ *Chorzów Factory case*, *PCIJ Publ.*, Series A, (1928) No 13, p. 47.

4. Conclusion and Prayer for Relief

Applicant, the Republic of Bretoria, respectfully requests this *Honourable Court*:

1. to declare the acts of the Kingdom of Pagonia assertedly taken to protect Pagonian cultural identity illegal under international law, and to order Pagonia to compensate Bretoria for the losses suffered by its citizens as a result of such acts; and
2. to declare that the protection afforded to copyright owners by the Kingdom of Pagonia is insufficient under international law, and to order Pagonia to compensate Bretoria for the losses suffered by its citizens as a result of copyright infringements in Pagonia.
3. to order the payment of a simple interest and to determine the rate and the date from which it should be awarded.

Respectfully submitted,

Agents for the Applicant

VI. LIST OF ABBREVIATIONS

African Charter	African Charter on Human and Peoples' Rights
AFTA	Agreement on the Common Effective Preferential Tariff Scheme for the Asean Free Trade Area
AIDI	Annuaire de l'Institut de Droit International
AJIL	American Journal of International Law
American Convention	American Convention on Human Rights
Am.U.L.Rev.	American University Law Review
Ann.fr.dr.int.	Annuaire français de droit international
ArizJICL	Arizona Journal of International and Comparative Law
Berne Convention	Berne Convention on the Protection of Literary and Artistic Works
BYIL	British Yearbook of International Law
CCSE	Conference on Cooperation and Security in Europe
CEFTA	Central European Free Trade Agreement
CERDS	Charter of Economic Rights and Duties of States
CJTL	Columbia Journal of Transnational Law
Charter of Paris	Conference on Security and Co Operation in Europe, Charter of Paris for a new Europe and a new era of democracy, peace and unity
Copenhagen Document	Conference on Security and Co Operation in Europe, Document of the Copenhagen meeting of the Conference on the Human dimension
Declaration	Universal Declaration of Human Rights
Duke J.Comp.&Int'l L.	Duke Journal of Comparative and International Law

EPIL	Encyclopaedia of Public International Law
EuZW	Europäisches Zeitschrift für Wirtschaft
ECLR	European Competition Law Review
ECHR	European Convention for the protection of Human Rights and Fundamental Freedoms
ECR	European Court Reports
EJIL	European Journal of International Law
ELR	European Law Review
Florence Agreement	UNESCO Agreement on the Importation of Educational, Scientific and Cultural Materials
FILJ	Fordham International Law Journal
GA	General Assembly
GATT	General Agreement on Tariffs and Trade
GYIL	German Yearbook of International Law
HICLR	Hastings International and Comparative Law Review
Helsinki Accords	Final Act Conference on Security and Co Operation in Europe
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ Rep.	Reports of the International Court of Justice
ICSID	International Center for the Settlement of Investment Disputes
<i>i. e.</i>	<i>id est</i>
ILM	International Legal Materials

ILR	International Law Reports
Iran-USCTR	Iran-United States Claims Tribunal
JDI	Journal de Droit International
J.Int'l Arb.	Journal of International Arbitration
JMJCIL	John Marshall Journal of Computer and Information Law
JWIP	Journal of World Intellectual Property
JWTL	Journal of World Trade Law
Law&Pol'y Int'l Bus.	Law and Policy in International Business
MERCOSUR	Treaty establishing a common market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Paraguay
MJIL	Michigan Journal of International Law
Minn.J.Global Trade	Minnesota Journal of Global Trade
NAFTA	North American Free Trade Agreement
NILR	Netherlands International Law Review
N.Y.L.Sch.J.Int'l &Comp. L.	New York Law School Journal of International and Comparative Law
N.Y.L.S.L.Rev.	New York Law School Law Review
N.Y.U. J.Int'l L.&Pol.	New York University Journal of International Law and Politics
OECD	Organization for Economic Co Operation and Development
PCIJ	Permanent Court of International Justice

RdC	Receuil des Cours
RIAA	Reports of International Arbitral Awards
RDAI	Revue de Droit des Affaires Internationales
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Unions
Santa Clara L. Rev.	Santa Clara Law Review
The Third Channel	The Third Channel. Journal of International Communication of the International Broadcasting Society
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Charter	Charter of the United Nations
Valuation	The valuation of nationalized property
Vand.L.R.	Vanderbilt Law Review
Virg.J.Int'l L.	Virginia Journal of International Law
WIPO CNRT	WIPO Copyright and neighboring rights and treaties
WIPO Copyright Treaty	WIPO Copyright Treaty and Agreed Statements Concerning the WIPO Copyright Treaty
WIPO Performances and Phonograms Treaty	WIPO Performances and Phonograms Treaty and Agreed Statements Concerning the WIPO

	Performances and Phonograms Treaty
WTAM	World Trade and Arbitration Materials
WTO	World Trade Organization
YJIL	Yale Journal of International Law
YLJ	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches Recht und Völkerrecht

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