

THE PHILIP C. JESSUP INTERNATIONAL LAW MOOT
COURT COMPETITION

1961

Case Concerning the Expropriation
of a Mining Company, Arcadia v.
Drangoland, United States of
Oceania v. Drangoland, 1961.

Problem

Arcadia v. Drongoland
U.S. of Oceania v. Drongoland

1961 Problem

Memorandum for Counsel

1. The hearing scheduled by the Court will be the preliminary hearing referred to in Article II(a) of the annexed Special Agreement.

2. Counsels' briefs and oral arguments should therefore be directed only to questions (i), (ii), (iv), (v) and (vi) set forth in Article I of the Special Agreement.

3. Counsel for the Government of Arcadia and the Republic of Drongoland will be concerned with questions (i) and (ii).

Counsel for the Governments of the United States of Oceania and the Republic of Drongoland will be concerned with questions (iv), (v) and (vi).

SPECIAL AGREEMENT FOR SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE OF A DIFFERENCE BETWEEN THE GOVERNMENT OF ARCADIA AND THE GOVERNMENT OF THE REPUBLIC OF DRONGOLAND AND BETWEEN THE GOVERNMENT OF THE REPUBLIC OF DRONGOLAND AND THE GOVERNMENT OF THE UNITED STATES OF OCEANIA WITH RESPECT TO A CONCESSION AGREEMENT BETWEEN WINDFALL, INC., A CORPORATION, AND THE GOVERNMENT OF THE REPUBLIC OF DRONGOLAND.

The Government of Arcadia, the Government of the Republic of Drongoland, and the Government of the United States of Oceania,

Considering that differences have arisen between the Government of Arcadia and the Government of the Republic of Drongoland over the expropriation by the latter Government of certain property of Windfall, Inc., a company incorporated in Arcadia and doing business in Drongoland,

Considering that differences have arisen between the Government of the Republic of Drongoland and the Government of the United States of Oceania over a claim by William Randolph Bonassis, a shareholder of the above-named Company, for the loss of value of his shares in the said Company, in consequence of the alleged breach by the Government of the Republic of Drongoland of the Concession Agreement between it and the said Company with respect to moneys claimed to be due to the said Company for goods supplied by it to the Government of the Republic of Drongoland,

Desiring that these differences should be settled by a decision of the International Court of Justice,

Desiring to define the issues to be submitted to the International Court of Justice by the presentation of a joint statement of the facts of the case,

Have agreed as follows:

Article I

The Court is requested to decide, upon the agreed facts set forth in Annex 1, the following questions:

- (i) Does Windfall, Inc., possess the nationality of Arcadia requisite to enable the Government of Arcadia to espouse its claim against the Government of the Republic of Drongoland?

- (ii) Did the refusal of the Government of the Republic of Drongoland to submit to arbitration, pursuant to the Concession Agreement, in order to determine its liability, if any, in respect of the expropriation of property of Windfall, Inc., relieve the Company from the necessity of exhausting its local remedies under the law of Drongoland prior to the presentation of a claim before this Court?

- (iii) If questions (i) and (ii) are answered in the affirmative, did the expropriation or refusal to arbitrate (or both), referred to above, constitute a violation of an international obligation of the Government of the Republic of Drongoland, and if so, what is to be the nature and extent of the reparation for such violation?

- (iv) Does William Randolph Bonassis possess the nationality of the United States of Oceania requisite to enable the Government of the United States of Oceania to espouse his claim against the Government of the Republic of Drongoland?

- (v) If question (iv) is answered in the affirmative, is the United States of Oceania entitled to espouse a claim by William Randolph Bonassis as a shareholder for loss of

value of his shares in Windfall, Inc., arising out of an alleged violation by the Government of the Republic of Drongoland of its Concession Agreement with Windfall, Inc., with respect to moneys claimed to be due to Windfall, Inc., for goods supplied by it to the Government of the Republic of Drongoland?

- (vi) If questions (iv) and (v) are answered in the affirmative, did the refusal of the Government of the Republic of Drongoland to submit to arbitration pursuant to the Concession Agreement, in order to determine its liability, if any, to William Randolph Bonassis in respect of such loss of value of his shares, relieve William Randolph Bonassis from the necessity of exhausting his local remedies under the law of Drongoland prior to the presentation of a claim before this Court?
- (vii) If questions (iv), (v) and (vi) are answered in the affirmative, did the alleged violation by the Government of the Republic of Drongoland or refusal to arbitrate (or both), referred to in questions (v) and (vi), constitute a violation of an international obligation of the Government of the Republic of Drongoland, and if so what is to be the nature and extent of the reparation for such violation?

Article II

(a) The Court is requested to hold a preliminary hearing to decide questions (i), (ii), (iv), (v) and (vi) referred to above or such of them as may be necessary in order to decide the further disposition of the case.

(b) If questions (i) and (ii) are answered in the affirmative, the Court is requested to hold a further hearing in order to decide question (iii) and the Government of Arcadia and the Government of the Republic of Drongoland reserve leave to adduce further evidence and to file further proceedings within the time fixed by the Court.

(c) If questions (iv), (v) and (vi) are answered in the affirmative, the Court is requested to hold a further hearing in order to decide question (vii) and the Government of the Republic of Drongoland and the Government of the United States of Oceania reserve leave to adduce further evidence or to file further proceedings within the time fixed by the Court.

Article IV

Upon the entry into force of the present Agreement, it may be notified to the Court under Article 40 of the Statute by any of the Contracting Parties.

Article V

(a) The present Agreement shall be subject to ratification.

(b) The instruments of ratification shall be exchanged as soon as possible in The Hague and the present Agreement shall enter into force immediately upon the exchange of ratifications.

In witness whereof the undersigned, being duly authorized by their respective Governments, have signed the present agreement and have affixed thereto their seals.

Done in triplicate at The Hague, the 17th day of August, 1960, in English.

[Signatures omitted.]

[The instruments of ratification were exchanged on 2 October 1960.]

Annex 1

1. Windfall, Inc. (hereinafter referred to as Windfall) is a corporation incorporated on March 5, 1950 in Arcadia, with its registered office in that State. From the date of incorporation to the present time, the registered shareholders of Windfall and the proportions of their shareholdings, have remained as follows:

<u>Shareholders</u>	<u>Voting Shares</u>
(i) Antix, Inc., a company incorporated in Arcadia and doing business in Arcadia and Drongoland, with 55% of its stock owned by nationals of the Republic of Drongoland, and the remainder distributed among nationals of states other than Arcadia	25%
(ii) National Ventures Ltd., a company incorporated and doing business in Drongoland, with 60% of its stock owned by nationals of Drongoland and the remainder distributed among nationals of states other than Arcadia and Drongoland	30%

Voting
Shares

- | | |
|---|-----|
| (iii) New Frontiers, Inc., a company incorporated and doing business in the Federation of Corvo, owned and controlled by nationals of Corvo | 5% |
| (iv) William Randolph Bonassis, a national of the United States of Oceania under the laws of that state | 40% |

2. As a result of certain negotiations commenced by incorporation, Windfall obtained from the Government of Drongoland on June 19, 1950, a concession, approved by the legislature of that country, granting Windfall "the exclusive right, within the territory of the Concession, to search for and extract bauxite and to use the same for the manufacture of aluminum, aluminum products and any other products" and "the non-exclusive right to transport, refine, or otherwise treat such bauxite and to transport, manufacture or otherwise treat such aluminum, aluminum products and other products, as well as the non-exclusive right to sell the same within Drongoland and to export the same." Windfall in return agreed to pay to the Government of Drongoland certain fixed annual sums as well as annual royalties calculated on the tonnage of aluminum, aluminum ore and products exported by Windfall. The Government also agreed to purchase from Windfall a fixed minimum tonnage of aluminum each year during the first 10 years of the Concession (which was to expire on June 18, 1970) at a price to be calculated with reference to a fixed proportion of the average export price.

3. The Concession Agreement also contained the following provisions:

"Article 15: This Concession shall not be annulled by the Government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities.

"Article 16: (1) Any difference between the parties of any nature whatever and, in particular, any difference arising out of the interpretation of this Agreement and of the rights and obligations therein contained and any difference relating to any of the matters subject to this Agreement or relating to the duration, termination or cancellation in any manner whatever of the rights and obligations contained in this Agreement, shall be settled by arbitration, if such difference is not resolved by agreement between the parties.

(2) The party requesting such arbitration shall so notify the other party in writing. Each of the parties shall appoint an arbitrator and the two arbitrators, before proceeding to arbitration, shall appoint an umpire. If the two arbitrators cannot, within two months, agree on the person of the umpire, the latter shall be nominated, at the request of either of the parties, by the President of the International Court of Justice. If the President of the International Court of Justice belongs to a nationality or a country which, in accordance with clause (3), is not qualified to furnish the umpire, the nomination shall be made by the Vice-President of the said Court.

(3) The umpire shall be of a nationality other than that of Drongoland, Arcadia, or the United States of Oceania, and shall not be closely connected with the said countries by being or having been in the service of any of the said countries or by being resident or having resided in any of the said countries.

(4) If one of the parties does not appoint its arbitrator, or does not advise the other party of its appointment, within 60 days of having received notification of the request for arbitration, the other party shall have the right to request the President of the International Court of Justice (or the Vice-President in the case provided for in clause (2)) to nominate a sole arbitrator, to be chosen from among persons qualified as above mentioned, and in this case, the difference shall be settled by this sole arbitrator.

(5) The procedure of arbitration shall be that followed, at the time of arbitration, by the International Court of Justice. The place and time of arbitration shall be fixed by the umpire or by the sole arbitrator provided for in clause (4), as the case may be.

(6) The award shall be based on the juridical principles contained in Article 38(1) of the Statute of the International Court of Justice. There shall be no appeal against the award.

(7) The expense of the arbitration shall be borne in the manner determined by the award."

4. Pursuant to the Concession, Windfall established a branch in Drongoland and commenced mining and manufacturing activities in December, 1950. Most of the bauxite mined was used for the produc-

tion of aluminum; a small proportion was used for the manufacture of various chemicals and abrasives. Branch offices were also opened in Oceania and Corvo in order to obtain access to the markets in these countries. By 1955, 60% of Windfall's income was produced by exports of aluminum and other products from Drongoland negotiated through its Oceania and Corvo branches, the balance of its income arising from sales within Drongoland, including sales to the Government.

5. On September 6, 1956, the Drongolese legislature enacted an amendment to the Claims Against the Government Act. The amendment provided, in part, that "actions against the state, whether by aliens, citizens or corporations wheresoever incorporated, shall be brought only before the courts of the State and the State shall not be bound by any order, award or judgment not pronounced by such courts. This Act shall apply notwithstanding any agreement or law to the contrary, whether entered into or enacted before or after the date of this Act."

6. In January, 1957, a dispute arose between Windfall and the Government of Drongoland concerning the sum of \$2,500,000 claimed by Windfall in respect of aluminum supplied to the Government pursuant to the Concession Agreement. The Government denied indebtedness, disputing both the interpretation of the Agreement and the performance alleged by Windfall. In response to a formal request by Windfall to refer the matter to arbitration pursuant to Article 16 of the Agreement, the Government stated in a letter dated August 15, 1957: "In light of the Amendment of September 6, 1956, to the Claims Against the Government Act, the Government of Drongoland is unable to accede to your request for arbitration.

Any claim by the Company should be brought in the appropriate courts of this State. The Government cannot be a party to any arbitration of this dispute and cannot recognize any arbitral award purporting to be made pursuant to the Concession Agreement."

7. On September 15, 1957, Windfall advised the Government of Drongoland that the Company would have to consider cutting off supplies of aluminum to the Government until the dispute was settled by arbitration under the Concession Agreement. On October 15, 1957, the Drongolese legislature passed an Act expropriating part of Windfall's property comprised in the Concession, consisting of one of the Company's mines, a factory, and all the aluminum and aluminum ore thereon. The Act provided for the appointment of three Drongolese legislators to assess compensation.

8. Windfall protested to the Government, demanding that the question of the legality of the expropriation and the amount of compensation payable, if any, be submitted to arbitration in accordance with the Concession Agreement. The Government declined to follow the arbitral procedure prescribed in the Concession Agreement on the grounds set forth in its letter of August 15, 1957. Windfall thereupon appealed to the Government of Arcadia for diplomatic protection. The Government of Arcadia made representations to the Government of Drongoland, and, being unable to reach agreement, decided to refer the dispute to the International Court of Justice, pursuant to the terms of the foregoing Special Agreement.

9. At an extraordinary meeting of shareholders of Windfall on May 17, 1958, it was resolved that the Company should request the Government of Arcadia to press its claims in respect of the

expropriation only and to waive the claim for \$2,500,000 referred to in paragraph 6 above. The representatives of Antix, Inc., and National Ventures Ltd. voted for, and Mr. Bonassis and the representative of New Frontiers, Inc., voted against, the resolution. At this meeting the representatives of Antix and National Ventures submitted letters which each company had allegedly received from the Minister for National Development of the Republic of Drongoland. The letters, which were substantially identical, read in part as follows: "The Government regards with concern and disfavour attempts by Windfall, Inc., of which you are a shareholder, to obtain a settlement of its claim against the Government in a manner inconsistent with the laws and public policy of the Republic. In particular, the Government regards Company's claim for \$2,500,000 for aluminum allegedly supplied to the Government as without foundation in fact or law, and if this claim is pursued, against the best interests of the Republic, the Government will have to consider cancelling any contracts it might have with those organizations in Drongoland possessing an interest in Windfall, Inc." The Government of Drongoland does not deny that these letters were sent.

10. In consequence of the waiver by the Government of Arcadia, at the request of Windfall, of the claim for \$2,500,000, Mr. Bonassis requested the Government of the United States of Oceania to seek compensation from Drongoland for the loss of value of his shares in Windfall caused by Drongoland's refusal to settle Windfall's claim for this amount. It is agreed that between December 31, 1956, and October 14, 1957, the market value of Bonassis' shares in Windfall had diminished by approximately sixteen percent

and by a further twenty-one percent between October 15, 1957, and August 17, 1960. Being unable to reach agreement on this matter, the Government of Drongoland and the United States of Oceania, with the consent of the Government of Arcadia, decided to refer the question of Mr. Bonassis' claim to the International Court of Justice together with the question of Windfall's claim.

11. Mr. Bonassis' parents were both citizens and residents of Corvo. Bonassis was born in the United States of Oceania while his parents were visiting that country in 1904, and thereby acquired Oceanian nationality jure soli under the laws of that country. His parents took him back to Corvo in 1905 and he lived there until 1927. Under the laws of Corvo, a person born in another State could become a citizen of Corvo only by naturalization or, if his parents were citizens of Corvo, by election to assume Corvonian citizenship and renounce any other citizenship, upon attaining the age of 21. Bonassis never made any such election.

12. In 1927, Bonassis, who had been engaged in the importing business in Corvo, went to Oceania to join the executive staff of World Enterprises, Inc., a large corporation with international interests. He worked for World Enterprises until 1933 and during this period built a home in Oceania, though he spent much time abroad attending to the overseas business of the company. In 1933, on a business visit to Thule, he met and married a national of that country and decided to make his home there. He thereupon left the employ of World Enterprises, though retaining a share interest in the Company, and obtained an executive position with an investment organization in Thule. Subsequently he obtained interests in a

number of corporations, organized in Arcadia, Drongoland and other countries for the purpose of obtaining and exploiting mineral concessions in these countries. He resigned his position in Thule in 1939 and since then has spent at least 9 months of each year outside Thule, attending to his scattered business interests. During the last 10 years he has visited Oceania on four occasions, for business reasons, each visit lasting less than a week. He maintained his house in Oceania and stayed in it during his visits. He has never voted in an Oceania federal, state, or local election and has never participated in public affairs in any way during his residence there.

13. Bonassis' wife has lived in their house in Thule since their marriage. His children were educated there and still reside there. Though his assets are distributed among Oceania, Drongoland, Arcadia and other countries, his private funds are concentrated in Thule. During his annual three months vacation in Thule he has played a leading part in civic affairs and contributed generously to local philanthropic foundations, though he has never held any elective position and never acquired Thule citizenship.