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International Law Moot Court Competition

MEMORANDUM FOR JUDGES

Prepared Solely for the Use of Judges

[Note: You will find it helpful to read the at-
tached Problem prior to reading this memorandum]

This moot court problem is based upon a hypothetical dispute between a large developed country and a small developing one. It is intended to capture from a legal point of view something of the present-day world economic situation, and particularly to highlight contemporary problems in international trade between countries of differing levels of development. The basic economic disputes have been put in the context of considerable socio-political controversy involving human rights, the applicability of U.N. controls and sanctions, and a legal problem of the authority of the municipal law of the large developed countries.

This memorandum is intended to assist judges by briefly elaborating upon these major issues, arguments and authorities. It does not attempt to provide a comprehensive analysis of these issues nor a citation of all relevant authorities. Teams may appropriately identify other issues, draw on other authorities, and formulate and organize their arguments in different ways.

I. General Purpose of the Problem

The Problem centers on the General Agreement on Tariffs and Trade (GATT) and, more specifically, upon the legal obligations between signatories to protocols of accession to the Agreement. Of concern here are both tariff barriers, such as the price differential action, and nontariff barriers, such as

the countervailing duty and antidumping actions. To assist Judges in the identification and understanding the GATT-related issues, attention should be focused particularly upon the following GATT provisions:

- 1) Art. III
- 2) Art. VI
- 3) Art. XV
- 4) Art. XVI
- 5) Art. XXIV
- 6) Art. XXXII
- 7) Protocol of Provisional Application

The following reference works and documents might be usefully consulted:

- 1) World Trade and the Law of GATT, John H. Jackson, Bobbs-Merrill Co., New York, 1969
- 2) The GATT; Law and International Economic Organization, Kenneth W. Dam, University of Chicago Press, Chicago, 1970
- 3) "GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade," Robert E. Hudec, 80 Yale Law Journal 1299 (June 1971)

The purpose of the Problem is to test the participants' abilities in dealing with an interesting and important body of law that comprises the GATT, and to apply specific provisions of the Agreement to a series of different international trade issues and problems.

Therefore, participants should devote their time and attention to the following: the legality under GATT of the regulations of a regional power authority, of which the provinces of the developed country are members; the effect of U.N. resolutions (and particularly Security Council Resolution 253) on a member-state's actions with respect to a corporation in which its nationals have a substantial interest; and the legality of both countervailing and antidumping duties levied on certain exports from the developing country by the developed country.

Participants should not argue, nor should Judges require them to argue, points related to the jurisdiction of the arbitral

tribunal, procedural matters involving the tribunal, and other national or international remedies available to the parties (for example, the question of the exhaustion of local remedies).

It should be noted that while the developed country, Titania, may be readily identified as the United States, and while, in fact, the Titanian Code in the Problem is identical to U.S. statutes, this identification should not be further drawn. In other words, it should not be assumed, for other purposes and reasons, that Titania is the United States. Most importantly, no references within the Problem should be considered to imply the the U.S. context, including its law, nor should U.S. law and precedent be argued.

Similarly, Rhodania will be identified, and indeed may be seen, as Southern Rhodesia; but the identification should be made only as pertains to U.N. resolutions and documents involving collective measures taken by the U.N. against Southern Rhodesia.

II. Case for Westphalia

- A. The Illegality Under GATT of the FRRPA Provision for a Price Differential and the Decision Based Upon It to Award a Contract to Interco.

Westphalia will dispute the awarding of the contract by the FRRPA to Interco on the basis of GATT Article III, which states:

§1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

§4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale,

purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

This is so even when Article III is read in light of Article XXIV (12), which states:

Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.

and in light of the wording of the Protocol of Provisional Application, which states:

§1. The Governments of the COMMONWEALTH OF AUSTRALIA, the KINGDOM OF BELGIUM, CANADA, the FRENCH REPUBLIC, the GRAND-DUCHY OF LUXEMBURG, the KINGDOM OF THE NETHERLANDS, the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, and the UNITED STATES OF AMERICA, undertake, provided that this Protocol shall have been signed on behalf of all the foregoing Governments not later than 15 November 1947, to apply provisionally on and after 1 January 1948:

- (a) Parts I and III of the General Agreement on Tariffs and Trade, and
- (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.

§3. Any other Government signatory to this Protocol shall make effective such provisional application of the General Agreement, on or after 1 January 1948, upon the expiration of thirty days from the day of signature of this Protocol on behalf of such Government.

Since the Problem indicates that Titania is a contracting party to the GATT and to all existing agreements in implementation of GATT, it may be correctly assumed that she (Titania) has signed a protocol of accession in terms of the Protocol of Provisional Application of the GATT, so as to bind her to GATT provisions notwithstanding that the GATT itself has never technically come into force. "Contracting parties" is defined in Article XXXII of GATT as "those governments which are applying the provisions of this Agreement under ... the Protocol of Provisional Application."

Westphalia will argue that Article III is applicable, notwithstanding §8(a) of Article III, which states:

The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

Westphalia can argue that §8(a) does not apply because the turbines do not constitute a governmental purchase "with a view to" governmental use by the FRRPA but rather to "use in the production of goods for commercial sale," since power to be produced by the turbines is sold to all kinds of industrial users. Westphalia will also argue that Article XXIV (12) is not applicable since Titania legislatively approved the provincial government's action, and that in any event such action is attributable to Titania since GATT must be read as self-executing apart from the Protocol of Provisional Application.

Finally, the ambiguity of the word "provisional" in the Protocol of Provisional Application, in the terms of which Titania's provisional accession to GATT falls, is unimportant, even though Article III falls within Part II of the GATT, which is clearly

covered by the Protocol. Here we quote from Professor Jackson's book at p. 63:

As to the legal result of "provisional", it might be asked what, in addition to the other legal results mentioned, is the result of using the word "provisional"? In the practice of GATT, as represented in the extensive GATT documentation, this writer has found no instance in which the clause "provisional application" has had any meaning in itself. Only the other specific clauses of the protocol have been utilized to derive a legal result of "provisional application". Indeed, even in the preparatory work for the protocol, the meaning of "provisional application" tended to be equated with executive action as restricted by the "existing legislation" clause.

This is so because, even if the compact of FRRPA was in effect when Titania became a GATT member, the regulation authorizing differential pricing was not "existing" mandatory legislation within the meaning of the Protocol.

B. The Illegality of Titanian Involvement in the FRRPA Sale to Interco under U.N. Human Rights Law.

Westphalia will also argue the illegality of the purchase of Interco's turbines in the context of the U.N. Charter. U.N. Security Council Resolution 253 is binding on member states including Titania. Section 3(a), (b), and (c) is clearly applicable to the importation into Titania of the turbines from Rhodania and to the activities of Titania's nationals, as shareholders in Interco.

Even if Titania's nationals are not involved directly in the operation of Interco with respect to the production and sale of these turbines, which Titania will argue, Westphalia can argue that there has been sufficient Titanian involvement in Interco by means of both the 45% ownership of Interco by Titanian interests and the approval by those interests of the practices of apartheid which indisputably apply to the management and employment policies of Interco.

Also, under U.N. Charter Article 39, Westphalia will argue that Rhodania's apartheid practices are a threat to international peace and security as defined by U.N. Charter Article 2(6), and thus Rhodania is subject to U.N. jurisdiction.

Furthermore, Westphalia will argue that the approval of the FRRPA compact by Titania's legislature and Titania's implicit approval of the actions of its nationals as shareholders in Interco, constitute violations of U.N. Security Council Resolution 253 §3 and §4, the objective of which is clearly to isolate and bring economic pressure to bear against the illegal apartheid regime in Rhodania.

Finally, under Articles 1, 2, 55, and 56 of the U.N. Charter and the obligations therein, Titania is precluded and prohibited from dealing with Rhodania or Interco.

C. The Illegality of the Countervailing Duty Under the GATT.

Westphalia will argue that the countervailing duty is not a justified response to Westphalia's differential exchange rate because, under Article XVI, which states:

If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary.

the rate is not a subsidy such as to justify the retaliatory imposition of countervailing duties.

Westphalia will also argue that the definition of "material injury" is not to be subjectively determined by Titania but rather objectively determined on the facts. It is enough that there has been no showing in the record of material injury to Titania or re-

tardation of its domestic industry under Article VI. §6(a) of Article VI reads:

No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

Therefore, because no material injury to Titania has been shown, Westphalia will contend that Article VI, which it argues is conditioned upon Article XVI, cannot be involved.

D. The Illegality of Titania's Antidumping Duty Under the GATT.

Westphalia will argue that the imposition of an antidumping duty is illegal under GATT since there has been no sufficient showing of "material injury" as required under §6(a) of Article VI. Without prejudicing her dispute of the findings made by the Titanian agency, and therefore without accepting the validity of the findings, Westphalia will argue that the 1/4 of 1% effect on Titanian private sales and earnings is insufficient to constitute a material injury. Therefore, there has been no violation of GATT even though the Westphalian marketing system under which the sales occur might be considered as a dumping technique.

Westphalia will also argue the illegality of the Titanian antidumping duty under GATT Article VI(1), which states:

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards

the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

- (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
- (b) in the absence of such domestic price, is less than either
 - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
 - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

Westphalia will contend that the duty is illegal because there has been no showing that the 30% of all unsold textile and apparel articles not bought by the Westphalian Government Marketing Organization generally find their way to domestic consumers. Therefore, there is no certainty that any of the goods were destined for consumption in Westphalia as required under Article VI(1)(a) for a showing of dumping. Even in the absence of a domestic price, as covered under Article VI(1)(b)(ii), there has been no indication that the goods were purchased by the Westphalian Government Marketing Organization for less than the cost of production plus whatever other minimal additional costs the Government Organization would have incurred in marketing these goods.

III. Case for Titania

A. Legality of "Price Differential" Technique.

Titania can respond that Article III of GATT cannot be applicable, as Westphalia argues, because of Article XXIV(12). The controversial action taken by the FRRPA is really, pro tanto, that of the five provinces in affecting the FRRPA governing council's decision on the basis of a differential pricing technique under FRRPA regulations, to award the contract for the turbines to Interco. Thus, it is at most a joint decision of the five provinces that is controversial, and not a matter of "national treatment." Thus, even though Article XXIV(12) requires that signatories perform an affirmative role in enforcing the GATT as to local entities such as the five provinces, nevertheless, affirmative action by such local entities, as such, does not imply "national treatment" such as to impose the requirements of Article III under XXIV(12).

Even if Article XXIV(12) is not applicable, the action by the FRRPA is protected because, despite the Protocol of Provisional Application, the compact among FRRPA members was in effect when Titania acceded to the GATT; and it is reasonable to consider the regulations which were promulgated under the compact, including that permitting the price differential technique, as ancillary to the compact, and therefore effective at the time of the accessions to the Protocol. There is no need for legislation in force to exist for the regulations under the "escape clause" of the Protocol to be considered mandatorily "existing;" it is enough that there are regulations which together compromise the sole effective legal implementation, indeed the sine qua non, of the compact, and which, therefore, are of substantial importance. The Titanian interests therefore qualify for "grandfather clause" protection under 1(b) of the Protocol.

B. Legality of Titanian Involvement in Interco Sale.

Titania will argue that U.N. Security Council Resolution 253 is not applicable in this situation since it is not clear that the turbines were exported from Rhodania but only that Interco is incorporated in Rhodania and that it has its principal place of business there. This is so because §3(a) of the resolution requires that all U.N. members "prevent the import into their territories of all commodities and products originating in Rhodania (Southern Rhodesia) and exported therefrom after the date of this resolution."

Furthermore, even though Titanian nationals are involved in

the ownership and operation of Interco, §3(b) of the resolution which states:

Any activities by their nationals or in their territories which would promote or are calculated to promote the export of any commodities or products from Southern Rhodesia; and any dealings by their nationals or in their territories in any commodities or products originating in Southern Rhodesia and exported therefrom after the date of this resolution, including in particular any transfer of funds to Southern Rhodesia for the purposes of such activities or dealings.

does not apply because there is nothing in the facts to indicate that the Interco turbines were actually exported from Rhodania (Southern Rhodesia) or that there was a transfer of funds to Rhodania (Southern Rhodesia) for that purpose.

Titania further argues that Security Council Resolution 253 is not legally binding on it; that it is invalid under the Charter; and that it intervenes in the domestic jurisdiction of Rhodania in violation of the U.N. Charter Article 2(7). Rhodania's apartheid policies do not represent a threat to international peace and security such as to make Article 2(6) applicable.

Moreover, Titania will argue that, even if binding, not all Security Council decisions are mandatory forever; they may fall into desuetude or there may be changed circumstances such as the recent proposal advanced by the British government for an agreement between itself and Southern Rhodesia (Rhodania), which can serve, at least, to suspend the authority of the Charter.

The U.N. Charter must be interpreted in light of practice. Thus, the U.S. foreign aid legislation permitting the import of chrome from Southern Rhodesia (Rhodania) may indicate more the flexibility than the literal rigidity of the U.N. Charter. In any case, the Arbitral Tribunal should defer on the human rights issue to a disposition of it by the U.N. legislative councils rather than its specialized judicial apparatus. To retain the matter before a court is not only improper, but unnecessary.

C. The Legality of Titania's Countervailing Duty Under the GATT.

Titania will argue that Westphalia's special exchange rate is a violation of Westphalia's GATT obligations under Article XV(4), which reads:

Contracting parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.

As Professor Jackson notes:

"This clause is not only very general but it also obligates GATT members not to frustrate the intent of the IMF articles, even though some GATT members are not Fund members! The preparatory work gives little guidance to the meaning of this clause."

but some clarity is given in Ad. Article XV, paragraph 4, which states:

The word "frustrate" is intended to indicate, for example, that infringements of the letter of any Article of this Agreement by exchange action shall not be regarded as a violation of that Article if, in practice, there is no appreciable departure from the intent of the Article. Thus, a contracting party which, as part of its exchange control operated in accordance with the Articles of Agreement of the International Monetary Fund, requires payment to be received for its exports in its own currency or in the currency of one or more members of the International Monetary Fund will not thereby be deemed to

contravene Article XI or Article XIII. Another example would be that of a contracting party which specifies on an import licence the country from which the goods may be imported, for the purpose not of introducing any additional element of discrimination in its import licencing system but of enforcing permissible exchange controls.

This, it will be argued, shown a violation of Article XV(4) by Westphalia.

It will also be argued by Titania that the purpose and result of the special exchange rate is not to assist Westphalia's international monetary position, which, under Article XV(9), would make the special rate permissible, but rather to erect a nontariff trade barrier which is clearly violative of Article XV.

Titania will further argue that the countervailing duty may be levied against the differential exchange rate of Westphalia first, because that rate is a "subsidy" under Articles VI and XVI, in which case retaliation in the form of a countervailing duty is clearly permissible, and second, even if the differential exchange rate is not deemed to be a subsidy under Article XVI, or if Article XVI is inapplicable, Titania's imposition of a countervailing duty against Westphalian goods is justified. This is so, first, because Article VI is not conditioned by Article XVI, and therefore, the existence of a subsidy under XVI is not required, and second, because the Protocol of Provisional Application supports the countervailing duty even though no injury is shown. Article VI falls under Part II of the GATT which is applied by the Protocol of Provisional Application "to the fullest extent not inconsistent with existing legislation." Since the Titanian countervailing duty statute requires no showing of injury, that statute is determinative and the countervailing duty is therefore permitted under Article VI.

D. The Legality of Titania's Antidumping Duty Under the GATT.

Titania will argue that Westphalia's marketing system clearly results in sales at lower than fair value and thus can be argued as dumping in violation of Article VI(1) and (2). Titania will contend that Article VI(1)(a) is applicable because a certain percentage of the 30% of textile and apparel articles remaining un-

sold do remain within Westphalia (destined for local consumption) at a price above that by which these goods are sold abroad by the Government Marketing Organization.

Titania will also argue that the judgment of its agencies concerning the existence and causation of material injury, namely, the displacement by Westphalian imports of domestic sales and a reduction of earnings, must prevail in determining whether its anti-dumping statute has been violated; that is, Titania will say that the materiality of injury is to be determined by the responsible agencies of the importing country and can be challenged as excessive under Article VI(1) and (2) only if the duty imposed exceeds the subsidy, and that Westphalia has failed to show that it does.

IV. Conclusion

In addition to the above, there are also other tangential and factual issues which can be raised in this problem. Policy issues and equity matters will probably also be treated by participants. Thus, the issues indicated here are by no means a complete list and students should be encouraged to develop ideas and arguments other than those set out above.

Finally, it should be noted that the FRRPA is a regional group but that it does not fall into any one of the three types of regional arrangements under the GATT; that is, the FRRPA is not to be considered as a customs union, a free trade area, or an interim agreement leading to the formation of either a customs union or free-trade area as defined under Article XXIV.