BEFORE AN ARBITRAL TRIBUNAL

Appointed by the
President of the
International Court of Justice

March, 1972

CASE NO. 1

WESTPHALIA

Applicant

v.

TITANIA

Respondent.

MEMORIAL FOR APPLICANT

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JURISDICTION

Titania and Westphalia have submitted the following question for determination by this Tribunal: "Whether the actions of Titania violated International Law?"

The determination of this question is to be governed by the terms of Article 38 of the Statute of the International Court of Justice [R-6].

QUESTIONS PRESENTED

I.

Whether Titania May Evade International Responsibility by Dealing Through FRRPA?

II.

Whether Titania Violated International Law in Her Dealings with Rhodania?

III.

Whether Westphalia's Trade Practices Comply with International Law?

IV.

Whether Titania's Imposition of Anti-Dumping Duties Violated International Law?

V.

Whether Titania's Imposition of Countervailing Duties Violated International Law?

VI.

Whether Titania's Imposition of Both Countervailing and Anti-Dumping Duties Violated International Law?

SUMMARY OF THE ARGUMENT

Titania may not evade international responsibility by dealing through FRRPA. Actions of Titania violated both the General Agreement on Tariffs and Trade and binding Security Council resolutions. Thus, Titania violated International Law in her dealings with Rhodania.

Westphalia's trade practices comply with international law and more specifically with the General Agreement on Tariffs and Trade.

Titania's imposition of countervailing and anti-dumping duties violated the General Agreement on Tariffs and Trade and general principles of International Law. Additionally, imposition of both duties on the same products violated International Law.

ARGUMENT

I. TITANIA MAY NOT EVADE INTERNATIONAL RESPONSIBILITY BY DEALING THROUGH FRRPA.

A. FRRPA Is Not A Subject Of International Law.

"The capacity for external action or international legal personality is in reality attributed to only a very limited number of organizations."[1] Although the United Nations is "a subject of international law,"[2] groups such as FRRPA should not be elevated to this status.

FRRPA should be classified as "an international institution with a special purpose."[3] Such institutions have only the functions and powers given them by their "definitive statutes."[4] FRRPA's "definitive statutes" are not in the record, and in their absence, Schwarzenberger's admonition to "err on the side of excessive caution"[5] in ascribing functions and powers to such institutions is persuasive.

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1. Kawashima, Some aspects of Illegal Acts of International Organizations, 16 Osaka L. Rev. 13, 16 (1968).

2. Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations [1949] I.C.J. 174.

3. Advisory Opinion on European Commission of the Danube [1927] P.C.I.J., ser. B. No. 14 at 64.

4. Id. accord D. Bowett, The Law of International Institutions 327 (2d ed. 1970).

5. G. Schwarzenberger, International Law 384 (2d ed. 1949).

An example of such institutions is the Caribbean Free Trade Association ["CARIFTA"]. CARIFTA is composed of independent states and dependencies of the United Kingdom.[6] Because of its composition and because of its "definitive statutes" CARIFTA does not have the power to conclude binding international agreements.[7] Thus, even CARIFTA is not a subject of International Law and FRRPA with far fewer attributes of international personality has less claim to this status.

In contradistinction to treaties which create international rights and obligations,[8] compacts generally create "politically insignificant" relationships.[9] FRRPA was created by a compact [R-1] and on the facts in the record, FRRPA does not merit classification as a subject of international law.

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6. Agreement Establishing the Caribbean Free Trade Association, April 30, 1968, in 7 International Legal Materials 935 (1968).

7. See id. art 37 and Meijers, "Carifta" and Association, [1970] Netherlands Y.B. Int'l. L. 55, 56-64.

8. Fitzmaurice, Draft Code on the Law of Treaties, Doc. A/CN. 4/101 cited at 51 Am. J. Int'l L. 574 (1957).

9. Virginia v. Tennessee, 148 U.S. 503 (1893); see also Lissitzyn, Territorial Entities Other Than Independent States in the Law of Treaties, 125 Recueil des Cours 1,27 (1968).

B. Titania Had Working Control of FRRPA In The Turbine Decision.

1. The Titanian provinces controlled the vote.

Fifty percent of the votes in FRRPA's governing council belong to the Titanian provinces [R-1]. Coupled with the 25% voting strength of Rhodania [R-1], Titania, through its provinces, could control the outcome of the FRRPA turbine decision.

2. Titania is responsible for the conduct of her provinces.

The Titanian provinces are local or regional governments within Article XIV of GATT [R-1]. This article charges Titania with responsibility for the provinces' economic conduct.

C. Alternatively FRRPA Was An Agent Of Titania In The Turbine Purchase.

1. Agency principles are recognized in International Law.

Bin Cheng affirms the general principle that acts of servants are imputable to the state-master.[10] The Permanent Court of International Justice held Great Britain responsible for the actions of an institution discharging public works

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10. Bin Cheng, General Principles of Law 181 (1953).

functions in Palestine.[11] States, like corporations, must accomplish their objectives through agents.[12]

2. Titania was responsible for the acts of her agent.

Some entity must bear international responsibility[13] for the illegality of the turbine purchase. The maxim qui facit per alium facit per se[14] has evolved to affix liability to the real party in interest.[15] Titania is that party.

II. TITANIA VIOLATED INTERNATIONAL LAW IN HER DEALINGS WITH RHODANIA.

A. The Turbine Purchase Violated GATT.

1. The preferential pricing violated the most-favored-nation principle.

The objective of a most-favored-nation clause is "simply that any given product of a particular foreign country will not be placed at a competitive disadvantage with the like

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11. The Manrommatis Palestine Concessions [1924] P.C.I.J. ser. A No. 2.

12. Sereni, Agency in International Law 30 Am. J. Int'l Law 638 (1940).

13. Chorzow Factory Case [1928] P.C.I.J. ser. A No. 176 at 29.

14. H. Broom, Legal Maxims* 644 (1854).

15. D.C. Dewan Moshideen Sahib & Sons v. United Beedi Workers Union, [1966] 3 All India Rptr. 370 (1964).

product of any third country . . . ."[16] This article "is in many ways the cornerstone of the General Agreement."[17] Although most-favored-nation treatment is not mandated by customary international law,[18] it is mandated by Article I of GATT.[19] "[C]ountries entitled to the MFN treatment enjoy absolute equality, which means they receive the same height of concessions and to the same extent as have been granted to another third country."[20]

Both Titania and Westphalia are contracting parties to GATT [R-1] which is "juridically speaking, a binding trade agreement."[21] Titania breached Article I by according a 50% price differential to a Rhodanian corporation,[22] without according Westphalia equal treatment.

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16. Memorandum from the Chief of the Division of Commercial Treaties and Agreements to Assistant Secretary of State; cited in 14 M. Whiteman, Digest of International Law 749 (1970) (emphasis in original).
17. K. Dam, The GATT Law and Economic Organization 18 (1970).
18. Case Concerning Rights of Nationals of the United States in Morrocco [1952] I.C.J. 176; K. Hyder, Equality of Treatment and Trade Discrimination in International Law (1968).
19. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 STAT. (5) (6), T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter cited as "GATT" with numerical section].
20. Rom, The Tariff Quota and its Treatment in GATT, 5 J. World Trade L. 131, 150 (1971).
21. Comment, Generalized Tariff Preferences for Developing Countries: The UNCTAD Agreed Conclusions, 10 Colum. J. Transnat'l L. 111, 118 (1971).
22. Case of Barcelona Traction Light and Power, Ltd. [1970] I.C.J. 3

Vattel observed that: "He who violates his treaties, violates at the same time the law of nations; . . . doubly guilty he does an injury to his ally, he does an injury to all nations, and inflicts a wound on the great society of mankind."[23]

2. Titania's failure to consult with Westphalia underscores the arbitrariness of the preferential pricing.

Article XXII of GATT requires that:

> Each contracting party shall accord sympathetic consideration to and shall afford adequate opportunity for consultation . . . with respect to any matter affecting the operation of this agreement.[24]

This requirement has resulted in "customary bilateral discussion regarding problems arising under the agreement. . . ."[25]

Westphalian remonstrances regarding the arbitrary price differential met with no success [R-3]. The failure to cooperate in seeking an amicable settlement underscores

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23. A. Vattel, Le Droit des Gens 221 (1773) cited in S. Crandall, Treaties Their Making and Enforcement 9 (1916)

24. GATT, supra note 19, at art. XXII 1.

25. Catudal, The General Agreement on Tariffs and Trade: An article-by-article analysis in Layman's Language 45 Dep't State Bull. 35, 38 (1961).

the arbitariness of Titania's conduct and violated Article XII of GATT.[26]

3. Titania's action was not within any most-favored-nation exception.

a. Domestic Vendor Preferences are inapplicable.

Purchases for "governmental use" and "not for resale" are exceptions to most-favored-nation treatment under GATT.[27] Various nations have enacted "buy domestic" statutes under this exception.[28] Under a "buy California" statute,[29] the City of San Francisco attempted to prefer a domestic turbine supplier over a lower bidder using foreign materials. In Baldwin-Lima-Hamilton Corp. v. Superior Court,[30] the action was held to contravene GATT because the production of electricity was for resale.

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26. Gatt, supra note 19, at art. XXII paragraph 1.

27. Id. art. XVII Para. 2.

28. E.g. 41 U.S.C. § 10 (a)-(d) (1970); Law of Dec. 12, 1970, Concerning Governmental Purchases, [1971] Boletin Official No. 22087 (Argen.) translated in 10 International Legal Materials 572 (1971).

29. Cal. Gov't Code §4303 (Deering 1958).

30. 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (1962); accord Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

Other such statutes have been similarly interpreted.[31] FRRPA produces electricity for resale [R-1]; therefore this exception does not apply to the Turbine purchase.

b. Customs Union and Free Trade area exceptions are inapplicable.

Article XXIV of GATT provides certain limited[32] exceptions for free trade areas and customs unions. According to GATT, "the purpose of a customs union or free trade area should be to facilitate trade. . . and not to raise [trade] barriers . . . ."[33]

Customs unions involve "uniformity of customs laws and tariffs, ..."[34] Free trade areas are merely lesser developed customs unions[35] which entail the elimination of restrictive commerce regulations "on substantially all of

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31. Territory v. Ho, 41 Hawaii 565 (1957); Texas Ass'n of Steel Transp. Inc. v. Texas Highway Comm'n, 364 S. W. 2d 749 (Tex. Civ. App. 1963); 6 Texas Int'l L.F. 134 (1970).

32. Hudec, GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade, 80 Yale L.J. 1299, 1358, (1971).

33. GATT, supra note 19, at art. Para. 4.

34. Advisory Opinion on the Austro-German Customs Regime [1931] P.C.I.J. ser. A/B, No. 41 at 51; accord Hay, The European Common Market and the Most-Favored-Nation Clause, 23 U. Pitt. L. Rev. 661 (1962).

35. Dam, Regional Economic Arrangements and the GATT: The Legacy of a Misconception, 30 U. Chi. L. Rev. 615,616 (1963).

the trade between the constituent territories in products originating in such territories."[36] Certain waivers have been granted by GATT to entities not strictly complying with these criteria such as the European Coal and Steel Community and Euratom.[37] The record shows no application for a waiver. Thus, the imposition of an arbitrary price differential may not be justified by references to the free trade area and customs union exceptions.

Since none of the exceptions justify Titania's conduct, the discriminatory price differential violated GATT.

B. Titania Violated Mandatory Security Council Resolutions.

As early as 1965, the General Assembly called upon all States "to refrain from rendering any assistance whatsoever to the minority regime in [Rhodania]."[38]

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36. GATT, supra note 19, at art. XXIV Para. 8(b).

37. Dam, Regional Economic Arrangements Legacy of a Misconception, 30 U. Chi. L. Rev. 615, 616 (1963).

38. G. A. Res. 2022, 20 U. N. GAOR, Supp 14 at 54, U.N. Doc No. A/Res./2022 (1965).

In a series of resolutions, the Security Council called upon all States (1) "to refrain from rendering any assistance to this illegal regime;"[39] (2) "not to entertain any diplomatic or other relations with [Rhodania];"[40] and (3) "to do their utmost to break off economic relations with [Rhodania] . . . ."[41] Again in 1966, the Security Council called upon all members to prevent the import, into their territories, of certain [Rhodanian] products.[42]

In 1968, these activities culminated in Security Council Resolution 253 calling upon Members to "prevent: (a) The import into their territories of all commodities and products originating in [Rhodania] and exported thereform after the date of this resolution . . . ."[43]

In 1970, the Security Council passed Resolution 277 reaffirming previous resolutions and calling upon Members

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39. 20 U.N. SCOR Resolution and Decision at 8 (Resolution 216) (1965).

40. Id. at 8-9 (Resolution 217).

41. (1966) U.N.Y.B. 112 (Resolution 221).

42. 21 U.N. SCOR Resolution and Decisions at 7-9 (Resolution 232). (1966).

43. (App. - page 2) (hereinafter cited as "Resolution 253").

to prevent circumvention of Resolution 253 by their "nationals, organizations, companies and other institutions . . . ."[44]

Security Council resolutions fall into two broad categories.[45] Resolutions under Chapter VI,[46] like General Assembly resolutions,[47] are recommendatory and have been held not to be binding on Members.[48] Resolutions under Chapter VII dealing with threats to peace and security are obligatory.[49]

Resolution 253 states that the Security Council is "acting under Chapter VII of the United Nations Charter." Chapter VII, Article 24 gives the Security Council the power to impose sanctions which may include "complete or partial interruption of economic relations . . . ."[50] Members are

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44. Resolution 277 of 1970, U.N. Monthly Chronicle, Apr. 1970,32.

45. J. Castaneda, Legal Effects of the United Nations Resolutions 72 (1969).

46. U. N. Charter ch. VI.

47. Advisory Opinion on Voting Procedure-Southwest Africa [1955] I.C.J. 66.

48. The Corful Channel Case [1948] I.C.J. 31.

49. Comment, International Law - Southern Rhodesia - United Nations - Security Council [1967] Camb. L. J. 1 and authorities therein.

50. U. N. Charter ch. VII, art. 41

required to fulfill in good faith obligations assumed under the Charter.[51] Among these is the duty to carry out decisions of the Security Council.[52] Additionally, members are required to refrain from assisting any state against which the U.N. is taking preventive or enforcement action.[53]

In the face of mandatory sanctions whose cumulative effect[54] is to isolate [Rhodania], Titania bought goods from Rhodania and thereby provided her with "funds or resources," also in contravention of Security Council Resolution 253.[55]

Both Titania's purchase and its effects are in contravention of Titania's obligations under the U. N. Charter.

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51. Id. art. 2 (2)

52. Id. art. 25; see L. Goodrich & E. Hambro, Charter of the United Nations - Commentary and Documents 122 (1946).

53. U. N. Charter art. 2 (5).

54. Advisory Opinion on Voting Procedure - South-West Africa [1955] I.C.J. 66 (Opinion of Lauterpacht J.) at 120.

55. Record Appendix I at Paragraph 4.

III. WESTPHALIA'S TRADE PRACTICES COMPLY WITH INTERNATIONAL LAW

A. The Use of Multiple Exchange Rates Is An Accepted Practice.

1. IMF recognizes use of MERs.

Although Article VIII Section 3 of the Agreement[56] proscribes multiple exchange rates, MERs antedate the International Monetary Fund[57] and are universally acknowledged by the Fund with no waiver requirements.[58]

In December 1970, nineteen countries maintained multiple exchange rates ranging as high as 300%.[59] Although Westphalia is not given to be a member of IMF, at least seven members of the Fund maintain multiple exchange rates.[60]

In fact "several countries which have gradually become dissatisfied with the results of other controls have switched

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56. Articles of Agreement of the International Monetary Fund, art. 8 § 3, 2 U.N.T.S. 40, 68.

57. de Vries, Multiple Exchange Rates, in 2 The International Monetary Fund 1945-65 22 (1966).

58. Id. at ch. 6.

59. Swidroski, Exchange Rates at the Beginning of 1970, Finance and Development, Dec. 1970 at 20-21.

60. Compare the listing at 12 IMF Staff Papers 282 (1965) with the listing of signatories to the Articles of Agreement of the International Monetary Fund in 2 U.N.T.S. 112-20 (1947).

to multiple rates: Pakistan and the Philippines have introduced them only within the last 5 years."[61]

Multiple Exchange Rates serve as balance of payments controls and as a revenue raising response to the inadequate tax structure of many developing countries.[62] "[M]ultiple exchange rates are utilized by capital importing countries not only to reduce stress on foreign exchange resources, but also as an indirect means of increasing sources of government revenues."[63]

2. GATT comtemplates use of MERs.

The interpretive note to GATT Article XVI regarding subsidies states:

> Nothing in section B [relating to export subsidies] shall preclude the use by a contracting party of multiple rates of exchange in accordance with the articles of Agreement of the International Monetary Fund.[64]

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61. de Vries, Multiple Exchange Rates: Expectations and Experiences, 12 IMF Staff Papers 282, 283 (1965).

62. Kanesa - Thasan, Multiple Exchange Rates: The Indonesian Experience, 13 IMF Staff Papers 354, 364 (1966).

63. Joint Committee on Continuing Legal Education of the ALI and the ABA, Law Governing International Transactions 13 (1962).

64. GATT, supra note 19, at Ad art. XVI B (1).

The only GATT limitations on MERs are found in Article XV, para. 4 and Article II, (3). The former specifies that parties shall not "frustrate the intent" of GATT or the IMF by exchange action. The latter prohibits currency alterations which "impair the value" of GATT concessions. Neither frustration of any GATT or IMF objective, nor impairment of any concession has been alleged in the instant case.

3. Westphalian use of MERs is not contrary to GATT.

According to Jackson: "The use of subsidies for primary products is not prohibited, only discouraged . . . ."[65] Article XVI, Paragraph 3 of the GATT makes provision for the application of subsidies to primary products. This clause has been interpreted by the United States to allow subsidization of "an exported processed product (not itself a primary product), which has been produced from such primary product. . . ."[66]

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65. J. Jackson, World Trade and the Law of GATT 393 (1969); accord, Butles, Countervailing Duties and Export Subsidization: A Re-emerging Issue on International Trade, 9 Virginia J. Int'l L. 82, 93 (1969).

66. U. S. reservation to Declaration Giving Effect to Article XVI (4) of the General Agreement on Tariffs and Trade 445 UNTS 303 (done Nov. 19, 1960).

Westphalian multiple exchange rates affect only raw wool, raw cotton, and textiles and apparel articles [R-4], thus effectively treating them as components of a single interdependent industry. The application of such subsidies to primary products is provided for in GATT. Textiles are "processed products" which are "produced from" primary products[67] - in this case raw wool and raw cotton. Currently, textile exports are being subsidized in the European Economic Community, Taiwan, Mexico, Brazil, and Japan.[68] Viewed in this light, the Westphalian multiple exchange rates are clearly within Article XVI of GATT as applied by other textile exporting countries.

B. Westphalian Government Market Organization Operations Are Not Contrary To GATT.

Article XVIII of GATT recognizes the need for governmental assistance to economic development.[69] One method of attaining this development is through governmental purchases and resale of the output of domestic producers.

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67. Note, Quantitative Restrictions on Textile Import, 6 Texas Int'l L. F. 82, 93 (1970).

68. Id. at 96.

69. GATT, supra note 19, at art. XVIII Para. 2.

Article III paragraph 8(b) of GATT provides:

> The provisions of this Article shall not prevent the payment of subsidies. . . effected through governmental purchases of domestic products.

State trading is conducted by a number of states. India state trades to assist shoe manufacturing,[70] Japan in at least three products,[71] and the United States in support of domestic agriculture.[72] Many developing African states have established domestic development institutions to assist in industrialization.[73]

Article XVII of GATT in paragraphs 1(a) and 1(b) requires these organizations to conduct trade in a non-discriminating manner in accordance with commercial considerations.[74]

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70. Behrman, State Trading by Underdeveloped Countries, 24 Law & Contemp Prob. 454, 476 (1959).

71. Marks, The Legal Environment of Australian-Japanese Trade, [1967] Australian Y. B. Int'l. L. 36, 64.

72. Dirks, U. S. Exports of Surplus Commodities, 5 I.M.F. Staff Papers 200 (1956).

73. McCarthy, African Investment Laws and Development Institutions - An Analogy to the Problems of the Ghetto, 50 Boston U. L. Rev. 360, 379 (1970).

74. G. Curzon, Multilateral Commercial Diplomacy 290 (1965).

WGMO's disposition of end of season textiles is commercially reasonable and "within the general principles of non-discriminatory treatment" prescribed by Article 1(a).

IV. TITANIA'S IMPOSITION OF ANTI-DUMPING DUTIES VIOLATED INTERNATIONAL LAW.

A. Westphalia's Actions Did Not Constitute Dumping.

1. Sales abroad were of unlike products at not "less than normal value."

Titania is a party to the Anti-Dumping Code of 1967 implementing Article VI of GATT [R-1]. According to this Code,

> a product is to be considered as being dumped, i. e. introduced into the commerce of another country at less than its normal value if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade for the like product when destined for consumption in the exporting country.[75]

The key phrases in the Anti-Dumping Agreement are "like product" and "normal value." Westphalia submits that in-season textiles and end-of-season textiles are products with marked differences in market appeal and saleability.

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75. GATT, supra note 19, at art. 2 para. (a) (emphasis added).

"The worth of the thing is the price it will bring."[76] The law of damages values fungible commodities at market value,[77] i.e. at "whatever prices are necessary to move them"[R-3]. Thus, Westphalia's textile sales in foreign markets of dissimilar products at their "normal value" does not constitute dumping under the Anti-Dumping Code.[78]

2. Sales abroad were not discriminatory.

Dumping was recognized long before the Anti-Dumping Code. Thus, the Code should be interpreted in light of the evil it sought to correct.[79]

In classical trade law dumping meant that: "Goods are sold abroad at prices different from those charged in the home market of the exporter, or in a relevant third market if there is no home market. . . ."[80] Viner defines dumping

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76. The I. C. White, 295 F. 593, 595 (4th cir. 1924).

77. C. McCormick, Handbook of the Law of Damages §44 (1935); 2M. Whiteman, Damages in International Law 1236-37 (1937).

78. GATT, supra note 19, at art. 2.

79. T. Cooley, A Treatise on Constitutional Limitations, 141 (8th ed. 1927).

80. de Jong, The Significance of Dumping in International Trade, 2 J. World Trade L. 162, 165 (1968).

as "price discrimination between markets."[81] Dumping is equated with transnational price discrimination.

WGMO purchases only 70% of the"end-of-season" goods for resale abroad, in any number of countries, at whatever price they will bring [R-4]. The remaining 30% "left with the industry" are not assigned a value in the record.

Without a given domestic price for "end-of-season" textiles, no basis for comparison with foreign prices exists. Thus, no finding of price discrimination is possible on the facts in the record or under the Anti-Dumping Code.

Even if a price differential existed, it could result from commercial factors favoring foreign trade in general.[82] From the evidence, the foreign price of WGMO goods cannot be found to reflect price discrimination.

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81. J. Viner, Dumping: A Problem in International Trade 3 (1923 reprinted 1966); see also Ehernhaft, Protection Against International Price Discrimination, 58 Colum L. Rev. 44, 46 (1958).

82. Marks, The Legal Environment of Australian-Japanese Trade, [1967] Australian Y. B. Int'l L. 36, 64 n.117.

B. Titanian Imposition Of Anti-Dumping Duties Was Illegal.

1. The imposition of duties without material injury violated Titanian law.

Injury is a statutory[83] or administrative[84] requirement before imposing anti-dumping duties in most developed countries. The need to show injury results mainly from the recognition that the law does not deal with trifles;[85] de minimus non curiat lex.

The United States was the third State to enact anti-dumping legislation, preceded only by Canada and British West Africa.[86] The Titanian statute is almost a literal copy of the early U. S. statute.[87] Recognized canons of statutory construction indicate that interpretations of an earlier

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83. 19 U.S.C. §160 (1970) Titanian Code §190 (undated).

84. Mackenzie, Anti-Dumping Duties in Canada, 4 Canadian Y. B. Int'l L. 131 (1969).

85. French Guiana Prize Case, 2 Dod. Adm. R. 159, 163, 163 Engl Rep. 1447, 1449 (1817).

86. J. Viner, Dumping A Problem in International Trade 274 (1923 reprinted 1966).

87. Compare Titanian Code §190 with 19 U.S.C. §160 (1970).

statute disclose the meaning of the latter enactment.[88] Thus, U. S. anti-dumping determinations are persuasive indicators of the meaning of the Titanian statute. The U. S. Tariff Commission considers three factors determinative of injury:

a. Predatory intent.

"Predatory intent has been a frequent concern in anti-dumping cases. Twice it has expressly served as the basis for a finding of injury and three times by inference."[89] Although these cases[90] were decided before the 1967 GATT Anti-Dumping Code, predatory intent or an intent to injure domestic concerns is still a persuasive factor.

b. Market share.

"Displacement or dislocation of part of the domestic industrys' pre-import market share by the sale of foreign

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88. 82 C.J.S. Statutes §372, at 860 (1953); T. Cooley, A Treatise on Constitutional Limitations 136 (8th ed. 1927).

89. Baier, Substantive Interpretations Under the Anti-dumping Act and the Foreign Trade Policy of the United States, 17 Stan. L. Rev. 409, 417 (1965).

90. Bicycles from Czechoslovakia, 25 Fed. Reg. 9782 (1960); Carbon Steel Bars and Shapes from Canada, 29 Fed. Reg. 12599 (1964); Steel Reinforcing Bars from Canada, 29 Fed. Reg. 3840 (1964); Portland Gray Cement from Portugal, 26 Fed. Reg. 10010 (1961); Vital Wheat Gluten from Canada, 29 Fed. Reg. 5921 (1964).

merchandise priced below fair value has frequently been the predominant factor in finding injury or a likelihood of injury to American industry."[91] The cases interpreting the quantum of market share requirement are somewhat contradictory. Although one early case found injury when only 0.4 percent of total production was displaced,[92] this case was subsequently overruled[93] and more recent cases have refused to find injury or likelihood of injury when less than one percent,[94] one percent,[95] two percent,[96] and seven percent[97] of the domestic market was displaced. One author

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91. Baier, Substantive Interpretations Under the Antidumping Act and the Foreign Trade Policy of the United States, 17 Stan. L. Rev. 409,420 (1965).

92. Cast Iron Soil Pipe from the U. K., cited in Ehrenhaft, Protection against Price Discrimination United States Countervailing and Antidumping Duties, 58 Colum. L. Rev. 44, 68 (1958).

93. Cast Iron Soil Pipe from Australia, 29 Fed. Reg. 5253 (1964).

94. Plastic Sheet from U. K., 29 Fed. Reg. 13354 (1964); White Portland Cement from Japan, 29 Fed. Reg, 9636 (1964), Titanium Dioxide from France, 28 Fed. Reg. 10467 (1963).

95. Tissue Paper from Norway, 23 Fed. Reg. 8892 (1958).

96. Tissue Paper from Finland, 23 Fed. Reg. 8891 (1958).

97. Plastic Baby Carriers from Japan, 29 Fed., Reg., 13990 (1964), White Portland Cement from Japan 29 Fed., Reg. 9636 (1964).

has concluded:

> Thus, it may be confidently stated that the tariff commission will not find injury, as distinguished from a likelihood of injury, unless the percentage of market invasion is upwards of seven to ten percent. The finding of a likelihood of injury, however, might result from a lesser percentage of market invasion if accompanied by evidence of predatory intent.[98]

c. Impact on industry.

"The effect of selling merchandise at prices below fair value upon the prices of competitive United States merchandise has been a leading indicator in determining injury."[99] In two recent decisions,[100] imported goods were priced below the domestic price. The Commission held, however, that despite this differential there was no apparent effect upon domestic prices, and any resulting "injury" was de minimus. The record

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98. Baier, Substantive Interpretations Under the Antidumping Act and the Foreign Trade Policy of the United States, 17 Stan. L. Rev. 409, 422 (1965).

99. Id. at 419-20.

100. Titanium Dioxide from Japan, 29 Fed. Reg. 5522 (1964); White Portland Cement from Japan, 29 Fed. Reg. 9636 (1964).

does not state that Westphalian products drove down N. J. B's price, or that they competed directly with any products of N. J. B.

Westphalian sales in the Titanian market accounted for only 0.25 percent of the market and an approximately equal share of the business of the complaining firm (N.J.B.) [R-5]. Measured against the three injury determinants, this injury was trifling and Titania's imposition of anti-dumping duties was unwarranted.

2. The imposition of duties violated the 1967 Anti-Dumping Code.

"[D]umping itself is not against GATT obligations."[101] The Anti-Dumping Code confines the imposition of anti-dumping duties to cases where dumping "causes or threatens material injury to an established industry or materially retards the establishment of an industry; . . . ."[102] Titanian Code, section 190, provides for the imposition of such duties upon a finding of injury but omits the term material.[103] Article 14 of the Anti-Dumping Code provides, however, that the parties

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101. J. Jackson, World Trade and the Law of GATT 402 (1969) (emphasis in original).

102. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Para. 22, 6 International Legal Materials 920 (1967) [hereinafter cited as GATT Anti-Dumping Code"].

103. Titanian Code §190 (undated).

to the Code shall take steps to insure that domestic laws conform to the Agreement[104] in order to conform domestic procedures to the Anti-Dumping Code.[105] Titania's failure to conform domestic statutes to the Anti-Dumping Code is therefore a violation of a binding treaty commitment. Westphalia, uniquely injured by this non-compliance, has standing[106] to assert that failure of Titania to conform its domestic code to its treaty commitments violates international law.[107]

Since no material injury as required by the 1967 Anti-Dumping Code existed in the instant case,[108] Titania has twice violated that code and should be held internationally responsible.

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104. GATT Anti-Dumping code, supra note 101 at art. 14.

105. K. Dam, The Gatt Law and Economic Organization 175 (1970), Shannon and Marx, The International Anti-Dumping Code and United States Anti-Dumping Law - an appraisal, 7 Colum. J. Transnat'l L. 171, 173 (1968).

106. Cf. Southwest Africa Cases [1966] I.C.J. 6.

107. L. McNair, Law of Treaties 100 (1961).

108. See argument supra at section V, A.

Titania may argue that her statute preceded the Anti-Dumping Code [R-6] and thus is an exception to that code. However, Titania did not sign the Anti-Dumping Code with reservations protecting its domestic statutes.[109] In the absence of such reservations, McNair notes "parties who enter into a treaty engagement are expected ipso facto to bring their municipal law into conformity with the treaty, . . ."[110]

V. TITANIA'S IMPOSITION OF COUNTERVAILING DUTIES VIOLATED INTERNATIONAL LAW.

A. The Levying Of Countervailing Duties Was Contrary To GATT.

Assuming arguendo that Westphalian action constitutes a subsidy[111] "not all subsidies under GATT are prohibited by the General Agreement, indeed the prohibited subsidy is the exceptional case."[112] Thus, not every subsidy is a proper subject for countervailing duties.

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109. GATT reservations are contained in 62 U.N.T.S. 122 (1950) and 651 U.N.T.S. 320 (1968).

110. L. McNair, Law of Treaties 100 (1961).

111. But see argument supra at section III.

112. J. Jackson, World Trade and The Law of GATT 425 (1969).

As in the imposition of anti-dumping duties, a finding of injury is made a requisite to the levying of countervailing duties by Paragraph 6 of Article VI of GATT. Therefore, Titania's imposition of countervailing duties violated GATT because injury was not even alleged [R-5], and Westphalia submits none existed.[113]

B. The Levying Of Countervailing Duties Cannot Be Justified Under The Titanian Statute.

1. The Titanian statute incorporates an implicit injury requirement.

With the exception of Titania, the U. S. is the only nation with a countervailing duty statute requiring no injury.[114] Like the Titanian Anti-Dumping Statute, the Titanian countervailing duty statute is almost a verbatim copy of the parallel U. S. statute.[115] Thus, U. S. interpretations of its statute are highly persuasive in interpreting the Titanian Code.[116]

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113. See argument supra at section IV, B, 1.

114. King, Countervailing Duties - An Old Remedy with New Appeal, 24 Bus. Lawyer 1179, 1185 (1969).

115. Compare Titania Code §1606 (undated) with 19 U.S.C. §1303 (1970).

116. See Note 87 supra and accompanying test.

There is "a basic principle underlying U. S. and European post-war trade policies, namely that it is necessary to show damage or disruption before restrictive action should be taken against imports from any source."[117] Thus, the U. S. statute "has been only rarely enforced."[118]

The criteria applied in the infrequent U. S. countervailing duty determinations are lacking in the instant case. In Nicholas & Co. v. United States,[119] and in subsequent determinations,[120] the pivotal fact was the sale of foreign goods at a lower price than competitive domestic goods. N.J.B. made no allegation of injury of any type [R-5].

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117. Blumental, A World of Preferences, 48 Foreign Affairs 549, 557 (1970); accord Ehrenhaft, Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties, 58 Colum. L. Rev. 44, 76 (1958).

118. Clubb, Panel on Escape Clause, Anti-Dumping and Other Temporary Relief Against Imports 47, 48 in AF of L/CIO, The Developing Crisis in International Trade, 47, 48 (1970).

119. 7 Ct. Cust. App 97, aff'd 249 U.S. 34 (1919).

120. See Berry, The Countervailing Duty in International Trade - A Legal Analysis, 28 Fed. Bar J. 329, 333 (1969).

It appears that even though the statute contains no injury requirement, "a detrimental result to our country's markets . . . is what [the statute] seeks to prevent."[121] The Titanian code should be interpreted as incorporating this same requirement by reference.

2. Titania's countervailing duty statute is not a defense to a violation of GATT.

The U. S. appears among GATT signatories which excepted existing domestic legislation from supercession by GATT but Titania made no such reservation.[122] Thus, Titania is bound by customary international law to conform her statute to the GATT.[123] It is equally well established that a party may not rely on municipal law to avoid treaty obligations. According to Lauterpacht, such an attempt "constitutes an illegality and gives rise to State Responsibility."[124] The Vienna Convention on the Law of Treaties, which restated customary international

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121. Id. at 335.

122. The signers of the reservation are listed in 62 U.N.T.S. at 125 (1950).

123. See Notes 106-109 supra and accompanying text.

124. 1 H. Lauterpacht, Collected Papers 230 (E. Lauterpacht ed. 1970).

law,[125] states that: "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[126] Thus, Titania's statute constitutes no defense to her violation of GATT.

C. Imposition Of Countervailing Duties On The Products Of A Developing County Was Unwarranted.

Assuming arguendo that Titania's imposition of countervailing duties was justified, imposition of these punitive duties on the products of a developing nation requires greater justification. The doctrine that one who abuses rights forefeits them is recognized in international law. Lauterpacht has noted that conduct otherwise lawful "ceases to be so when the advantage accruing to the one party from the exercise of an otherwise legal right results in a disproportionately grave injury to others; . . . ."[127] Friedman also states that a right "must not be used in such a manner that its anti-social effects outweigh the legitimate interest of the owner of the right."[128] Titania has imposed countervailing duties on the

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125. Vienna Convention on the Law of Treaties, Preamble Para. 7, in 8 International Legal Materials 679, 680 (1969)

126. Id. art. 27.

127. 1 H. Lauterpacht, Collected Papers 384 (E. Lauterpacht ed. 1970).

128. Friedman, The Uses of "General Principles" in the Development of International Law, 57 Am. J. Int'l Law, 279, 288 (1963); accord F. Garcia-Amador, Principios de Derecho Internacional Que Rigen La Responsabilidad 46-47 (1963).

products of an "impoverished developing country" [R-1] to offset sales amounting to 0.25 percent of the Titanian market. Clearly, the anti-social effects of such action outweigh Titania's interests. Titania should therefore be found to have abused its right and should not be allowed to assert it here.[129]

VI. TITANIA'S IMPOSITION OF BOTH COUNTERVAILING AND ANTI-DUMPING DUTIES VIOLATED INTERNATIONAL LAW.

A. Both Countervailing and Anti-Dumping Duties May Not Be Imposed In The Same Situation.

Article VI, paragraph 5 of GATT prohibits the imposition of "both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization." The rationale behind this exclusiveness is clear. Both duties compensate for trade imbalances. If both are applied to the same situation, a punitive imbalance results. Even the U. S. has administratively enforced this exclusiveness under statutes paralleling Titania's. "[T]here has never been an instance of the United States imposing both countervailing and anti-dumping duties on the same product from another country. . . ."[130]

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129. See Case of Free Zones of Upper Savoy and District of Gex [1932] P.C.I.J. ser. A/B No. 46.

130. King, Countervailing Duties an Old Remedy with New Appeal, 24 Bus. Lawyer 1179, 1186 (1969).

"The administrative practice has been to regard the exaction of either type of additional duty as exclusive of the other . . ."[131] By treaty and in practice, the remedies are mutually exclusive.

Titania levied both countervailing and anti-dumping duties on Westphalian imports [R-5]. This punitive overaction is contrary to GATT and international law.

B. Titania Is Estopped From Imposing These Duties.

The doctrine of venire contra factum proprium non valet[132] is established in international law.

Lauterpacht states: "[T]he absence of protest may, in addition, in itself become a source of legal right inasmuch as it is related to - or forms a constituent element of - estoppel or prescription."[133] "The effect of this doctrine

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131. Feller, Mutiny Against the Bounty; An Examination of Subsidies Border Tax Adjustments and the Resurgence of the Countervailing Duty Law, 1 Law & Policy in Int'l Bus. 17, 66 (1969).

132. Case of the Temple of Preah Vihear [1960] I.C.J. 40.

133. Lauterpacht, Sovereignty Over Submarine Areas, 28 Brit. Y. B. Int'l L. 376, 395 (1950).

is to preclude a state from denying the existence of any right which that state has previously recognized, by its representation, its declaration, its conduct, or its silence."[134]

In the instant case, Titania has acquiesced to the Westphalian textile practices for a period of at least three years [R-4], "sufficient evidence of this acquiescence being absence of protest."[135] Titania is thus estopped from imposing these duties which restrict the free flow of trade in contravention of the spirit of GATT.

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134. 4B E. Hambro, The Case Law of the International Court 851 (1966).

135. Wolfke, Practice of International Organization and Customary Law, [1967] Polish Y. B. Int'l L. 153.

CONCLUSION

On the basis of the authority and reasoning submitted, the Applicant respectfully requests that this Tribunal answer the question presented: "Were the actions of Titania illegal under International Law?" [R-6] in the affirmative.

CERTIFICATE AS TO LENGTH

We certify that by our count,
this memorial contains fewer
than 4500 words.

W. Paul Needham

Robert Urich

Alan B. Whitaker

John W. Wopat

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