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 RESPONDENT

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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 is Responsible for FRRPA's Activities?

II.

Whether the Contact with Interco Violates GATT?

III.

Whether Westphalia has Standing to Raise the Issue of Non-Compliance with Security Council Resolutions?

IV.

Whether U.N. Sanctions Against Rhodania Were Ultra Vires and Not Binding on Titania?

V.

Whether Westphalia's Export Trade Policies Violate GATT?

VI.

Whether Titania is Justified in Imposing Both Countervailing and Anti-Dumping Duties?

SUMMARY OF THE ARGUMENT

Titania is not responsible for the activities of FRRPA. FRRPA has individual legal personality apart from Titania. Further, the participation of Titanian provinces in FRRPA did not bind Titania to any agreements signed by FRRPA.

FRRPA is an interim free trade association and may grant preferences to members of the association without violating the most-favored-nation clause of GATT.

Westphalia has no standing to raise the alleged violation of U.N. sanctions before an arbitral tribunal. In any event, the sanctions are ultra vires and do not bind Titania.

Westphalia's export trade policies of both dumping and subsidizing textiles and apparel articles violate GATT and cannot be justified under Article XVIII of the Agreement.

Titania is entitled to invoke both her countervailing and anti-dumping statutes. These duties were legally levied under Titania's domestic statutes and GATT.

ARGUMENT

I. TITANIA IS NOT RESPONSIBLE FOR FRRPA'S ACTIVITIES.

A. FRRPA Has International Personality And Is Not Titania's Agent.

International law has progressed beyond the era when only states with boundaries were recognized as subjects of international law. International legal personality has been defined as:

> [t]he capacity . . . of an entity, with or without the characteristics of a state, to participate in the international community by having rights and duties attributed to it by international law.[1]

Not all associations among states create international legal personalities. However, organizations with permanent administrative structures capable of creating binding legal rights have generally been recognized as separate legal persons under international law.[2]

Two early regional economic associations recognized as international legal entities were the German Zollverin and

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1. A. Hay, Federalism and Supranational Organizations 18 (1966).

2. Id. at 28.

the Danube River Association.[3] Like FRRPA, both of these organizations had limited goals. Bismarck's Zollverin was established with the limited purpose of lowering customs barriers among its member states. The Danube River Association regulated trade along the Danube. These institutions were international organizations with limited purposes, and FRRPA clearly is within this classification.

FRRPA has its own institutional structure, the governing council (R-2), which can create binding legal obligations independently of any one of the member states. The decision to award the turbine contract to Interco was made entirely by FRRPA under its own regulations [R-2]. Under generally accepted principles of international law, the only way to bind Titania was through the vehicle of a state instrumentality or by the signing of the agreement with Interco.[4] The record fails to support either contention.

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3. Bernhardt, Der Abschluss völkrrechtlicher Verträge im Bundesstaat, 32 Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 6 (1957), cited in A. Hay, Federalism and Supranational Organizations at 22.

4. Lissitzyn, Territorial Entities in the Law of Treaties, 125 Recueil des Cours 5, 86 (1968) [hereinafter cited as "Lissitzyn"].

An agent is a person authorized by another to act for him.[5] There is no evidence of Titania empowering FRRPA to act as an agent, or of FRRPA's even consulting with Titania before awarding the contract to Interco.

B. Titanian Provinces Participating In FRRPA Acted Independently Of Titania.

A local or regional government cannot bind its national government internationally unless the national constitution expressly authorizes such action.[6] In the U. S., the federal government is not bound by a state's agreement with a foreign entity unless it consents to become bound.[7] Lissitzyn, a noted international scholar, has stated:

> The occasionally expressed view that the states in concluding . . . compacts [with foreign entities] are acting as agents of the federal union finds no support in the available evidence.[8]

Likewise, the Soviet constitution accords the various Soviet Socialist Republics power to make separate international

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5. Black's Law Dictionary 85 (4th ed. 1951).

6. Lissitzyn, supra note 4, at 86.

7. Id. at 31.

8. Id. at 30.

agreements which are not binding on the Soviet national government.[9]

States are not presumed bound by actions of their dependent entities unless they express a clear intent to become bound, or are bound by specific constitutional provisions.[10] The record contains no reference to any constitutional provisions authorizing the provinces to bind Titania. Thus, there is no basis to hold Titania responsible for the action of the provinces in the matter of FRRPA in concluding the turbine contract with Interco.

A crucial factor indicating a lack of intent to bind Titania is the fact that the provinces negotiated their participation in FRRPA without involving the Titanian federal government.[11] Subsequently, the Titanian legislature merely approved the compact already completed by the provinces. Therefore, the national government of Titania is not responsible for the provincial actions, and consequently for the activities of FRRPA.

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9. D. Zlatopolskiy, SSR-Federativnoye Gosudarstvo 95-154, 262-3 (1967), cited in Lissitzyn, supra note 4, at 34.

10. Lissitzyn, supra note 4, at 24.

11. Id. at 86.

Article 24, para. 12 of GATT requires Titania to take such "reasonable measures as may be available to it" to ensure compliance with GATT.[12] This requirement cannot be extended to demand action by Titania when provincial governments are acting on their own. But even if so interpreted, "reasonable measures" cannot include an intrusion by Titania into the actions of a separate legal person in discharging the limited functions for which it was specifically created.

II. THE CONTRACT WITH INTERCO DOES NOT VIOLATE GATT.

A. Interim Regional Associations May Grant Internal Preferences Without Violating The Most Favored Nation Clause.

The most-favored-nation clause of GATT requires that preferences accorded to one nation shall be accorded to all other member nations.[13] However, regional trade groups have an exception from the most-favored-nation clause of Article I.[14] Preferences accorded to trade group members create a wider trading area and are a step towards free trade.[15] GATT allows

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12. General Agreement on Tariffs and Trade, art. XXIV, para. 12, Oct. 30, 1947, 61 Stat. (5) (6), T.I.A.S. No. 1700, U.N.T.S. 194 [hereinafter as "GATT" with numerical section].

13. Id. at art. I.

14. K. Dam, GATT - Law and International Economic Organization 275 (1968) [hereinafter cited as "Dam"].

15. C. Wilcox, A Charter for World Trade 70-1 (1949).

these groups to grant internal preferences which do not extend to non-members.[16] Thus, FRRPA's failure to extend an intra-group preference to a non-member like the Westphalian bidders did not violate the most-favored-nation clause if FRRPA qualifies as an interim free-trade association.

B. FRRPA Qualifies As An Interim Free-Trade Area Under Article XXIV of GATT.

GATT defines a free-trade area as a group of two or more customs territories where commercial regulations are eliminated on substantially all the trade between the member countries.[17] GATT also recognizes interim free-trade areas.[18] The interim agreement establishing such an interim free-trade area must include a plan for the final free-trade area.[19]

It could be argued that because FRRPA has not eliminated commercial regulations on substantially all the trade among

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16. Dam, Regional Arrangements and GATT, 30 U. Chi. L. Rev. 615, 616 (1963).

17. GATT, supra note 11, at art. XXIV, para. 8(b).

18. Id. at art. XXIV, para. 5(c).

19. Id.

its members, it should not be considered an interim free-trade area. However, Article XXIV requirements have been liberally interpreted in favor of establishing interim free-trade areas. An identical objection was raised with regard to the European Coal and Steel Community, the predecessor to the Common Market:

> For several reasons, [the European Coal and Steel Community] was not a customs union or free-trade area within the meaning of Article XXIV. It covered only coal and steel, clearly not "substantially all the trade" between constituent territories in products originating within ECSC member countries under Article XXIV(8)(a)(i). . . . Second, . . . the ECSC was a hybrid between a customs union and a free-trade area. . . . Despite these grave departures from the terms of Article XXIV, support for a waiver was almost unanimous among the contracting parties.[20]

Euratom, an organization dealing only in nuclear products was also granted status as an interim free-trade association.[21] Based on the criteria applied to the ECSC and Euratom, FRRPA should be considered such an interim free-trade area.

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20. Dam, Regional Arrangements and GATT, 30 U. Chi L. Rev. 615, 638-9 (1963).

21. Id. at 616.

It could be also contended that FRRPA is not an interim free-trade area because there is no reference in the record to the existence of a plan for an eventual free-trade area as required by Article XXIV, para. 5(c). This requirement is not ironclad. The South African-Rhodesian Interim Free-Trade Association, which also had no plan, was granted a five-year extension to present a plan.[22]

The clear-cut policy of the contracting parties has been to construe liberally the requirements of Article XXIV relating to free-trade areas. No regional association has been denied status as a free-trade association for failure to formulate an interim plan or to eliminate trade barriers on all products.[23] FRRPA, like the European Coal & Steel Community, clearly falls within the interpretation previously given to Article XXIV.

III. WESTPHALIA DOES NOT HAVE STANDING TO RAISE THE ISSUE OF NON-COMPLIANCE WITH SECURITY COUNCIL RESOLUTIONS.

In international law the doctrine of jus standi provides that "only the party to whom an international obligation is due can bring a claim in respect to its breach."[24] The reasoning

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22. Subsequently they received a further extension. Id. at 636.

23. Dam, supra note 14, at 275.

24. Advisory Opinion on Reparation for Injuries Suffered in the Service of the U. N. [1949] I.C.J. 181-2.

behind jus standi is to insure the existence of a true controversy before proceeding to the merits of a case. When the violation of an edict of an international organization is in issue, the state wishing to raise the violation, apart from the organization, must affirmatively show it was vested with a direct legal right to enforce the edict of the promulgating organization.[25] When Liberia and Ethiopia, former members of the League of Nations, sought to end the South African mandate for Southwest Africa, the International Court of Justice held they had no standing apart from the League or its successor organization to question South African policies. Liberia and Ethiopia, as individual nations, did not possess any separate rights which they could assert independently of the rights of the League to require performance of the mandate:

> This right was vested exclusively in the League and was exercised through its competent organs. . . . But no right was reserved to them, individually as States, and independently of their participation in the institutional activities of the League, . . . to set themselves up as separate custodians of the various mandates. This was the role of the League organs.[26]

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25. South West Africa Cases (2nd phase), [1966] I.C.J. 4.

26. Id. at 29.

Westphalia, as an individual member of the United Nations, cannot singly demand enforcement of U. N. sanctions before an arbitral tribunal. An analogous situation exists in Anglo-American criminal law, where an individual citizen does not have the right to enforce the state's criminal laws. Instead, the citizen must inform the institution responsible for criminal law - the State - of the violation and rely upon the state to take action on the matter.

The language of the Security Council resolutions buttresses this contention. Section 18 of Resolution 253 (R. annex 6) requests U. N. members to report to the Secretary General; Section 20 establishes a committee of the Security Council "[t]o seek from any States members . . . such further information regarding trade of that State . . . or regarding any activities . . . that may constitute an evasion of the measures in this resolution. . . ." (R. annex 6) Nothing in the resolutions purports to confer upon an individual U. N. member the right to seek compliance with the resolutions.

The intent of the U. N. in sanctioning [Rhodania] was to bring pressure to bear on Rhodania but not to provide a remedy for economic disputes growing out of the Rhodanian situation. As the International Court of Justice has

recognized, "there must be some legal basis for a right to bring an international claim beyond indirect injury to an economic interest."[27] Westphalia is attempting to use sanctions with a specific social and political purpose to vindicate a material claim, an objective which it has no right to seek.

IV. U. N. SANCTIONS AGAINST RHODANIA WERE ULTRA VIRES AND DO NOT BIND TITANIA.

A. The U.N. Cannot Interfere In A Nation's Domestic Affairs In The Absence Of A Threat To International Peace.

Article 2, para. 7 prohibits intervention in matters essentially within the domestic jurisdiction of a state unless a threat to international peace exists. Rhodania's social policy "operates entirely within the boundaries of [Rhodania] and affects no one else."[28]

Article 2, para. 7 provides that a threat to peace is the only circumstance allowing U. N. intervention into a sovereign's domestic jurisdiction. Alleged violations of the human rights provisions in the U. N. charter[29] do not

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27. Briggs, Barcelona Traction: The Jus Standi of Belgium, 65 Am. J. Int'l L. 327, 341 (1971).

28. Letter from Dean Acheson to the Washington Post, Dec. 11, 1966, p. E-6, cols. 4-5 [hereinafter cited as "Acheson letter"] cited in A. Chayes, T. Ehrlich, A. Lowenfeld, International Legal Process 1379-80 (1969).

29. U. N. Charter art. 55.

remove a situation from a nation's domestic jurisdiction since "nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[30] The maxim expressio unius est exclusio alterius[31] shows that article 2, para. 7 overrides the human rights provisions in the Charter.[32] Article 2, para. 7, thus prohibits intrusions into the domestic affairs absent a threat to international peace.

B. Rhodania's Domestic Affairs Present No Threat To International Peace.

Before imposing economic sanctions under Article 41, the Security Council must determine as a condition precedent that a threat to international peace or an act of agression has occurred.[33]

Rhodania's policies may fall short of an undefined utopian social standard. "Certainly [Rhodania's] voting

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30. Id. at art. 2, para. 7.

31. That which is included excludes the rest. H. Broom, Legal Maxims 505, 521 (1854).

32. L. Sohn, Cases on United Nations Law 629 (1956).

33. D. Greig, International Law 574 (1970).

laws are not contrary to any international obligation. The one man, one vote deduction from the Fourteenth Amendment is not recognized at international law. . . ."[34] Alec Douglas-Home characterized the sanctions a "misuse" of the U. N. charter:

> If nations feel entitled to use, to invoke mandatory sanctions because the Constitution of a country falls far short of the standards of democracy we require, we should be at war with half the world today. . . .[35]

Rhodania presents no threat to peace; her armies are not at her borders. The only conceivable threat to peace comes not from Rhodania but from Rhodania's neighbors. Rhodania was unjustifiably termed a threat to peace because her neighbors posed a threat of an armed intervention in violation of the express dictates of Article 2, para. 4 of the Charter.[36] Thus,

> [Rhodania,] in doing what the U. N. has no jurisdiction to forbid, annoys African members to the point where they may transgress against the First Amendment of the U. N.[37]

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34. Acheson letter, supra note 28.

35. 737 Parl. Deb., H. C. (5th ser.) 1076-7 (1966).

36. All members of the United Nations "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independance of any state." U.N. Charter art. 2, para. 4.

37. Acheson letter, supra note 28.

The general rationale behind the sanctions has been that Rhodanian domestic policies create a threat to international peace because in "the contemporary intensely interdependent world, peoples interact through shared subjectivities. . . ."[38] The threat of offending "subjectivities" does not present an Article 39 threat to the peace. Such reasoning could be applied to justify any U. N. foray into another sovereign's affairs.

C. Ultra Vires Security Council Resolutions Are Not Per Se Binding.

The Council failed to observe Article 2(7) in characterizing a domestic situation as a threat to the peace. A resolution of the Council does not become binding on U. N. members simply because the Council invokes the language of Article 25. "Only decisions made in accordance with other provisions of the Charter have this binding effect for members of the Organization. . . ."[39] Since the sanctions clearly exceed the U. N.'s jurisdiction, they are not binding on Titania.

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38. McDougal and Reisman, Rhodesia and the United Nations: The Lawfulness of International Concern, 62 Am. J. Int'l L. 1, 12 (1966).

39. D. Greig, International Law 572-3 (1970)

V. WESTPHALIA'S EXPORT TRADE POLICIES VIOLATE GATT.

A. Westphalian Textile And Apparel Trade Practices Constitute Dumping Under Titanian Statutes And GATT.

Dumping consists of "selling goods abroad at prices lower than those charged in the home market of the exporting country."[40] Under Titania's anti-dumping statute, dumping occurs when goods are sold in Titania at "less than fair value,"[41] which has been held to mean less than "the cost of production."[42]

GATT's Anti-Dumping Code defines dumping as selling for a price less than "the cost of production in the country of origin plus a reasonable addition for selling cost and profit."[43]

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40. de Jong, Dumping in International Trade, 2 J. World Trade L. 171 (1968) [hereinafter cited as "de Jong"]; accord, GATT, supra note 11, at art. VI.

41. 19 U.S.C. §160 (1970); Titanian Code §190 (undated).

42. Kleberg & Co. v. U.S. 71 F.2d 332, 21 C.C.P.A. 110 (1933).

43. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade,July 1, 1968,[1968] 19 U.S.T. 4348, T.I.A.S. No. 643 651, U.N.T.S. 320 [hereinafter referred to as the "GATT Anti-Dumping Code".]

Westphalia has been buying up surplus goods from her textile and apparel industry and selling them in Titania at prices which over the last three years have averaged 15 percent less than the cost of production [R-4]. This action is not novel in international trading and whenever it has occurred, it has been uniformly branded as dumping. As one legal scholar has noted:

> At the end of a season, producers or growers will try to get rid of their unsold stocks . . . at unnaturally low prices. Such cases most closely correspond to the original meaning of the term dumping.[44]

Thus under both Titania's domestic statutes and GATT, Westphalian dumping is clearly established.

B. Westphalia's Exchange Practices Which Result In Subsidies To Non-Primary Products Violate GATT.

Multiple exchange rate policies call for different rates of exchange for different monetary transactions.[45] Westphalia is engaged in this practice [R-4]. GATT contracting parties are forbidden "to engage in any discriminatory currency arrangements

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44. de Jong, supra note 40, at 173; accord, J. Viner, Dumping: A Problem in International Trade 27 (1923 reprinted 1966).

45. Dam, supra note 14, at 138.

or multiple currency practices,"[46] except when authorized under the Articles of Agreement of the International Monetary Fund or approved by the Fund.

Nothing in the record indicates that Westphalia's multiple currency practice was given either authorization or approval by the Fund. Therefore, the practice was violative of Article XV of GATT.

Article XVI of GATT prohibits subsidies "either directly or indirectly on the export of any product other than a primary product,"[47] and it is generally recognized that multiple exchange rate practices fall within the meaning of the term export subsidies of GATT.[48] Thus, where the multiple exchange rate practice affords an export subsidy to non-primary products it is doubly violative of GATT.

GATT defines a primary product as:

> any product of farm, forest, fishery, or any mineral in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.[49]

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46. Articles of Agreement of the International Monetary Fund, art. VIII, para. 3, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39; incorporated into GATT by Art. XV.

47. GATT, supra note 12, at art. XVI, para. (b)(4).

48. Dam, supra note 14, at 138.

49. GATT, supra note 12, at addendum to art. XVI §B, para. 2.

Westphalia's multiple exchange rate practice is applied to apparel articles [R-3,4] and it cannot be rationally argued that apparel articles fall within the above definition of primary products. Therefore, the practice provides an export subsidy for a non-primary product in violation of Article XVI of GATT.

Only three countries, Austria, the United Kingdom, and the United States made reservations to Article XVI.[50] The United States, for example, reserved only the right to subsidize the export of "processed [non-primary] products."[51] Since Westphalia accepted Article XVI without reservation [R-1], she is bound by the literal terms of the article. Article XVI, paragraph one, further requires parties granting subsidies to provide written notification to the Contracting Parties of the extent and nature of the subsidization. Jackson has termed this requirement, "the first and historically oldest obligation in GATT regarding subsidies. . . ."[52] There is nothing in the

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50. Declaration Giving Effect to the Provisions of Article XVI, para. 4 of the General Agreement on Tariffs and Trade, Nov. 14, 1962, [1962], 13 U.S.T. 2605, T.I.A.S. No. 5277, 445 U.N.T.S. 294.

51. J. Jackson, World Trade and The Law of the GATT 398 (1969) [hereinafter cited as "Jackson"].

52. Id. at 387.

record to indicate that Westphalia complied with this requirement. Her failure to provide notification compounds her already established violations of Article XVI.

C. Westphalia's Actions Cannot Be Justified Under Article XVIII Of GATT.

Article XVIII of GATT allows a contracting party "the economy of which can support only low standards of living or is in the early stages of development to deviate temporarily from the provisions of the other Articles. . . ."[53] This article was intended to enable underdeveloped countries with embryonic industries some leeway in developing their economies.[54] This article was not intended to be a carte blanche "for protecting industries that were merely weak rather than infant."[55] Since 1955, only two countries have been held to meet the requirements of this article.[56] The record contains neither sufficient information to conclude that Westphalia meets those requirements nor evidence of application for such a waiver as required by Article XVIII, Section C.

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53. GATT, supra note 12, at art. XVIII, para. 4(a).

54. Dam, supra note 14, at 227.

55. G. Curzon, Multilateral Commercial Diplomacy 212 (1965).

56. Jackson, supra note 51, at 655.

Even if Westphalia were found to qualify under Article XVIII, she is allowed only to "deviate temporarily" from the other provisions of GATT. In light of an established multiple currency practice in favor of exports, and the dumping of textiles and apparel articles for three years, Westphalia's deviations are more than temporary. Therefore, she cannot invoke Article XVIII to excuse her non-compliance with Articles VI, XV, XVI, and the GATT Anti-Dumping Code.

VI. TITANIA IS JUSTIFIED IN IMPOSING BOTH COUNTERVAILING AND ANTI-DUMPING DUTIES.

A. Titania May Invoke Both Her Countervailing And Anti-Dumping Statutes.

Every signatory to GATT, (except Haiti),[57] has accepted Part II of the Agreement, which contains the countervailing and anti-dumping duty sections, "to the fullest extent not inconsistent with existing legislation."[58] The interpretation given to such qualified acceptance is clear. The United States has steadfastly refused to have GATT override

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57. Id. at 60.

58. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Geneva, October 30, 1947, 61 Stat. (5),(6); T.I.A.S. No. 1700, 55-61 U.N.T.S.; Annecy Protocol of Terms of Accession to the General Agreement on Tariffs and Trade, Oct. 10, 1949, 64 Stat. B139 T.I.A.S. No. 2100, 62 U.N.T.S. 122; accord Jackson, supra note 51, at 61.

her domestic statutes and has stated that any conflict between her anti-dumping statute and the GATT Anti-Dumping Code should be resolved in favor of the statute.[59] The Federal Republic of Germany has been equally adamant in upholding the validity of her own statutes vis-a-vis Part II of GATT.[60]

No instance has been found in which a major industrial nation has invalidated domestic legislation because such legislation was inconsistent with Part II of GATT. In view of its timely reservation, Titania is authorized to proceed under her domestic statutes.

B. Under The Titanian Domestic Statutes, Both The Countervailing And Anti-Dumping Duties Were Legal.

1. The countervailing duty was legal.

Titanian Code Section 1606 authorizes the imposition of a countervailing duty, whenever any "country . . . shall pay or bestow directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country. . . ."(R-8)

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59. 114 Cong. Rec. S12168 (1968).

60. Tax Court of Hamburg, Judgment of Oct. 29, 1969 (IVa 353/66), 16 Aussenwirtschaftsdients des Betriebs Beraters 93 (1970).

The finding of injury either actual or probable, is not a prerequisite to the levying of a countervailing duty under this statute.

The appropriate administrative authorities have wide discretion to determine whether a countervailing duty should be levied. Concerning the United States, whose statute is substantially identical with the Titanian countervailing duty statute, it has been noted that, "nowhere in our foreign trade regulation is the amplitude of administrative discretion wider than in the countervailing duty area."[61]

By establishing a multiple exchange rate that affords a subsidy to export products, Westphalia is directly bestowing a bounty on the export of textiles and apparel articles.[62] The levying of a countervailing duty by Titania was legal under her statute and the administrative determinations relating thereto cannot be disturbed.

2. The anti-dumping duty was legal.

The Titanian Anti-Dumping Statute requires a finding

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61. Davis, The Regulation and Control of Foreign Trade, 66 Colum. L. Rev. 1442, 1445 (1966).

62. See generally Energetic Worsted Corp. v. U.S., 224 F. Supp. 606 (Cust. Ct. 1963); V. Mueller & Co. v. U.S., 115 F.2d 354 (C.C.P.A. 1940); F.W. Woolworth Co. v. U.S., 115 F.2d 348 (C.C.P.A. 1940).

by the Tariff Commission that an industry in Titania "is being or is likely to be injured." (R-7) Since the United States Anti-Dumping Act is substantially identical to the Titanian statute, interpretations of the U. S. Act are relevant. It has been noted with regard to the U.S. Act that: "[T]he injury requirement of the Act should be given 'a broad' (liberal) construction. . . ."[63]

The legislative history of the U. S. statute indicates that Congress intended that evidence of only the slightest degree of injury recognizable by law would suffice. Congress rejected proposals to add the term materiality,

> in order to avoid the possibility that [the statute] might be interpreted to require proof of a greater degree of injury than is required under existing law for imposition of anti-dumping duties.[64]

This injury or threat of injury requirement has been satisfied under the U. S. statute where less than 1 percent of the market[65] and 0.5 percent of the market[66] was displaced.

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63. Long, United States Law and the International Anti-Dumping Code, 3 Int'l Lawyer 464, 475 (1969).

64. H. R. Rep No. 1089, 82d Cong; 1st Sess. 7 (1951).

65. Cast Iron Soil Pipe From the United Kingdom U.S. Tariff Comm'n Release Oct. 27, 1955., cited in Ehrenhaft, Protection against Price Descrimination: United States Countervailing and Anti-Dumping Duties, 58 Colum. L. Rev. 44, 68 (1958).

66. Steel Bars, Reinforcing Bars, and Shapes from Australia 35 Fed. Reg. 4161 (1970).

Westphalia has demonstrated willingness to dump textiles in Titania "at whatever prices are necessary to move them." (R-4) Such a policy indicates both a capacity and a propensity to act in disregard of the consequences to Titania's economy. The finding of material injury or the threat thereof by Titania [R-5] was warranted and the anti-dumping duty therefore legally levied.

C. Titania's Countervailing And Anti-Dumping Duties Were Legal Under GATT.

Assuming arguendo that Titania is bound by GATT rather than by her domestic statutes, her actions were still legal under GATT. The GATT Anti-Dumping Code allows a determination of injury when the authorities are satisfied that the dumped imports are demonstrably the principal cause of "material injury or the threat of material injury"[67] to a domestic industry. Under the Code, this determination is made by the "authorities concerned"[68] based on examination of all factors bearing on the state of the industry in question. These factors include "market share, employment, volume of dumped

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67. GATT Anti-Dumping Code, supra note 43, at art. 3(a).

68. Id.

imports profits, and prices."[69] The Code does not explicitly define the term "material injury." In fact, the list of factors to be considered ends with the caveat: "No one or several of these factors can necessarily give decisive guidance."[70]

In the Hatters Fur Case, a Working Party established by the GATT Secretariat held that a determination under GATT of whether injury has occurred "is essentially a matter of economic and social judgment involving a considerable subjective element."[71] The Working Party also held that a determination made by the "authorities concerned" is "entitled to the benefit of any reasonable doubt."[72]

The Titanian "authorities concerned" were in a unique position to examine all factors bearing on the state of the

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69. Id. at art. 3(b).

70. Id.

71. Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the GATT Geneva, Nov. 1951 (Sales No. GATT 1951-3) at 21 [hereinafter cited as "Hatters' Fur Case]."

72. Id. at 23.

industry in question and were required to find only "the threat of material injury." Westphalia has an established practice of dumping and a demonstrated willingness to dump goods "at whatever prices are necessary to move them" (R-4), regardless of the effect on other economies.

The decision of the Titanian "authorities concerned" is supported by facts contained in the record and any "reasonable doubt" as to the validity of the determination must be resolved in favor of Titania.[73] This factual determination should not be overturned.

Article VI of GATT requires a finding of material injury or the threat thereof to an established domestic industry as a prerequisite to the levying of countervailing duties.[74] Substantial quantities of subsidized Westphalian goods have been sold in Titania's markets, and the end-of-season sales alone have averaged T $5 million annually over the last three years. [R-5] Further, there is nothing to prevent Westphalia from selling a proportionately larger share or possibly all of her subsidized textile and apparel

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73. Id.

74. GATT, supra note 12, at art. VI para 6(a).

CONCLUSION

Franconia respectfully requests

(1) A declaration by the Court that Franconia is legally entitled to the reparations it claims, and

(2) A declaration by the Court that Aegea and Barcelona are not entitled to the reparations claimed by them.

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On the Memorial

In the instant case Westphalia, acting through the Westphalian Government Marketing Organization, dumped textile and apparel articles in Titania (R-4) AND in addition, acting through the Westphalian Central Bank, provided an export subsidy (R-4). Titania has properly levied a separate duty in response to each of these separate situations.

CONCLUSION

On the basis of the authorities and reasoning presented, Titania respectfully requests this Tribunal to answer the question presented: "Were the actions of Titania illegal under International Law?" [R-6] in the negative.

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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