

THE PHILIP C. JESSUP INTERNATIONAL LAW MOOT
COURT COMPETITION

1972

Case Concerning an International
Trade Dispute, Westphalia v.
Titania, 1972.

Problem

1972 JESSUP PROBLEM

Titania, a superpower, and Westphalia, an impoverished developing country, are contracting parties to the General Agreement on Tariffs and Trade (GATT) and to all existing agreements in implementation of GATT, and are members of the United Nations.

During the period 1968-1970, there has been a noticeable rise in protectionist sentiment in both countries, due to a variety of causes which are not wholly clear and in any event need not now detain us. The following events occurred:

a) Westphalia's government-owned and -operated electrical equipment manufacturing industry was the lowest bidder on a bid for turbines solicited by the Fluvia River Regional Power Authority, a group comprised of five provinces of Titania and two developing countries, Daresh (which is a U.N. member) and Rhodania (which is not a U.N. member), all of which border on the Fluvia River and have important commercial and transportation interests in the use of the river. The FRRPA is established and operated under a compact negotiated by the five Titanian provinces and the two developing states and consented to by Titania's legislature. The turbines are to be used by the FRRPA at one of its pumping stations located in Titania.

The Authority produces electricity from water power and sells it to industrial users of all kinds in each of the par-

ticipating countries, in accordance with regulations adopted by its governing council composed of representatives of the specified provinces and states. The Titanian provinces are local or regional governments within the meaning of Article XXIV, paragraph 12 of the GATT. The governing council of the FRRPA is organized so as to give the five Titanian provinces 50% of the vote on all issues before the council with the other 50% being divided equally between Daresh and Rhodania. One of the Authority's regulations authorizes differential pricing in favor of persons or organizations having their principal place of business and a majority of their productive assets located in one or more of the seven constituent units comprising the Authority. The governing council, on a motion by one of the Titanian provinces, approved and established a price differential of 50% in favor of, and therefore awarded the contract to, Interco Corporation.

Interco is an international corporation with 4,000 employees which is incorporated in Rhodania and has its principal place of business there. 45% of the corporation is owned by Titanian interests, 45% by Rhodanian interests and 10% by citizens of third countries. Rhodania is a politically controversial country because of its policies and practices of apartheid, which indisputably applies to the management and employment and policies of Interco, with full approval of the Titanian inter-

ests involved. For example, although the population of Rhodania is 75% black, there are no black employees in Interco. The U.N. has passed a series of measures and sanctions concerning the government in Rhodania, including U.N. resolutions calling upon all members of the U.N. to boycott Rhodanian goods. [For purposes of the Competition, all U.N. resolutions, including S/RES/253 (29 May 1968) (attached as ANNEX-I) and subsequent documents, involving collective measures taken by the U.N. against Southern Rhodesia, are relevant. All references to "Southern Rhodesia" should be read as references to "Rhodania".]

The government of Westphalia, having unsuccessfully appealed to the FRRPA against its action, complained bitterly to the government of Titania that this action taken by the FRRPA not only made a mockery of slogans such as "trade not aid", thereby profoundly discouraging a country which was trying to pay its own way in the world, but was illegal under the rules of GATT, as well, and a violation of Titania's obligations under the U.N. Charter.

b) One of Westphalia's major industries in private hands, the textile and apparel industry, is also a major foreign exchange earner through its export sales. Westphalia encourages the expansion of the export sales of this industry in a variety of ways:

1) Foreign exchange proceeds from export sales are purchased from the exporter by the Westphalian Central Bank at a rate calculated at the equivalent of T\$1 (Titanian dollar) to 50 W.F. (Westphalian francs), while the ordinary exchange rate is T\$1 to 35 W.F. [Note that T\$1 is equivalent to \$1 (U.S.).] Two other classes of exports from Westphalia -- raw cotton and raw wool -- also benefit from this special exchange rate.

2) Near the end of each cycle of seasons in the textile and apparel industry, which in Westphalia means on or about September 15, 70% of all the textile and apparel articles remaining unsold in the hands of the industry are bought up by the Westphalian Government Marketing Organization at prices representing their estimated cost of production as determined by the Government upon advice of the industry's governing council. The articles are then sold abroad at whatever prices are necessary to move them. This varies from country to country, but during the past three years in which the scheme has been in operation, the Marketing Organization averaged a return from such sales amounting to about 15% below the amount it cost to take them off the hands of the industry.

The second largest Titanian manufacturer of textile and apparel articles, N. J. Burley and Sons, Inc. (N.J.B.), initiated both a countervailing duty and an antidumping action before the appropriate Titanian agencies under the appropriate

domestic statutes.* In the countervailing duty proceeding, it made no allegation that the sales of Westphalian textile and apparel articles which benefitted from the special exchange rate caused injury to N.J.B. In the antidumping action, it alleged and proved that sales by the Westphalian Marketing Organization amounted to T\$5 million, displacing approximately 1/4 of 1% of domestic sales of textile and apparel articles, on an annual basis, and having an approximately equivalent impact upon N.J.B.'s earnings; no other injury to N.J.B. or the industry was alleged or proved.

When the appropriate Titanian agencies found that N.J.B.'s complaints were well-founded and levied both countervailing and antidumping duties on Westphalia's exports to Titania of textile and apparel articles, the Government of Westphalia again complained that the actions were both unwarranted and unlawful.

Titania took the position that, apart from the wisdom of the domestic statutes and regulations in question under both a) and b) above, or their application in the particular cases, the actions taken were not illegal under international law. It offered to submit the question of their illegality to binding arbitration by a panel of three (3) arbitrators appointed by the President of the International Court of Justice, specifically waiving any other possible remedies, domestic or international, which might be available. Westphalia agreed to this.

In the compromis which constituted the Arbitral Tribunal's mandate, Titania and Westphalia jointly submitted this issue: were the actions taken by Titania illegal under international law? The Arbitral Tribunal, like the International Court of Justice itself, is governed in its determinations by the terms of Article 38 of the Statute of the International Court of Justice.

The Tribunal having been duly appointed, Westphalia appears as applicant and Titania as respondent. The parties have stipulated to the above facts and circumstances (which it is therefore unnecessary to repeat in briefs filed before the Tribunal) and have waived any preliminary or other procedural objections.

* Titania's statutes were adopted prior to the time Titania became a member of the GATT and they read as follows:

Titanian Code

§1606. Countervailing duties

Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation 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, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this chapter, then upon the importation of any such article or merchandise into Titania, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has

been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this chapter, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated. The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

§190. Antidumping duties

(a) Whenever the Secretary of the Treasury determines that a class or kind of foreign merchandise is being, or is likely to be, sold in Titania or elsewhere at less than its fair value, he shall so advise the Titanian Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in Titania is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into Titania. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter called a "finding") of his determination and the determination of the said Commission. For the purposes of this subsection, the said Commission shall be deemed to have made an affirmative determination if the Commissioners of the said Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers.

(b) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in paragraph (a) of this section, there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special duty in an amount equal to such difference.

ANNEX-I

U.N. SECURITY COUNCIL

RESOLUTION ON

SOUTHERN RHODESIA*

Distr.
GENERAL

S/RES/253 (1968)
29 May 1968

RESOLUTION 253 (1968)

Adopted by the Security Council at its 1428th meeting,
on 29 May 1968

The Security Council,

Recalling and reaffirming its resolutions 216 (1965) of 12 November 1965, 217 (1965) of 20 November 1965, 221 (1966) of 9 April 1966, and 232 (1966) of 16 December 1966,

Taking note of resolutions 2262 (XXII) adopted by the General Assembly on 3 November 1967,

Noting with great concern that the measures taken so far have failed to bring the rebellion in Southern Rhodesia to an end,

Reaffirming that, to the extent not superseded in this resolution, the measures provided for in resolutions 217 (1965) of 20 November 1965, and 232 (1966) of 16 December 1966, as well as those initiated by Member States in implementation of those resolutions, shall continue in effect,

Gravely concerned that the measures taken by the Security Council have not been complied with by all States and that some States, contrary to resolution 232 (1966) of the Security Council and to their obligations under Article 25 of the Charter, have failed to prevent trade with the illegal régime in Southern Rhodesia,

* [The Security Council unanimously adopted the resolution on May 29, 1968.]

Condemning the recent inhuman executions carried out by the illegal régime in Southern Rhodesia which have flagrantly affronted the conscience of mankind and have been universally condemned,

Affirming the primary responsibility of the Government of the United Kingdom to enable the people of Southern Rhodesia to achieve self-determination and independence, and in particular their responsibility for dealing with the prevailing situation.

Recognizing the legitimacy of the struggle of the people of Southern Rhodesia to secure the enjoyment of their rights as set forth in the Charter of the United Nations and in conformity with the objectives of General Assembly resolution 1514 (XV),

Reaffirming its determination that the present situation in Southern Rhodesia constitutes a threat to international peace and security,

Acting under Chapter VII of the United Nations Charter,

1. Condemns all measures of political repression, including arrests, detentions, trials and executions which violate fundamental freedoms and rights of the people of Southern Rhodesia, and calls upon the Government of the United Kingdom to take all possible measures to put an end to such actions;

2. Calls upon the United Kingdom as the administering Power in the discharge of its responsibility to take urgently all effective measures to bring to an end the rebellion in Southern Rhodesia, and enable the people to secure the enjoyment of their rights as set forth in the Charter of the United Nations and in conformity with the objectives of General Assembly resolution 1514 (XV);

3. Decides that, in furtherance of the objective of ending the rebellion, all States Members of the United Nations shall prevent:

(a) The import into their territories of all commodities and products originating in Southern Rhodesia and exported therefrom after the date of this resolution (whether or not the commodities or products are for consumption or processing in their territories, whether or not they are imported in bond and whether or not any special legal status with respect to the import of goods is enjoyed by the port or other place where they

are imported or stored);

(b) 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;

(c) The shipment in vessels or aircraft of their registration or under charter to their nationals, or the carriage (whether or not in bond) by land transport facilities across their territories of any commodities or products originating in Southern Rhodesia and exported therefrom after the date of this resolution;

(d) The sale or supply by their nationals or from their territories of any commodities or products (whether or not originating in their territories, but not including supplies intended strictly for medical purposes, educational equipment and material for use in schools and other educational institutions, publications, news material and, in special humanitarian circumstances, food-stuffs) to any person or body in Southern Rhodesia or to any person or body for the purposes of any business carried on in or operated from Southern Rhodesia, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply;

(e) The shipment in vessels or aircraft of their registration, or under charter to their nationals, or the carriage (whether or not in bond) by land transport facilities across their territories of any such commodities or products which are consigned to any person or body in Southern Rhodesia, or to any other person or body for the purposes of any business carried on in or operated from Southern Rhodesia;

4. Decides that all States Members of the United Nations shall not make available to the illegal régime in Southern Rhodesia or to any commercial, industrial or public utility undertaking, including tourist enterprises, in Southern Rhodesia any funds for investment or any other financial or economic resources and shall prevent their nationals and any persons within their territories from making available to the régime or to any such undertaking any such funds or resources and from remitting

any other funds to persons or bodies within Southern Rhodesia except payments exclusively for pensions or for strictly medical, humanitarian or educational purposes or for the provision of news material and in special humanitarian circumstances, food-stuffs;

5. Decides that all States Members of the United Nations shall:

(a) Prevent the entry into their territories, save on exceptional humanitarian grounds, of any person travelling on a Southern Rhodesian passport, regardless of its date of issue, or on a purported passport issued by or on behalf of the illegal régime in Southern Rhodesia; and

(b) Take all possible measures to prevent the entry into their territories of persons whom they have reason to believe to be ordinarily resident in Southern Rhodesia and whom they have reason to believe to have furthered or encouraged, or to be likely to further or encourage, the unlawful actions of the illegal régime in Southern Rhodesia or any activities which are calculated to evade any measure decided upon in this resolution or resolution 232 (1966) of 16 December 1966;

6. Decides that all States Members of the United Nations shall prevent airline companies constituted in their territories and aircraft of their registration or under charter to their nationals from operating to or from Southern Rhodesia and from linking up with any airline company constituted or aircraft registered in Southern Rhodesia;

7. Decides that all States Members of the United Nations shall give effect to the decisions set out in operative paragraphs 3, 4, 5 and 6 of this resolution notwithstanding any contract entered into or licence granted before the date of this resolution;

8. Calls upon all States Members of the United Nations or of the specialized agencies to take all possible measures to prevent activities by their nationals and persons in their territories promoting, assisting or encouraging emigration to Southern Rhodesia, with a view to stopping such emigration;

9. Requests all States Members of the United Nations or of the specialized agencies to take all possible further action under Article 41 of the Charter to deal with the situation in Southern Rhodesia, not excluding any of the measures provided in

that Article;

10. Emphasizes the need for the withdrawal of all consular and trade representation in Southern Rhodesia, in addition to the provisions of operative paragraph 6 of resolution 217 (1965);

11. Calls upon all States Members of the United Nations to carry out these decisions of the Security Council in accordance with Article 25 of the United Nations Charter and reminds them that failure or refusal by any one of them to do so would constitute a violation of that Article;

12. Deplores the attitude of States that have not complied with their obligations under Article 25 of the Charter, and censures in particular those States which have persisted in trading with the illegal régime in defiance of the resolutions of the Security Council, and which have given active assistance to the régime;

13. Urges all States Members of the United Nations to render moral and material assistance to the people of Southern Rhodesia in their struggle to achieve their freedom and independence;

14. Urges, having regard to the principles stated in Article 2 of the United Nations Charter; States not Members of the United Nations to act in accordance with the provisions of the present resolution;

15. Requests States Members of the United Nations, the United Nations Organization, the specialized agencies, and other international organizations in the United Nations system to extend to Zambia as a matter of priority with a view to helping her solve such special economic problems as she may be confronted with arising from the carrying out of these decisions of the Security Council;

16. Calls upon all States Members of the United Nations, and in particular those with primary responsibility under the Charter for the maintenance of international peace and security, to assist effectively in the implementation of the measures called for by the present resolution;

17. Considers that the United Kingdom as the administering Power should ensure that no settlement is reached without taking into account the views of the people of Southern Rhodesia, and in

particular the political parties favouring majority rule, and that it is acceptable to the people of Southern Rhodesia as a whole;

18. Calls upon all States Members of the United Nations or of the specialized agencies to report to the Secretary-General by 1 August 1968 on measures taken to implement the present resolution;

19. Requests the Secretary-General to report to the Security Council on the progress of the implementation of this resolution, the first report to be made not later than 1 September 1968;

20. Decides to establish, in accordance with rule 28 of the provisional rules of procedure of the Security Council, a committee of the Security Council to undertake the following tasks and to report to it with its observations:

(a) To examine such reports on the implementation of the present resolution as are submitted by the Secretary-General;

(b) To seek from any States Members of the United Nations or of the specialized agencies such further information regarding the trade of that State (including information regarding the commodities and products exempted from the prohibition contained in operative paragraph 3 (d) above) or regarding any activities by any nationals of that State or in its territories that may constitute an evasion of the measures decided upon in this resolution as it may consider necessary for the proper discharge of its duty to report to the Security Council;

21. Requests the United Kingdom, as the administering Power, to give maximum assistance to the committee, and to provide the committee with any information which it may receive in order that the measures envisaged in this resolution and resolution 232 (1966) may be rendered fully effective;

22. Calls upon all States Members of the United Nations, or of the specialized agencies, as well as the specialized agencies themselves, to supply such further information as may be sought by the Committee in pursuance of this resolution;

23. Decides to maintain this item on its agenda for further action as appropriate in the light of developments.