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Decisions of International and Foreign Tribunals

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Case Comments

Decisions of International and Foreign Tribunals

International Court of Justice

Germany v. Iceland
United Kingdom v. Iceland

On June 5, 1972, the Government of the Federal Republic of Germany filed in the Registry of the International Court of Justice an application instituting proceedings against Iceland as a result of the decision of the Government of Iceland to extend, as from September 1, 1972, the limits of its zone of exclusive fisheries jurisdiction from 12 nautical miles from the baselines to 50 nautical miles.

The Government of the Federal Republic of Germany bases the jurisdiction of the Court, for the purposes of the preceedings, on Articles 35 and 36 of the Statute of the Court, on an exchange of Notes of July 19, 1961 between the Governments concerned, and on a Declaration of October 29, 1971 whereby the Federal Republic of Germany accepted the jurisdiction of the Court in accordance with a Security Council resolution of October 15, 1946.

Germany predicates its application on the same principles of international law as had been urged by the United Kingdom in its application, filed April 14, 1972, instituting proceedings against Iceland on the same subject of fisheries jurisdiction. *See* 6 THE INTERNATIONAL LAWYER 665 (July, 1972).

On July 21, 1972 a request by Germany for the indication of interim measures of protection in this case was handed to the Registrar of the Court.

The Court has decided to hold a public sitting at the Peace Palace on

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Wednesday, August 2, 1972 for the purpose of hearing the representatives of the parties on the subject of this request.

In the case of *United Kingdom v. Iceland,* the Government of the United Kingdom had filed on July 19, 1972, its request for the indication of provisional measures of protection, and will be heard on the subject at a public sitting of the Court on August 1.

Article 41, paragraph 1, of the Statute of the Court confers upon it the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party pending final decision. The applicable procedure is laid down by Article 61 of the Rules of Court which provides, in part, that "a request for the indication of interim measures of protection shall have priority over all other cases. The decision shall be treated as a matter of urgency."

Requests for the indication of interim measures of protection were received by the Court in two previous cases, *Anglo-Iranian Oil Company* and *Interhandel.*

India v. Pakistan

At nine public sittings held from 19 to 23 June, and on 27, 28 and 30 June and 3 July, counsel for India and Pakistan addressed argument to the Court on behalf of their Governments in this appeal relating to the jurisdiction of the ICAO Council. *See* 6 THE INTERNATIONAL LAWYER 201 (January, 1972) and 665 (July, 1972).

The written pleadings in the case were filed on the following dates:

- Memorial of India: December 22, 1971;
- Counter-Memorial of Pakistan: February 29, 1972;
- Reply of India: April 17, 1972 (the time-limit, originally fixed at March 30, was extended at the request of the Indian Government by an Order of March 20);
- Rejoinder of Pakistan: May 16, 1972 (time-limit fixed by the Order of March 20).

By authorization of the Court, these pleadings were made accessible to the public as from June 19.

In its response to India's contentions (*see* 6 THE INTERNATIONAL LAWYER at p. 202), Pakistan has urged that:

> a—the question of Pakistan aircraft overflying India and Indian aircraft overflying Pakistan is governed by the Convention and Transit Agreement;
>
> b—the contention of the Government of India that the Council has no jurisdiction to handle the matters presented by Pakistan in its Application is misconceived;
>
> c—the Appeal preferred by the Government of India against the decision of the Council in respect of Pakistan's Complaint is incompetent;
>
> d—if the answer to the submission in c above is in the negative, then the contention of the Government of India that the Council has no jurisdiction to consider the Complaint of Pakistan, is misconceived;

e—the manner and method employed by the Council in reaching its decisions are proper, fair and valid; and

f—the decisions of the Council in rejecting the Preliminary Objections of the Government of India are correct in law.

At the recent public hearings, the contentions of India were presented by his Excellency Lt.-General Yadavindra Singh, as Agent, and by Mr. N. A. Palkhivala, as Chief Counsel, and those of Pakistan by His Excellency Mr. J. G. Kharas, as Agent, and Mr. Yahya Bakhtiar, as Chief Counsel. Mr. Palkhivala and Mr. Bakhtiar also answered questions put to them by various members of the Court.

At the end of the sitting of July 3, Vice-President Ammoun, Acting President in the case, declared the oral proceedings closed and stated that the Agents would be informed in due course of the date fixed for the public reading of the judgment. The Court will now proceed to its private deliberation of the case.

Rules of Court

On May 10, 1972, the Court adopted a number of amendments to its Rules of Court, and a new edition of the Rules, incorporating these amendments, was published on June 6, 1972. The new Rules of Court will become effective on September 1, 1972, but the existing Rules will continue to apply to all phases of cases submitted to the Court before that date.

Of the 85 articles of the prior Rules, 18 were amended or subdivided, and a number of new articles were added, so that the new Rules comprise 91 articles, 23 of which are new or have amended texts.*

The amendments are intended to make the procedure as simple and expeditious as possible, to provide for greater flexibility, and to endeavor to reduce the cost for the parties, both in contentious proceedings [at the written stage (present Articles 37 to 38 and 40 to 42) and at the oral stage (present Articles 48, 51 to 52 and 57 to 60)] and in advisory proceedings (present Article 82). In addition, the provisions as to assessors (Article 7), preliminary objections (present Article 62) and the formation of Chambers (present Articles 24 and 71 and 72) have been made more detailed.

The Rules of Court, which were initially adopted on May 10, 1946 and which remained unchanged until the present amendments, should be distinguished from the Statute of the Court, which was adopted in 1945 at the San Francisco Conference, and which is an intergral part of the United Nations Charter. The purpose of the Rules, which are drafted by the Court itself, is to spell out the detailed application of the Statute in terms of the organization and procedure of the Court.

*From Article 25 onwards, the numbering of the articles has been changed and will no longer correspond to the numbering of the existing Rules.

While the Court has not yet completed the entire revision of its Rules, it decided at this time to modify those articles listed above which appeared to call for priority amendments as a matter of immediate usefulness. The Court is to continue its work on the general revision of the Rules.

Application for Review of a Judgment of the United Nations Administrative Tribunal

On July 3, 1972 the International Court of Justice received from the Secretary-General of the United Nations a request for an advisory opinion on an administrative issue.

Mr. Mohamed Fasla, an official of the United Nations Development Program (UNDP), was the holder of a fixed-term appointment which was due to expire on December 31, 1969. As this appointment was not renewed, Mr. Fasla appealed successively to the two bodies competent to hear applications alleging non-observance of the terms of appointment or contracts of employment of staff members, that is, the Joint Appeals Board (1969-1971) and the United Nations Administrative Tribunal (1970-1972). As a result, the Administrative Tribunal, sitting in Geneva on April 28, 1972, rendered Judgment No. 158, whereby it decided that Mr. Fasla should receive six months' salary and was entitled to submit certain claims for reimbursement to the Secretary-General.

Mr. Fasla considered that the Administrative Tribunal had not fully considered and passed upon all his claims, and he therefore applied under Article 11 of the Tribunal's Statute for a review of the judgment. In accordance with the provisions of that Article, his application was examined by the Committee on Applications for Review of Administrative Tribunal Judgments, a committee which is composed of the member states, the representatives of which have served on the General Committee of the most recent regular session of the General Assembly. In New York, on June 20, the Committee on Applications decided to request the International Court of Justice for an advisory opinion on the question whether the Administrative Tribunal had failed to exercise jurisdiction vested in it or had committed a fundamental error in procedure which had occasioned a failure of justice. When the Court has rendered its advisory opinion, the Secretary-General has either to give it effect or to request the Tribunal to convene specially in order to confirm its original decision or render a new one.

Argentina

Re Jackson and Sanchez Archila,
(Federal Court, La Plata, Dec. 15, 1971), 66 AM.J. INT'L LAW 636 (July, 1972)

Jackson, a United States national, and Sanchez Archila, a Guatemalan national, were charged with hijacking a Braniff aircraft over Mexico in July, 1971, and diverting it to Buenos Aires from its scheduled destination in New York. They held the aircraft and crew for some twenty hours after landing at Buenos Aires before surrendering to the police. They were charged under Article 198(3) of the Argentine Penal Code with the offense of seizure of an aircraft by threat or force. Both of the accused were found guilty and were sentenced to imprisonment.

At the time of the offense, Argentina was not a party to either the Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) (20 U.S. Treaties 2941; T.I.A.S., No. 6768) or the Convention for the Suppression of Unlawful Seizure of Aircraft (T.I.A.S., No. 7192). In considering the question of jurisdiction in this instance of international aircraft hijacking, the court held:

> According to the record of the investigation and evidence offered at the trial, Jackson forced the pilot and crew by threats and a display of weapons to submit to his orders, throughout the entire flight, in effect seizing command of the aircraft. The use of threats and arms characterizes the new type of offender contemplated in Article 198(3), for there can be no doubt that the pilot and crew acted in response to the fear which Jackson had generated in the course of the offense for which he is now being tried. The seizure of the aircraft and detention of those rightfully in control of it while it was in flight as well as standing in the airport . . . constitute acts which have been consummated within the jurisdiction of the Republic. (Article 1, Penal Code.)

India

> *M/S. V/O Tractoroexport, Moscow v. M/S. Tarapore and Co.*, Madras, 58 A.I.R., S.C. 1 Pt. 685, Jan. 1971 (Supreme Court of India), 66 AM. J. INT'L. LAW. 637 (July, 1972)

Plaintiff, an Indian company, sought an interim injunction restraining defendant, a Russian firm, from participating in arbitral proceedings in Moscow relative to a controversy over the sale of certain excavating machinery to plaintiff under a contract concluded in 1965 and a letter of credit open by plaintiff with the Bank of India in favor of the defendant. Plaintiff had complained to defendant about certain defects in the machinery delivered to it, and, thereafter, when the rupee was devalued, defendant demanded an increase in the letter of credit to cover this change. Plaintiff filed suit in Madras for breach of contract and sought an injunction on payments on the letter of credit as well as on certain devaluation drafts. In November, 1967, defendant began an arbitral proceeding in Moscow in pursuance of an arbitration clause in the contract, and also sought to stay the suit in Madras, arguing that the dispute should have been submitted first to arbitration in Moscow, and invoking Section 3 of the Foreign

Awards (Recognition and Enforcement) Act 1961 (XLV, 1961, cited by the court), the law implementing the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 U.N. Treaty Series 38), which section provides:

> Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedures, 1908, if any party to a submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect to any matter agreed to be referred any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings, and the Court unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred shall make an order staying the proceedings. (58 A.I.R., S.C. 1, 5.)

In January, 1968, plaintiff filed application for an interim injunction against defendant's continuing the arbitration proceeding in Moscow. Defendant's application for a stay was dismissed by the lower court and plaintiff's application for the interim injunction was granted. Defendant appealed from both orders, and the Supreme Court dismissed the appeals.

The first question considered was whether there was a conflict between the language of Section 3 and that of Article II(3) of the Convention which provides:

> The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that said agreement is null and void, inoperative or incapable of being performed. (*Id.*)

After examining the background of the 1961 Act and earlier Indian and English legislation for the implementation of international arbitral agreements, the Supreme Court held:

> As it was open to the legislature to deviate from the terms of the Protocol [1923 Geneva Protocol on Arbitration Clauses] and the Convention [1927 Geneva Convention on the Execution of Foreign Arbitral Awards] it appears to have given only a limited effect to the provisions of the 1958 Convention. A clear deviation from the rigid and strict rule that the courts must stay a suit whenever an international commercial arbitration as contemplated by the Protocol and the Conventions, was to take place, is to be found in Sec. 3. It is of a nature which is common to all provisions relating to stay in English and Indian arbitration laws, the provisions being that the application to the court for stay of the suit must be made by a party before filing a written statement or taking any other step in the proceedings. If the condition is not fulfilled, no stay can be granted. It cannot thus be said that Sec. 3 of the Act or similar provisions in the prior Act of 1937 or the English Statutes were enacted to

> give effect in its entirety to the strict rule contained in the Protocol and the Conventions. (*Id.* 10.)

With regard to the issuance of the injunction against the arbitration proceeding, defendant had urged that, because neither it nor the Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce was subject to the jurisdiction of Indian courts, this order had no effect, but the court said:

> Ordinarily, a party which has entered into a contract of which an arbitral clause forms an intergral part should not receive the assistance of the Court when it seeks to resile from it. But in the present case a suit is being tried in the Courts of this country which, for the reasons already stated, cannot be stayed under Section 3 of the Act in the absence of an actual submission of the disputes to the arbitral tribunal at Moscow prior to the institution of the suit. The only proper course to follow is to restrain the Russian Firm which has gone to the Moscow Tribunal for adjudication of the disputes from getting the matter decided by the tribunal so long as the suit here is pending and has not been disposed of. (*Id.* 12.)