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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

AUSTRALIA AND NEW ZEALAND v. FRANCE (Nuclear Tests)[1]

On 22 June 1973, the International Court of Justice, by 8 votes to 6, rendered orders indicating, pending its final decision in the cases concerning *Nuclear Tests,* the following provisional measures of protection:

The Governments of Australia, New Zealand and France should each ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radioactive fall-out on Australian territory, the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands.

In indicating interim measures, the Court took into account the following considerations, *inter alia:*

(1) the material submitted to the Court leads it to the conclusion, at the present stage of the proceedings, that the provisions invoked by the Applicants with regard to the Court's jurisdiction appear, *prima facie,* to afford a basis on which that jurisdiction might be founded;

(2) it cannot be assumed *a priori* that the claims of the Australian and New Zealand Governments fall completely outside the purview of the Court's jurisdiction or that the Governments may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Applications; and

(3) for the purpose of the present proceedings, it suffices to observe that the information submitted to the Court does not exclude the possibility that

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[1]*See also* 7 INT'L LAW. 762 (July 1973).

damage to Australia and New Zealand might be shown to be caused by the deposit on Australian and New Zealand territory of radioactive fall-out resulting from such tests and to be irreparable.

The Court concluded that it was unable to accede, at the present stage of the proceedings, to the request made by the French Government that the cases be removed from the list. However, the decision in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the cases, or any question relating to the admissibility of the Applications, or relating to the merits themselves, and leaves unaffected the right of the French Government to submit arguments in respect to those questions.

The Court further decided that the written pleadings shall first be addressed to the question of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Applications, and fixed 21 September 1973 as the time-limit for the Memorials of the Governments of Australia and New Zealand and 21 December 1973 as the time-limit for the Counter-Memorial of the French Government.

By order entered 12 July 1973 in each of these two cases concerning Nuclear Tests, the Court, by 8 votes to 5, decided to defer its consideration of two applications by the Government of Fiji for permission to intervene in the proceedings until it had pronounced upon the questions to which the pleadings mentioned in its orders of 22 June 1973 are to be addressed.

In the meantime, it has been reported by several reliable sources that on 21 July 1973, the French Government proceeded with a nuclear explosion over the atoll of Muroroa in the South Pacific. See, *e.g., Wall Street Journal,* Vol. LII, No. 15 (July 23, 1973), p. 1; *The New York Times,* Vol. CXXII, No. 42,183 (July 22, 1973), p. 6.

PAKISTAN v. INDIA (Trial of Pakistani Prisoners of War)[2]

On 4, 5 and 26 June 1973 the Court held public hearings on the request by Pakistan for interim measures of protection, relating to a dispute concerning accusations of genocide made against 195 Pakistani prisoners of war and civilian internees detained in India, at which hearings the representatives of the Government of Pakistan were present and submitted observations. The Government of Pakistan had chosen as judge *ad hoc* Sir Muhammad Zafrulla Khan, who sat in the proceedings until 2 July 1973.

By letter dated 11 July 1973, the Agent for Pakistan informed the Court that it was expected that negotiations would very shortly be taking place between Pakistan and India in which the issues which were the subject of

[2]*See* 7 INT'L LAW. 727 (July 1973).

Pakistan's Application would be under discussion, and asked the Court to postpone further consideration of its request for interim measures in order to facilitate those negotiations, and to fix time-limits for the filing of written pleadings.

By order dated 13 July 1973 the Court, by 8 votes to 4, decided that the written proceedings in the above case shall first be addressed to the question of its jurisdiction to entertain the dispute, and fixed 1 October 1973 as the time-limit for the filing of a Memorial by the Government of Pakistan and 15 December 1973 as that for the filing of a Counter-Memorial by the Government of India.

In the recitals of its order of 13 July 1973, the Court stated that the fact that Pakistan now asks it to postpone further consideration of its request for the indication of interim measures signifies that the Court no longer has before it a request for interim measures which is to be treated as a matter of urgency. The Court therefore concluded that it is not called upon to pronounce upon the request, but in the circumstances, must first of all satisfy itself that is has jurisdiction to entertain the dispute.

UNITED KINGDOM AND GERMANY v. ICELAND
(Fisheries Jurisdiction)

By order entered on 12 July 1973 in each of the two Fisheries Jurisdiction cases, the Court, by 11 votes to 3, has confirmed that the provisional measures indicated in operative paragraph 1 of the Orders of 17 August 1972 should, subject to the power of revocation or modification conferred on the Court by paragraph 7 of Article 61 of its 1946 Rules, remain operative until the Court has given final judgment in each case.[3]

In its considerations mentioned in each order, the Court observed that:

(1) negotiations have taken place or are taking place between the States concerned with a view to reaching an interim arrangement pending final settlement of the disputes;

(2) the provisional measures indicated by the Court do not exclude an interim arrangement which may be agreed upon by the Governments concerned, based on catch-limitation figures different from those indicated as maxima by the Court and on related restrictions concerning areas closed to fishing, number and type of vessels allowed and forms of control of the agreed provisions; and

(3) The Court, pending the final decision, and in the absence of such interim arrangement, must remain concerned to preserve, by the indication

[3]See 6 INT'L LAW. 665 (July, 1972) and 889 (Oct., 1972); 7 INT'L LAW. 232 (Jan., 1973) and 505 (April, 1973).

of provisional measures, the rights which may subsequently be adjudged by the Court to belong respectively to the parties.

Application for Review of Judgment No. 158, United Nations Administrative Tribunal

A request for an advisory opinion had been submitted to the Court on 3 July 1972 by a letter of 28 June 1972 from the Secretary-General of the United Nations in the following terms:

> The Committee on Applications for Review of Administrative Tribunal Judgments has decided that there is a substantial basis within the meaning of Article 11 of the Statute of the Administrative Tribunal for the application for the review of Administrative Tribunal Judgment No. 158, delivered at Geneva on 28 April 1972.
>
> Accordingly, the Committee requests an advisory opinion of the International Court of Justice on the following questions:
>
> 1. Has the Tribunal failed to exercise jurisdiction vested in it as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgments (A/AC.86/R. 59)?
>
> 2. Has the Tribunal committed a fundamental error in procedure which has occasioned a failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgments (A/AC.86/R.59)?

The International Court of Justice decided, by 10 votes to 3, to comply with the request, and on 12 July 1973, rendered its Advisory Opinion:

(a) with regard to Question I, by 9 votes to 4, that the Administrative Tribunal has not failed to exercise the jurisdiction vested in it as contended in the application to the Committee on Applications for Review of Administrative Tribunal Judgments; and

(b) with regard to Question II, by 10 votes to 3, that the Administrative Tribunal has not committed a fundamental error in procedure which has occasioned a failure of justice as contended in the application to the Committee on Applications for Review of Administrative Tribunal Judgments.

An extended analysis of the Advisory Opinion may be found in ICJ *Communiqué* No. 73/26 (12 July 1973).

INDIA

G. Y. BHANDARE v. ERASMO (All India Reporter 1972 Goa 28)

This proceeding arose from an election petition involving the question of citizenship under clause 2 of the Goa, Daman and Diu (Citizenship) Order, 1962. Respondent contended that since he was born in Goa on December 22, 1938, he became a citizen of India from December 20, 1961 under clause 2 of the Goa, Daman and Diu (Citizenship) Order, 1962; that the

national status of a subject of annexed territory was a matter for the State to decide, so that the courts of law could not interfere in the matter; and that accordingly, the question of his loss of citizenship should be referred to the Government of India for its decision under Section 9(2) of the Citizenship Act, 1955 and the rules made thereunder. Petitioner asserted that respondent never acquired Indian citizenship and that the question of his losing it did not arise; and since this case did not involve the loss of citizenship, it could not be referred to the Central Government for decision, and the court had jurisdiction to decide the question.

In dismissing the election petition, the Court concluded, *inter alia:*

"The question whether a person has acquired Indian citizenship or not by virtue of the Citizenship Order cannot be determined by a reference to the provisions of the main part of C1. 2 alone of that order, clause 2 being inseparable from its provisos. The first proviso has to be considered along with clause 2 as the acquisition of Indian citizenship under clause 2 depends upon any declaration made under the first proviso to that clause. It follows that the determination of the validity of a declaration made under the proviso forms an integral part of the process as ascertaining whether a person has or has not acquired Indian citizenship under clause 2 of the Citizenship Order. If while determining the question of the validity of the declaration I come to the conclusion that a valid declaration was made under the first proviso of clause 2, the words 'shall not be deemed to have become a citizen of India as aforesaid' occurring in the first proviso shall have to be given its full effect, which is to totally neutralize the effect of the words 'shall be deemed to have become a citizen of India' occurring in clause 2. In that event the respondent is deemed to have never acquired Indian citizenship and therefore no reference to the Central Government for determination of any question under Section 9(2) read with rule 30 need be made. If on the other hand I come to the conclusion that the alleged declaration dated 27-4-1962 is not valid or if the petitioner fails to prove that the respondent never was an Indian citizen a reference to the Government of India to determine the question whether the respondent had lost the Indian citizenship which he acquired, must necessarily follow."

RANG RAO v. STATE OF MYSORE (All India Reporter 1972 Mysore 98)

A petition for writ raised the question of constitutional validity of the provisions of the Mysore (Abolition of Cash Grants) Act, 1967, which abolished, with retroactive effect, the payment of cash grants, which the petitioners had used to obtain from the former State of Hyderabad, now merged into the State of Mysore after the coming into force of the Indian Constitution.

The object of that part of the Act under attack is to discontinue certain classes of cash grants in the Hyderabad Area of the new State of Mysore. Section 4 of the Act in effect seeks to discontinue payment of cash grants not merely in future, but also retroactively as of a date long prior to the passage of the Act. Under that section, a sum equal to four times the annual amount payable to the grantee, is provided as compensation both for past arrears of cash grants and for recurring payments which have been discontinued.

The petitioners, while challenging the validity of the Act, also contended that even if the State had the power to abolish cash grants, it could do so only prospectively and not retrospectively. It was further argued that the obligation to pay them, and the corresponding right to receive them, had accrued and crystallized into a liability to pay certain sums of money towards cash grants and a corresponding right in the petitioners to receive such sums of money from the State; and that the State could not acquire a person's right to receive a sum of money by paying, by way of compensation, a smaller amount, nor was there any public purpose for such acquisition.

In holding Section 4 unconstitutional, the Court noted that the result would have been different "if the Dominion of India had repudiated or refused to recognize cash grants granted or continued by the Nizam, (and) the petitioners would have been without any remedy." However, "once the New State, namely, the Dominion of India, recognized such grants granted or continued by the Nizam, subsequent repudiation of such grants, cannot be regarded as constituting an Act of State."

COSTA RICA

NICARAGUAN HIJACKERS' CASE. 9 ICJ Review (Dec. 1972), p. 78.

On December 12, 1971, three Nicaraguan nationals hijacked a Nicaraguan passenger plane and forced the crew to fly to Costa Rica, where they intended to refuel before continuing on to Cuba. On arrival in Costa Rica, they threatened to attack the passengers if their demands were not satisfied and the plane refueled, but these were refused. When a fire broke out in the plane, the hijackers were forced to surrender. Permission to enter and remain in Costa Rica was denied them, and they were returned by an order of the Costa Rican Government to Nicaragua. This action to establish the right of asylum of the hijackers was brought against the President of the Republic and the Minister of Public Safety in Costa Rica.

The Supreme Court of Costa Rica held that extradition should be carried out in accordance with the provisions of paragraph 2 of Article 31 of the Constitution, The Hague Agreement for the Suppression of Hijacking,

which was ratified by Costa Rica, and the Law on Extradition (No. 4795 of 16/7/71). Both under the Penal Code of Costa Rica and under The Hague Agreement, hijacking is regarded as a purely criminal, and not as a political, offense, so that there was no violation of paragraph 1 of Article 31 of the Constitution. However, the decision to extradite was taken by an executive act, without any extradition proceedings having been instituted and without any decision of the judiciary, and the extradition was therefore a breach of Article 31(2) of the Constitution and of Article 4 of the Law on Extradition, and also of the provisions of The Hague Agreement. Extradition cannot be granted at the discretion of the Executive, but only by a specific order of a court.

The Court accordingly concluded that the expulsion of the hijackers was illegal. Since the hijackers had already been handed over to the Nicaraguan authorities, however, the legal effect of the decision stands as a precedent only.