Decisions of International and Foreign Tribunals

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England

In *Agbor v. Metropolitan Police Commissioner* [1969] 2 All E.R. 707, the Court of Appeal consisered the meaning of Articles 22(2) and 30(1) of the Vienna Convention on Diplomatic Relations. A house in London included the flat of a diplomatic attaché of the Nigerian Federal Government on the ground floor, and the offices of the Biafran government on the first floor. The Biafrans, using a key in their possession,, installed Mrs. Agbor and her family in the flat after the Nigerian attaché moved out. Rather than take the matter to court, the Nigerian High Commissioner relied on Articles 22(2) (the receiving State must take "all appropriate steps" to protect the mission premises against intrusion) and 30(1) (the private residence of a diplomatic agent enjoys the same protection as the mission premises), and called on Her Majesty's Government for assistance, with the result that the Metropolitan Police summarily evicted Mrs. Agbor and her family.

The Court of Appeal granted an interlocutory injunction directing the defendant to restore Mrs. Agbor's possession of the flat, and held, first, that plaintiff's claim to possession rested on the fact that she was there under a claim of right which could be challenged only in court, since the forcible retaking of premises by anyone was forbidden by the Statutes of Forcible Entry; and second, the flat was not then "the private residence of a diplomatic agent" within Article 30(1), since the attaché had left the premises definitively, so that neither the High Commissioner nor the police could rely on the Convention. It was observed that Article 22(2), in using the phrase "all appropriate steps," "enables the police to defend the premises against intruders (but) not to turn out people who are in possession and claim as of right to be there" (at p. 707D).

Court of Justice of the European Communities

In *Salgoil v. Ministry of Foreign Commerce of the Italian Republic,* Case 13/68, December 19, 1968; Recueil XIV/5, p. 662, plaintiff, an

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Italian company, contracted with a firm established at Bâle for importation into Italy of impregnated dyes "from countries of the EEC and/or the OEEC"; and under the agreement, plaintiff paid half the price, and the other party shipped the first quantity of dyes to plaintiff. At the time of shipment, the import of those products was not governed by any quantitative restrictions of the Italian legislature. Shortly thereafter, a new law prohibited imports insofar as this was permitted by international agreements, and a decree which followed made imports conditional upon issuance of a license. The customs officials refused admission of the first quantity of the dyes, and when plaintiff's request for an import license was refused by the Ministry of Foreign Commerce, plaintiff made claim for damages in the civil court of Rome, relying primarily on asserted violation of Articles 31 and 33 of the EEC Treaty.

The court declared itself incompetent to hear the matter, on the ground that these treaty provisions contain only obligations for member States, and do not confer any direct rights on citizens; and the Court of Appeal, being of opinion that its decision was dependent on the interpretation of Articles 30 *et seq.* of the EEC Treaty, submitted two questions to the Court of Justice of the European Communities for a preliminary ruling under Article 177 of the EEC Treaty.

In answer to the first question, the court held that both under Article 31, para. 2, and Article 32, para. 1, as of the time of notification of the lists of liberalized products or, at the latest, after the time limit for giving notice as foreseen in the articles, these articles have direct effect in the relations between a member State and its citizens, and create in favor of the latter, rights which municipal courts must safeguard. In answer to the second question, it was also held that those articles "obligate the authorities, and especially the competent courts of the member states, to safeguard the interests of the subjects which may be affected by a possible misinterpretation of the said provisions, and to do so by way of a direct and immediate protection, irrespective of the relationship existing between these interests and the public interest according to municipal law"; and the "municipal legal order must designate the competent court which has to secure this protection, and in this respect it belongs to it to decide how the individual position of the private person thus to be protected has to be qualified." 6 C.M.L. Rev. (October 1969) pp. 478 *et seq.*

In *Becher v. Commission,* Case No. 30/60, November 30, 1967, Recueil XIII-4, p. 369; 2 CCH Common Market Reporter ¶ 8058, plaintiff asked that the community be ordered to make reparations for the injury which plaintiff sustained by reason of a decision (subsequently annulled by the

Court of Justice as illegal) of the commission, which decision had maintained a safeguard measure by which the Federal Republic of Germany suspended the issuance of import licenses for certain grain, with the result that plaintiff had to pay indemnities to obtain cancellation of the contracts made in anticipation of issuance of the license for which it had applied, and sustained other losses by having to import, under unfavorable conditions, the quantities accepted under the contracts and having failed to realize its anticipated profit when unable to import grain at the zero levy rate.

The court held that the conduct of the commission, in having applied Article 22 of the Regulation No. 19 incorrectly, so that its action was injurious to the interests of importers who had relied on information furnished to them in accordance with the community rules, constituted an official fault, which establishes a basis for community liability; that "the commission is under the same obligations as the governments of the member states to examine carefully every safeguard measure of which it is notified and is independently responsible for maintaining a safeguard measure"; and further, while the purpose of the provisions of Regulation 19 is essentially to protect the general interest, "they may also include the interests of individual enterprises such as the plaintiff, which, in their capacity as grain importers, participate in intra-community trade," which the court found to be the case before it.

The court also held, however, that plaintiff must produce evidence that it has exhausted domestic administrative and judicial remedies to obtain a refund of any levies paid which it did not legally owe; and that, as to financial losses and unrealized profits, it is entitled to recover the indemnities paid and its losses upon resale, but that the claim for unrealized profit is based on essentially speculative factors, and that loss cannot be measured at more than 10 per cent of the amount which plaintiff would have to pay in levies if it had carried out the purchase contracts which were subsequently cancelled.

The court further withheld final judgment because plaintiff's claim against the EEC, then before the Court of Justice, was also pending against a member state before a national court for the same injury, and care must be taken to ensure that plaintiff is not awarded damages which are either inadequate or excessive, by awaiting the judgment of the national court.

Neumann v. Hauptzollamt Hof/Saale, Case No. 17/67, December 13, 1967; Recueil Vol. XIII-5, p. 571; 2 CCH Common Market Reporter ¶ 8059. On November 19, 1962, plaintiff imported from Poland into Germany, slaughtered chickens on which the *Zollamt* (customs office) de-

manded, in addition to the levy calculated at the rate in effect since November 5, 1962, and the turnover equalization tax, a supplementary levy which was to be imposed beginning November 19, 1962 on the basis of Commission Regulation No. 135/62 dated November 7, 1962 and published in the Official Journal on the same date, and which became effective on the date of its publication.

Plaintiff attacked the additional levy and regulation on several grounds, and the *Bundesfinanzhof* (Federal Tax Court) submitted to the Court of Justice a series of questions for perliminary ruling, as a result of which that court held that "the member states conferred upon the community institutions the power to levy measures such as those provided in Regulation No. 22," which are directly applicable to the member states in order to create a common organization of the agricultural markets, "thereby limiting their sovereign rights accordingly"; and the validity of the system "can in no way be affected by whether the levy is a customs duty, a tax, or something else."

The court further held that the validity of the regulation in question was unaffected by the fact that it did not take into account the offering price for a specific import in determining the additional levy; and that while "the Treaty leaves it to the institution issuing the regulation to specify the date on which it is to take effect," this cannot "be viewed as being totally free of all judicial control," especially in the event of retroactive effect, since a "legitimate concern for legal security would be jeopardized if immediate effectiveness were decreed without good reason"; and the court upheld the reasonableness of the instant regulation.

In *Industria Molitoria Imolese et al. v. Council,* Case No. 30/67, March 13, 1968; Recueil Vol. XIV-2, p. 172; 2 CCH Common Market Reporter ¶ 8059, plaintiff sued the Council of the European Communities, to annul one of its regulations which set the prices and determined the principal marketing centers for grains for the 1967-1968 marketing year, insofar as such provisions determine the derived intervention prices for soft wheat in the marketing centers of Bologna and Amona. The court held that the suit is "inadmissible" under Article 173, para. 2 of the Treaty, which permits an individual to bring suit for annulment only against decisions that are addressed to them or which, although taken in the form of a regulation or of a decision addressed to another person, are of direct and individual concern to them. The court found that the provisions of the regulation in question "do not concern, within each marketing center, the interests of certain specified, designated, or identifiable persons, but affect the in-

terests of groups of consumers and dealers designated in the abstract and identifiable solely by reason of their participation in the market of the products concerned."

In *Beus v. Hauptzollamt München,* Case No. 5/67, March 13, 1968; Recueil, Vol. XIV-2, p. 126; 2 CCH Common Market Reporter, ¶ 8060, a request was submitted to the Court of Justice by the *Finanzgericht* (Tax Court) at Munich, seeking a preliminary ruling on the validity of an EEC Commission regulation introducing a compensatory tax on imports of table grapes from Bulgaria and Rumania. It was held, *inter alia,* that (1) the objectives set forth in Article 39 of the EEC Treaty for the purpose of protecting the interests of farmers as well as consumers, cannot be attained at the same time and completely, and the council, in weighing those interests, must therefore take into account the so-called principle of "community preference" which is one of the basic principles of the treaty; (2) the words "other import taxes," used in Article 11(2) of Regulation 23 as amended by Regulation 65/66, include the German turnover equalization tax as well as the community compensatory tax levied on the basis of such regulations, so that, in calculating the import price of fruits and vegetables from third countries, the quotations on the representative markets of the member states must be reduced by the amount of such taxes; and (3) the phrase "substantial part of the produce sold throughout the year or part of such year," also used in that article, indicates that the commission has a certain margin of discretion in choosing the varieties to be considered in setting the preference price, and the court's examination is limited to whether or not the commission's choice was arbitrary.

Commission of the European Communities

In *Pirelli S. p. A.—Società Italiana Dunlop S. p. A.* (IV/24,470) and *S. A. des Pneumatiques Dunlop—S. A. Pirelli France* (IV/24,471), Official Journal No. L 323, 2 CCH Common Market Reporter ¶ 9336, the commission, on December 12, 1960, endorsed two reciprocal agreements between a French company and an Italian company and their respective subsidiaries in Italy and France, for the manufacture by one, for the account of the subsidiary of the other, of tires and inner tubes in quantities fixed jointly every year by the parties. The commission concluded that, since the parties had deleted or amended certain clauses which were incompatible with the EEC rules of competition, it was able to clear the agreement; that is, that on the basis of the information it had obtained, there were no grounds for it to intervene as provided in Article 2 of Council Regulation No. 17, and that this case involves no appreciable restraint of competition.

India

The Rann of Kutch boundary award between India and Pakistan was reported in the January, 1969 issue of *The International Lawyer* (Vol. 3, pp. 425-427), and the decision of the High Court of Delhi dismissing three civil writ petitions to restrain implementation of the award, was reported in the April, 1969 issue (Vol. 3, p. 709). The Supreme Court of India (Hidayatullah, C.J.) has recently dismissed five writ petitions and three appeals from the decisions of the High Courts of Gujarat and Delhi, thereby again refusing to restrain implementation of the award on the ground that the necessary change can only be effected by a constitutional amendment of the territories of India as indicated in the constitution. Observing that a writ of mandamus issued only at the instance of a party whose fundamental rights are directly and substantially invaded, or are in imminent danger of being so invaded, the court expressed serious doubt as to whether the petitioners have a direct interest to question the action of the government, or to raise any controversy regarding the implementation of the award. But the court concluded that the case should be decided on its merits.

While agreeing with petitioners "that no cession of Indian territory can take place without a constitutional amendment," the court held that an "agreement to refer the dispute regarding boundary involves the ascertainment and representation on the surface of the earth, a boundary line dividing two neighbouring countries and the very fact of referring such a dispute, implies that the executive may do such acts as are necessary for permanently fixing the boundary"; and a "settlement of a boundary dispute cannot therefore be held to be a cession of territory." *Maghaubhai Ishwarbhai Patel and Others v. Union of India,* AIR 1969 Supreme Court 783; 9 Indian Journal of International Law 234.