Case Comments

Decisions of International and Foreign Tribunals

MALCOLM W. MONROE,* Departmental Editor

International Court of Justice

Barcelona Traction, Light and Power Company, Limited (Belgium vs Spain) (New Application, 1962), International Court of Justice Communiqué No. 70/2, 5 February 1970; IX International Legal Materials (March 1970) 227. Barcelona Traction was incorporated in 1911 in Toronto, Canada, where it has its head office. For the purpose of creating and developing an electric power production and distribution system in Catalonia, Spain, it formed a number of subsidiary companies, and, in 1936, the group thus constituted supplied the major part of Catalonia's electricity requirements.

According to the Belgian Government, some years after the First World War Barcelona Traction's share capital came to be very largely held by Belgian nationals, but the Spanish Government contended that the Belgian nationality of the shareholders had not been proven.

In 1948, in circumstances set out at some length in the judgment of the court, the Spanish court of Reus (Province of Tarragona) declared Barcelona Traction bankrupt, and ordered the seizure of its assets and of the assets of two of its subsidiaries. There followed a series of measures which finally led to the creation of new shares of the various subsidiaries and their sale by public auction (1952). The purchaser was a Spanish company, Fuerzas Electricas de Cataluna, S.A. (FECSA).

Proceedings in which Belgium claimed reparation from Spain for damages sustained by the Belgian shareholders of the company, were instituted before the Spanish courts without success, and representations were made to the Spanish Government by several other governments, after which the Belgian Government referred the dispute to the International Court of Justice in 1958.

The Belgian Government gave notice of discontinuance of the proceed-

*B.A. (1940) and LL.B. (1942), Tulane University School of Law; partner, Deutsch, Kerrigan & Stiles, New Orleans; member, American, Louisiana State, New Orleans, and Federal Bar Associations, American Judicature Society and Maritime Law Association; president (1957-1959), Phi Delta Phi International Legal Fraternity.

ings in 1961, with a view toward negotiations between the representatives of the private interests concerned but, these negotiations having failed, that Government filed a new application with the Court in 1962.

The Court first addressed itself to the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company incorporated in Canada, the measures complained of having been taken not in relation to any Belgian national, but to the company itself.

The Court observed that when a State admitted foreign investments or foreign nationals into its territory, it was bound to extend the protection of the law to them and to assume obligations concerning the treatment to be afforded them. Such obligations were not absolute, however, and in order to bring a claim in respect to the breach of such an obligation, a state must first establish its right to do so.

When the question is one of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the state of the company alone to exercise diplomatic protection for the purpose of seeking redress. No rule of international law confers such a right on the shareholder's state.

It has been maintained that a state may assert a claim when investments by its nationals abroad—such investments being part of a state's national economic resources—were prejudicially affected in violation of the right of the state itself to have its nationals enjoy claimed treatment. But, the Court held, on the facts before it, such a right could only result from a treaty or special agreement, and no such instrument was in force between Belgium and Spain.

It had also been maintained that, for reasons of equity, a state should be permitted, in certain cases, to assert the protection of its nationals, shareholders in a company which had been the victim of a violation of international law. The Court considered that the adoption of the theory of diplomatic protection of shareholders as such, would open the door to competing claims on the part of different states, which could create an atmosphere of insecurity in international economic relations. The Court concluded that in the particular circumstances of the case before it, when the company's state could act, *jus standi* was not conferred on the Belgian Government by considerations of equity.

Therefore, since no *jus standi* before the Court had been established, the Court refused to render a decision on any other aspect of the case.

Accordingly, the Court rejected the Belgian Government's claim by 15 votes to 1, twelve votes of the majority being based primarily on the foregoing reasons.

Court of Justice of the European Communities

In *Commission of the European Communities vs Government of the Italian Republic,* Case 24/68, July 1, 1969; 7 C.M.L.Rev. (Jan. 1970) 72, the Commission asked the Court of Justice to establish that Italy had failed to comply with its obligations under Article 16 of the EEC Treaty, in levying a so-called "statistical duty" on goods exported to other member states, and that the Republic had also failed to comply with other treaty obligations in levying such a duty on agricultural products subject to common market organizations, and imported from other member states. The Court, agreeing that Italy had failed to comply with its treaty obligations, held that (a) whether the "statistical duty" be regarded as one general charge or as two different charges, one on imports and the other on exports, is immaterial to its qualification under the treaty; (b) the effect of the "statistical duty" is equivalent to that of a customs duty, and the minimal amount thereof does not justify it, the only criterion being the nature of the charge; and (c) the benefit resulting from the statistical information was of such a general nature, and its evaluation so uncertain, that the "statistical duty" could not be deemed compensation for a service actually rendered.

Similar legal concepts were involved in *Social Fonds voor de Diamantarbeiders, Antwerp vs S. A. Ch. Brackfeld & Sons and Chougol Diamond Co.,* Consolidated Cases 2-3/69, July 1, 1969; 7 C.M.L.Rev. (Jan. 1970) 74. The Belgian social security fund for diamond workers was created as a public fund, to which every importer of uncut diamonds is required to contribute a percentage of the value of such diamonds. The King has the right, however, to exempt from such contribution, uncut diamonds either having a value not exceeding 300 BFr. per carat, or imported from the Netherlands on the basis of the trade agreement between the Belgian and Netherlands diamond industries. The Fund instituted these proceedings against some 300 importers who refused to pay their contributions. In answering the several questions submitted by the *Vrederechter* in his request for a preliminary ruling, the Court followed its decision in the *Italian Republic* case, *supra,* and added that (a) the obligations of Articles 9 and 12 are precise and clear, and their application are not subject to any further action on the part of the Community or national authorities, so that these dispositions create individual rights, which national courts are bound to safeguard; (b) the treaty prohibits any tax between member states levied on imports or exports, without regard to the nationality of the economic agents who might suffer from such measures; and (c) with respect to the common customs tariff, there are no rules in the treaty which explicitly

prohibit taxes having equivalent effect on trade with third countries; and while such taxes might possibly be detrimental to the aims pursued toward the uniform application of the common customs tariff, the question whether the freedom of member states in this field might be limited on the basis of the treaty could arise only after the common customs tariff came into force.

In *Firma Schwarzwaldmilch Gmbh vs Einfuhr-und Vorratsstelle für Fette,* Case No. 4/68, July 11, 1968; Recueil XIV-4, p. 549, plaintiff, in seeking to overturn the forfeiture of the bond which he had posted as security for performance of his obligation to import nonfat dry milk from France, pleaded *force majeure* within the meaning of Article 6, par. 2, of Regulation No. 136/64, on the ground that the machinery in the powdered milk department of his supplier broke down, thus preventing delivery of the goods, and that the remaining time was too short to permit import from another source except at a considerably higher price and substantial resulting loss, and without guarantee of quality.

The court rejected the importer's plea, holding that (a) the term "mechanical breakdown" as used in Article 6, par. 3(e) of the regulation does not cover a breakdown of machinery designed for the production of goods, but only methods of transportation; (b) "force majeure," which must be construed according to the legal framework within which it is to produce its effects, requires not only an extraordinary occurrence beyond the importer's control making timely import impossible, but also a showing that the consequences, despite reasonable care, could have been avoided only at unreasonable sacrifice; and (c) the regulation's list of various contingencies which could be considered within the term "force majeure" was not exhaustive, and the courts of the Member States could find force majeure to exist in other circumstances.

Franz Völk vs S.P.R.L. Ets.J. Vervaecke, Case 5/69, July 9, 1969; 7 C.M.L.Rev. (Jan. 1970) 81. Under a written agreement, Völk granted Ets. Vervaecke the exclusive right to sell the former's "Konstant" washing machines, and agreed to protect defendant in its guaranteed sales territory, while defendant agreed not to sell machines of any competitor. Plaintiff averred that the defendant had violated the agreement, while defendant contended that the "absolute territorial protection" clause rendered the agreement null and void under Article 85 of the EEC Treaty. In response to the request of the *Oberlandesgericht* (Court of Appeal) of Munich for a preliminary ruling, the Court held that (a) to be capable of affecting trade between member states, the agreement must, on the basis of a totality of objective legal and *de facto* factors, permit one to anticipate with a sufficient degree of probability that it might exercise such a direct or indirect, and actual or potential, influence on trade currents between mem-

ber states as to be harmful to the realization of the objectives of the institution of a single market among States; (b) the prohibition of Art. 85, para. 1, is applicable only when the agreement also has the object of effect of preventing, restricting or distorting competition within the Common Market; (c) an agreement is therefore not prohibited by that article, when its influence on the market is insignificant because of the weak position of the parties in the relevant market; and (d), thus, an "exclusive dealing agreement," even embodying absolute territorial protection, is not prohibited by para. 1 of that article.

Australia

Bonser vs La Macchia, 43 Aust. L.J.R. 275 (Australia, High Ct., Sept. 30, 1969), 64 Am. J. Int. Law (April 1970) 435. Under date of October 16, 1967, hoping to obviate such litigation as ensued in the United States over the distribution of continental-shelf resources between the federal and state governments, an agreement was signed by the Australian Prime Minister and the Premiers of the six states, distributing the oil and gas resources of the Australian continental shelf. Under this agreement, the states were granted authority to license and administer the exploration and exploitation of resources in Australia's offshore areas. In the case under consideration, defendant was charged with fishing some six-and-a-half miles from the nearest point on the coast of New South Wales (which exercises jurisdiction over fisheries in a three-mile territorial sea), with a net of a smaller mesh than that permitted under Federal legislation. His defense was predicated, in part, on the contention that the Federal Parliament did not have the power to legislate with respect to fisheries more than three miles from the coast or, in the alternative, that the constitutional power to legislate for "fisheries in Australian waters beyond territorial limits" did not extend to the waters in which he was fishing in alleged contravention of the legislation.

The court unanimously rejected defendant's contentions, relying primarily on the cases of *Reg. vs Keyn (The Franconia)* (1876) 2 Ex. D. 63, holding that "at common law, the realm ended at the edge of the sea and . . . it did not extend to the bed of the sea, i.e., to any portion of the earth's crust adjacent to the realm covered at low tide, nor did it extend to the waters which washed the shores"; and *Reference re Ownership of Off-Shore Mineral Rights* (1968), 65 D.L.R. (2nd) 353 (Supreme Court of Canada), in which latter case, it was held that the territorial sea had not become part of the adjacent Province of British Columbia. One of the Justices expressed the ground for the court's decision, which accords with that of Canada, as follows:

> It is simply that territorial waters are an adjunct of territorial sovereignty: and that all rights and interests in territorial waters arise as an attribute of that sovereignty. Before federation, New South Wales was not a sovereign polity. It was a British colony, a self-governing colony but not a sovereign body. Upon federation it lost some of its powers of self-government, because of the assignment to the new polity, the Commonwealth, of the capacity to make laws on topics defined by the Constitution. Before federation, dominium and imperium in the territorial sea adjacent to the British colony New South Wales belonged to the British Crown as the sovereign of the colonial territory in international law. That position was not altered by federation. The former Australian colonies became States in the new Commonwealth; but of course not sovereign States. That term is sometimes heard: but clearly it is wrong: and nothing is added to political stature by a false description, which is perhaps the result of a supposed analogy, obviously fallacious in law and in historical fact, with the States of the United States of America.

France

Crédit Industriel et Commercial vs Cara; and *Cie. Francaise de Crédit et de Banque vs S.A.R.L. Atard Brothers* (French Court of Cassation, 1969), *Recueil Dalloz Sirey* (1969), p. 341; VIII Int. Legal Materials (Nov. 1969) 1206. The Cara brothers, owners of agricultural property in Algeria, had overdrawn their account with the *Comptoir d'Escompte de Sid-Bel-Abbes,* whose assignee was the *Crédit Industriel et Commercial.* To settle this debt, one of the brothers had given seven bills of exchange which were not paid at maturity. The Caras' property was expropriated pursuant to an Algerian Decree of October 1, 1963. The bank subsequently sued the defaulting Cara brother in Nancy, France, where he was then living, but the court dismissed the action on the ground that the Decree of October 1, 1963, and various prefectorial implementing orders, had brought about the "nationalization" of the assets of the brothers Cara and that, as a result, the *de facto* association between the two brothers had been relieved of the liabilities "which were assumed by the new juridicial person (the Algerian State) which ought to be substituted for the obligor according to the rules of international law implicitly acknowledged in the Evian Agreements."

The court held that the Algerian decree declares as "assets of the state," only agricultural enterprises belonging to those persons who, at the date of the decree, were not Algerian nationals or could not prove that they had accomplished the legal formalities in order to acquire that nationality, and is accordingly against French public policy set out in the Government Statements of March 19, 1962 (approved in France by referendum and in Algeria by self-determination vote), providing that no one can be deprived of his property without prior determination of fair compensation. The Court concluded that, in holding debtors discharged from their obligations

to creditors pursuant to a foreign law offensive to French public policy, the Court of Appeals had violated the pertinent statutes, and the judgment below was accordingly vacated and the case was remanded to the Court of Appeals of Orléans.

In the *Cie. Francaise de Crédit* case, Atard Brothers & Co., which operated a flour and semolina mill in Algeria, had on April 1 and 30, 1963, signed two bills in favor of the predecessor of the plaintiff bank, the balance of which had not been paid at maturity, whereupon the bank sued the corporation and the individual Atards who had guaranteed the corporation's obligations. The court below held that the debt and the sureties had been discharged, because an Algerian Decree of May 22, 1964 on the nationalization of flour mills and semolina, pasta and couscous factories, provided that assets, rights and obligations in their entirety are to be transferred to the national enterprises replacing them, and that such a transfer creates a right to compensation for which the national enterprises are to be responsibile and which will be paid to the rightful claimants, according to rules set out in a subsequent order.

On appeal, the Court of Cassation noted that "there is no need to examine whether the Algerian legislation providing for the nationalization of the Atard enterprise is or is not contrary to French public policy, for the question is not one of giving effect to these statutes in France, but rather of drawing the consequences in France in conformity with the French legislation of a juridical situation created in a foreign country in accordance with foreign law", and that in this respect, "It is consistent with the principle set forth in French law and therefore with public policy, that the liabilities of nationalized enterprises follow their assets and are transferred to the national society"; and this transfer constitutes a novation which can be invoked against the former creditor who is not given the option to accept such a substitution since he is legally bound to recognize it.

However, the Court found that various provisions of the Algerian law which left the Administration free to determine compensation within an unspecified period of time and at its own discretion, providing for only a ceiling which cannot be exceeded by the Administration, are contrary to French public policy and that, therefore, is freeing the debtors of their obligations to their creditors pursuant to a foreign law contrary to French public policy, the Court of Appeals had violated the pertinent statutes, requiring dismissal of the appeal and remand of the case to the Court of Appeals of Amiens.

Netherlands

United States of America vs Bank voor Handel en Scheepvaart, N.V.,

Netherlands Supreme Court (Civil Chamber), October 17, 1969; summarized from *Rechtspraak van de Week,* Nov. 1, 1969, pp. 279-297. The United States petitioned for reversal of a decision of the Court of Appeals at The Hague, dated May 24, 1968 (Docket No. 81 R/65), in favor of *Bank voor Handel en Scheepvaart N.V.* (the Bank), a corporation domiciled in Rotterdam.

On October 20, 1942, the United States had seized, pursuant to the Trading-with-the-Enemy Act, by vesting order No. 248, all the shares of Union Banking Corporation (a New York corporation), owned by the *Netherlands N.V. Handelscompagnie Ruilverkeer,* a subsidiary of the Bank, as well as a claim which the Bank had on Union Banking Corporation. The United States liquidated the Union Banking Corporation. In the course of the liquidation, the Union Banking Corporation paid to the United States its above-mentioned debt, and transferred its remaining assets to the United States. The appropriate authorities in the United States have treated the Bank and the *N.V. Handelscompagnie Ruilverkeer* as enemy subjects, since, in their opinion, by reason of direct or indirect ownership of shares, these companies were under complete control of Heinrich Thyssen-Bornemisza who was of Hungarian and/or German nationality; but the Bank and its subsidiary have not been considered enemy subjects in the Netherlands within the meaning of the Dutch Decree on Enemy Property. The United States, after the termination of hostilities, neither returned the seized assets of the Netherlands companies nor indemnified those companies.

The Supreme Court first denied the existence of (a) any rule of international law prohibiting the Netherlands courts from passing on the question whether a seizure by another state is in violation of international law; (b) a more limited rule of international law, to the effect that the Netherlands courts would not be allowed to rule on the validity under international law of a seizure undertaken by another state, if the seized assets were situated in the territory of the seizing state; and (c) the even more limited rule, according to which such power would be denied to the Netherlands courts, if it does not appear that the seizure is based on the fact that the owners of the seized assets are Dutch or are domiciled in the Netherlands or that, in any other way, Netherlands interests are also affected by the seizure.

Turning to the merits, the Court held that the seizure—in view of the provisions of the Trading-with-the-Enemy Act, as it read in 1942—did not mean that the assets in question would never be returned to the owners; but could only be characterized as a measure taken by the belligerent state during hostilities, with respect to assets of subjects of an enemy state,

without thereby definitively destroying the rights of those subjects. Thus, the United States had not acted in violation of international law by the seizure, assuming that the seized assets in fact belonged to an enemy subject.

The Court then noted that the Netherlands Government has taken the position—Law of July 20, 1951, Official Gazette No. 311—that it is lawful for the state to seek reparation from the assets of enemy subjects, even when the treaty does not impose on the aggressor states the obligation to compensate their subjects whose assets were expropriated.

Moreover, no rule of international law is violated by the United States having designated for purposes of the Trading-with-the-Enemy Act, the assets of the Bank and of *N.V. Handelscompagnie Ruilverkeer* as belonging to an enemy subject when the companies were completely controlled by an enemy subject; and it is irrelevant that the Bank and the *N.V. Handelscompagnie Ruilverkeer* were not considered as enemy subjects by the Netherlands authorities and that their assets were not enemy property within the meaning of the Netherlands Decree on Enemy Property.

The Supreme Court accordingly reversed the decision of the Court of Appeals at The Hague, and remanded the case to the Court of Appeals in Amsterdam for further proceedings.

Rhodesia

In *R. vs Ndhlovu and Others,* 1968(4) S.A. 515 [R., A.D.], 19 International and Comparative Law Quarterly 166 (Jan. 1970), the Rhodesian Appellate Division refused to consider as *res judicata,* the holding of the Privy Council (the supreme appellate tribunal for Southern Rhodesia under the 1961 Constitution) in *Madzimbamuto vs Lardner-Burke* [1968] 3 All E.R. 561, that the Smith government was not the lawful government of Rhodesia. Considering the matter anew, but applying the test (the "efficacy of the change") adopted by the Privy Council to determine whether a revolutionary government had become a lawful government, the court concluded that sanctions did not result in the overthrow of the Smith government and that there were no other factors which might succeed in doing so. It was accordingly held that the 1961 Constitution must be deemed annulled.

N.B.—The case of *N.V. Cabolent vs National Iranian Oil Company* (Hague Court of Appeal, Nov. 28, 1968), a digest of which appeared in the January 1970, issue of *The International Lawyer* (p. 409), is reported in *Nederlandse Jurisprudentie,* 1969, No. 484, p. 1329; and IX *International Legal Materials* (Jan. 1970) 152. The case of *Industria Molitoria Imolese et al. v. Council,* Case No. 30/67, March 13, 1968, which was briefed in

the April 1970, issue of *The International Lawyer* (p. 581), is reported in 2 CCH Common Market Reporter ¶ 8060; and the case of *Beus v. Hauptzollamt Munchen,* Case No. 5/67, March 13, 1968, a brief of which appears at p. 582 of the same issue of *The International Lawyer,* is reported in 2 CCH Common Market Reporter ¶ 8061.