International Lawyer

Volume 1 | Number 1 Article 11

1967

Decisions of International Tribunals

Eberhard Deutsch

Recommended Citation
Eberhard Deutsch, *Decisions of International Tribunals*, 1 INT'L L. 134 (1967)
https://scholar.smu.edu/til/vol1/iss1/11

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

Case Comments

Decisions of International Tribunals

EBERHARD DEUTSCH*, DEPARTMENTAL EDITOR

The function of this department is hampered by the absence of a central clearinghouse for decisions of international tribunals. The State Department of the United States is very helpful in this connection,[1] but it does not maintain complete records and is interested primarily in cases involving American interests.

Even if the State Department should ask all American consuls to report all international judicial and arbitral decisions within their jurisdictions, a large part of the world would still be outside the range of coverage, and there would, in any event, be an inevitable time lag between rendition and availability of decisions and opinions in such cases.

Only the United Nations could furnish reasonably prompt and near-worldwide coverage of international adjudication, by arranging for early reports of such proceedings by and through all member nations.

I. The South-West Africa Cases [2]

One of the most widely-publicized, and far-reaching in practical effect, international judgments ever rendered, was handed down on July 18, 1966, by the International Court of Justice in the South West Africa Cases (*Ethiopia v. South Africa* and *Liberia v. South Africa,* Nos. 46 and 47, General List).

Adding to the intensity of the international reaction to the judgment was the closeness of the vote of the Judges, who divided evenly (7-7), the judgment being determined by the second or "casting" vote

* The author is a member of the Bar of Louisiana; Tulane University—1925; and is Chairman of the Committee on Peace and Law through United Nations.

[1] The Honorable Leonard C. Meeker, Legal Adviser to the Department of State, has been especially cooperative in gathering material, and in making it available to the author, for the preparation of portions of the within article.

[2] See Symposium on this case, *supra,* p. 12.

of the President of the Court, Sir Percy Spender of Australia; [3] as well as the fact that the ground of the judgment seemed quite close to an issue on which the Court had reached an apparently contrary result, by an 8-7 vote, on December 21, 1962, when it ruled that it had jurisdiction to consider the merits of the same case.

The judgment rejected the claims of Ethiopia and Liberia, seeking an adjudication either that the United Nations has supervisory authority over South Africa's administration of South West Africa (a former German colony) under a 1920 mandate of the League of Nations, or that South Africa's mandate is no longer in force, and, further, that South Africa has, particularly by establishing the *apartheid* system in the mandated territory, failed to discharge its mandated duty to promote the well-being of the territory's inhabitants, and has violated other provisions of the mandate, including that prohibiting military training of natives of the territory and establishment of military installations therein.

Voting with the President to dismiss were Judges Bohdan Winiarski (Poland), Jean Spiropoulos (Greece), Sir Gerald Fitzmaurice (Great Britain), André Gros (France), Gaetano Morelli (Italy) and Jacques Theodore Van Wyjk (*ad hoc,* South Africa). Judges Morelli and Van Wyjk wrote concurring opinions, and the President appended to the judgment a declaration setting forth his views as to the proper scope of concurring and dissenting opinions, which he felt should be limited to discussion of the grounds of the Court's judgment, and should not discourse on the merits of other questions which the concurring or dissenting Judge thinks the Court should have decided.

The dissenting Judges, all of whom wrote opinions, were V. K. Wellington Koo (Nationalist China, Vice President of the Court), Vladimir M. Koretsky (USSR), Kotaro Tanaka (Japan), Philip C. Jessup (United States), Luis Padilla Nervo (Mexico), Isaac Forster (Senegal) and Sir Louis Mbanefo (*ad hoc,* Nigeria, appointed by the complainants).[4]

---

[3] A vacancy on the Court has existed since the death in August 1965 of Judge Abdel Hamid Badawi of the United Arab Republic, and two judges did not participate: Judge Bustamante (Peru) on account of illness, and Judge Zafoullah Kahn (Pakistan) recused because he had participated in the UN debates on the subject of the case.

[4] Both Judge Badawi, who died in 1965, and Judge Bustamante who did not participate in the decision because of his illness, had voted in favor of Ethiopia and Liberia in the 1962 decision on the preliminary objections as to jurisdiction. Had either been sitting in 1966, the decision as to jurisdiction as rendered, would unquestionably have gone the other way.

The Court's judgment, after reciting the substantive contentions of the complainants, states that two questions of an antecedent character pertaining to the merits of case were presented. The first was whether the mandate to South Africa still subsisted, and the other whether the complainants had sufficient legal interest in the substance of their claims to confer on them the requisite standing before the Court. The Court held that the complainants did not have such interest, and accordingly found it unnecessary to decide the other antecedent question.

The Court found that under the mandate system established by Article 22 of the Covenant of the League of Nations, each instrument of mandate contained articles (which the Court called "conduct" provisions) defining the mandatory's powers and obligations vis-à-vis the inhabitants of the territory and the League and its organs; and other articles (which the Court called "special interest" provisions) conferring certain rights relative to the mandated territory directly on the members of the League as individual states, or in favor of their nationals.

Under Article 2 of the Covenant of the League of Nations, the Court pointed out, the League acted through its Assembly and Council, and individual member states could not act as to League matters except as explicitly stated in the Covenant; and it called attention to the facts that Article 22 of the Covenant provided expressly that mandate obligations were to be exercised "on behalf of this League," and that mandatories were to report to the Council; that individual member states could take part in the League's administrative processes only through their participation in the activities of League organs; that only the consent of the Council, not that of the member states, was required for the modification of mandates; and that the normal League voting rule was unanimity, and, since the mandatory was a member of the Council on questions affecting the mandate, such questions could not be decided against the mandatory's contrary vote.

These factors the Court considered decisive against the contention that any one or more individual states could undertake to enforce "conduct" provisions of a mandate against the mandatory, pointing out that otherwise the position of a mandatory caught between the conflicting views of forty or fifty states would have been untenable.

The complainants had cited the provision of Article 22 of the Covenant that the mandatory system rested on the "principle" that the "well-being and development" of the inhabitants of the mandated

territories was "a sacred trust of civilization," and argued that all civilized nations had an interest in enforcing the trust. But the Court drew a distinction between moral ideals, in which category it considered the "sacred-trust" principle to fall, and legal rules intended to give effect to such ideals, which it found to be wanting.

Nor was merit found in the argument of the complainants that the League's rights devolved on its individual members upon its dissolution, the Court pointing out that it had previously ruled only that individual members, after the League's dissolution, continued to possess no other rights than those which they had theretofore individually possessed, and that expressions by various mandatories, when the League was dissolved, of their intention to continue to be guided by their mandates, could not be construed as conferring new rights on individual states.

The Court also rejected the suggestion that its decision might be deemed unacceptable insofar as it led to the conclusion that no entity could claim the due performance of a mandate, holding that its sole function was to determine the existence of rights, not the legislative creation of rights to avert consequences which might be thought undesirable.

The Court held that its 1962 judgment sustaining the complainants' right to invoke the clause of the mandate referring disputes to the Court (as successor, under Article 37 of its Statute, to the Permanent Court of International Justice) did not foreclose its present decision as to their standing. Under Article 62, Paragraph 3 of the Court's rules, it pointed out, proceedings on the merits were suspended during consideration of the preliminary jurisdictional objection; and further, jurisdiction is an adjectival question, while that of standing goes to the substantive right of a party to enforce his claim.

While the jurisdictional clause of the mandate referred to the Court "any dispute whatever . . . between the mandatory and another member of the League . . . relating to . . . the provisions of the Mandate," the Court decided that even this broad language could not have the effect of dispensing with the requirement that the complainant member establish its legal interest in its claim. The Court limited the effect of this clause to disputes as to "special interest" provisions of the mandate. It buttressed its decision on this point by referring to the jurisdictional clauses of the minority treaties signed after the First World War, in which any difference of opinion was characterized in advance as justiciable because it was held to be a

dispute of an international character, as well as to the "legislative history" of the jurisdictional clause in the mandates.

Finally, the Court discussed what had been called the "argument of necessity," that since, under the unanimity rule, the Council of the League was, as a practical matter, powerless to impose its views on the mandatory, it was essential to preserve the "sacred trust" from being flouted by the mandatory at will, that each member of the League have standing to call the mandatory to account. The Court answered this submission by pointing out that, in practice, much trouble was taken in the Council's administration of the mandate system to arrive by negotiation at mutually acceptable conclusions without forcing the mandatory either to acquiesce against its will or to cast its veto, with the result that the veto right had never been exercised; that it could hardly be supposed that it was intended that policy decisions be imposed on a mandatory through "the haphazard and uncertain action of individual members"; and that it would be inconsistent with the mandate's undisputed right of veto to superimpose a legal right of complaint on other members if the mandatory exercised its right.

The Court epitomized the basis of its decision by remarking that, except when asked by all parties to a dispute to give a decision *ex aequo et bono* under Article 38-2 of its Statute, it was not a legislative body but could apply the law only as it found it; that its powers of filling gaps or supplying omissions extended only to the process of interpretation, not to rectification or revision; and that the *"actio popularis,"* or right of any member of a community to take legal action to vindicate a public interest, is unknown to international law.

In sum, the decision would seem to represent judicial restraint as opposed, in the prevailing view, to a contention for judicial activism.

The longest dissent, written by Judge Jessup of the United States, expressed disagreement with the Court's judgment as to standing, on the basis of an exhaustive discussion of the *travaux préparatoires,* or historical background, of the mandate system and the League's structure and role therein, and of judicial precedents on the question of standing in international law, and on matters of public concern in the municipal law of the United States; and the dissent further submitted that the question of standing was finally decided the other way by the Court's jurisdictional judgment in 1962.

Other dissenting opinions went into the substantive merits of the case, and found that at least some of the claims of the complaining

states, particularly those relating to South Africa's imposition of the *apartheid* system on the mandated territory as a violation of its duty to foster the well-being of the inhabitants, are well founded.

II. Italy-United States Air Transport Cargo Services

On July 17, 1965, an arbitral tribunal composed of Professor Stanley D. Metzger of Georgetown University (appointed by the United States), Professor Riccardo Monaco of the University of Rome (appointed by Italy) and the Honorable Otto Riese (Honorary Professor at the University of Lausanne and former Judge of the Court of Justice of the European Communities, designated by the two other arbitrators) handed down its decision in a dispute between Italy and the United States as to the interpretation of the Air Transport Services Agreement between the two countries, signed at Rome on February 6, 1948. III *International Legal Materials: Current Documents* (*American Society of International Law*—November, 1964) 1001.

Ever since (and even before) the Agreement was signed, United States airlines had operated all-cargo services between New York and points in Italy. Alitalia, the Italian airline, had operated such services since January 1961. Beginning in June 1963, the United States airlines notified the Italian aeronautical authorities of several proposed increases in their then-existing Italy-United States all-cargo services, first by increasing the number of such flights, and later by substituting jet for propeller equipment.

The Italian aeronautical authorities declined to consent to these increases, stating that the Agreement "regulates only the matter of mixed transports (i.e. passengers, mail, and cargo) . . . and not that of exclusively cargo services, which are not mentioned at all," and that all-cargo services "are to be understood as having been operated on the basis of a reciprocal concession outside the agreement."

Following further diplomatic correspondence and consultations, the matter was submitted to arbitration. The only question presented was whether the provision of the Agreement, that "air carriers designated by each of the contracting parties . . . will enjoy in the territory of the other contracting party . . . the right of commercial entry and departure for international traffic in passengers, cargo and mail at the points enumerated on each of the routes specified in the schedules attached," applies to all-cargo services.

The majority of the arbitrators (Judge Riese and Professor Metzger) agreed with the position of the United States that all-cargo

services are covered by the quoted provision. First, taking the word "and" in its usual cumulative or conjunctive sense, the arbitrators ruled that each contracting party has the right, but not the obligation, to carry passengers, cargo, and mail on each flight. In other words, the Agreement's grant of the right to carry all three enumerated types of "load" does not exclude the right to carry only one or two of the three on a given flight. Feeling that the text of the Agreement is clear on this point, the arbitrators rejected Italy's contention for interpretation of the Agreement against the United States as the proffering party, and for that interpretation least restricting national sovereignty. The arbitrators also considered the meaning of the provision, giving "and" its frequent alternative or disjunctive use, as they considered it to have been used in the provision in question, and, *a fortiori,* reached the same conclusion.

The arbitrators further bolstered their decision through other exegetic analyses. The provision in question must be read in the context of the other provisions of the Agreement, one of which adopted, by reference, a definition of the "concept of air services . . . as 'scheduled air service performed by aircraft for the public transport of passengers, mail *or* cargo.' "

The arbitrators held that the Agreement was based on the 1946 so-called Bermuda Agreement between the United Kingdom and the United States; that, viewed against the background of the Chicago Convention on International Civil Aviation, the Bermuda Agreement could not be deemed to exclude all-cargo services from its application in the absence of an express provision to that effect; and that, because of its familiarity with the *travaux préparatoires* for the conference out of which the Bermuda Agreement resulted, Italy was aware of the American Government's objective to cover all types of air traffic in its Agreement with Italy. Finally, the post-Agreement conduct of the parties, in countenancing regular all-cargo service by each other's designated airlines for several years without any indication that such service was considered *dehors* the Agreement or required special permission, was held to evidence the parties' practical construction of the provision in question as covering all-cargo service.

Professor Monaco's dissenting opinion, while conceding that the Agreement cannot be construed as authorizing only flights carrying passengers, mail, and cargo, was based primarily on the contention that the Agreement authorizes only flights which are at least capable of such combination transport, and excludes all-cargo service by air-

craft built specifically for such carriage alone, and therefore incapable of carrying passengers.

III. Arbitral Commission on Property Rights in Germany

The latest reported decisions of the Arbitral Commission on Property, Rights and Interests in Germany, established by the Signatory States to the Convention of May 26, 1952, on the Settlement of Matters Arising out of the War and the Occupation, are those of 1964 reported in Volume 7 of the Commission's reports. Only the cases discussed below involved new questions of any significance or general interest.

A. Status of Greek-owned Swiss Corporation

In the case of *Privat Handels-und Finanz-Aktiengesellschaft, Zurich, Switzerland v. The Federal Republic of Germany,* 7 Decisions 273, the Third Chamber of the Commission held, on December 18, 1964, that the States Signatory to the Settlement Convention have adopted the "Anglo-Saxon theory that the nationality of a corporation is that of the State under the laws of which it is incorporated," not the "theory of control" based on "the nationality of the persons in control of the juristic person"; and that accordingly, since the Swiss Confederation is neither one of the States Signatory nor has acceded to the Charter of the Commission, a Swiss joint stock company, although wholly owned by nationals of Greece, which has acceded to the Charter, is not entitled to appeal to the Commission.

B. German-Seized Dutch Patents

In the case of *Philips Patentverwaltung GMBH, Hamburg v. The Federal Republic of Germany,* 7 Decisions 217, the Commission, in Plenary Session, decided, on December 16, 1964, with seven dissents, a rather complex series of questions arising under Allied High Commission Law No. 8 of 20 October 1949, relating to the industrial, literary and artistic property rights of foreign nations and nationals, and particularly Article 4 of the Law providing for reinstatement of patent applications, and Article 5 providing for extension of the duration of patents. The complainant ("PV") sued for itself and in behalf of the Dutch company NV Philips' Gloeilampenfabrieken, Eindhoven ("Philips-Eindhoven"), as trustee of the patent rights in question.

Article 14 of Law No. 8 originally defined foreign nationals entitled to its benefits as citizens or nationals of a country which was

in a state of war with Germany at any time between 1 September 1939 and 8 May 1945. On 9 November 1950, Law No. 41 amended Article 14 to extend the definition of foreign nationals to include natural or juristic persons (a) treated under German legislation as an enemy or as under controlling enemy influence, and accordingly subjected to discriminatory treatment on nationality grounds between 1 September 1939 and 8 May 1945, and (b) whose industrial, literary, or artistic property rights in Germany were impaired as a result thereof. Patent-extension claims by foreign nationals, as originally defined, had to be filed before 3 October 1950. Foreign nationals coming only under the extended definition were given until 1 April 1951 to file such claims.

PV filed its claims in February 1951, and the Commission held the claims time-barred insofar as they were based on the rights of Philips-Eindhoven. As to the claims filed by PV in its own right, the Commission held that the first condition of Law No. 41 was satisfied since, while there was no formal declaration of war, *de jure* and *de facto* war was waged by Germany against the Netherlands from and after 10 May 1940 as recognized in Article 14(h) of Law No. 8; PV was under controlling Dutch influence at the time (being owned by Philips-Eindhoven); and after German occupation of the Netherlands, Philips-Eindhoven, and consequently all of its German interests including those relating to PV, were placed under German custodianship pursuant to the General Orders of the Reich Minister of Justice of 20 June and 17 September 1940, the Ordinance of the Reich of 15 January 1940, and the Ordinance of the Reich Minister of Justice of 30 May 1940.

As to the second condition of Law No. 41—impairment of property rights as a result of discriminatory treatment on nationality grounds—the Commission first held that no such impairment was established merely by virtue of proof of appointment of custodians of the property, in the absence of any showing that the custodians were in fact agents of rival firms. The Commission then held that no impairment of PV's rights could have resulted from denial of retransfer thereof to Philips-Eindhoven.

PV contended that it had been unable to take advantage of provisions of the German Ordinance of 10 January 1942 for extension of the duration of patents, because of a clause in the Ordinance excluding from its benefits patents held by foreigners (a term which PV contended was construed to refer to the beneficial owner, in this

case Philips-Eindhoven), and because PV's management "would have exposed itself to serious danger if it had attempted to claim the benefits granted by this Ordinance."

The Commission held adversely to this contention on the ground that the German Patent Office and the *Reichsgericht* had considered the PV patents in question as owned by PV itself for purposes of the Ordinance, and that PV had indicated no case in which any person or authority had set up, as against it, the clause of the Ordinance relating to foreign-held patents, or in which PV found itself prevented at the time from benefiting from the extension effected by the Ordinance.

Finally, the Commission held that PV had made a sufficient showing of impairment of its industrial property rights, through use of four of its patents by other German firms for armament production, without payment of compensation therefor, whereas German firms not subject to sequestration had been compensated for such use of their patents.

The Commission rejected PV's contention that, having shown impairment of its property rights as to four patents, it should be regarded as a foreign national for purposes of Law No. 8 in relation to all of its other patents and patent applications, holding instead that "the only reasonable interpretation is that the persons fulfilling the conditions laid down in [Law No. 8 as amended] should be considered as 'foreign nationals' in regard to those of their industrial, literary, and artistic property rights which have actually been impaired, each right forming a separate case." However, the Commission reopened the case to permit introduction of further evidence as to possible use of other PV patents without payment of appropriate compensation.

Three of the dissenting opinions, taking PV's side, are variously based on the theories that PV should have been permitted to assert Philips-Eindhoven's rights by virtue of a Trust (*Treuhand*) Agreement between them; that the denial of the re-transfer of patent rights by PV to Philips-Eindhoven did impair the former's property rights, by preventing the latter from obtaining the benefits of Law No. 8 with respect thereto, and by precluding the latter from taking whatever steps may have been available to it ("including measures of retaliation") to obtain compensation for use of the patents by German firms; and that a showing of impairment of any of its property rights should have qualified PV for the benefits of Law No. 8 as to all of them.

In the final dissenting opinion, four Commissioners took the

position that PV's claims should have been rejected *in toto,* on the ground that it was not proven that PV was treated under German war legislation as an enemy or as being under controlling enemy influence, but that PV, even assuming that its shares were sequestered by the custodianship of Philips-Eindhoven, was treated no differently from other German companies; and that no sufficient showing was made that PV was either entitled to, or unlawfully deprived of, compensation for use of its patents.

C. Compensation to US Citizens for Household Goods Confiscated by German Occupation Authorities in Holland

On March 26, 1965, the Commission, in Plenary Session, handed down a decision in the case of *Willi and Gertrud Scheidt v. The Federal Republic of Germany.* The claim was filed by American citizens, under Article 4 of Chapter Five of the Settlement Convention, for compensation in respect to household goods confiscated during the war by the German occupation authorities in Rotterdam. The only question decided was whether nationals or residents of the United States, England, and France may obtain compensation under the Convention.

The question arose from the fact that Ariticle 4 of Chapter Five provides for payment of such compensation to nationals and residents of states which have "acceded" to the Charter of the Arbitral Tribunal, whereas the text of the Convention seems to distinguish between the Three Powers (United States, England, and France) on the one hand, and the states which have acceded to the Charter on the other.

Not surprisingly, the Commission held in favor of the claimants, stating that the contrary argument "offends the intelligence" *prima facie.* It pointed to various provisions of the Convention, recognizing the right of all persons to restitution for property seized by Germany or her allies as occupying powers, and explained the references to the "acceding states" as intended to extend to their nationals and residents rights already implicitly granted to those of the Three Powers.

One of the Commissioners dissented on the basis of a strictly literal reading of Article 4 of Chapter Five, which he deemed required by Article 8 of the Charter of the Commission. The dissenting Commissioner derived additional support for his position from pre-Convention restrictions on the eligibility of restitution claimants, dating back to the London Declaration of 5 January 1943, reaffirmed in a decision

of the Allied Control Council dated 17 April 1946, to those whose claims arose from dealings in property situated in occupied territory.

Dr. Albert Loewy v. Germany. An interesting decision which, while not rendered by an international tribunal, did involve international questions as to international claims, was rendered on April 28, 1965 by the German *Bundesgerichtshof* (Federal High Court) in Karlsruhe, in the matter of Dr. Albert Loewy. Dr. Loewy was an Austrian national at the time of the *Anschluss,* and was deported to Dachau in March 1938 and later sent to Buchenwald. In February 1939 he escaped from Buchenwald, and eventually made his way to England and then to the United States, where he became a naturalized citizen in June 1942.

In 1962, Dr. Loewy filed an application under Section 150 of the (German) Federal Compensation Law, for compensation for his deportation. The High Court, however, affirmed the decision of the lower courts that Dr. Loewy, as a national and resident of Austria (albeit post-*Anschluss*) when he was deported, could not be considered a resident of a territory from which Germans were expelled within the purview of Section 150 of the Law, and, having become an American citizen before the Law was enacted, could not be considered a refugee for purposes of Section 160 thereof. Dr. Loewy's claim was therefore rejected with the suggestion that he seek compensation from Austria.

On May 25, 1966, the *Oberlandesgericht* (Court of Appeals) in Zweibruecken rendered a judgment, in the case of Izchak Horowitz, which is contrary in part to the judgment of the *Bundesgerichtshof* in Dr. Loewy's case. The Court of Appeals distinguished the High Court's decisions of the Loewy line as involving a former version of Section 150. The Court then held that under an amended version of that Section, effective retroactively to October 1, 1953, Austrian citizens within the régime of German language and culture are entitled to compensation (if they had departed specified territories prior to October 1, 1953) for damages sustained prior to September 18, 1945.