Case Comments

Decisions of International Tribunals

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The major headache of this department remains, as noted in a previous issue of *The International Lawyer,* the unavailability of decisions and opinions of international tribunals (especially arbitral tribunals) of general interest. Readers are invited to forward copies of such decisions which may have come to their attention, and which have not yet been reported in these columns.

I. International Arbitration Developments

A. Gut Dam Claims

On October 11, 1966, an agreement came into force between Canada and the United States for amicable settlement of some $9,000,000 of claims by U.S. residents on the shore of Lake Ontario for damage caused by high water resulting from Canada's construction and maintenance of Gut Dam (removed in 1953) across the international boundary in the St. Lawrence River (TIAS 6114). Although the Secretary of War's approval of the plans for the dam (required by the Act of June 18, 1902, as a condition of the consent of the United States to construction thereof) was itself conditioned on Canada's making good any damage to property of United States citizens caused by construction and operation of the dam, Canada has taken the position that the United States may have made itself liable for some of this damage, so the agreement empowers the arbitral tribunal to determine by whom the compensation it awards shall be payable.

A three-member arbitral tribunal, known as the Lake Ontario Claims Tribunal—United States and Canada, has been appointed: Professor Alwyn Freeman of Johns Hopkins University by the United States; the Honorable Daniel Roach, retired Judge of the Court of Appeals of Ontario, by Canada; and Dr. Lambertus Erades, Vice

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President of the Rotterdam District Court in The Netherlands, by both governments as Chairman. The agreement contemplates that claims will be presented by the United States Government on behalf of the claimants, and that awards will be entered and paid in United States currency. The Tribunal's headquarters are in Ottawa, and meetings will be held there and in Washington.

As a result of the signing and ratification of this agreement, the Foreign Claims Settlement Commission has discontinued its investigation and determination of claims regarding Gut Dam, and is turning over its records on those claims to the Department of State.

B. Venezuela—United Kingdom Boundary Dispute

In contemplation of the approaching independence of British Guiana, the Governments of the United Kingdom and Venezuela last February entered into an agreement for establishment of a mixed commission "with the task of seeking satisfactory solutions for the practical settlement of" the dispute between the two Governments arising from Venezuela's contention that the 1899 arbitration award concerning the frontier between Venezuela and British Guiana is null.

The commission, composed of two representatives appointed by each Government, is allowed four years within which to reach full agreement for settlement of the controversy. If any questions then remain unsettled, the Governments (or, if they cannot do so within three months, an appropriate international organ selected by them, or if they cannot agree on such an organ, the Secretary-General of the United Nations) are to choose successive means of peaceful settlement among those provided in Article 33 of the Charter of the United Nations, until either the controversy has been resolved, or all such means of settlement have been exhausted. British Guiana became a party to the agreement as of the date of its independence.

C. Argentina-Chile Boundary Dispute

In April 1966, the Government of the United Kingdom laid down the terms of the Palena arbitration proceeding, involving a dispute between (and referred for arbitration to the United Kingdom by) Argentina and Chile as to the interpretation and implementation of part of a boundary award made by King Edward VII in 1902. The Court of Arbitration is composed of Lord McNair (President), Mr. L. P. Kirwan, and Brigadier K. M. Papworth, and the question to be determined is the course of the Argentina-Chile boundary in the sector

between boundary posts 16 and 17, to the extent that the course of the boundary in that sector has remained unsettled since the 1902 award.

D. ECAFE Commercial Arbitration Resolutions

In January 1966, the ECAFE (United Nations Economic Commission for Asia and the Far East) Conference on Commercial Arbitration, in Bangkok, adopted a number of resolutions on the subject of international commercial arbitration—one calling on the ECAFE Centre for Commercial Arbitration to prepare rules on the basis of stated recommendations as to scope of arbitration, appointment, removal and replacement of arbitrators, site of arbitration, procedural rules, and basis, interpretation, and correction of awards; another recommending maintenance of current descriptive lists of available arbitrators in, and of institutions and persons available and competent to serve as appointing authorities for, each of the principal fields of international trade involved; another recommending the propagation and popularization of model arbitration clauses set forth therein; and another recommending adoption and dissemination by the Centre of standards for conciliation of international trade disputes set forth therein.

E. Other Arbitration Provisions

Arbitration clauses relating to disputes arising thereunder are included in safeguard agreements concluded within the past two and a half years between the United States, the International Atomic Energy Agency, and South Africa (TIAS 5880), Portugal (TIAS 5915), Viet-Nam (TIAS 5884), Thailand (TIAS 5861), Nationalist China (TIAS 5882), the Philippines (TIAS 5879), Austria (TIAS 5914), and Greece (TIAS 5952). Such a clause is also included in the Treaty of Amity and Economic Relations, signed last February, between the United States and the Togo Republic, whereas the similar treaty between the United States and Thailand, signed last May, provides for submission of disputes arising thereunder to the International Court of Justice; both treaties contain clauses relating to arbitration of disputes arising between their nationals.

II. Supreme Restitution Court for Berlin

On May 19, 1965, the Court handed down its decision in the case of *Weyl v. German Reich,* 22 Decisions 228. The claimants sought damages under the Federal Restitution Law for loss of house-

hold goods sequestrated by the German authorities at Arnheim in The Netherlands. The decision rejecting the claims was based on the Court's holding that restitution is due under the law only if the confiscation of property was motivated by racial, religious, or political considerations, whereas the goods at issue had been seized along with that of all other residents of Arnheim when it was attacked by the Allies in 1944.

The claimants contended that ownership of the goods had previously vested in the Reich under the Eleventh Ordinance (of November 25, 1941) pursuant to the Reich Citizenship Law, and that this constituted deprivation of such ownership on political grounds. The Court found that the "subjective prerequisites" for application of Section 3 of the Eleventh Ordinance were present, inasmuch as the then owner of the goods had lost his German nationality, in accordance with Sections 1 and 2(a) of the Ordinance when it entered into force in 1941, by virtue of his emigration from Germany in 1939 under pressure of persecution measures. The Court held, however, that the forfeiture of property provided by Section 3 of the Ordinance did not affect the goods in question, then in The Netherlands, but could affect only property which was situated in Germany when the Ordinance became effective.

This conclusion was considered to follow from the general territorial principle of international law that a state cannot arbitrarily promulgate legislation for territories beyond its own dominion, and that, consequently, expropriations of property under Section 3 of the Eleventh Ordinance could not effectively apply to goods, even though owned by German nationals, situated abroad. The Court held this principle applicable even when the foreign territory is under occupation by the legislating state, and that, in this situation, only legislation expressly and independently promulgated for application in the occupied territory is effective therein.

The Court recognized that the German Reich could have acted in defiance of this general principle by actually applying the forfeiture provisions of Section 3 to property in foreign territory under its domination; but found that such "abusive application of the expropriation principles" to The Netherlands had not in fact taken place. This finding was based on the fact that the incorporated Eastern territories, and the Protectorate of Bohemia and Moravia, but none of the other occupied countries, are mentioned in the Ordinance's definition of the "area of application" thereof; that the Eleventh Ordinance was not "adopted

for The Netherlands" as was done in Belgium and occupied France; and that such sequestration legislation as was adopted for The Netherlands did not include any provision, corresponding to Section 3 of the Eleventh Ordinance, for forfeiture of property by operation of law, but, on the contrary, each relevant case of confiscation of property by German authorities in The Netherlands "was an individual operation."

Finally, the Court mooted the question whether the forfeiture provisions of the Eleventh Ordinance affected the goods in suit at the time when they crossed the German-Dutch border after the 1944 seizure, holding that any such effect would have occurred outside the area of applicability of the Berlin Restitution Ordinance and hence beyond the jurisdiction of the Berlin restitution courts.

III. Decisions of Indian Courts

In recent months, courts in India have rendered two decisions involving principles of international law. *Mirza Ali Akbar Kashani v. The United Arab Republic* (All India Reporter 1966 Supreme Court 230) was an action in damages for breach of a contract for the exclusive supply of tea. Section 86 of the Indian Code of Civil Procedure authorizes institution of suit against "foreign rulers" only with the consent of the Central Government. Such consent was not obtained in the instant case, and the respondent sought dismissal on this ground, and on the ground of absolute sovereign immunity under the rules of international law as adopted and applied by the municipal law of India.

The trial court rejected both contentions (and also held, incidentally, that the respondent had waived its jurisdictional objections by entering an appearance and filing pleas thereafter), holding that the consent requirement applies only in case of suit against the ruler of a foreign State, not against the foreign State itself, and that the sovereign-immunity plea was not valid in a suit on a commercial contract.

The Court of Appeal of the Calcutta High Court reversed. The appellate Court affirmed the trial court's holding on the consent question, but upset its other two holdings. It held that an application challenging the jurisdiction of the court below could not be regarded as submission to the jurisdiction, and that the bar of absolute sovereign immunity applied.

The Supreme Court of India affirmed the judgment of the Court of Appeal, but reached its conclusion by disagreeing with that Court on the consent question. The Supreme Court stated that it thus found it unnecessary to reach the immunity question, although its opinion indi-

cates quite clearly its view that the consent provision in effect delimits, and except for the consent requirement abrogates, the "doctrine of immunity under International Law" so far as the municipal courts of India are concerned. The Court's decision that the statutory reference to "foreign Rulers" in the consent provision includes foreign States was reached through an intricate process of statutory construction.

In *Kadi Municipality v. New Chhotalal Mills Co. Ltd.* (All India Reporter 1965 Gujarat 293), the Gujarat High Court decided a question of state succession arising from the merger into the Dominion of India of the former princely State of Baroda, which thereupon became part of the Province of Bombay. In 1935, the Government of Baroda had, by *Tharav,* given the corporate party a twenty-year exemption from the octroi duty leviable by the Municipality of Kadi. In 1952, the Government of Bombay issued an administrative order canceling the exemption, and the municipality assessed the company with octroi duty. The company paid under protect, sued for refund and for an injunction against further assessments, and recovered judgment which the High Court affirmed.

The Court found no merit in the Municipality's threshold attack on the initial validity of the exemption, holding that the Ruler of Baroda State had been an absolute monarch subject to constitutional limitations on his governmental powers. Recognizing that acquisition of territorial sovereignty, whether by conquest or by cession pursuant to treaty, is an act of state, and that the subject of the ex-sovereign can enforce in the courts of the new sovereign only those rights which the latter has recognized, the Court held that the *Tharav* in question was continued in force after the merger by Paragraph 4 of the Administration of the Baroda State Order applicable to laws of Baroda.

In holding that the *Tharav* was a law rather than a mere executive act, the Court applied the definition evolved in this connection by the Supreme Court, under which a law is an act which prescribes a binding rule of conduct for observance in the future, and determines or affects legal rights and obligations. Having been continued in force as a law, the exemption was not subject to withdrawal by executive fiat, but only by appropriate legislation by competent authority.

IV. Arbitral Commission on Property, Rights, and Interests in Germany

In the period November 1962-1963, this Commission, established under the Convention on the Settlement of Matters Arising Out of the War and the Occupation, decided several cases of interest.

In the case of *Felix Hamburger v. Germany* (VI Decisions 125), the Third Chamber of the Commission held that the wartime blocking by the German authorities, as enemy property, of Reichsmark bank accounts belonging to American citizens must be considered as permissible under modern international law; and that such action could give rise to no claim cognizable under the Convention as discriminatory treatment if the resultant injury could not have been avoided without infringing the Ordinance under which the blocking action was taken. Another ground for rejecting the particular claim at issue was that it was for consequential damages arising from the claimant's inability to use the blocked funds to pay off two mortgages, and was not a claim for return of property or for restoration of rights and interests, the sole type of claim within the purview of the Convention.

Sales Affiliates Patentverwertungsgesellschaft v. Muholos-Elektro-Apparatebau Alfred Muller (VI Decisions 132) involved an application under Article 7 of Allied High Commission Law No. 8, on Industrial, Literary and Artistic Property Rights of Foreign Nations and Nationals. This article authorizes persons (natural or "juristic") who, between September 1, 1939, and September 30, 1949, were, in good faith, manufacturing, selling, or using the subject matter of patents which were obtained with the priority provided under Law No. 8, to continue under a non-exclusive license. The license is to be granted by the holder of the patent rights, on terms either mutually agreed, or, if such agreement is not reached with the holder of the rights, fixed by the Grand Senate of the German Patent Office on application by the prospective licensee.

The Commission, in Plenary Session, considering the patent-holder's appeal from the Senate's decision, first determined that both parties had the necessary *locus standi,* the holder of the patent rights as German transferee of a patent originally granted to an American corporation, and the applicant as acquirer of the entire business of the firm which was the "interim user" of the subject matter of the patent during the statutory period September 1, 1939-September 30, 1949.

On the merits, the Commission held that the Senate, in fixing the royalty rate, had not given appropriate consideration to the agreed royalty being paid by some 40 licensees accounting for about 98% of the market; and it held further that the fact that such a large number of contractual licensees had accepted this rate supported the conclusion that, absent any showing of special reasons for fixing such a rate, it should be regarded, and fixed, as the rate appropriate to other

licenses, and specifically the applicant's license, under Article 7 of Law No. 8. The Commission also held that the royalty should be based on list price less a lump sum, rather than a net sales price based on actual rebates, commissions, and discounts, paid or allowed in individual cases, the latter basis being considered more cumbersome administratively and more conducive to abuse.

One of the Commissioners dissented on all points, being of the opinion that only the original non-German holder of patent rights or its "legal successor," and not a mere assignee, may be considered such holder for purposes of Article 7 of Law No. 8; that only the actual "interim user" of the subject matter of the rights, not the successor to its business, may obtain a license under Article 7; and that the agreed payment of the royalty rate by the contractual licensees, adopted by the Commission, lacked the evidentiary conclusiveness which the Commission accorded it, because the contractual licenses provided for revision of the rate downward if a lower rate should be granted to a compulsory licensee.

In the case of *The Italian Republic v. Germany* (VI Decisions 156), Italy sought compensation for two lots of metals removed by force from Italy by the German forces during World War II, and thereafter consumed. Paragraph 1 of Article 4, Chapter 5 of the Settlement Convention requires, in the case of property consumed, that it have been theretofore identified in Germany. Reversing the Second Chamber, the Commission held in Plenary Session that such identification need neither have been preceded by an application for restitution nor have taken place in accordance with any special procedure, and that knowledge by the German authorities of the origin of the lots of metals in question constituted sufficient identification thereof as property removed from an occupied country.

Five Commissioners dissented; three on the ground that the identification contemplated by the Convention is specific identification by formally regulated procedures rather than by mere ascertainment of existence, and that the identification made in the instant case did not meet this standard; and two on procedural and jurisdictional grounds. In a subsequent phase of the case, the Commission held that the amount of compensation to be awarded is replacement value, on the date of the decision fixing and ordering payment thereof, in the country where the property was confiscated (VII Decisions 213).

The case of *Margarine-Union GMBH v. Germany* (VI Decisions 192) involved the provisions of Article 6 of the Settlement Conven-

tion, which provide certain exemptions from exceptional German taxes, to the extent levied for the specific purpose of meeting charges arising out of the war, or out of reparation or restitution to any of the United Nations, natural persons who on June 21, 1948, were nationals of, or companies then organized under the laws of, one of the United Nations, or German companies then owned, to the extent of at least 85%, by such persons or companies, as to certain property owned by them as of specified dates.

From the property levy imposed on the complainant under the Equalization of Burdens Law, the *Finanzamt* had first deducted the amount of the Immediate-Aid levy (a war or reparation charge) actually imposed on the complainant, as provided in paragraph 6 of Article 6 of the Convention, and had then calculated the payments due at 1.7% per quarter for 27 years (reduced, for the first three years, by 88.08%, corresponding to the percentage of share ownership in the complainant German company, of firms organized under the laws of one of the United Nations).

The complainant argued that the deduction on account of the Immediate-Aid levy should have been calculated at 18% of half the value of the property involved, as provided in paragraph 6 of Article 6 for cases in which the Immediate-Aid levy was not actually imposed; but the First Chamber of the Commission rejected this contention, on the ground that by providing this special method of computation of the deduction in cases in which the Immediate-Aid levy was not imposed, the Convention implicitly excluded the application of the method in cases in which that levy was imposed.

The complainant also objected to the 1.7% quarterly rate, arguing that it should be entitled to the 1.5% rate provided in the Equalization of Burdens Law for companies and persons exempted from the Immediate-Aid levy by §6 of the Immediate-Aid Ordinance. The Commission also rejected this contention, holding that the benefit of the 1.5% rate cannot be extended to companies (such as the complainant) not in the category to which the law provides for application thereof. The Commission pointed out further that §56a of the Equalization of Burdens Law simply grants to companies in the favored category the option of claiming the 1.5% rate or the benefits of the Convention, and that the complainant, claiming the benefits of the Convention, was excluded from claiming the 1.5% on this ground as well.

In *Salzberg v. Germany* (VII Decisions 159), the First Chamber

of the Commission held that, for purposes of the tax exemptions provided by Article 6 in favor of nationals of the United Nations, the complainant, having acquired Russian nationality as a resident of Polish Eastern territory incorporated into the U.S.S.R. during World War II was entitled to be treated as a Russian national in the absence of any evidence of renunciation of Russian nationality, notwithstanding his severance of all ties with Russia, his assumption of permanent residence outside Russia, his occasional choice of the status of a Stateless person, and occasional recognition of his status as a Polish national by some German authorities and the American Military Government and in UNRA and IRO documents. The Commission set aside a Property Levy Order which, because of administrative mistakes and the complainant's unfamiliarity with his rights and the proper procedure for enforcing them, had been issued without affording the complainant the opportunity, pursuant to §56 of the Equalization of Burdens Law, of opting between the benefits provided for in that law and those provided under the Settlement Convention.

The Commission held that it was without jurisdiction to entertain the question whether the complainant was entitled to the benefit of any tax exemptions or other compensatory provisions of the Equalization of Burdens Law, without reference to the Settlement Convention, such questions being solely within the competence of the German civil and constitutional courts. This holding provoked a lengthy dissent by one of the Commissioners.

In *Holländisches Frachtenkontor GMBH v. Germany* (VII Decisions 155), the Third Chamber of the Commission reaffirmed the decision of the Second Chamber in *Gilis v. Germany* (V Decisions 184) that the Commission is empowered to apply only the exemptions from war and reparations taxes expressly provided in the Settlement Convention, as opposed to a contention of plenary exemption of foreigners from such taxes under the asserted general rule of international law to this effect, contended to be, pursuant to Article 25 of the Basic Law of Germany, a part of federal law which takes precedence over other laws.

V. Germany-Denmark
Continental Shelf Delimitation

On February 20, 1957, the Federal Republic of Germany and the Kingdom of Denmark notified the International Court of Justice that they had entered into a special agreement to submit to the Court

the question of "what principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by" the convention of June 9, 1965; and that the respective governments have agreed to delimit the continental shelf in accord with the decision of the ICJ. Further details will appear in the next issue of *The International Lawyer*.