

Case Comments

Decisions of International Tribunals

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Two cases have just been instituted before the International Court of Justice, for the purpose of determining issues which have arisen as to rights in connection with the continental shelf in the North Sea.

So far as is known, no publication devoted to matters of international law has followed developments as they occur throughout litigation from its institution before, to its conclusion in, an international tribunal.

The International Lawyer will report, from time to time, all developments, from inception to ultimate disposition, in the cases just begun by the Federal Republic of Germany against the Kingdoms of Denmark and of the Netherlands. The first report, that as to commencement of the actions, pursuant to a brief note thereof in the last issue, is published herewith.

The within article also records the recent decision in the Argentina-Chile boundary dispute, outlining the basis on which the Arbitral Court reached its conclusion; some interesting decisions by Indian courts, involving points related to international law; and finally two significant opinions of the Arbitral Commission on Property Rights and Interests in Germany.

I. International Arbitration Developments

A. North Sea Boundary Disputes

The current offshore gas-drilling activity in the North Sea has resulted in submission of two interesting boundary disputes to the International Court of Justice.

Under date of February 21, 1967, the Court issued a press communiqué advising that, on the previous day, the Registry had been advised of two Special Agreements, one between the Kingdom of Denmark and the Federal Republic of Germany, and the other

between the Federal Republic of Germany and the Kingdom of the Netherlands, for submission of differences to the Court.

The Special Agreements, which are practically identical substantively, recite that in each case the delimitation of the coastal continental shelf in the North Sea between the parties has been laid down by Convention (December 1, 1964, between West Germany and the Netherlands; June 9, 1965, between Denmark and West Germany), but that disagreement exists as to the further (outward) course of the boundary.

The Agreements do not request the Court to fix the boundaries, but only to declare the applicable principles and rules of international law. The parties bind themselves to delimit the continental shelf in the North Sea as between themselves pursuant to the principles and rules declared by the Court.

In each case, a Memorial is to be submitted by West Germany within six months after February 20, 1967, a Counter-Memorial by the other party within six months after delivery of the German Memorial, and a reply and rejoinder within further time limits fixed by the Court, all without prejudice to any question of burden of proof.

B. Argentina-Chile Boundary Arbitration

On December 9, 1966, Queen Elizabeth II handed down the United Kingdom's award in a boundary dispute between the Argentine Republic and the Republic of Chile. The dispute arose as to interpretation of an award made by King Edward VII on November 20, 1902, fixing parts of the boundary between the two countries. The 1966 award was based on the report of a Court of Arbitration consisting of Lord McNair as President, Mr. L. P. Kirwan, and Brigadier K. M. Papworth (Professor D. H. N. Johnson, Registrar).

Because of confusion as to the identity and course of the Rio Encuentro, controversy developed as to the course of the boundary fixed by the 1902 award between Boundary Posts 16 (at the juncture of Rios Carrenleufu/Palena and Encuentro/Falso Engano) and 17 (Lake General Paz), a distance of about 38 kilometers or 24 miles, as the crow flies.

The difficulty stemmed from the provision of Article III of the 1902 Award, as amplified by reference to paragraph 22 of the report of the Arbitration Tribunal, that the boundary in the area at issue should pass to a point on the Rio Palena opposite the junction of the Rio Encuentro; should then follow the Rio Encuentro along

the course of its western branch to its source on the western slopes of Cerro Virgen; and ascending the peak called Cerro Virgen, should then follow the local water-parting southwards to the northern shore of Lake General Paz.

In fact, neither branch of the Rio Encuentro has its source on the slopes of Cerro Virgen. The river on the western slopes of Cerro Virgen is the Rio Engano, which has its source in the Lagunas del Engano just north of Lake General Paz, and flows across the slopes of Cerro Virgen into the Rio el Salto (or el Tigre), a branch of which rises on the western slopes of Cerro Virgen, and which in turn flows into the Rio Palena at a point west of the junction of the Rio Encuentro with the Palena.

Further ground for dispute stemmed from the fact that a short distance south of its junction with the Palena, the Rio Encuentro divides into two main water-courses. Chile of course submitted that the more eastward of these is the continuation of the Encuentro, whereas Argentina just as naturally insisted that the eastern branch is the Rio Falso Engano, and that the branch to the west is in fact the continuation of the Encuentro.

Argentina also contended that the Rio el Salto (or el Tigre) should have been considered as the Encuentro for purposes of marking the boundary in the first place, since this is the river joining the Palena which has a source on the western slopes of Cerro Virgen.

However, the 1965-66 arbitration was simplified by the fact that a Mixed Boundary Commission set up by Argentina and Chile in 1941 to try to work out their differences under the 1902 Award, had already established that the boundary in the area in dispute runs in the north from the junction of the Rios Palena and Encuentro to the confluence of the eastern and westerly water-courses of the Encuentro, and in the south from Cerro Virgen along the local water-parting to Boundary Post 17 on the northern shore of Lake General Paz.

From the confluence of the branches of the Encuentro, Argentina contended that the boundary should, in order to meet the river having a source on the western slopes of Cerro Virgen, follow the westerly water-course of the Encuentro to its most westerly source, thence travel overland a short distance to the Rio Engano, follow the Engano to its junction with the Rio el Salto (or el Tigre), then turn southward along the latter river to the source of that branch

on the western slopes of Cerro Virgen, then following the local water-parting southward to Boundary Post 17.

Chile argued, perhaps somewhat less persuasively, that the boundary should follow the eastern water-course of the Encuentro to its source on the slopes of the Cordon de las Virgenes, and thence along the watershed to Post 17. Chile bolstered its position by suggesting initially that a mountain considerably to the east, and called by Chile since 1955 Pico Virgen, is the peak to which reference is made in the 1902 Award as the Cerro Virgen. Chile also relied on evidence of Chilean administration in the disputed area, and Chilean loyalties of the inhabitants.

Both countries urged estoppel (preclusion) against each other, Chile on the basis of concessions it claimed Argentina had made in the course of an exchange of diplomatic notes in 1913-15 with reference to the question at issue, Argentina on the basis of certain official Chilean maps, issued between 1913 and 1952, which showed the boundary running on a course nearer to that for which Argentina contended.

The Court of Arbitration declined to assign weight to an isolated statement in one of the Argentine notes indicating that Boundary Post 16 should have been placed farther east; and also found no estoppel against Chile, in light of the prevailing ignorance as to the geography of the area, although noting that its erroneous cartography over such a long period seemed at odds with its claim of administration of the disputed territory during the same period.

There was much argument by the parties as to the "critical date," in this case, meaning the date after which the Court should not admit evidence of administrative activities of the parties in the disputed area. The Court, since it was charged with interpreting a previous Award, found the concept of the critical date to be of little value in its determination.

Both parties, but particularly Chile, submitted "fulfillment material" in evidence of their respective exercises of administrative jurisdiction in the area. This evidence referred to registration of land titles, imposition of land taxes and military service, registration of settlers with the police, registration of births, marriages, and deaths, maintenance of electoral rolls and animal brand registers, taking of censuses, provision of health and educational facilities and so on.

The Court, while rejecting Argentina's contention of irrelevance, nevertheless found this evidence inconclusive, since it found that the

inhabitants turned to the authorities of both countries in case of need, and tried to keep on good terms with both sides.

The Court of Arbitration accordingly rested its determination exclusively on interpretation of the 1902 Award. In this connection, two of the three members of the Court, accompanied by its technical staff, journeyed to the disputed area as a field mission, and made both air and ground reconnaissance of the territory, which was also aerially photographed.

The Court's approach to the problem it faced was dominated by two principles: first, the general principle that when a river forming a boundary divides, the boundary normally follows the major channel; and second, that it was the intention of the 1902 Award that the boundary proceed through Cerro Virgen.

As to the first point, the Court found that official reports of Argentina, dating to within a few years after 1902, identified the eastern branch of the Rio Encuentro as the major channel, a conclusion which the Court considered as confirmed scientifically by the greater length, annual volume, and drainage area of this branch.

The Court determined that the boundary should follow this branch to the point of its closest approach to Cerro Virgen, that, at that point, the boundary (in accord with the general practice of the 1902 Award) should follow local water-partings to Cerro Virgen, proceeding thence by local water-partings to Boundary Post 17.

A Demarcation Mission was named to mark the course of the boundary pursuant to the new award, which largely followed Argentina's contentions, but did depart therefrom sufficiently to place most of the Chilean settlers in Chile.

II. Decisions of Indian Courts

In a case reminiscent of *Haddock v. The King*,* the Government of India contended, in *Jethwani v. Kazi* (All India Reporter 1966 Bombay 54), that it has absolute discretion to grant or deny a passport to any citizen of India. This contention received short shrift in the Bombay High Court. The petitioner had received several passports over a period of years, when his latest application was rejected without assignment of reasons. The Government defended against his writ petition for judicial relief, solely on the stated ground.

* Reported in Herbert, *Uncommon Law* 110.

The Court noted that Indian law, by prohibiting entry into India without a passport, necessarily implies a governmental obligation to issue passports in proper cases, since the Constitution preserves the right of all Indian citizens to reside in India. The Court found further that since the Government concededly issues passports to some citizens, arbitrary refusal of a passport to any citizen would violate the Constitutional rule against denial of equality before the law.

Finally, the Court held that freedom of travel abroad is included in "personal liberty" guaranteed by the Constitution against deprivation except according to procedure established by law. Having decided that passports may not, for these reasons, be denied administratively except pursuant to legislative standards (of which none have been formulated to date), the Government was ordered to honor the petitioner's passport application. The Kerala High Court reached the same result in *Manjooram v. Government of India* (AIR 1966 Kerala 20).

Chibar v. Union of India (AIR 1966 Supreme Court 442) involved the question of subsistence of rights acquired under the Portuguese régime in Goa. The Supreme Court applied the settled rule that in cases of territorial acquisition by conquest, the new sovereign need recognize only rights granted or recognized by him vis-à-vis the residents.

In *Parwatawwa v. Channawwa* (AIR 1966 Mysore 100), the Mysore High Court applied the federal-state rule, familiar in America, that possession of Indian (national) domicile (as a condition of citizenship) does not preclude the concurrent existence of domicile within a particular Indian State for purposes of application of State law.

III. Arbitral Commission on Property Rights and Interests in Germany

In the case of *Coenrad J. Veerman* (No. 243), the Third Chamber of the Arbitral Commission adhered to the Commission's consistent holding that, for purposes of obtaining compensation under Articles 3 and 4 of Chapter Five of the Settlement Convention for property confiscated by the German authorities during World War II, it is essential that the claimant prove that the confiscated property was, after the cessation of hostilities, actually in territory now part of the Federal Republic of Germany or Berlin.

Since the instant claimant could show only that his property, having been confiscated in the Netherlands, was loaded aboard German Rhine vessels, and such evidence did not exclude the possibility of destruction of the property by aerial bombardment or distribution thereof at some place now within the boundaries of East Germany, the Third Chamber, on April 27, 1966, dismissed the claimant's application.*

In the case of *Dr. René Springer* (No. 305), the Second Chamber of the Commission, in a judgment handed down on May 26, 1966, re-examined the question of exemption of nationals of any of the United Nations from the Mortgage Profits Tax imposed by the Federal Republic pursuant to the Equalisation of Burdens Law. Since the question of exemption from this particular tax has not been considered by the Commission in Plenary Session, the Second Chamber went into the matter at some length.

Dr. Springer, at the time of his escape from Germany and naturalization in France in 1933, owned property in Heidelberg which was encumbered with a mortgage. Fearing confiscation, he agreed to sale of the property, but after the war he was awarded co-ownership of a six-tenths share on the ground that the property had been sold under abnormal circumstances. His RM 12,000 share of the subsisting mortgage debt was converted into DM 1,200 by the currency reform, and the resultant 90% profit was taxed away under the Mortgage Profits Tax, designed to prevent unjust enrichment of debtors as a result of conversion of Reichsmark mortgage debts.

The Settlement Convention provides for exemption of certain United Nations nationals from exceptional taxes on property imposed for the specific purpose of meeting charges arising out of the war, or out of reparation or restitution to any of the United Nations; recites that when a tax is levied only partly for such purposes, the exemption shall "in principle" be proportionate to the part of the tax imposed for these purposes; and states that in the case of Immediate Aid and property levies under the Equalisation of Burdens Law, the partial exemption extends to payments falling due in the

* The same result was reached on the same date in the case of *Edgar Rothschild et al.* (No. 254), *Willie and Gertrud Scheidt* (No. 255—property brought to Lubeck, but no showing made that it was in existence there or elsewhere after cessation of hostilities in Germany), and *Siegfried Rosenthal* (No. 245).

six-year period from 1 April 1949 to 31 March 1955. There is no reference to the Mortgage Profits Tax.

The Commission's consideration of the question proceeded from its settled principle that no general rule of public international law establishes an exemption, in favor of former enemies of a defeated nation, from taxes imposed by the nation to meet its war costs, but that such an exemption can be effected only by agreement.

The Commission found that whereas Chairman McCloy had commenced his discussions with Chancellor Adenauer on the basis of the same general exemption of United Nations nationals from war-cost taxes that had been allowed in the case of Italy and other German allies, this rigid position had been modified considerably in the course of the protracted negotiations that ensued; and that, in the end, two classes of tax exemptions were established by the Settlement Convention—a total exemption from exceptional taxes levied expressly to meet war costs and reparation payments, and a partial exemption as to specified taxes recognized as having been imposed for these and other purposes.

The Commission found further that the specification of reparation-payment taxes, in addition to war-cost taxes, is indicative of a restrictive meaning of the term "war costs," which, in a broad sense, would include reparation payments without specification thereof. The Commission went on to deduce that the exemption applies to taxes levied to meet clear and direct material damage caused by the war, plus all exceptional expenditures incurred to compensate the victorious nations for their occupation costs and war losses. The Commission found that the exemption does not extend to taxes imposed to defray the expenses of re-establishing and consolidating the political, economic and social structure of the defeated nation, since the family of nations has a predominant interest in the stability and security of its members.

Among the exceptional taxes accordingly not covered by the exemption, the Commission placed those whose proceeds are destined for reconstruction, public assistance, re-integration of refugees, public works and the alleviation of hardships caused by currency reform.

As to the Mortgage Profits Tax, the Commission found this to be a mixed-purpose tax not subject to total exemption. In the absence of any reference thereto in the provision for partial exemp-

tion, the Commission had recourse to the *travaux préparatoires* leading up to the Settlement Convention; and on the basis of a letter from Chairman McCloy to Chancellor Adenauer, it deduced that the parties intended to grant no exemption from the taxes levied under the Equalisation of Burdens Law, except for the Immediate Aid and property levies for which specific partial-exemption provision is made in the Convention.

The Commission also concluded that decisive weight on this point should be accorded to the fact that none of the United Nations governments have intervened to support their nationals' claims to exemption from the Mortgage Profits Tax, although it has been assessed regularly against United Nations nationals.