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Decisions of International and Foreign Tribunals

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International Court of Justice

As reported in the July 1967 and October 1967 issues, proceedings have been instituted between The Netherlands and Denmark, respectively, and the Federal Republic of Germany to obtain a declaration of principles governing delimitation of national boundaries in the North Sea.

On April 26, 1968, the Court, on a finding that the interests of Denmark and The Netherlands are identical and on motion by all three Governments, ordered the cases consolidated and fixed August 30, 1968 as the date for filing of a common rejoinder by those two States. Meanwhile, the Federal Republic had selected Professor Hermann Mosler, Director of the Max Planck Institute, to sit as Judge *ad hoc* pursuant to Article 31 of the Statute, and Denmark and The Netherlands had chosen Professor Max Sorensen.

Commission of the European Communities

On March 1, 1968, the French Conseil d'Etat held that a 1962 domestic ordinance preserving the customs system in force prior to Algeria's independence, which exempts goods imported from Algeria, prevails over the levy and license requirements imposed by prior-enacted Council Regulation No. 19 of the EEC. *Syndicat général des fabricants de semoules de France,* 1968 Recueil Dalloz Sirey 285. In response to Written Question No. 28/68 submitted by a Member of Parliament, the Commission, on July 17, 1968, stated that it has taken cognizance of this decision, that the Commission is not of the opinion that a subsequently issued domestic provision takes precedence over an EEC regulation, that the Conseil d'Etat evidently considered itself without competence to review the compatability of a domestic law

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with either the French Constitution (Article 55 of which confers on treaties "an authority superior to that of the laws") or international law, that the Commission is considering what steps may be indicated in the case, and that the procedure of Article 169 of the EEC Treaty appears to be applicable when a Member State violates Article 177's requirement of referral to the Commission for prior interpretation of relevant Community rules essential to a decision by national court of final resort. Official Journal No. C71, CCH Common Market Reporter ¶¶9245-46.

The Commission has handed down several recent decisions on requests for clearances. Industry trade associations were granted negative clearances in the cases of the *Eurogypsum Association* (Official Journal No. L57, CCH ¶9220) and the *Societé Commerciale et d'Etudes des Maisons d'Alimentation et d'Approvisionnement a Succursales* (CCH ¶9250), even though the latter group engaged in a small amount of joint purchasing activity, found to have no perceptible effect on the position of the suppliers in the markets concerned. In the matter of the *Alliance de Constructeurs Francais de Machines-Outils,* negative clearance was given to the formation by noncompeting machine-tool manufacturers of a joint export agency; the members' agreement not to manufacture or sell machines competitive with one another's products was considered unobjectionable in view of the fact that none are now competitive with one another and that the total market share of the members is small (10% of French machine-tool exports) (CCH ¶9249). The case of *ACEC-Berliet* involved a joint venture agreement between the inventor of an electric transmission for motor coaches and a motor-coach manufacturer; the agreement was held restrictive of competition in that Berliet agreed to buy electric transmissions only from ACEC and the latter agreed to supply them in France only to Berliet and in each Common Market country except Belgium only to a single manufacturer; nevertheless a five-year clearance was granted under the provision of Article 85, paragraph 3 of the Treaty that paragraph 1 of Article 85 may be declared inapplicable to an agreement that promotes technical progress or improves production or distribution of a product so long as a fair share of the resulting profit is reserved for consumers (CCH ¶9251).

Rann of Kutch Decision

The Great Rann of Kutch (Cutch) is a salt marsh lying between the former Province of Sind (formerly part of British India, now part of

Pakistan) to the north and west, and certain former Indian States (which merged with India) to the south and east. Following the partition of India, the Governments of India and Pakistan exchanged diplomatic notes concerning the boundary in this area. The dispute led to tension resulting in armed hostilities in April 1965. On June 30, 1965, the Governments agreed to a cease-fire and restoration of the status quo pending referral of the dispute to a special tribunal (absent amicable settlement which was not reached).

India nominated Ambassador Ales Bebler, Judge of the Constitutional Court of Yugoslavia, and Pakistan nominated Ambassador Nasrollah Entezam of Iran, former President of the General Assembly of the United Nations. The two Governments being unable to agree on a chairman, the Secretary-General of the United Nations, on their application, nominated Judge Gunnar Lagergren, now President of the Court of Appeal for Western Sweden.

The tribunal sat in Geneva. After preliminary adoption of procedural rules, investigations by the parties of each other's archives and filing of pleadings, oral hearings began on September 15, 1966 and continued until July 14, 1967 in the Palais des Nations. The record comes to over 10,000 pages, and some 350 maps were filed as exhibits. In February 1966, the question arose whether the tribunal was empowered to adjudicate *ex aequo et bono;* after hearing the parties, the tribunal, finding no clear authorization in this regard in the agreement of June 30, 1965, ruled that it had no such power.

India relied on a historical approach, on pre-partition maps (principally that of Macdonald's Survey in 1855-70), and on various pre-partition administrative reports and official notes, letters and publications treating the Rann as (Kutch one of the abutting Indian States) territory. The Macdonald line appeared in all known editions of the 32-mile map of India produced by the Survey of India Department, in the Index Map of the Province of Sind of 1935, and thereafter in all official maps until the end of British rule. The Sind Commissioners questioned the line in 1885 and 1905, and subordinate Sind authorities raised the question on other occasions, but received no support from the British Government. Only at one point—in the westernmost portion, where it does not follow the northern edge of the Rann—was the line changed by agreement based on proofs of exercise of governmental authority by Sind and by the Rao of Kutch. India contended that this compromise impliedly confirmed the remainder of the line.

Pakistan relied on various displays of Sind and British authority in the Rann, and primarily on the contention that as the Rann is a "marine feature" separating two States, the question should be determined on the principles of the median line and equitable distribution, with the bets being governed by the principle of the nearness of shores.

The tribunal rendered its award on February 19, 1968. The chairman's opinion finds that there was no generally accepted historical boundary between Sind and the Indian States abutting the Rann; rejects Pakistan's median-line argument; and decides in India's favor, principally on the ground of British acquiescence in maps showing the Rann as Kutch territory, as to all sectors as to which there was no evidence of substantial display of Sind authority. As to sectors in which continuous and, considering the nature of the Rann, intensive Sind activity (mainly of a customs and police nature) met with no effective opposition from Kutch, the chairman held that Pakistan had made out a better title. Two deep inlets which would otherwise have constituted near-enclaves of India in Pakistan territory were awarded to Pakistan in the interest of promoting peace and stability, and at one point a jagged stretch of boundary was smoothed out by running the line along the outer points of the jutting tongues of land.

The end result was to give India about 90% of the disputed territory. Mr. Entezam, after tentatively deciding that Pakistan had made out a clear title to the northern half of the Rann, ultimately concurred in the chairman's opinion; whereas Judge Bebler dissented on the ground that the Macdonald line should have been considered determinative. Excerpts from the award and opinions are reported at 7 International Legal Materials 633.

Court of Justice of the European Communities

On July 13, 1966, the Court handed down its decision in *Etablissements Consten and Grundig-Verkaufs-GmbH vs Commission of the European Economic Community,* 5 International Legal Materials 891, CCH Common Market Reports, ¶ 8046. At issue was the validity, under Article 85 of the Common Market Treaty, of an exclusive-distributorship contract between a German radio and television manufacturer and a French distributor. The exclusive territory was metropolitan France, the Saar and Corsica; the distributor was precluded from selling competing products and from selling outside its

territory; and the manufacturer was precluded from selling in the territory to competitors of either the distributor or its customers. Similar provisions were included in the manufacturer's contracts with other distributors in Germany and other companies. The distributor was authorized to use the manufacturer's name, emblem and international trademark, which the distributor registered in France.

The manufacturer registered all of its exclusive distributorship contracts with the EEC Commission, which, reserving decision on the others, ruled that the contract with the French distributor infringed Article 85 and ordered manufacturer and distributor to refrain from taking any action to hinder other parties from acquiring and selling the manufacturer's products in the contract territory. The manufacturer and the distributor brought actions to annul the decision. Italy and West Germany intervened in support of the plaintiffs, and two independent distributors intervened in support of the Commission.

In sustaining the infringement ruling, the Court took a *per-se,* as opposed to an *ad-hoc* rule-of-reason, approach, holding that "since the contract . . . prevents all enterprises other than Consten from importing Grundig products into France and . . . prohibits Consten from re-exporting such products to other countries of the Common Market, it unquestionably impairs trade between Member States . . . [and] it is not necessary to take into consideration the actual effects of an agreement where its purpose is to prevent, restrict, or distort competition."

The Court first decided that Article 85 applies to vertical agreements between non-competitors as well as horizontal agreements, rejecting the argument that a vertical agreement is no different from establishment by a producer of its own internal distribution system. Also rejected was the good-effects argument: the Court held that an agreement which hinders competition violates Article 85 despite the fact that it may increase the volume of total international trade or that it may increase competition between products of different producers. The Court did, however, adduce economic reasons in this connection, stating that producer competition generally "loses its effectiveness" as brand differentiation increases, and that the substantial portion of consumer prices attributable to distribution costs calls for stimulation of competition at the distributor level. The Court embraced the local-squeeze-international-pinch position, with reference to the trademark provisions of the arrangement, holding that these were not saved from treaty infringement by the fact that the distributor's trademark

rights depended on local law, when the purpose of the trademark provisions was to facilitate prevention of importations by competing distributors.

Finally, the Court found that the plaintiffs had established no sufficient grounds for exempting the agreement under paragraph 3 of Article 85. It held that, for invocation of the exemption on the ground of improvement in product manufacture or distribution, the plaintiffs must show substantial "objective" advantages–as distinguished from, "subjective" improvements defined "according to the peculiarities of the contractual relationship at issue"–compensating for the detriment to competition involved and rendering the detriment essential to the advantage. The Court rejected out of hand the arguments that nullification of the agreement would make it impossible for the distributor to estimate its requirements ("these risks are . . . inherent in any trading activity"), that non-exclusive distributors, especially those having no contractual relationship with the manufacturer, might impair its goodwill by furnishing inadequate customer service (the plaintiffs are free to advertise the servicing advantages offered by the "official" distribution network), and that the exclusive feature was essential to the distributor's recovery of its start-up costs (no relationship to improvement of distribution).

The Commission's decision was annulled only to the extent that it nullified the entire agreement, since the Commission had not found that the provision for exclusive direct delivery by manufacturer to distributor in France alone violated Article 85.

In its slightly earlier (June 30, 1966) decision in *Société-Technique Miniere vs Societe-Maschinebau Ulm,* CCH Common Market Reporter ¶ 8047, which was an abstract interpretative decision rendered in response to a request by a French court, the Court held that a distributorship agreement, the sole exclusive feature of which was the German manufacturer's agreement to sell a specified quantity of its products only to the distributor in France and the distributor's agreement not to handle competing goods without the manufacturer's consent (there being no prohibition against "parallel importation" into France by others or against resale of the products by the distributor for delivery outside France), is not *per se* ("by its nature alone") violative of Article 85, but only if, in view of industry and competitive conditions, there is a reasonable expectation that it may exercise direct or indirect, actual or potential influence on commerce between member States capable of impeding the realization of a common market and

preventing, restricting or distorting competition in intent or effect. The Court also held that failure of the parties to notify an agreement to the Commission does not of itself strike the agreement with nullity.

In *Belgian, Dutch and German Cement Works (S.A. Cimenteries etc.) vs Commission,* CCH Common Market Reporter ¶ 8052, the Court held, on March 15, 1967, that a registered letter from the Commission advising the parties to an agreement notified to the Commission pursuant to Regulation No. 17, that the Commission had, on provisional examination, concluded that the agreement violated Article 85 and that Regulation No. 17's provisional exemption of the agreement from the fine rules would terminate upon receipt of the letter, constituted a decision by the Commission appealable to the Court. The Court pointed out that termination of the exemption from fines subjected the parties to possibly serious financial loss, thereby affecting their interests, changing their legal position and having a binding legal effect on them. On the merits, the Court annulled the decision for want of a statement of the grounds on which it was based.

European Commission of Human Rights

In the case of *Iversen vs. Norway*, digested at 8 Journal of the International Commission of Jurists 125, involved a Norwegian law requiring newly licensed dentists to accept two-year stints in the public dental service. The applicant, having withdrawn from the service after six months, was convicted of violating the law and sentenced to a fine or imprisonment. After dismissal of his appeal by the Supreme Court of Norway, he submitted an individual application to the Commission on the contention that the law in question violates Article 4 of the European Convention of Human Rights prohibiting slavery, servitude and forced labor (penal servitude, military and emergency service, and service forming part of "normal civic obligations" being exempted from the Prohibition). In a decision on December 17, 1963, a majority of the Commission took the position that the Norwegian law does not entail forced labor, a concept which involves labor which is not only involuntary but is also unjust or oppressive or involves avoidable hardship, since the instant service was for a short time in the applicant's chosen professional field and no discriminatory, arbitrary or punitive application of the law was involved.

Belgium

In re Articles 10 and 14 of European Convention on Human Rights (1966 Journaux des Tribunaux 685, 9 Journal of the International Commission of Jurists 123) involved the validity of § 41 of the Belgian Law of August 2, 1963, which requires business firms to "use the language of the region where their registered office or places of business are situated" in documents required by law and in communications to their employees. On November 8, 1966, the Twelfth Civil Chamber of the Brussels Court of First Instance held this provision invalid because of its incompatibility with Articles 10(1) and 14 of the European Convention for the Protection of Human Rights, which respectively guarantee freedom to impart information without governmental interference, and enjoyment of Convention-guaranteed rights without discrimination on grounds *inter alia* of language, social origin, political or other opinion, or association with a national minority. On application by the plaintiff firm whose business premises were in Flemish territory, the Register of the Commercial Court was ordered to accept documents written in French.

India

In *Sawhney vs Assistant Passport Officer,* All India Reporter 1967 Supreme Court 1836, the Supreme Court of India reached the same conclusion as had the Bombay High Court in *Jethwani vs Kazi* (noted at 1 International Lawyer 693) as to the Government's contention that it has absolute discretion to issue or withhold a passport. The existence of such a power was denied by the Court on the ground that the right to travel is part of the personal liberty guaranteed by Article 21 of the Constitution against deprivation except according to procedure established by law, and that in the absence of valid legislative standards for determining whether a passport shall issue, the executive branch has no discretion in this regard.

In *Yusuf vs Union of India,* AIR 1967 Patna 266, the Court held that the usual rule against acquisition by an infant of an independent domicile of choice, must yield to the provision of Article 7 of the Constitution of India that Indian citizenship is lost by migration to

Pakistan with the intention of permanently residing there; and that a minor of sufficient years to form such an intention had lost his Indian citizenship by such migration.

Malaysia

During the Indonesian confrontation with Malaysia, a group of Chinese Malay volunteers serving with the Indonesian forces were captured by the Malaysian authorities and sentenced to death. On their appeal to the Privy Council, they contended that, as prisoners of war entitled to the benefits of the Malaysian Geneva Conventions Act, 1962, they could not be tried until three weeks after notice of the prosecution had been served on the protecting power. The board held that persons who are nationals of, or who owe allegiance to, the detaining power are not entitled to the benefits of the Act but are ordinary criminals; and that, in any event, all but one of the appellants had lost whatever rights they may have had in this regard by failing to raise the issue prior to their trial. As to the one who had raised the issue, it was held that there was a mistrial, since the court below should either have determined the issue (adversely to the accused) or given the required notice before proceeding with the trial. *The Public Prosecutor vs Oie Hee Koi,* [1968] 2 WLR 715 (PC).

European Commission of Human Rights

On September 20, 1967, Denmark, Norway, Sweden and the Netherlands filed applications with the Commission against the Government of Greece. The applications alleged that the Greek Government's suspension of the articles of the Greek Constitution guaranteeing fair arrest and pre-trial confinement procedures, release on bail, trial by regularly-constituted courts in the proper venue, the rights of peaceable assembly and political and economic association, security against unlawful searches, freedom of speech and press, and trial by jury, violated Articles 5, 6, 8, 9, 10, 11, 13 and 14 of the European Convention on Human Rights, respectively guaranteeing the rights of personal liberty and security, fair trial by independent and impartial tribunals, respect for private and family life as well as home and correspondence, freedom of thought, conscience and religion, freedom of expression, freedom of peaceful assembly and association, effective remedy for violations of these rights, and enjoyment of these rights without discrimination on any ground including political opinion. The

applications were brought under Article 24 of the Convention, which states that any party thereto may refer to the Commission any alleged breach thereof by another party.

After hearings on January 23 and 24, 1968, the Commission on the latter date decided that the applications are admissible. The Commission, noting that the present Greek Government did not contend that it is not bound by the international obligations entered into by its predecessor Governments, rejected the argument that the revolutionary nature of the present Government precludes examination by the Commission of the legality of its acts vis-á-vis the Convention, since it is in times of disturbance and danger that the guarantees of the Convention assume their greatest importance.

The Commission also ruled that the failure of any party to the Convention, or of the Consultative Assembly, to take any steps to initiate similar proceedings with reference to the Turkish revolution of 1960, does not foreclose the Commission from acting on proper applications made in another case.

The Commission rejected the Greek Government's representation that a resolution adopted by the Consultative Assembly expressing concern at the situation in Greece constituted anticipatory condemnation of Greece, pointing out that the Assembly has no competence to pass on applications alleging violations of the Convention, and that the Commission is an independent body not influenced by declarations of the Assembly.

The Commission held, finally, that there is no requirement of exhaustion of domestic remedies in cases brought by one Government against another, and that in such a case, an application may not be rejected out of hand on the ground of being manifestly ill-founded, but that this question must await determination on the merits, and that the Greek Government's contentions that its actions at issue were justified under Article 15 of the Convention could not be considered at this stage but must be reserved for examination of the merits. 7 International Legal Materials 818.

In *X vs The Netherlands,* 22 Decisions 23, the Commission, on February 6, 1967, reaffirmed its interpretation of Article 6, paragraph (1) of the Convention of Human Rights, under which certain tax procedures are excluded from that paragraph's procedural guarantees "in the determination of . . . civil rights and obligations or of any criminal charge." The plaintiff, a Dutch citizen working in Belgium, had been assessed with Dutch old-age contributions based in part on his

income earned in Belgium. His application to the Commission was rejected.

Peru

The Fourth Correctional Court of Peru has found in favor of Refineria Conchan Chevron S.A., a Standard Oil Company of California affiliate, in a habeas corpus action by Refineria Conchan to nullify three Peruvian governmental decrees of 1967, the effect of which was to provide for preferential treatment of the state-owned refinery.

The invalid Peruvian decrees had provided that service stations located on public lands adjacent to public thoroughfares were required to sell petroleum products produced by the govenment-owned La Pampilla Refinery. The government refinery was also given preferential treatment in future service station expansion and relocation and with regard to petroleum import regulations. In holding that the decrees were invalid, the court stated that the decrees clearly violated freedoms of commerce, industry and rights of property and, in effect, established a special preferential regime in favor of the public entity. Such a preferential regime, the court found, contravened Peruvian constitutional principles against the issuance of special laws for particular entities. The court also stated that to uphold the decrees would be manifestly unjust since it would allow the government to unilaterally avoid its contractual obligations and to enjoy the benefits of the investment and work of those in the private sector.

The decision of the Fourth Correctional Court became final on October 15, 1968, when the government's appeal against the decision was declared to be unfounded by the Peruvian Supreme Court.*

*The same conclusion was reached in *S. A. Brasserie de Haecht vs Consorts Wilkin-Janssen*, CCH Common Market Reporter ¶8053 (December 12, 1967).