

Case Comments

International Law Cases in National Courts

RICHARD C. ALLISON*, Departmental Editor

Cases involving questions of international law decided recently by federal and state courts are noted below.

Antitrust Law—"Export" Sale

In the first opinion of the Supreme Court to consider the meaning of the words "export trade" under the Webb-Pomerene Act, 15 U.S.C. § 62 (1964), the Court, in *United States of America v. The Concentrated Phosphate Export Association*,—U.S.—21 L.Ed 2d. 344 (1968), said that what may outwardly have all the characteristics of export trade may not be as a matter of business and economic realities.

In 1964 the Government filed a civil antitrust suit against an association of phosphate producers who had made eleven sales of concentrated phosphate to South Korea between 1961 and 1966. The Government contended that the concerted activities of the association violated Section 1 of the Sherman Act, 15 U.S.C. § 1 (1964), but the member companies of the association alleged that their actions were exempt from such antitrust liability under Section 2 of the Webb-Pomerene Act as "act[s] done in the course of export trade."

On a direct appeal to the Supreme Court from the District Court's decision,¹ the Supreme Court determined that the purpose of the Act was to allow American businesses to join together in export associations in order to compete with foreign cartels and for this narrow purpose Congress created an express exemption from the antitrust laws. The Court in remanding the case found, however, that Congress did not mean and the Act's exemption could not be read so as to insulate the transactions of the association from the prohibitions of the antitrust laws. The transactions involved were not simple purchases by South Korea, but were almost entirely financed by the United States

* Member of the New York Bar. Assisted by Charles C. Foster of the New York Bar.

¹ See 2 THE INTERNATIONAL LAWYER 367 (Jan. 1968).

Government through the Agency for International Development (“AID”), which had exercised effective control of the transactions at every stage, including the selection of the commodity, the determination of the amount to be purchased, the control of the contracting process, and the payment of the bill. Furthermore, the members of the association were not in any real competition with foreign suppliers, and the total effect was that the United States Government, through its agencies, was furnishing the fertilizer to South Korea and, therefore, the transactions were not “export trade” within the meaning of the Webb-Pomerene Act and would not be exempt from the antitrust laws simply because a foreign government was the nominal “purchaser.”

Shipping Act—Extraterritorial Application

In *Armament Deppe, S.A. v. United States of America*, 399 F.2d 794 (5th Cir. 1968), nine foreign steamship lines, which were members of the Continental—U.S.A. Gulf Westbound Freight Conference, were engaged in the operation of ocean vessels from Europe to United States ports on the Gulf of Mexico. Under a dual-rate contracts system they contracted with foreign shippers, who agreed to tender all or any fixed portion of their cargo destined for certain American ports to conference carriers for which they paid a lower rate than other shippers. The United States initiated a civil action to recover penalties at the rate of \$1,000 per day alleging that these arrangements involved violations by each carrier of the Shipping Act of 1916, 46 U.S.C. §§ 813a., 814 (1958).

The foreign carriers agreed that they were subject to the jurisdiction of the United States while they were within United States ports, but alleged that all of the dual-rate contracts involved were entered into abroad with foreign shippers and that the Shipping Act should not be given extraterritorial effect.

The court, however, pointed out that as the contractual terms provided that the contracts were to be carried out eventually in United States ports, Congress, under the power which it has to regulate commerce with foreign nations, U.S. CONST. Art.I, § 8, had the authority to regulate shipping contracts even though they were executed abroad between foreign national. “Consummation of the contract is, therefore, by acts which are ultimately performed in the United States—thus making them subject to the laws of this Nation.” 399 F.2d at 798 - 799.

The lower court’s refusal to dismiss the complaint was, therefore, correct.

Sovereign Immunity

The procedural point of how a plea of sovereign immunity should be entered and adjudicated was raised in *Pan American Tankers Corporation v. Republic of Vietnam*, 291 F.Supp. 49 (S.D.N.Y. 1968).

This case involves the procedural point of how a plea of sovereign immunity should be entered and adjudicated.

Plaintiffs, owners and operators of three American flag vessels, petitioned the court for an order to compel arbitration under a contract with the defendants, the Ministry of Economy of the Republic of Vietnam and two Vietnamese corporations, who allegedly had breached the contract.

The Republic of Vietnam appeared specially and claimed sovereign immunity. The Republic of Vietnam also stated in its notice of special appearance that its Ambassador would petition the United States Department of State for a suggestion to be forwarded to the court that the plea of immunity be accepted and that the court hold in abeyance the plaintiffs' petition to compel arbitration pending receipt of such suggestion from the Secretary of State.

The court held that, while the Republic of Vietnam was free to utilize diplomatic channels, the petition to compel arbitration should not be held in abeyance as otherwise the court's ruling would be dependent upon the decision of the defendant to make such a request of the Department of State, and furthermore there was no guarantee that the Department would make any suggestion of immunity in this case.

The court also rejected as inappropriate the plaintiffs' request that the court directly seek the view of the Department of State since the suggestion of the Department of State would be far more than an expression of its position in an *amicus curiae* brief, but "would apparently be conclusive upon the Courts. [Citations omitted.] The Court, therefore, should not adopt a procedure that may prejudice one side or the other in the presentation of its views." 291 F.Supp. at 51.

The court held that the Republic of Vietnam by directly imposing the defense of sovereign immunity had correctly asserted the defense and that it was obligatory for the court to decide the issue of sovereign immunity upon a full, evidentiary record.

Stating that the record was so meager as to render it difficult or impossible to decide whether the contract in issue was of a commercial or of a governmental nature, the court ordered the Republic of Vietnam to submit affidavits and other proofs in support of its plea of sovereign immunity.

Foreign Affairs—Decedents' Estates

In the wake of the United States Supreme Court decision *Zschernig v. Miller*, 389 U.S. 429 (1968)² holding an Oregon "Iron Curtain" statute invalid on the ground that it was an intrusion by the state into the field of foreign affairs, the New Jersey Supreme Court in *In Re Estate of Kish*, 52N.J. 454, 246 A.2d 1 (1968) considered a similar New Jersey statute, N.J. REV. STAT. 3A:25-10 (1952), which would limit distribution to legatees, next of kin or trust beneficiaries residing abroad if under the laws of the foreign country they would not have the benefit or control of the money or other property due them.

Proceedings were instituted by certain Hungarian beneficiaries under a New Jersey decedent's will to compel the executors to make payment of their distributive shares. When the lower court affirmed the judgment of the Probate Division directing distribution to the Hungarian residents, the Attorney General petitioned the court on the grounds that the proof was insufficient to establish that the Hungarian beneficiaries would receive their distributive share without a substantial diminution. The New Jersey Supreme Court affirmed the lower court's decision, not only on the basis that the order of the Probate Division did not violate the New Jersey statute but also on the basis that the statute had in the past been improperly applied under the criteria set out by the Supreme Court in *Zschernig*.

While the *Zschernig* decision was in reference to an Oregon statute which provided for the escheat of the property to the state, the New Jersey statute was custodial only and did not require any reciprocity. The court felt, nevertheless, that the reasoning of the *Zschernig* case would apply to the New Jersey statute and held that the New Jersey statute would be enforceable only to the extent that it could be established by "a routine reading of foreign laws" that the receipt or use of the distributive shares is forbidden or made impossible by the law of the beneficiaries' country. Otherwise, if state courts applied the statute based upon their own evaluation of a foreign country's political or economic system and its administration of the law, they would be entering the field of foreign affairs.

The court concluded that even under a pre-*Zschernig* approach, petitioners had established that the beneficiaries in Hungary would have the use, benefit and control of their shares. Furthermore, the court stated that in the future the burden of establishing that the criteria of

² See 3 THE INTERNATIONAL LAWYER, 173 (Oct. 1968)

the statute were not met would rest upon the party seeking the withholding of the distributive share. In reference to the Attorney General's argument in his post-*Zschernig* brief that there would be a substantial diminution of the distributive shares received by the Hungarians because under the laws of Hungary dollars would be converted into Hungarian forints at the official rate of exchange instead of at the higher "free" foreign exchange rate, the court held that it would not be a party to the violation of the Hungarian law by authorizing the purchase of Hungarian currency on the "free" market.