Case Comments

International Law Cases in National Courts

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A number of cases involving questions of international law have been decided recently by federal, state and local courts.

Antitrust Law—"Foreign Commerce"

Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968) involves a determination of whether the plaintiffs were engaged in foreign commerce for purposes of the application of Sections 1 and 2 of the Sherman Act. The Circuit Court heard this case on appeal from a decision by the District Court to dismiss the complaint at the close of oral argument, apparently because there was no claim of restraint of foreign commerce.

According to the complaint the plaintiffs, operators of United States flag vessels, were engaged in selling their services to exporters of cement and fertilizer in Taiwan and Thailand. These exporters needed American flag shipping for their sales to South Vietnamese importers, since the importers would be paid the shipping expense if American flag vessels were used.

Plaintiffs sought to establish themselves in this specialized market by using older, less costly vessels than those used by the defendants, the principal suppliers of this market for American flag vessels. The 21 defendant American shipping lines, members of the 2 defendant shipping conferences, were organized in an association which set the rates for transporting cargoes of foreign origin from one foreign port to another. Neither these rates nor the articles of the association were filed with the Federal Maritime Commission.

Plaintiffs alleged that defendants, in pursuit of a conspiracy to block the plaintiffs, first asked AID for a directive limiting AID-fi-

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nanced shipping to "conference liners." AID refused to cooperate and even countermanded a ruling of the Director General of Commerce of South Vietnam that only association members could carry these shipments. When the Defense Department also refused to cooperate, the defendants, at a meeting of the association threw open their rate schedule on shipments from Taiwan and Thailand to South Vietnam. The rates dropped about 45%, forcing plaintiffs out of business. Thereafter, the defendants raised their rates to a new high.

The principal issue in the case as formulated by the Court was "[w]hether the District Court was correct in its jurisdictional determination that the complaint made no allegation of restraint on United States foreign commerce." (404 F.2d at 811).

The defendants contended that United States foreign commerce is not restrained in violation of the Sherman Act unless the effect is on commodity imports or exports or transportation to or from the United States. Since the plaintiffs' service was to ship foreign goods from one foreign port to another, the defendants argued, there could be no foreign commerce involved.

The court first examines the broad concept of commerce as treated by *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824) and the economic effects of such trade on United States balance of payments and domestic commerce accounts in determining that this class of sale of services is within the Constitutional grant to Congress to regulate "commerce with foreign nations."

Turning then to the application of the Sherman Act to this type of commerce, the court treats the possible international complications involved. The court points out that most international controversy in this area has arisen from application of United States' antitrust laws to foreigners for acts not done in the United States, citing *United States v. Aluminum Co. of America,* 148 F.2d 416, 443 (2nd Cir. 1945) for its statement that:

> . . . any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.

The court indicates, however, that no such international complications exist in this case since the defendants are nationals of the United States and nationality is a recognized basis for regulating conduct.

Acknowledging that the issue is one of first impression, the court holds that:

> . . . there is an identifiable, distinctive market for American-flag shipping service where the American characteristic is dominant—a market defined as involving the transportation of AID-financed cargoes, which has a definite nexus with significant interest of the United States—the Sherman Act is applicable to a conspiracy to exclude newcomers from the trade. (404 F. 2D at 816).

In so doing the court emphasizes that this conclusion was influenced by recognition that the trade in question "is entirely a product of the United States policy of subsidizing its merchant marine." (404 F. 2d at 816). Furthermore, only Americans can serve this market. These American contacts and nexus, the court suggests, provide objective standards which may usefully supplement the most frequently stated test (found in *United States v. Aluminum Co. of America, supra,* at 443-444.) as to whether the Sherman Act is applicable to acts without the United States, i.e., whether the parties intended to and did affect United States imports and exports.

Determination of Boundaries—Coastal Waters

In *United States v. State of Louisiana (The Louisiana Boundary Case),* ——— U. S. ———, 89 S. Ct. 773 (1969), the United States Supreme Court upheld its decision in *United States v. California,* 381 U.S. 139, 85 S. Ct. 1401 (1965) to adopt the definitions from the Convention on the Territorial Sea and the Contiguous Zone, [1964] 15 U.S.T. (pt. 2) 1607, T.I.A.S. 5639, for purposes of the Submerged Lands Act of 1953, 43 U.S.C. §§1301-1315, and indicated that such definitions should be used in determining certain boundary lines of Louisiana.[1]

The stake in deciding which definition to apply, as indicated by Mr. Justice Black in his dissent in *The Louisiana Boundary Case,* is whether the Federal Government or Louisiana will have the power to lease the submerged land to oil companies. The "Inland Water Line," determined pursuant to federal legislation adopted in 1895, is favored by Louisiana for it is an established boundary line apportioning the land in a manner acceptable to Louisiana. The Convention on the Territorial Sea and the Contiguous Zone, on the other hand, defines

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[1] The opinion in a second case, United States v. State of Louisiana (*The Texas Boundary Case*), ——— U.S. ———, 89 S.Ct. 768 (1969), handed down the same day also applied the definitions of the Convention in determining the Texas coastline for purposes of the Submerged Lands Act. Only the opinion in *The Louisiana Boundary Case,* however, discussed international legal principles and their application; the summary that follows is, therefore, limited to that case.

"coastline" to be the modern, ambulatory coastline, whether modified by natural or artificial means.

In the *California* case the Supreme Court based its choice of the definitions contained in the Convention in part on the desirability of "a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations." (381 U.S. at 165, 85 S.Ct. at 1415) In *The Louisiana Boundary Case* Louisiana argued that this Convention was not meant to be the sole measure of inland or territorial waters or to divest a nation of waters which it long considered its own and that the continuous and unopposed regulation of navigation within the "Inland Water Line" should establish this line as the boundary for inland waters according to the principles of international law, notwithstanding the definitions contained in the Convention and applied in the *California* case. Alternatively, Louisiana argued that the "Inland Water Line" as an assertion of sovereignty comes within the exception of Article 7 of the Convention for "historic bays."

The Supreme Court rejected both of these contentions, finding that "nothing in either the enactment of the 1895 Act or its administration indicates that the United States has ever treated [the "Inland Water Line"] as a territorial boundary." (89 S. Ct. 780) Justice Steward quotes the *California* case (381 U.S. at 172, 85 S. Ct. at 1419) to the effect that historic title can be claimed only when the "coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." The determination of the "Inland Water Line" was made solely as an aid to regulate navigation, and the Supreme Court finds universal agreement that "the reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters." (89 S.Ct. at 781) Such regulation is deemed an incident of the coastal nation's jurisdiction over the territorial sea, as contrasted with its complete sovereignty over the nearest zone to the nation's shores, its inland waters.

Nevertheless, the Supreme Court leaves open the possibility, to be determined in the first instance by a Special Master, that the waters of the Mississippi River Delta are "historic bays" within the meaning of Article 7 of the Convention, apparently without reference to the "Inland Water Line," and directs the Master to consider relevant any exercises of dominion by Louisiana in determining the existence of historic title.

The Court describes the three zones of the navigable seas as follows:

> Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations. Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation.
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> Whether particular waters are inland has depended on historical as well as geographical factors. Certain shoreline configuration have been deemed to confine bodies of water, such as bays, which are necessarily inland. But it has also been recognized that other areas of water closely connected to the shore, although they do not meet any precise geographical test, may have achieved the status of inland waters by the manner in which they have been treated by the coastal nation. (89 S.Ct. at 780-781)

Louisiana also contended that acceptance of the "Inland Water Line" will fulfill the "requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States," quoting from the court's opinion in the *California* case, 381 U.S. at 167, 85 S. Ct. at 1416. Louisiana emphasized that, whereas the Convention's definition providing for an ambulatory coastline would furnish the desired "definiteness and stability" for California because of its comparatively straight rocky coastline, the same definition applied to the constantly shifting Louisiana coastline molded by the vagaries of the Mississippi River and the Gulf storms would produce uncertainty and endless litigation. The Supreme Court took up this argument in connection with whether areas between the mainland and fringes of outer islands constitute inland waters. The court notes that the Convention allows for straight baselines in defining the coastline rather than the ambulatory coastline as a recognition of the principle established in the *Fisheries Case (United Kingdom v. Norway)* [1951) I.C.J. 116, for those nations with island fringes along their shore. Such straight baselines, however, are optional with the coastal nation.

The Supreme Court in the passage quoted below does appear to recognize the distinction Louisiana draws between its own coast and that of California, but chooses to exercise judicial restraint in refusing to apply the straight baseline method:

> . . . While we agree that the straight baseline method was designed for precisely such coasts as the Mississippi River Delta area, we adhere to the position that the selection of this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States, albeit paritally motivated by a domestic concern, not to extend its borders to the furthest extent consonant with international law. (89 S. Ct. 807)

The court concluded its opinion by providing for the appointment of a Special Master to make a preliminary determination of the Louisiana boundaries in the Gulf of Mexico in accord with this decision.

The dissent by Mr. Justice Black, joined in by Mr. Justice Douglas, would apply the "Inland Water Line" in defining the Louisiana coastline for the reasons of certainty and stability advanced by Louisiana, and to relieve the courts of burdensome litigation which otherwise would result. The dissenting opinion also contains this interesting rejoinder to the majority:

> There appears to be one thing certain about the problem, however, and that is that the dispute between Louisiana and the United States is no part of international affairs subject to international law, but is exclusively a domestic controversy between the State and Nation. (89 S.Ct. at 813)

Outer Continental Shelf—Proprietary Interests in Coral Reef

In a recent case in the Southern District of Florida likened by the court to a fairy tale, two separate groups of colonizers failed in their claim to have established new island nations on several coral reefs located four and one-half miles off the southeast coast of Florida, near Miami. In *United States v. Ray,* 294 F. Supp. 532 (S.D. Fla. 1969), both the defendant, Ray, and the intervenor, Atlantis, representing a second group of entrepreneurs, planned sizable real estate developments on the nearly submerged reefs and each of the two groups envisioned an independent island nation. The Atlantis group had plans for a mint, and international bank with numbered accounts and a gambling casino.

Prior to the United States' action to permanently enjoin defendant's dredging, filling and other activities, both the defendant and the intervenor had placed structures on the reefs.

Chief Judge Fulton refused to uphold the first contention of the Government that the activities of the defendant constituted a trespass

on reefs that are part of the United States Outer Continental Shelf. He did find that these reefs, because of their submerged nature and location, are part of the "seabed and subsoil" of the United States Outer Continental Shelf as defined by both the Outer Continental Shelf Lands Act (43 U.S.C. § 1331-1343) and by the 1958 Geneva Convention on the Continental Shelf (15 U.S.T. 471, T.I.A.S. 5578). He further found that these coral reefs constitute "natural resources"as defined in the aforementioned Act and Convention and that evidence demonstrated that defendant's dredging and filling of the reefs and further work planned by both the defendant and intervenor would irreparably injure these natural resources.

Nevertheless, there was no trespass since the United States is not in actual possession of the reefs, nor apparently has it ever claimed actual title to them. The court found that Congress intended the Outer Continental Shelf Lands Act to assert "a less comprehensive interest" in the Continental Shelf than was granted to the States by the Submerged Lands Act (43 U.S.C.§§1301-1303, 1311-1315) over the land beneath navigable waters within the boundaries of the States. This interest in the Continental Shelf has been judicially determined to be less than a fee simple, and the distinction between complete sovereignty over coastal waters and the lesser interest in the Outer Continental Shelf is found to comport with international law.

The United States was upheld on its second claim, however, that the construction on these reefs by the defendants and the intervenor were unlawful in the absence of a permit from the Secretary of the Army. The requirement of this permit is contained in Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403; the authority of the Secretary of the Army, thereunder, is extended by the Outer Continental Shelf Land Act, 43 U.S.C. §1333(f).

The ownership claims of both the defendant and the intervenor were found to be inconsistent with the provisions of the Outer Continental Shelf Land Act and with those of the 1958 Geneva Convention of the Continental Shelf. "Whatever proprietary interest exists with respect to these reefs belongs to the United States under both national (Shelf Act) and international (Shelf Convention) law. Although this interest may be limited, it is nevertheless the only interest recognized by law, and such interest in the United States precludes the claims of the defendants and intervenor" (294 F. Supp. at 542).

Treaties—Tax Discrimination

In *Schieffelin & Co. v. United States,* 294 F. Supp. 53 (Cust. Ct. 1968) the plaintiffs, importers of both Irish and Scottish spirits, objected to alleged discrimination in the assessment of the United States tax on spirits in violation of treaties with Ireland and Great Britain.

The spirits imported by the plaintiffs are bottled and ready for consumption at approximately 85 proof. Since these spirits are below 100 proof, the United States' tax on spirits is levied against these imports at a rate based on the "wine gallon." In comparison, domestic producers withdraw their liquor from bond at not less than 100 proof, and, because of the high proof, are subject to the tax at the same rate, but based on the "proof gallon," a measure of liquid somewhat larger than the "wine gallon." Plaintiffs alleged discrimination since, in order to be taxed on the more favorable "proof gallon" basis, they must import in bulk at 100 proof or above and then have the spirits diluted and bottled in the United States, thereby possibly reducing the quality of plaintiffs' product.

The question for the court, therefore, was whether this difference in tax assessment violates the respective treaties of Ireland and Great Britain with the United States. Article XVI of the Treaty of Friendship, Commerce and Navigation between the United States and Ireland, entered into force on September 14, 1950, provides as follows:

> 1. Products of either Party shall be accorded, within the territories of the other party, national and most-favoured-nation treatment in all matters affecting internal taxation and sale, distribution, storage and use. 1 U.S.T. 788, 797.

Article XXI of this same treaty provides:

> 1. The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favourable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party. 1 U.S.T. 788, 801.

The treaty between the United States and Great Britain (8 Stat. 228) entered into force July 3, 1815, likewise contains a most-favoured-nation clause.

In rejecting plaintiffs' claim of discrimination in violation of the treaties, the court found that "[u]nderproof imported spirits (bottled) and proof or overproof domestic spirits (bulk) at the time of tax

determination do not involve 'like situations,' and consequently, the provisions of Articles XVI and XXI of the Irish treaty are not applicable here." The court also emphasized that the importers have the option of importing in bulk and paying the same rates as do American distillers.

Trusts and Estates—Iron Curtain Statute

In *Estate of Fred Hinz,* N.Y.L.J., March 10, 1969, p. 17, col.2 (Sur. Ct. N.Y. County), petitioner, a resident of the Russian Zone of Occupation of Germany, sought to withdraw funds deposited with the Director of Finance of the City of New York pursuant to the provisions of New York's "Iron Curtain" statute, SCPA §2218 (McKinney Supp. 1968) (formerly SCA 269-a). In support of his demand, petitioner cited *Zscherning v. Miller,* 389 U.S. 429,88 S. Ct. 664 (1968) which struck down the application of an "Iron Curtain" statute in Oregon.

Surrogate Di Falco in denying petitioner's application cited the New York Court of Appeals' interpretation of the *Zscherning* case (*Matter of Leikind,* 22 N.Y.2d 346 (1968) to the effect that the Oregon statute, itself, was not unconstitutional, but rather the Oregon court's application of the statute which interfered with United States' foreign affairs.

Surrogate Di Falco pointed out further that the New York statute, as amended effective June 22, 1968, is designed not to interfere with United States' foreign policy since the statute's application is triggered only by a ruling or determination of the Federal Government:

> 1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. SCPA §2218 (McKinney Supp. 1968).

Since the Russian Zone of Occupation of East Germany is listed by the United States Treasury Department is an area to which checks drawn on United States' funds may not be sent and there being no reasonable assurance that persons in petitioner's situation would receive the funds, petitioner's application was denied.

Warsaw Convention—Limitation on Liability

The jury award was upheld in *Stolk v. Compagnie Nationale Air France,* N.Y.L.J., Feb. 26, 1969, p. 22, Cols. 3-6 (N.Y.C. Civ. Ct.) on the trial level in New York involving the defense of a limitation on liability for loss of luggage during a flight governed by the provisions of the Warsaw Convention [Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, TS 876 (1929)].

On trial the jury awarded the plaintiff $2,000 damages for loss of two pieces of luggage during her flight on defendant's airline from New York to Paris. Defendant moved for judgment notwithstanding the verdict as to all claims in excess of $330. Defendant claimed that its liability was so limited by Article 22 of the Warsaw Convention or, in the alternative, by the Local and Joint International Passenger Rules Tariff No. PR-2 which defendant had filed with the Civil Aeronautics Board pursuant to 49 U.S.C. §1373(a).

As to the liability limitations the trial judge pointed out that two previous cases had treated this same problem under the Warsaw Convention in regard to limitations on liability for death or personal injury. In *Mertens v. Flying Tiger Line, Inc.,* (341 F.2d 851, 856 (2nd Cir. 1965), *cert. denied,* 382 U.S. 816), the Court held that the passenger ticket must be delivered in a manner providing the passenger a reasonable opportunity to protect against the liability limitations on personal injury and death. In *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.,* (253 F. Supp. 237, 243 (S.D.N.Y. 1966), *aff'd* 370 F.2d 508 (2nd Cir.), *aff'd by evenly divided ct.,* 390 U.S. 455) limitations on liability for personal injury or death "so artfully camouflaged that their presence is concealed" were held not to constitute notice to the passenger.

These two cases were so decided despite any specific requirement in the Warsaw Convention that the limitation be printed on the passenger ticket. The judge pointed out, therefore, that the principles of these cases should apply *a fortiori* in this case since the Convention specifically denies the defense of limited liability on lost luggage unless that limitation appears on the baggage ticket. The miniscule statement of the limitation on the baggage ticket was, accordingly, given no effect.

The trial judge also held that the notice printed in ten point type relating to limitations on liability for death and personal injury was

insufficient to put plaintiff on notice of the Convention's baggage liability limitation.

Finally, the judge held that this flight, being an international flight rather than a domestic flight, came within the provisions of the Warsaw Convention and not the aforementioned tariff rules filed with the Civil Aeronautics Board.

The motion for judgment notwithstanding the verdict was, therefore, denied, and the defendant was held liable in the amount of $2,000.

Admissibility of Evidence Seized in Border Search

Refusal to pay customs duty upon entry into Canada proved a little more costly than anticipated to three defendants in a recent decision ruling on a motion to suppress evidence obtained in a border search.

In *People v. DeLoach,* 297 N.Y.S. 2d 220 (Buffalo City Ct. 1969), defendants had attempted to enter Canada by car but were denied admission by Canadian Customs Service when one defendant refused to pay approximately $10.00 duty on certain publications which he claimed to have edited and published. Defendants then turned around, crossed back over the Peace Bridge into the United States, whereupon they were stopped at the United States Customs Compound and, despite their explanation of what had just happened, found their car subjected to a thorough search. As a result, an action was brought against them for possession of marijuana.

In the course of upholding the search and the admissibility of the evidence, seized, Judge Kasler ruled that the defendants' departure from the United States was effective and complete when they had crossed the boundary line midway over the Niagara River and that it was of no consequence in ruling on the legality of the search that the defendants had no opportunity to purchase any Canadian goods subject to duty.

Furthermore, the Judge upheld the search even though it was not based on suspicion of illegal importation of goods subject to duty, but rather suspicion that defendants had goods unlawful to possess.

Nor was there any obligation on the part of the United States Customs Officials to contact their Canadian counterparts to verify defendants' story. Such a duty, the Judge found, would in effect make probable cause a requirement for a border search, contrary to the case of *Alexander v. United States,* 362 F. 2d 379, 382 (9 Cir. 1966), *cert. denied,* 385 U.S. 977, 87 S. Ct. 519.