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Title/Style of Cause: Tabacalera Boqueron S.A. v. Paraguay
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Decided by: Chairman: Ambassador John Donaldson;
First Vice Chairman: Dr. Carlos Manuel Ayala Corao;
Second Vice Chairman: Professor Robert Kogod Goldman;
Members: Ambassador Alvaro Tirado Mejia, Dr. Oscar Lujan Fappiano, Dean Claudio Grossman.
Dated: 16 October 1997
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I. BACKGROUND

Petitioners

1. The case was presented on behalf of Tabacalera Boquerón S. A., and its owners, the shareholders Julio Domínguez Dibb (Paraguayan), Karen Wilson Smith (English), Diana Domínguez de Rolón (Paraguayan), Astrid Domínguez de Scavone (Paraguayan), and Alejandro Domínguez (Paraguayan) who own all the voting shares. According to the lawyer of the petitioners, the company is a family business, husband, wife and children, and the case alleges an "aggression against their assets."

II. FACTS

2. Tabacalera Boquerón S. A., was founded in 1985, and is today the undisputed leader in tobacco sales in Paraguay, with a production of 1,500 packs of cigarettes a day, and with sales of approximately 30,000 cartons a month. The company has registered certain brandnames in Paraguay in accordance with existing legislation. On August 6, 1992, the company registered the cigarette brandname "RICH." It must be pointed out that until that time there were no cigarettes with that or any other similar name.

3. The Ritz Hotel Limited, an English company, registered their brandname "Ritz" for certain hotel goods and merchandise and requested the inclusion of the brandname "RITZ" for articles classified in class 34 (unprocessed or manufactured tobacco, smoking related articles, matches, etc.), and although they sold cigarettes with the "RITZ" brandname as souvenirs, they

were never involved in the production of cigarettes since the registration of the brandname on July 27, 1988 (Concession 129.329).

4. On August 18, 1993, the company Tabacalera Boquerón S. A. registered their brandname "Ritz Boquerón," for the production of cigarettes, and proceeded with the stipulated publication in the newspaper "Correo Comercial." After that date one could challenge the brandname for 60 days.

5. On September 20, 1993, Mr. Hugo T. Berkemeyer, in his role as agent of Souza Cruz S.A. (in accordance with a power of attorney dated May 18, 1993), requested the registration in the Directorate of Industrial Property and the transfer of the "Ritz" brandname. The owner of the brandname, Ritz Hotel Limited, sold and transferred said brandname to Souza Cruz S.A, headquartered in Rio de Janeiro, Brazil, for a nominal value of US\$ 10.00

6. The Brazilian company Souza Cruz S.A. registered the brandname in Paraguay on September 24, 1993. The petitioners point out that said registration was invalidated due to serious irregularities, since,

- The power of attorney given by Souza Cruz S.A. to Dr. Hugo T. Berkemeyer lacks certain formalities set forth in Paraguayan law, such as failing to inform in the certifications if the issuers had the authority to represent the firm as well as to give powers to third parties.

- On the other hand, the petitioners point out that the document for transferring the brandname, presents peculiar characteristics, since although the firm, The Ritz Hotel Limited, headquartered in 17 Waterloo Place in London, appears as principal, in the version presented for registration, the signature of Mr. Frank J. Klein appears, as Chairman of the aforementioned firm, fully empowered to carry out the transfer of the brandname. Nevertheless, next to his signature and at the bottom of the document is a seal that says, The Ritz Hotel Limited (Paris), and an address, 15 Place Vendome in Paris, (France), from which the petitioners infer that it is not the same company that initially registered the brandname.

- According to Paraguayan law, the change of address of someone who has registered a brandname must be communicated to ensure its validity vis-a-vis third parties.

- Another irregularity pointed out by the petitioners is that the signature of the purchaser or agent is nowhere in the document.

- Finally, it is pointed out that the price of US\$ 10.00 is a ridiculous sum for a brandname of that nature.

- It is also pointed out that the cession was carried out through private documents, failing to observe the formalities stipulated by Paraguayan law for transfers of this nature to be carried out in Paraguay, which must be effected through public documents.

- The petitioners add that Paraguayan law stipulates that every transfer of brandnames after registry, to ensure their effectiveness vis-a-vis third parties, must be published for two consecutive days in a large circulation newspaper in the capital of the country and once in the Industrial Property magazine. In this regard, the two publications stipulated by law had been carried out in the "Informaciones" newspaper, which, according to the petitioners, has a circulation of 40.

- It is alleged that 60 days were not observed to oppose registration, a time frame that would be applied by analogy according to the petitioners.

7. The granting of the "Ritz" brandname was registered on behalf of Souza Cruz S.A. on December 24, 1993, giving complete rights to that company, through a marginal entry to the deed of title, although, as it is pointed out, the transfer would be only for tobacco, cigarettes and derived products and not all the brand rights registered on behalf of The Ritz Hotel Limited.

8. The petitioners point out that the aforementioned situation left them in a situation doubly defenseless since, first, given the lack of compliance with the obligation to publish, they were not able to oppose the transfer on time and, second, their brandname "Rich" was endangered, since once the transfer of the brandname "Ritz" was registered, the new owner contested the brandname "Rich," owned by the petitioners.

9. On December 27, 1993, Tabacalera Boquerón S.A. submitted a note to the Ministry of Industry and Commerce requesting the nullification of said transfer.

10. The next day, December 28, 1993, the Legal Advisor of the Ministry, Dr. Juan Jesus Bibolini, submitted a note pointing out that in his opinion the requested nullification was proper, since it was an imperfect transfer that lacked the necessary and essential signature of the buyer.

11. On the basis of the report of his legal advisor, the Ministry of Industry and Commerce promulgated Resolution No. 6 on December 24, 1994, stipulating the cancellation of the registration of the transfer in the Directorate of Industrial Property that was listed in the marginal entry 129.329 on June 27, 1988, of the "Ritz" brandname class 34 in favor of Souza Cruz S.A.

12. On January 26, 1994, Souza Cruz S.A., through his lawyer Luis A. Salmodi, submitted a note to the Ministry of Industry and Commerce, filing a "writ of revocation" against Resolution No. 6, alleging that since no transfer had been given of the presentation made by Tabacalera Boquerón S.A., it had been left defenseless, and, therefore, this was a violation of the Paraguayan Constitution as regards due process. He also alleged the nullification of the Resolution since the appropriate remedy against the registration of the "Ritz" brand was the "writ of appeal and nullification" and it denied that the registration could be annulled administratively, since the procedure employed to promulgate the Resolution was invalid. He requested its abrogation since it was contrary to authority and to roll back the procedure so as to be able to grant the transfer of the note impugning the resolution.

13. The petitioners point out that from the moment that the Ministry found for the appellant, it assumed a jurisdictional function which it does not have. According to Chapter VII of Title I of Law No. 751/79, once the administrative procedure has been finalized and once a well-founded resolution of the Ministry of Industry and Commerce has been issued, pursuant to an opinion of the legal advisor, one can only present an administrative law petition against the final resolution during the following 10 days, submitting it to the Auditing Office.

14. Faced with this new petition, the Legal Advisor of the Ministry realized that it was necessary to submit a copy of the document to Souza Cruz S.A., to avoid the aforementioned situation of defenselessness (Article 17 of the Paraguayan Constitution), so that on January 27,

1994, Resolution No. 7 was enacted in which the Minister of Industry and Commerce personally revoked aforementioned Resolution No. 6.

15. To said Resolution Tabacalera Boquerón S.A. filed a writ for Revocation and Annulment, since Resolution No. 6 of the Ministry had a definitive character and, therefore, the only proper course was to follow a contentious administrative process. In response, the Ministry enacted Resolution No. 12 on February 4, 1994, confirming Resolution No. 7.

16. On March 24, 1994, the Minister issued Resolution No. 32 (final), in which, based on article 38 of Law 751/79, the Minister understood that the transfer of the brand “Ritz” does have as its purpose or result to confuse the public as to its nature, origin, etc., and added that Souza Cruz S.A. had been manufacturing “Ritz” cigarettes for years, (the petitioner claims that it is in Brazil where they have registered the brand) and is the legitimate owner of the “Ritz” brand in Paraguay. Thus, the Minister accepted a statement made through a private instrument, apparently made September 15, 1993 by the Board of Souza Cruz S.A., accepting the transfer of the “Ritz” brand.

17. Tabacalera Boquerón S.A. filed an administrative law suit against Resolution No. 32, which was submitted to the Auditing Office, Court No. 1. Said suit was dismissed because the plaintiff did not have standing, pursuant to Judgment No. 126 on December 29, 1994.

18. Against said decision a Writ of Clarification was filed, which was overturned by Judgment No. 1 on February 8, 1995. As a result the petitioner filed a writ of Appeal and Nullification before the Supreme Court.

19. On December 27, 1995, the Supreme Court by Judgment No. 440, dated December 27, 1995, decided to declare the Nullification Remedy void, and to uphold Judgment No. 126 dated December 29, 1994, enacted by the Auditing Office, First Court, and of Judgment No. 1 of February 8, 1995, issued by the same tribunal. The petitioner was notified of the decision of the Supreme Court on March 12, 1996, exactly 6 months prior to the presentation of the present complaint).

20. Finally, Tabacalera Boquerón S.A., filed a petition of Unconstitutionality in the suit “Tabacalera Boquerón S.A. v. Resolution No. 32 dated March 24, 1994, enacted by the Ministry of Industry and Commerce,” which was rejected “in limine” by a judgment issued March 27, 1996, of which the petitioner was notified on April 11, 1996.

III. PROCEEDINGS BEFORE THE COMMISSION

21. The complaint was filed with the Inter-American Commission on September 11, 1996, six months after a final sentence was handed down by the Paraguayan Supreme Court in the suit Tabacalera Boquerón S.A., v. Resolution No. 32 dated March 24, 1994, of the Ministry of Industry and Commerce.

Alleged Violations

22. The petitioners point out that they have been victims of a violation of their rights as set forth in Articles 16 (Freedom of Association), 21 (2) (Right to Property), 24 (Right to Equal Protection) and 8 (1) (Right to a Fair Trial), in the American Convention on Human Rights. The complaint is based on the alleged violation of the Right to Property, specifically: "In the case that concerns us, Tabacalera Boquerón S.A. and its shareholders were denied the legitimate use of the brandname, through the illegitimate denial thereof by the Paraguayan authorities, in an act that constitutes an illegal privation of property, which is clearly prohibited by paragraph 2 of Article 21 of the above mentioned American Convention." The petitioners seek compensation pursuant to Article 10 of the above -mentioned Convention.

IV. ADMISSIBILITY

23. The petition complies with the formal requisites of admissibility established in Article 46 of the Convention:

- (a) The petitioner has exhausted internal legal remedies available under Paraguayan law.
- (b) The petition was presented within the time frame established by Article 46 (b) and Article 38 of the Commission's Regulations (the petitioner was notified of the Supreme Court's decision on March 12, 1996, and the petition was received by the Commission September 11, 1996.)
- (c) The matter at hand is not pending before any other international procedure.
- (d) In the petition, all the formal requisites of Article 46 (c) have been complied with insofar as name, nationality, profession, address and the signature of the legal representative of the entity submitting the petition.

24. As far as the standing of the petitioner to present a case before the Commission:

The Preamble of the American Convention on Human Rights as well as the provisions of article 1 (2) resolve that "for the purposes of this Convention, 'person' means every human being," and that consequently the system for the protection of human rights in this hemisphere is limited to the protection of natural persons and does not include juridical persons.[FN1]

[FN1] Report No. 10/91, Case 10.169 (Peru), IACHR, ANNUAL REPORT 1990-91, p. 423.

25. In this case, the petition has been filed on behalf of Tabacalera Boquerón S.A., and its shareholders. In this sense and according to the aforementioned jurisprudence, the Commission has pointed out that the protection afforded by the inter-American human rights system is limited to natural persons, and excludes legal entities. Therefore, Tabacalera Boquerón S.A., as a legal entity, cannot be a "victim" of a human rights violation in the inter-American system, since such bodies are not protected by the Convention. It would, perhaps, be advisable to analyze the situation of individual shareholders, in this case the owners of the company, who also claim to be victims in this case.

26. In this regard, the shareholders of Tabacalera Boquerón S.A. point out that they have been victims of an attack against their right to property, which is protected by the Convention in

Article 21. In this regard and after a more detailed analysis of the rights specifically alleged, it must be pointed out that the Convention in the aforementioned article limits the protection of the right to property to individual persons. The Commission stated: "Consequently, in the inter-American system, the right to property is a personal right. The Commission is empowered to vindicate the rights of an individual whose property is confiscated, but is not empowered with jurisdiction over the rights of judicial beings, such as corporations or as in this case, banking institutions." [FN2]

[FN2] Ibid.

27. Although in this case we are not dealing with a banking institution, it is also true that both are corporations, that is to say, legal entities, and in the case in question, the party directly affected by the judicial decisions was always Tabacalera Boquerón S.A. and it was also Tabacalera Boquerón S.A. which suffered "damages to its assets." During domestic judicial proceedings, the shareholders were never mentioned as victims of any violation, there were never any initiatives to protect their rights; therefore, just as in the aforementioned case, what is at issue is not the individual property rights of shareholders, but the commercial rights and "assets" of Tabacalera Boquerón S.A., which are not protected by the jurisdiction of the Inter-American Commission on Human Rights.

28. According to Article 47 (b) of the Convention, the Commission will declare a petition inadmissible when it does not state facts that tend to establish a violation of the rights guaranteed by the Convention.

29. Regarding the competence of the Commission in the matter at hand, the Commission is of the view that this conflict involves proceedings of a commercial nature in which human rights have not been violated. When analyzing the merits of the petition, notwithstanding the nature of the parties, all the accompanying documents lead to the conclusion that the petition is within the framework of private international law and international commercial transactions, especially trademark law where no violation of human rights of natural persons has been established, for which reason the subject matter of this complaint is not within the competence of the Commission, according to the Convention and its Regulations.

30. Regarding the basic allegation insofar as the right to property of the shareholders, the legal meaning of word "property" refers to "the right to dispose of a thing in any legal way, to possess it, to use it and to exclude everyone else from interfering with it." [FN3] Property has been defined as "that dominion or indefinite right of user, control, and disposition which one may lawfully exercise over particular things or objects." [FN4]

[FN3] Black's Law Dictionary, West Publishing Co. p. 1382.

[FN4] Ballantin's Law Dictionary. The Lawyers Cooperative Publishing Company, Rochester, N.Y. 1969, p.1009.

31. The present petition, refers to a commercial matter, specifically one dealing with brandnames, where two companies have disputed the use of the brandname "Ritz," and through different procedural steps in the Paraguayan legal system, the Supreme Court in a final decision decided in favor of one of the companies, dismissing the claim of the petitioners. Once Tabacalera Boquerón S.A.'s attempt to obtain the use of the brandname ended, by means of the Supreme Court's rejection of the writ of unconstitutionality presented by the company, the judgment in favor of Compañía Souza Cruz S.A. was no longer appealable.

32. In the case, after analyzing the concepts of property with regards to Article 21 (2) of the Convention, "[N]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law," it must be pointed out that from the petition one does not derive that the petitioners, in this case the shareholders of Tabacalera Boquerón S.A., (since the company itself, as a legal entity, cannot be protected against human rights violations in the inter-American system) were victims of a violation of their right to property.

33. Therefore, the Commission is of the view that the conflict regarding the right to property regarding the brandname of cigarettes, between two companies with limited liability of a commercial nature, does not constitute, *prima facie*, a violation of Article 21 of the Convention, and consequently, there is no reason to impute international responsibility to the State of Paraguay.

V. CONCLUSIONS

34. The Commission concludes that the petition fulfills the formal admissibility requirements of Article 46 of the Convention.

35. Nevertheless, from the analysis of the documents submitted and from the petition, the Commission has declared the complaint presented against the Paraguayan State inadmissible *ratione personae* given the lack of jurisdiction of the Commission over the rights of legal entities and over operations or legal acts of a commercial nature. Article 47 (b) of the American Convention stipulates:

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

...

b. any of the requirements indicated in article 46 has not been met;

36. With regards to the Tabacalera Boquerón S.A. company, it cannot be a victim of a violation of the Convention within the inter-American system for the protection of human rights, given its legal nature. At the same time, regarding the shareholders of the company, it must be pointed out that all the legal actions undertaken with the aim of exhausting domestic remedies were carried out by the legal entity Tabacalera Boquerón S.A., and in the attached documents

there are no indications that any legal actions were taken in the paraguayan courts on behalf of the shareholders, thus not exhausting internal remedies on their behalf.

37. Given the aforementioned considerations of fact and law, the Commission has decided that the case is inadmissible *ratione personae* in accordance with Article 47 (b) of the Convention and Articles 31 and 41 of the Regulations of the Inter-American Commission on Human Rights; and decides to publish the present report in its Annual Report to the General Assembly of the OAS.