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International Law--Foreign Decree May Be Examined Under International Law (Banco Nacional De Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961)

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currence is enhanced when, as here, the two are used conjunctively, without clear distinction.

INTERNATIONAL LAW—FOREIGN DECREE MAY BE EXAMINED UNDER INTERNATIONAL LAW.—Farr, Whitlock & Co. contracted to purchase sugar from a wholly-owned Cuban corporate subsidiary of Compania Azucarera Vertientes-Camaguey [hereinafter referred to as C.A.V.], an American owned corporation incorporated in Cuba. Payment was to be made in New York upon the presentation of the necessary shipping documents. Before the loading of the sugar could be completed at the Cuban port of Jucaro, the Cuban government nationalized the property of C.A.V. In order to obtain the sugar, Farr, Whitlock & Co. subsequently entered into a new agreement with plaintiff's assignor, a government-owned corporation, containing the same terms as the original contract of sale. Thereafter, pursuant to Section 977-b of the New York Civil Practice Act,[1] the New York State Supreme Court appointed a temporary receiver for the New York assets of C.A.V., to whom Farr, Whitlock & Co. was directed to pay the proceeds of the sale. Plaintiff, a financial agent of the Cuban government, basing its claim upon the second agreement, sued in federal court to recover the sales proceeds either from Farr, Whitlock & Co. or from the receiver. The District Court, in dismissing plaintiff's complaint, *held* it could refuse to enforce a foreign nationalization decree which was in violation of international law. *Banco Nacional De Cuba v. Sabbatino,* 193 F. Supp. 375 (S.D.N.Y. 1961).

Prior to the instant decision, it was a well-established principle that the courts of this country would refuse to question the validity of an act of a foreign sovereign having intraterritorial effect.[2]

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ingenuity to carry over the previous adequate review when a *substantially* identical question had been previously reviewed.

[1] This section provides for the appointment of a receiver to liquidate New York assets of a foreign corporation which has been dissolved, liquidated, nationalized or has ceased to do business by revocation or annulment of its organic law or by dissolution or otherwise.

[2] See RE, FOREIGN CONFISCATIONS 58 (1951). The "Act of State" doctrine, while precluding the courts of the forum from reviewing the legislative and executive acts of the foreign state, does not preclude the review of "judicial proceedings of a foreign court resulting in a judgment if enforcement is sought in the courts of the forum." *Id.* at 59. Although foreign judgments are usually enforced on the basis of comity, courts have refused to give effect to them where they were violative of the public policy of the forum. Moreover, "foreign judgments . . . have been

This principle, known as the "Act of State" doctrine, had its genesis in the immunity *ratione personae* [3] afforded the *person* of a foreign sovereign.[4] However, the decision of Lord Chancellor Cottenham in *Duke of Brunswick v. King of Hanover,*[5] in which he stated that "a foreign Sovereign, coming into this country, cannot be made responsible here for an *act* done in his sovereign character in his own country . . . ," [6] was influential in extending this principle to include the *act* of a foreign sovereign, eventually resulting in the immunity *ratione materiae.*[7] This principle was expanded into what is now known as the "Act of State" doctrine by Mr. Chief Justice Fuller in *Underhill v. Hernandez,*[8] wherein he stated that "every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." [9]

In reaching its decision in the present case, the District Court adhered to the *Underhill* decision only to the extent that it could not refuse to enforce the nationalization decree on the ground that it did not comply with the formal requisites imposed by Cuban law, nor on the ground that it was violative of the public policy of the forum. However, it did disturb the sacrosanct position which the "Act of State" doctrine had enjoyed since Mr. Chief Justice Fuller's decision in *Underhill,* by inquiring whether it could examine the validity of an act of a foreign sovereign under international law, a question apparently not previously passed upon by any American court.[10] Finding support in the approval of

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challenged even in United States courts on the ground of fraud, fairness of procedure, existence of jurisdiction; and have also been denied conclusive effect when there has been a lack of reciprocity." Zander, *The Act of State Doctrine,* 53 AM. J. INT'L L. 826, 833-34 (1959).

[3] "By reason of the person concerned; from the character of the person." BLACK, LAW DICTIONARY (4th ed. 1951).

[4] See RE, *op. cit. supra* note 2, at 21.

[5] 2 H.L.C. 1, 9 Eng. Rep. 993 (1848).

[6] *Id.* at 17, 9 Eng. Rep. at 998. (Emphasis added.)

[7] "By reason of the matter involved; in consequence of, or from the notice of, the subject-matter." BLACK, LAW DICTIONARY (4th ed. 1951). See Mann, *Sacrosanctity of Foreign Act of State,* 59 L.Q. REV. 42, 48 (1943).

[8] 168 U.S. 250 (1897).

[9] *Id.* at 252. Since in both *Duke of Brunswick* and *Underhill* the defendants were representatives of a foreign government, it is possible that these cases could have been decided by relying solely on the doctrine of sovereign immunity. Therefore, the statement relating to the "acts of government" would seem to be dicta.

[10] Banco Nacional De Cuba v. Sabbatino, 193 F. Supp. 375, 379-80 (S.D.N.Y. 1961). *But see* Pons v. Republic of Cuba (D.C. Cir. July 27, 1961) in 146 N.Y.L.J., Oct. 13, 1961, p. 1, col. 1-2. There, Cuba sought an injunction and accounting from Pons, who, as a Cuban agent, held property

such action by legal commentators and text writers,[11] and in the willingness of foreign forums [12] to make similar examinations, the Court held that it could examine the validity of the Cuban act under international law.

In so doing, the Court determined that the expropriation of C.A.V.'s property was in retaliation for acts by the United States Government and that the use of such property was not reasonably related to a public purpose.[13] It further found that the nationalization decree was discriminatory since it classified United States nationals separately from all other nationals without any reasonable basis for such classification. Moreover, the Court pointed out that although the law pursuant to which the decree was adopted provided for compensation to be paid in Cuban government bonds, the condition placed on the payment of interest on the bonds, as well as the uncertainty of payment at maturity, rendered the bonds unmarketable and valueless. On the basis of these findings, the Court held the nationalization to be a patent violation of international law and refused to enforce it.[14]

It is not clear whether or not the "Act of State" doctrine can properly be regarded as a rule of international law.[15] If it were a rule of international law, the District Court in the present case, by questioning the validity of the Cuban nationalization, would itself be violating international law. However, it is generally felt that the doctrine is not a rule of international law, its application being limited solely to Anglo-American and Dutch

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of that country. Pons counterclaimed for the value of property in Cuba allegedly taken from him by the Cuban government without compensation. The court, applying the "Act of State" doctrine, refused to examine the validity of the Cuban act. In an interesting dissent, however, Judge Burger, pointing out the extraordinary equitable relief sought by Cuba, felt that we should not "carry the act of state doctrine to the point where we permit a foreign state to come into our courts as a suitor and secure equitable relief on a better or different terms than those available to an American litigant in the same courts." *Ibid.*

[11] Banco Nacional De Cuba v. Sabbatino, *supra* note 10, at 380 n.6.

[12] *Id.* at n.7.

[13] See Mann, *Outlines of a History of Expropriation,* 75 L.Q. REV. 188, 208-09 (1959), wherein the author states: "[M]ore than forty-five written constitutions . . . make it clear that property cannot be taken except for public purposes and against payment of compensation. . . ." See also Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., [1955] Int'l L. Rep. 23 (Italy): "[T]he Italian courts must refuse to apply in Italy any foreign Law which decrees an expropriation, not for reasons of public interest but for purely political, persecutory, discriminatory, racial and confiscatory motives." *Id.* at 42.

[14] Banco Nacional De Cuba v. Sabbatino, *supra* note 10, at 385-86.

[15] See 1 OPPENHEIM, INTERNATIONAL LAW 267 (8th ed. Lauterpacht 1955).

courts.[16] Moreover, no international tribunal has ever adopted it, nor is there evidence of any diplomatic protest against a judicial decision which has failed to adhere to it.[17] Therefore, it is probable that, as pointed out by the Court, the "Act of State" doctrine is "a rule of self-imposed restraint . . . [probably based on] a wise recognition of and respect for the sovereignty of each state within its own territory. . . ." [18]

The Court's examination into the validity of the confiscation under international law could conceivably be upheld on the following rationale. International law is, in the United States, part of the law of the land.[19] As such, not only treaties which are declared to be the supreme law of the land by virtue of the Constitution,[20] but also customary international law which has received the assent of the United States, are binding upon American courts even to the extent of overruling previous municipal law.[21]

In view of this, our courts should be free to determine when an act of a foreign sovereign is illegal under international law standards, and upon that determination refuse to enforce it. Since our courts are bound to apply international law, it would not be a breach of international law to refuse to give effect to an internationally illegal act. Therefore, the instant decision is at least prima facie valid.

Formerly, when the property of an individual had been confiscated, his remedies were either to seek redress in the courts of the confiscating country [22] or to resort to diplomatic channels. In some instances, the consistent application of the "Act of State" doctrine has led to unjust and inequitable results [23] where

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[16] See Zander, *The Act of State Doctrine,* 53 AM. J. INT'L L. 826, 844 (1959).

[17] See Mann, *International Delinquencies Before Municipal Courts,* 70 L.Q. REV. 181, 198 (1954).

[18] Banco Nacional De Cuba v. Sabbatino, *supra* note 10, at 381.

[19] See OPPENHEIM, *op. cit. supra* note 15, at 41.

[20] U.S. CONST. art. VI.

[21] See OPPENHEIM, *op. cit. supra* note 15, at 41-42.

[22] Resort to the courts of the confiscating state would be particularly futile in the instant case since it appears that the established courts of Cuba have been abolished. See affidavit of Dr. Elio Rena Alvarez (former judge of the highest court in the Province of Havana, Cuba) to the effect "that there is in truth and fact no laws [*sic*] in open courts, no forums for judicial determination, no right of litigation or no constitutional guarantees presently existing on the island of Cuba. . . ." Brief for the Cuban-American Sugar Company and Cuban American Sugar Mills Company as Amicus Curiae, appendix I, p. 3, Banco Nacional De Cuba v. Sabbatino, *appeal docketed,* No. 26986, 2d Cir., September 27, 1961.

[23] See RE, FOREIGN CONFISCATIONS 170 (1951). See also Bernstein v. Van Heyghen Freres S.A., 163 F.2d 246 (2d Cir.), *cert. denied,* 332 U.S. 772 (1947), wherein the court refused to examine the validity of an allegedly anti-Jewish confiscation by Nazi officials. The court indicated, however, that

these two remedies were involved. However, by virtue of the instant Court's decision, it ostensibly appears that an injured party has been given a third remedy in the area of foreign confiscations—resort to the courts of the forum. But it must be borne in mind that a municipal court's decree has no extraterritorial effect. Thus, the remedy offered is only a partial one since, while the court has the power to award the property within its jurisdiction to the true owner, no such power exists as to property located outside its jurisdiction.

But while the District Court's decision apparently gives the injured party a more direct remedy, albeit only a partial one, it may have caused more problems than it has solved. The examination of the validity of an act of a foreign government under international law would impose upon the courts an added burden, not only by increasing the volume of cases to be adjudicated, but also by requiring courts to have a greater knowledge of the rules of international law. Furthermore, there is the additional problem that international law does not enjoy a uniform interpretation in every country.[24]

Inquiry into the validity of an act of a foreign government under international law could also lead to the possibility of the judiciary embarrassing the executive in the conduct of foreign relations. Since this function is committed by the Constitution to the political departments of the federal government,[25] the courts cannot make foreign policy. However, by questioning the act of a foreign sovereign, the courts could jeopardize the government's position in the field of foreign affairs.[26]

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if the executive branch were to give it permission to exercise jurisdiction, it might do so. *Id.* at 251.

[24] See Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 AM. J. INT'L L. 141, 146-48 (1960). A recent example of this problem arose in the nationalization of the Anglo-Iranian Oil Company's oil field by the government of Iran. In Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary), [1953] 1 Weekly L.R. 246 (Aden), one of the most noted cases arising out of that act, the Supreme Court of Aden, departing from the traditional *Underhill* rule, examined the validity of the nationalization and, finding it confiscatory, held it to be in violation of international law. In two similar cases (Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., [1955] Int'l L. Rep. 23 (Italy); Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, [1953] Int'l L. Rep. 305 (Japan)) which arose out of the same incident, the courts of other countries found the decree was not confiscatory. It is obvious that the confusion resulting from decisions such as these could have a serious adverse effect on international trade.

[25] See United States v. Belmont, 301 U.S. 324 (1937).

[26] As pointed out by the Court, this possibility does not arise in the present case since the State Department has expressed its view as to the invalidity of the nationalization decree. See 43 DEP'T STATE BULL. 171 (1960). But the question remains, what are the courts to do when the

The weight of authority seems clearly against inquiring into the validity of a foreign decree when its effect is intraterritorial. However, the Court in the instant case chose to depart from this view. As a practical matter, the wisdom of the instant decision is doubtful in view of the problems to which it gives rise.[27]

LABOR LAW — APPORTIONMENT OF COLLECTIVE BARGAINING COSTS—NO AUTHORIZATION OF UNION'S POLITICAL SPENDING OVER MEMBER'S OBJECTION. — Nonunion employees filed to enjoin the enforcement of a union-shop contract entered into by appellant union and the employer railroad under Section 2, Eleventh of the Railway Labor Act.[1] Union-shop agreements provide for union membership as a condition to continued employment. The employees alleged that since the union policy was to spend a substantial portion of the dues collected for political causes which they opposed, so much of the Railway Labor Act as authorized union shops was violative of first amendment freedoms regarding association and belief. The Supreme Court of Georgia sustained this contention and the union appealed. Refusing to consider the constitutional question, the United States Supreme Court *held* that the sole purpose of section 2, Eleventh was to apportion collective bargaining costs among all the benefiting employees, and since political spending is not an element of collective bargaining, dues collected cannot be spent for political causes over the objection of a member. *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

According to the union-shop provision of section 2, Eleventh a union and employer are permitted to agree, notwithstanding state "right to work" laws, that union membership be a condition of continued employment, provided that the nonpayment of periodic dues, initiation fees and assessments shall be the only reason for refusing or revoking membership.[2]

The constitutionality of such agreements was first tested in *Railway Employes' Dep't v. Hanson*,[3] which involved an action

executive has not indicated its position on a certain matter or if it were to change its view regarding a particular situation?

[27] Notice of Appeal has been filed in the instant case and it is to be argued before the United States Court of Appeals for the Second Circuit during the current term.

[1] Railway Labor Act § 2, Eleventh, 64 Stat. 1238 (1951), 45 U.S.C. § 152, Eleventh (1958).

[2] *Ibid.*

[3] 351 U.S. 225 (1956).