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DISCUSSION OF RECENT DECISIONS

INTERNATIONAL LAW—DOMESTIC EFFECTS OF FOREIGN ACTS AND LAWS—WHETHER THE ACT OF STATE DOCTRINE SHOULD BE APPLIED TO FOREIGN ACTS WHICH VIOLATE INTERNATIONAL LAW—The United States Supreme Court in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 84 Sup. Ct. 923 (1964), recently considered the question of whether the Act of State doctrine[1] precluded the courts of this country from inquiring into the validity of a

1 The Act of State doctrine, briefly stated, provides that the courts of the United States will not inquire into the validity of the acts of a foreign government performed within its own territory. Underhill v. Hernandez, 168 U.S. 250, 18 Sup. Ct. 83 (1897).

Cuban expropriation decree which was alleged to be in violation of international law.

In the *Sabbatino* case, the respondent, Farr, Whitlock and Company, American commodity brokers, had contracted to purchase a quantity of sugar from a Cuban corporation, Compania Azucarera Vertientes-Camaguey de Cuba (C.A.V.). It was agreed that Farr, Whitlock would pay for the sugar in New York upon presentation of the shipping documents and a sight draft. Prior to shipment of the sugar from Cuba, the President of the United States acted to reduce the Cuban sugar quota.[2] The Cuban government retaliated by ordering the forced expropriation of property or enterprises in which American nationals had an interest, including the properties of C.A.V., whose capital stock was principally owned by United States residents. The sugar, which had previously been placed aboard ship, was seized by the Cuban government, and permission to allow its shipment under the contract between Farr, Whitlock and C.A.V. was denied.

In order to obtain delivery of the sugar, Farr, Whitlock entered into new contracts with Banco Exterio de Cuba, an instrumentality of the Cuban government. After the sugar was delivered, petitioner, an assignee of Banco Exterio, presented the bills of lading and sought payment from Farr, Whitlock. Farr, Whitlock refused to make payment, having received notification that C.A.V. was also claiming to be the rightful owner and entitled to payment for the sugar.

Petitioner, Banco Nacional then brought suit against Farr, Whitlock in Federal District Court.[3] Alleging conversion, it sought to recover payment for the sugar. Farr, Whitlock, in answer to the complaint, stated that the expropriation decree violated international law and therefore petitioner's title to the sugar was invalid. Petitioner replied that the Act of State doctrine precluded the courts of this country from passing on the validity of the Cuban decree. The District Court held that the Cuban expropriation decree was violative of international law in three respects: it was retaliatory and not for a public purpose; it was discriminatory; and it did not provide adequate compensation. While recognizing the existence of the Act of State doctrine, the court held that the doctrine was not applicable to foreign acts which are clearly in violation of international law. Summary judgment was therefore granted against petitioner.

The Court of Appeals affirmed[4] and the United States Supreme Court, after granting certiorari,[5] reversed, holding that the Act of State doctrine is applicable to foreign acts of state even if they violate international law.[6]

2 Exec. Order No. 3355, 25 Fed. Reg. 6414 (1960).
3 Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961).
4 Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962).
5 Banco Nacional de Cuba v. Sabbatino, 372 U.S. 905, 83 Sup. Ct. 717 (1963).
6 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 Sup. Ct. 923 (1964).

The majority opinion, delivered by Mr. Justice Harlan, stated that " . . . [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, . . . even if the complaint alleges that the taking violates customary international law."[7]

In reaching its decision, the Court relied principally on three prior decision: *Underhill v. Hernandez;*[8] *Oetjen v. Central Leather Co.;*[9] and *Ricaud v. American Metal Co.*[10] In the *Underhill* case, an American citizen sued for damages claiming that he had been assaulted by Hernandez, a military commander in a revolutionary Venezuelan government. Since the United States had recognized the revolutionary government prior to the suit, the Court, applying the traditional version of the Act of State doctrine, refused to inquire into the acts of Hernandez, stating 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."[11]

The principles established in the *Underhill* case were extended in the *Oetjen* case to include foreign confiscatory acts. It was found that General Villa, conducting military operations in Mexico under the Carranza government, had confiscated a quantity of hides from a Mexican citizen. The hides were subsequently sold to a Texas corporation and became the subject matter of a replevin action brought by an assignee of the original owner. The Court, noting that the Carranza government had been recognized by this country at the time of the confiscation, refused to examine the validity of the confiscations, and stated: "To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."[12]

The facts in the *Ricaud* case were similar to those in *Oetjen,* except that the property confiscated belonged to a United States citizen. The Court, relying on the principles established by *Underhill* and *Oetjen,* refused to inquire into the seizure.

Relying on these three prior cases, the majority opinion in *Sabbatino* stressed the fact that international law neither requires the Act of State doctrine nor does it forbid the doctrine's application. The Court reasoned

7 *Id.* at 428, 84 Sup. Ct. at 940.

8 168 U.S. 250, 18 Sup. Ct. 83 (1897).

9 246 U.S. 297, 38 Sup. Ct. 309 (1918).

10 246 U.S. 304, 38 Sup. Ct. 312 (1918). For other cases developing and applying the Act of State doctrine, see: United States v. Belmont, 301 U.S. 324, 57 Sup. Ct. 758 (1936); American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 Sup. Ct. 511 (1908); Hudson v. Guestier, 4 Cranch 293, 2 L. Ed. 625 (1808); Ware v. Hylton, 3 Dall. 199, 1 L. Ed. 568 (1796); Blad v. Bamfield, 3 Swans. 604, 36 Eng. Rep. 992 (1674).

11 Underhill v. Hernandez, 168 U.S. 250, 252, 18 Sup. Ct. 83, 84 (1897).

12 Oetjen v. American Metal Co., 246 U.S. 297, 303, 38 Sup. Ct. 309, 311 (1918).

that the doctrine arises not as an express constitutional requirement, but rather from a recognition that the conduct of foreign relations, in a system of separation of powers, is primarily committed to the Executive branch of the government, and that inquiries into the validity of foreign acts of state might either embarrass the executive branch or conflict with its aims. Addressing itself to this point the Court said:

> If the Executive Branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law would greatly strengthen the bargaining hand of the other State with consequent detriment to American interests . . . . Considerably more serious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary.[13]

The majority opinion also stressed the availability of diplomatic channels as a means of obtaining relief when acts of a foreign sovereign are questioned. The Court felt that the variety of means available to the Executive to persuade or coerce fair treatment for American nationals causes the effect of judicial invalidation of expropriative acts to dwindle in comparison.

It was also urged that the Act of State doctrine should be applied to violations of international law only at the insistence of the Executive. The Court rejected this contention, reasoning that often the Executive branch does not wish to take an official position, particulary at a time which would be inopportune diplomatically. In addition, the Court pointed out that, "It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive . . . ."[14]

Mr. Justice White, who delivered the only dissenting opinion, observed that under the rules advanced by the majority, the courts would be placed in the unenviable position of being powerless to question acts which are clearly in violation of international law and yet likewise powerless to refuse to pass on the issues in claims founded on those acts. He reasoned that,

> International law . . . provides an ascertainable standard for adjudicating the validity of foreign acts and courts are competent to apply this body of law, notwithstanding that there may be some cases where comity dictates giving effect to the foreign act because it is not clearly condemned under generally accepted principles of international law.[15]

[13] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432, 84 Sup. Ct. 923, 942 (1964).

[14] *Id.* at 436, 84 Sup. Ct. at 944.

[15] *Id.* at 461, 84 Sup. Ct. at 958.

The position taken by the majority in this case is that the Act of State doctrine is a necessary corollary to the recognized authority of the Executive to direct foreign relations, and that all foreign acts, even those in violation of international law, shall be shielded from inquiry out of deference to or fear of conflict with the Executive. This position may be further justified on the grounds that domestic courts possess only limited ability to examine acts which take place in foreign territories. In addition, the difficulties of enforcement and the natural tendency of domestic courts to formulate universal principles of international law, which may be no more than expressions of national foreign policy,[16] lend support to the majority's holding.

On the other hand, the Court should avoid the mechanical extension of a rule which deprives the Court of its power to adjudicate issues on their merits and to administer justice to litigants properly before it.[17] The decision reached by the majority in the *Sabbatino* case will prevent the courts of the United States from passing on the validity of foreign acts regardless of how flagrantly international law has been violated and regardless of whether any conflict with or embarrassment of the Executive would actually result. A litigant contesting the validity of a foreign act will be left to the rather complex and often illusory methods of obtaining relief through diplomatic channels.

Article III, § 2 of the United States Constitution states that, "The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Clearly, controversies of the type here under discussion are within the judicial power. In addition, since international law is part of the law administered by the courts of the United States,[18] it is submitted that the Supreme Court has not only the power, but the duty, to dispose of cases properly brought before it, including those involving foreign acts which violate international law. While a policy which promotes uniformity and cooperation between the judicial and political branches in the area of foreign affairs is to be favored, it seems that such a policy should not be extended where it results in substantial injustice to one of the litigants.[19] These principles have been clearly summarized by Story:

16 Comment, 62 Colum. L. Rev. 1278, 1310 (1962); Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 16 Rutgers L. Rev. 1 (1961).

17 ". . . [T]here is no reason for the courts to abdicate their function . . . in those cases in which there is at stake no matter of international law substantially affecting the national interest." Franck, *The Courts, the State Department and National Policy: A Criterion for Judicial Abdication*, 44 Minn. L. Rev. 1112, 1123 (1960). See also Mann, *The Sacrosanctity of the Foreign Act of State*, 59 L.Q. Rev. 42 (1943).

18 The Paquete Habana, 175 U.S. 677, 20 Sup. Ct. 290 (1900).

19 "By a consistent use of the principles of private international law, a proper deference to the clearly expressed policies of the Executive, and by an intelligent use of judicial discretion, it should be possible to recognize and give effect to all such foreign

> And, certainly, there can be no pretence to say, that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or when their moral character is questionable or their provisions are impolitic or unjust.[20]

The decision reached by the majority, extending the Act of State doctrine to foreign acts which violate international law, is another step towards defining the role of domestic courts in the areas of foreign relations and international law.

T. F. LYSAUGHT

WITNESSES—ATTORNEY-CLIENT PRIVILEGE—INSURED'S STATEMENT TO INSURER REMAINS PRIVILEGED ALTHOUGH TRANSMITTED TO ATTORNEY DEFENDING INSURED ON CRIMINAL CHARGE—In *People v. Ryan,* 30 Ill. 2d 456, 197 N.E.2d 15 (1964), the Illinois Supreme Court was confronted with the questions of (1) whether an insured's written statement given to her liability insurance carrier's investigator regarding the details of an accident she was involved in was within the attorney-client privilege, and (2) whether the transmittal of such statement, with her consent, to the attorney defending her on a criminal charge arising out of the same accident was a voluntary waiver of the privilege, thereby subjecting the statement to discovery by the prosecutor. On appeal, the Illinois Supreme Court reversed the Appellate Court[1] for the Third District and held that the insured's statement given to her insurer was within the attorney-client privilege and not subject to discovery by the State, while in control of the insurer, or even after transmittal, with the insured's consent, to her attorney for use in defending her in a criminal proceeding.

On February 18, 1961, Della Emberton was involved in an automobile-truck collision resulting in the death of two persons. At the time of the accident, Mrs. Emberton carried a public liability insurance policy, whereby her insurance carrier agreed to defend and pay all claims for personal

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acts of state which do not conflict with the fundamental concepts of justice and morality prevailing in the international community." Zander, *The Act of State Doctrine,* 53 Am. J. Int'l L. 826, 852 (1959).

20 Story, Conflict of Laws § 33 (3d ed. 1846).

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1 The Appellate Court said that the insured's statement would be privileged while in the insurance carrier's hands or if transmitted to the attorney of its choice in defending the insured. However, the court held that the privilege was waived when transmitted to Ryan for use in defending Della Emberton against the criminal charge, a use entirely different from that which the statement was originally intended. Ryan was considered to be a mere third party to whom a privileged communication was revealed with consent of the person entitled to assert the privilege (the insured), thereby waiving the privilege. People v. Ryan, 40 Ill. App. 2d 352, 189 N.E.2d 763 (3d Dist. 1963).