Case Comments

International Law Cases in National Courts

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Applicability of Hickenlooper Amendment

The United States Court of Appeals for the Second Circuit recently held in *Banco Nacional de Cuba v. The First National City Bank of New York* (N.Y.L.J. 8/25/70, p.1) that the Hickenlooper Amendment to the Foreign Assistance Act of 1964[1] applied only to expropriated property marketed in the United States or proceeds thereof.

The case arose as a result of a 1958 transaction under which First National City made a loan to a corporate agency of the government of the Republic of Cuba in the amount of $15,000,000, which was secured by collateral held in New York.[2] Following the seizure of control by the Castro forces on January 1, 1959, First National City renewed the loan and Banco Nacional succeeded to rights and obligations of the loan pursuant to a law of the Castro government. The loan was renegotiated in 1960 and Banco Nacional repaid one-third thereof, leaving a principal amount outstanding of $10,000,000.

In September 1960 the Cuban Government seized all branch offices of

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[1]22 USC § 2370 (e) (2), as amended 79 Stat. 658-59 (September 6, 1965): "(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right of property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of compensation and the other standards set out in this subsection. . . . "

[2]The collateral consisted of United States government bonds and obligations of the International Bank for Reconstruction and Development.

First National City in Cuba without providing any compensation. Shortly thereafter First National City closed Banco Nacional's accounts and advised Banco Nacional that it had exercised its rights of lien and offset. It also sold the collateral held in New York as security on the loan, from which it received an amount substantially in excess of that required to discharge the principal and interest of the loan.

Banco Nacional brought an action in November 1960 to recover the excess received by First National City on the sale of the collateral held as security for the loan. In February 1961 it amended its complaint to set forth an additional cause of action for recovery of the deposits maintained by nationalized Cuban banks with First National City in New York.

Judge Bryan of the District Court granted summary judgment for First National City dismissing Banco Nacional's claim for the New York deposits of nationalized Cuban banks and denied summary judgment on the other cause of action, but only because there were triable issues as to the amount of First National City's offset. He held that First National City was entitled to set-off any amounts due it from the expropriation of its properties by the Cuban government against Banco Nacional's claim based on the sale of the loan collateral.

Banco Nacional appealed the decision as to both causes of action but pressed only that for the excess from the sale of collateral.

Judge Bryan based his decision on the Hickenlooper Amendment, which, "for all practical purposes," had legislatively reversed the decision of the United States Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Application of the act of state doctrine as sustained in that decision would forbid judicial scrutiny by the courts of one country of the validity of acts of the government of another, within its own territory. Judge Bryan held, however, that he was compelled by the Hickenlooper Amendment to disregard the act of state doctrine and to determine the validity of the confiscation under international law. Since it was a reprisal evincing discrimination against nationals of the United States and because no adequate compensation was provided, the court held that the expropriation did violate international law principles and that, therefore, First National City was entitled to that offset it claimed.

On appeal, the Court of Appeals for the Second Circuit reversed. Agreeing with the District Court that the *Sabbatino* decision, by itself, would call for the application of the act-of-state doctrine and, thus, rejection of First National City's claims, the Court examined the legislative history behind the Hickenlooper Amendment and reached a different conclusion from that of Judge Bryan:

"If one fact is clear from the legislative history, it is that this language [the

> Hickenlooper Amendment] was designed to be invoked by American firms in order to afford them 'a day in court'—and presumably a monetary recovery—when some other entity attempted to market the American firms' expropriated property and some aspect of such an attempted transaction took place in this country. We cannot believe that through the same language Congress intended to create a self-help seizure remedy for those few American firms fortunate enough to hold or have access to some assets of a foreign state at the time that state nationalized American property."

Furthermore, the Court of Appeals took the view that permitting an offset in this situation would run counter to another important Congressional policy, expressed in the system of claim submission and blocking of assets of the International Claims Settlement Act of 1949[3] and the Trading with the Enemy Act.[4] Under this system, claimants such as First National City are entitled to submit claims based on their expropriated property to the Foreign Claims Settlement Commission. Further, Congress and the Executive Branch have acted pursuant to the Trading with the Enemy Act to block all Cuban assets in the United States as of July 18, 1963.[5] If First National City were to be permitted an offset, both these policies would, according to the court, be frustrated with a resultant windfall to First National City since proceeds from the sale of the collateral, representing Cuban assets in this country, would not be blocked but would be retained directly by the bank. The opinion concludes that, although at present there is no statutory provision to this effect, should claims against the Cuban government eventually be paid by the use of vested Cuban assets, First National City would take a priority position at the expense of other claimants and it would receive a substantial portion of its claim directly through retention of assets which would never become part of the fund available to all claimants on a pro rata basis.

Exclusive Federal Jurisdiction Over Consuls Reaffirmed

A Michigan court in *Kita v. Matuszak,* 175 NW 2d 551 (Mich. Ct. App.—1970), recently held that state courts do not have subject matter jurisdiction over a counterclaim against a foreign consul.

The consul general of Poland had brought an action in a state court as attorney-in-fact for certain Polish nationals, alleging that defendant by fraud and deceit had caused to be probated the will of his sister naming

[3]Pub. L. 88-666, 78 Stat. 1110, amended Oct. 19, 1965; Pub. L. 89-262, sec. 1, 79 Stat. 988; Nov. 6, 1966; and Pub. L. 89-780, sec. 1, 80 Stat. 1365, 22 USC §§ 1643-1643k (1970 Supp.).

[4]50 USC A. App. § 5 (1970 Supp.); Proc. 3447, 27 F.R. 1085, 3 C.F.R., 1959-1963 Comp.

[5]*See* C.F.R. § 515, *et seq.*, 1970.

himself as sole legatee. Defendant counterclaimed for libel consisting of false charges of criminal activity. The lower court denied plaintiff's motion to strike the counterclaim for lack of subject-matter jurisdiction.

On appeal the Michigan Court of Appeals reversed, holding that 28 USC § 1351* granted exclusive jurisdiction to the Federal courts in all civil actions, including counterclaims, affecting foreign consuls and vice-consuls, with the exception of actions for divorce and alimony. In so doing, the Court distinguished cases holding that jurisdiction to sustain counterclaims exists, at least to the extent of any set-off, where actions are instituted by foreign governments, since the doctrine of sovereign immunity is deemed to have been waived by bringing the action. First, these cases did not involve such a jurisdictional statute as 28 USC § 1351 conferring exclusive jurisdiction on the Federal courts. Secondly, foreign consuls do not share the privileged immunity of foreign nations, sovereign states and ambassadors or other foreign ministers. Therefore, there is no "sovereign immunity" to be waived by bringing an action in a state court.

Instead, the immunity enjoyed by consuls is limited to actions based on acts committed by the consul within the scope of his official duties. Whether the particular act is within or without said scope is a question for the federal courts to answer, pursuant to 28 USC § 1351. Thus, the exemption of a consul from state jurisdiction, if it can be said to be a "privilege," is one of the United States government to keep within the federal court system those cases which might in any degree affect the foreign relations of the United States.

Since jurisdiction over the subject matter is an absolute requirement of a judicial proceeding, and since it cannot be conferred by consent, conduct or waiver, the Court concluded that the lower court had erred in denying plaintiff's motion to dismiss defendant's counterclaim for lack of subject matter jurisdiction.

Compulsion by Foreign Government Held Complete Defense to Antitrust Action

It was held by a federal district court in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D.C. Del.—1970), that compulsion by foreign governmental authorities to boycott an American corporation was a complete defense to an action under the United States antitrust laws based on boycott.

Plaintiff Interamerican, a Delaware corporation, incorporated in October

*The [Federal] district courts shall have original jurisdiction, exclusive of the courts of the States, of all actions and proceedings against consuls or vice-consuls of foreign states.

1959, planned to process low-cost Venezuelan crude oil in a bonded refinery in Bayonne, New Jersey, and to export products or sell them as ship's bunker in New York Harbor, thus avoiding United States import quota and tariff restrictions. In furtherance of this plan, Interamerican rented and substantially modified a Bayonne refinery to meet its expected needs. It also arranged to receive shipment of Venezuelan crude oil from defendant-suppliers Monven and Texaco (formerly Supven), through the efforts of defendant Amoco as trader.

After Interamerican had received three shipments pursuant to contracts consummated under this arrangement, it was informed by Amoco that, because the Venezuelan government had forbidden further sales, direct or indirect, to Interamerican, Amoco was unable to obtain oil from its suppliers and therefore could make no further shipments. Amoco tried, without success, to secure other suppliers of suitable crude oil, and Interamerican attempted by various means to obtain Venezuelan crude oil from other sources, but all suppliers refused to sell without the explicit permission of the Venezuelan government. Finally, after obtaining one more cargo of oil from Supven, Interamerican was forced to terminate its operations.

Interamerican commenced a treble damage action against suppliers Monven and Supven, trader Amoco, and Monsanto as responsible for the conduct of its subsidiary Monven, alleging a conspiracy to destroy Interamerican's potentially profitable business and asserting that defendants' refusals to deal with it established a violation of the antitrust laws. Defendants did not deny either the refusals to deal or the fact of damage, but based their defense on the fact that the Venezuelan government forbade them to deal with Interamerican.

Before discussing the merits of the case, the court examined in some detail its factual background in three respects: (1) the rather unhappy relationship between two of Interamerican's chief stockholders and the Venezuelan government; (2) the control exercised by the Venezuelan government over foreign oil concerns doing business there; and (3) Interamerican's peculiar situation in the oil industry in that it could transact its business without regard to import quotas or tariffs so long as it sold only for export or in New York Harbor, and, therefore, would sell at prices lower than other companies subject to the tariffs and import quotas and would sell entirely to foreign markets, both of which factors concerned the Venezuelan government. The Court also alluded to the angry reaction of Venezuelan authorities in the press during the initial stages of Interamerican's arrangement with defendants in 1960, as well as negotiations between Venezuelan government representatives and Interamerican's representatives during the same period.

The Court concluded that defendants were compelled by the regulatory authorities of Venezuela to boycott plaintiff and that such compulsion was a complete defense to plaintiff's action under the antitrust laws based on that boycott. Therefore, defendants' motion for summary judgment was granted.

In coming to this conclusion, the court examined the law of compulsion. There can be no dispute, it noted, that sovereignty includes the right to regulate commerce within a nation and, when a nation compels a certain trade practice, firms there have no choice but to obey. "Acts of business become effectively acts of the sovereign." (307 F. Supp. at 1298). The Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns, but rather of those committed by persons and corporations. Furthermore, anti-competitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce. Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business.

In addition, the Court rejected paintiff's argument that, even if compulsion were a good defense, the acts of compulsion must be valid under Venezuelan law. It held that the act of state doctrine, "based upon proper concepts of sovereignty and separation of powers, commands that conduct of foreign policy reside exclusively in the executive." (307 F. Supp. at 1299). Therefore, whether or not Venezuelan officials acted within their authority and by legitimate procedures was not relevant to the matter at hand.[1]

The Court further concluded that the facts indicated that this was a proper case for summary judgment. Once governmental compulsion was shown, and there was no evidence that said compulsion was sought or induced by defendants, further examination was neither necessary nor proper. Indeed, the effective demonstration of compulsion precluded an inference of illegal conduct. When defendants explained their refusals to sell with uncontradicted evidence of a legal excuse (compulsion), the burden fell upon plaintiff to demonstrate issues of fact with respect to the

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[1]In connection with the act-of-state question, the court rejected plaintiff's attempt to limit the case of Banco Nacional de Cuba v. Sabbatino, 376 US 398 (1964), to expropriation decrees.

explantions. Since no such issue was present on the record, the case was a proper one for granting summary judgment to defendants.

Cuban Assets Control Regulations Upheld

In the case of *Nielsen v. Secretary of the Treasury,* 424 F2d 833 (CA D.C.—1970), the Court of Appeals for the District of Columbia held that the Secretary of the Treasury had the authority to block United States assets of Cuban corporations under the Cuban Assets Control Regulations.

Appellants were Cuban refugees who owned 750 of the 1,000 outstanding shares of Acueducto Yateritas, S.A. ("Yateritas"), a Cuban corporation which supplied water to the United States naval base at Guantanamo Bay until February 6, 1964. Though appellants had left Cuba in September of 1960 and lived in other places in the Western Hemisphere, Yateritas continued to supply Guantanamo with water until its property was seized and shut down by the Castro government on February 6, 1964. Following a settlement agreement of past claims between Yateritas and the United States Navy on October 22, 1965, monies were deposited in the account of the corporation in a New York bank, which account was then blocked pursuant to the Cuban Assets Control Regulations. An application by Yateritas for a license from the Secretary of the Treasury to withdraw the funds deposited in its New York account was denied and, thereafter, separate license applications filed by each appellant in his capacity as shareholder of Yateritas were also denied by the Federal Reserve Bank in New York. Consequently, appellants brought this action seeking a judgment (1) directing the Treasury Department and agencies thereunder to license each of them to withdraw one-fourth of the balance in the corporation's New York bank account, and (2) declaring that the action of the Treasury Department and its related agencies was unconstitutional because it deprived them of property without due process of law.

The United States District Court for the District of Columbia dismissed the complaint and plaintiffs appealed to the Court of Appeals, which affirmed the decision of the District Court.

The Court of Appeals held, in the first place, that the blocking of the United States assets of Yateritas was in accordance with the Cuban Assets Control Regulations, promulgated under the Trading With the Enemy Act, as amended, which provides that, during a time of emergency, the President may prohibit the transfer of "any property in which any foreign country or a national thereof has an interest" if the property is "subject to the jurisdiction of the United States."[1] Since the United States has officially been in a state of emergency since 1950,[2] the Secretary of the Treasury validly invoked the statute when he issued the Cuban Assets Control Regulations in 1963, which applied the statute's prohibitions to transfers of property in which Cuba, as a designated country, or Cuban nationals have "any interest of any nature whatever, direct or indirect."[3] Since the unblocking provision in the Regulations was inapplicable because the property under consideration was owned by a Cuban corporation active since the 1963 effective date, the blocking of the assets of Yateritas in New York was held to be in accordance with the regulations duly authorized by statute.

The Court then dismissed appellants' arguments with regard to constitutionality. Though no standards are provided in the Trading With the Enemy Act as to which country shall be "designated" thereunder, the doctrine that a statute may not confer undue latitude in the President has minimal force in the area of foreign relations. Exective officials acted within the zone of their discretion when they concluded in 1963 that the attitudes and activities of Cuba were so inimical to the interest of the United States as to justify the prohibitions embodied in the Cuban Assets Control Regulations.

Appellants also argued that they were not "blocked" Cuban nationals and thus should be entitled to a proportionate share of the assets. The Court stated that, in the first place, the situation under consideration involved a blocking, rather than a vesting of assets. At such a point, the courts should give latitude to Congress, in terms of time and substantive determinations, to evolve a set of vesting provisions which it deems reasonable in the light of a broad overview of the relevant circumstances. Such circumstances might include the possible use of blocked assets to satisfy American claims against Cuba, as well as any Cuban national interest therein.

Furthermore, the Court noted that even if the government had unilaterally vested the assets involved, any claims of appellants based on illegality would encounter substantial problems, starting with the proposition that the government may be able to accept the country of incorporation as establishing the nationality of a corporation having assets within our borders without being required to pierce the corporate veil. In that case, the entity involved would be a Cuban corporation, rather than a group of non-Cuban shareholders.

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[1]50 U.S.C.A. App. § 5 (b).
[2]50 U.S.C.A. App. p. 9 (1950).
[3]31 C.F.R. § 515.201 (b)-(d) (1969).

Finally, with regard to the argument that the government had unconstitutionally discriminated against aliens, the Court alluded to "an historic enclave of the law" which established that a state or country may marshal local assets for the benefit of local creditors before claims of creditors outside the state or nation are realized. Pursuant to this principle, the Court concluded that alien stockholders have no constitutional objections to a preference given to American stockholders in the marshaling of American assets, at least where the following circumstances are present: (1) the preference is given in the context of a blocking program; (2) Congress has not yet spelled out its permanent program, even assuming for discussion that the blocking is a forerunner to vesting; and (3) recognition of the alien's constitutional right to participate on equal terms in American assets would convert the character of the liquidation from one that is partial and temporary to one that is absolute and permanent.