

A New Opinion on the Act-of-State Doctrine: A Case Note

Occidental Petroleum Corporation v. Buttes Gas & Oil Company, et al., decided by the United States District Court for the Central Division of California on March 17, 1971 (not reported at this writing), is of interest to international lawyers because of the Court's application of the act-of-state doctrine in an anti-trust proceeding involving activities of foreign governments.

The suit by Occidental and a wholly owned subsidiary was for treble damages under the Sherman Act, as the result of an alleged conspiracy to deprive them of a significant part of their offshore oil concession in the Persian Gulf, granted by the Trucial State of Umm al Qaywayn. It was charged that the defendants had induced foreign governments to extend adjacent territorial waters to prevent plaintiffs from drilling on their concession and to create a dispute regarding boundaries.

Plaintiffs claimed to have suffered one hundred million dollars in damages, and demanded three times this amount on the ground that the action complained or constituted an unlawful conspiracy under the Sherman Act in restraint of the foreign commerce of the United States. The Court dismissed the complaint on the authority of *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), holding that the act-of-state doctrine, applied by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), "bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant."

Shortly after Buttes had itself failed in its bid to obtain the concession granted to Occidental, Buttes obtained an offshore concession from the neighboring Trucial State of Sharjah. This included the island of Abu Musa located 38 miles off the coast of Sharjah. Plaintiffs alleged that, at the time that the Buttes concession was granted, Sharjah claimed territorial waters

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of no more than three miles, and that it was subsequently induced by Buttes to extend its claim to 12 miles for the purpose of appropriating a part of the Occidental concession where Occidental was preparing to drill on a promising prospect. It was also claimed that defendants had "induced and procured the National Iranian Oil Company to assert at this time that the island of Abu Musa was Iranian territory." Iran claimed territorial waters of 12 miles.

Although the British Government, which at the time exercised control over the foreign relations of the Trucial States, initially rejected the assertions of Sharjah that the Occidental concession encroached upon Sharjah territory, it later intervened to prevent Occidental from drilling in the disputed area. The plaintiffs claimed that their seagoing equipment "was boarded under force by the British Royal Navy" and that the home of the Ruler of Umm al Qaywayn was "buzzed by airplanes of the British Royal Air Force and surrounded by British soldiers." In these circumstances, the Ruler directed the plaintiffs not to drill in the area claimed to be within the territorial waters of Sharjah and Iran. Both Sharjah and Umm al Qaywayn agreed to refer their claims to a mediator appointed by the British Government.

All but one of Buttes' defenses were dismissed. The Court held that the complaint alleged sufficient effect on United States foreign commerce to provide subject-matter jurisdiction; that the case would not require "an explicit or implicit adjudication" of the rights of foreign States to the disputed area, a determination of foreign boundaries being a task which the Court could not pursue; that foreign States were not indispensable parties; that the charge of inducing and procuring executive acts by foreign governments was not beyond the subject-matter jurisdiction of the Court under *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); but that the Court was barred from adjudicating the claims by the act-of-state doctrine. As regards this last defense, the Court held that the doctrine did not deprive it of jurisdiction, but it did require a finding that the complaint failed to state a cause of action.

Although the plaintiffs argued that they did not complain of the acts of foreign States, but only of the defendants' conduct in "catalyzing" such acts, the Court pointed out that they had dubbed such States as "co-conspirators" and had thus questioned their conduct under the anti-trust laws. An inquiry into such conduct, the Court said, was surely barred by the act-of-state doctrine. The contention that several of Sharjah's acts were violative of international law was also barred by the doctrine, the Court said, adding "specifically by the *Sabbatino* decision."

Furthermore, because a private anti-trust claim requires proof of damage resulting from forbidden conduct, plaintiffs were asking the Court to "sit in judgment" upon the sovereign acts pleaded, whether or not the countries involved were considered co-conspirators. The plaintiffs would have to prove that Sharjah had issued a fraudulent territorial-waters decree, and that Iran had laid claim to the island of Abu Musa at the behest of the defendants. Although the plaintiffs insisted that they were ready to prove the former allegation by use of "internal documents," the Court pointed out that such inquiries into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act-of-state doctrine is aimed to avert.

The plaintiffs contended, however, that the doctrine had been "sapped of its vitality and rationale by the so-called 'Sabbatino Amendment.'" After pointing out that by its terms this amendment is "extremely narrow," and that in all other cases the act-of-state doctrine "remains the law of the land," the Court concluded that plaintiffs' assertion that the amendment "in effect pulled the rug out from under the act of state doctrine in all cases" was groundless. Moreover, the amendment applied only to a "confiscation or other taking," whereas the plaintiffs had only alleged an "attempted confiscation" in this case.

It is also of interest that the plaintiffs argued that Sharjah and Umm al Qaywayn could not qualify as States under the act-of-state doctrine because they had delegated to Great Britain ultimate authority over their foreign relations. Citing the *Zeiss* case (293 F.Supp. 892, *aff'd.*, 433 F.2d 686), the Court said that "application of act of state to the Trucial States would appear to follow a fortiori." Previously recognized as independent sovereigns by Great Britain, these States had ceded supervision of their foreign relations only by a series of treaties. Whatever their international status might be, "their degree of international personality is obviously greater than that, say, of Wuerttemberg." Nor was the Court's conclusion that the doctrine applies to the Trucial States disturbed, as regards Sharjah, by the assertion that some of the conduct of its Ruler was motivated by his own gain and benefit. The Court was satisfied that at all times he acted in his official capacity and on behalf of his State.

It does not appear from this interesting decision where the mediation of the boundary dispute now stands, or how Iran's claims are being met. Clearly the situation is a difficult one; but at least the activities of the governments concerned are beyond the reach of our anti-trust laws.