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International Law Cases in National Courts

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Case Comments

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A number of cases involving questions of international law have been decided recently by both federal and state courts.

Production of Evidence Located in Foreign Jurisdictions

The Case of *United States of America v. First National City Bank,* 396 F. 2d 897 (2d Cir. 1968), raises an issue that has become more important with the increase in foreign trade and the number of companies with branch offices abroad.

First National City Bank of New York refused to comply with a subpoena duces tecum to produce certain documents located at its office in Frankfurt, Germany in connection with a Federal Grand Jury investigation of alleged violations of the United States antitrust laws by two of its customers on the grounds that violation of bank secrecy could subject the bank to civil liability and economic loss under the laws of Germany. The court affirmed the lower court's decision holding the bank and the officer responsible for the refusal in contempt, and held that under international law a state which has jurisdiction to enforce a law is not precluded from exercising its jurisdiction solely because it requires a person to engage in conduct subjecting him to liability under the laws of another state which has jurisdiction with respect to that conduct. Since the court had in personam jurisdiction over the bank, it had the power to require the production of the documents located in Germany despite the potential civil liability. In reaching its decision the court, with the assistance of expert witnesses, carefully reviewed the so-called "bank secrecy law" of Germany, which, it was found, is not statutory but rather is in the nature of a privilege that may be waived by the customer but not the bank. Weighing the

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value placed upon this privilege under German public policy against the interest of the United States in the enforcement of its antitrust laws, and noting that neither the German government nor the Department of State had indicated that enforcement of the subpoena would violate German public policy or embarrass German–American relations, the court concluded that enforcement of the subpoena was warranted. It expressly refrained from grounding its ruling upon the fact that the bank would not risk criminal liability under German law by complying with the subpoena, stating:

> "But, the government urges vigorously, that to be excused from compliance with an order of a federal court, a witness, such as Citibank, must show that following compliance it will suffer criminal liability in the foreign country. We would be reluctant to hold, however, that the mere absence of criminal sanctions abroad necessarily mandates obedience to a subpoena. Such a rule would show scant respect for international comity; and, if this principle is valid, a court of one country should make an effort to minimize possible conflict between its orders and the law of a foreign state affected by its decision. Cf. Restatement, *supra*, § 39(2); Ings v. Ferguson, *supra*, 282 F.2d at 152. The vital national interests of a foreign nation, especially in matters relating to economic affairs, can be expressed in ways other than through the criminal law. For example, it could not be questioned that, insofar as a court of the United States is concerned, a statement or directive by the Bundesbank (the central bank of Germany) or some other organ of government, expresses the public policy of Germany and should be given appropriate weight. Equally important is the fact that a sharp dichotomy between criminal and civil penalties is an imprecise means of measuring the hardship for requiring compliance with a subpoena. In Application of Chase Manhattan Bank, *supra*, this Court affirmed the modification of a subpoena because strict obedience would have resulted in a violation of Panamanian law punishable by a fine of not more than 100 Balboas (equivalent to $100); we held that a violation was the equivalent of a misdemeanor under our criminal law. It would be a gross fiction to contend that if the Bundesbank were to revoke the license of Citibank for a violation of bank secrecy the impact would be less catastrophic than having to pay an insignificant fine because the revocation is theoretically not 'equivalent to a misdemeanor' or criminal sanction. We are not required to decide whether penalties must be under the 'criminal law' to provide a legally sufficient reason for noncompliance with a subpoena; but, it would seem unreal to let all hang on whether the label 'criminal' were attached to the sanction and to disregard all other factors. In any event, even were we to assume arguendo that in appropriate circumstances civil penalties or liabilities would suffice, we hold that Citibank has failed to provide an adequate justification for its disobedience of the subpoena." (396 F.2d at 901-902)

Forum Non Conveniens

In a death action against an airline company and the manufacturer of the plane involving plaintiffs' decedents who were killed in Peru on a flight that had originated in Brazil destined for California, an order conditionally dismissing the complaint on the ground of forum non conveniens was reversed and remitted to the lower court for reconsideration in the light of the facts referred to below. Varkonyi v. S.A. Varig,–N.Y. 2d–,–N.E. 2d–(1968)

The New York Court of Appeals held that, since the defendant foreign corporations were doing business in New York, there was no statutory prohibition against the maintenance of the action there; and that, while in general it is left to the discretion of the lower court to decide whether to accept a suit between nonresident parties on a cause of action having no nexus with this state, the lower court was in error when it failed to take into account such special circumstances as the unavailability elsewhere of a second forum in which the plaintiffs would be able to obtain effective redress. It was also pointed out that the plaintiffs from Europe, with limited means, would otherwise have to pursue their action against one defendant in North America and against the other defendant in South America, and that only in New York could both defendants be brought together.

An action by plaintiff, a resident and citizen of Colombia, to recover for personal injuries sustained by him in New York in 1966 while aboard a Panamanian ship was dismissed on motion on the ground of forum non conveniens. Hernandez v. Cali, Inc.,–Misc. 2d–,–N. Y.S. 2d (Sup. Ct. N.Y. Co. 1968) Most of the "contacts" of the case were in Panama, such as the contract of employment which vested jurisdiction over such action in Panamanian courts and whereby the defendant shipping company had agreed to accept process issued in any Panamanian action.

Act of State Doctrine–Hickenlooper Amendment

The act of state doctrine–left for moribund if not dead after the enactment of the Hickenlooper or Rule of Law amendment[1] to the Foreign Assistance Act of 1961–shows signs of continuing vitality in a four–to–three decision by the New York Court of Appeals which

[1] U.S. Code, Tit. 22, § 2370 (e)(2), 78 State. 1009, 1013 [1964] as amended 79 Stat. 653 (1965).

reverses the Appellate Division's finding [2] that certain action by an agency of the Cuban Government did not constitute an act of state. *French v. Banco Nacional de Cuba,*–N.Y. 2d–,–N.E. 2d–(1968)

In 1957 plaintiff's assignor, Alexander Ritter, an American, made a $345,000 investment in a Cuban farm at a time when Cuban legislation, as an inducement to foreign investors, authorized them to exchange the earnings from their investments for American dollars and exempted such earnings from Cuba's tax on exportation of money. After Fidel Castro had taken control of the Cuban Government, the Cuban Currency Stabilization Fund in July 1959 issued Decision No. 346, ostensibly an exchange control measure, which suspended the processing of certificates issued to investors under the earlier legislation. When Ritter tendered his certificates with 150,000 Cuban pesos for exchange, he was refused payment in U.S. dollars by the defendant bank on the basis of Decision No. 346.

On appeal from the Appellate Division's judgment against the defendant bank, the court held that in view of the State Department's failure to file a "suggestion of sovereign immunity" and its conclusion that the activities from which the present action arose were *jure gestionis,* of a commercial nature, the court denied the defendant bank's defense of sovereign immunity.

However, the court held that the act of state doctrine, as set out in the original *Sabbatino holding*[3], which prohibits courts in the United States from inquiring into the validity of the acts of a foreign government done within its own territory or into whether such acts were adopted in conformity with the internal procedures and requirements of the foreign state, was applicable. The majority judges concluded that the breach of contract in question resulted from and in a sense was in itself an act of state, and held that the court was barred from making further inquiry unless the Hickenlooper Amendment opened the way for it to do so.

The court found that the following wording from the Hickenlooper Amendment did not encompass the facts at hand:

> No court in the United States shall declin 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 to property* is asserted by any party

[2] See 2 THE INTERNATIONAL LAWYER 359 (Jan. 1968).

[3] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

> including a foreign state . . . *based upon* (or traced through) *a confiscation or other taking* . . . by an act of that state in violation of the principles of international law." [Emphasis supplied.

In the view of the majority judges, Ritter's loss was not due to any taking of property but to the breach of a promise upon which he had relied, and the language of the statute as well as its legislative history indicated that the Hickenlooper Amendment was not intended to apply to a breach of contract but was limited to situations, such as found in *Sabbatino*, where a claim of title or other right to specific property had been expropriated abroad. In other words, the majority felt that the primary objective of the legislation was to prevent the United States from becoming an international "thieves' market" for property of American nationals confiscated abroad.

Since under this construction the Hickenlooper Amendment was not applicable and the act of state doctrine was determinative, it was not necessary to consider whether the Cuban Government had offended principles of international law. Nevertheless, the court, adverting to currency regulation as practiced by communist and capitalist nations alike (including the United States), stated that the control of national currency and of foreign exchange is an essential governmental function and that Cuba had a legitimate right to protect its scarce foreign exchange reserves. Cuba's breach of its agreement to exchange Ritter's pesos for dollars, while deplorable, was not so unreasonable "as to outrage current international standards of governmental conduct." The court suggested that plaintiff would have to seek her remedies in this country through diplomatic efforts of the United States Government and through legislation by Congress for the protection of American interests in Cuba. A vigorous dissenting opinion written by Judge Keating and joined in by the other two minority judges, contended that a proper reading of the Hickenlooper amendment and of the Congressional intent leads to the conclusion that the facts under consideration were within its ambit. Consistently with this analysis of the amendment, the dissenting judges scrutinized Decision No. 346 to determine whether it was in fact a legitimate exercise of a sovereign nation's right to protect its international economic position or whether it was a disguised act of confiscation. Considered in relation to the entire matrix of economic regulations adopted by the Castro Government, the dissenting judges were persuaded that Decision No. 346 was simply a part of a scheme to purge all American ownership from the Cuban economy.

Internal Revenue Code—Act of State Doctrine

In Louisa B. Gunther Farcasanu, 50 T.C. No. 89 (Sept. 17, 1968), which provides a glimpse of life in Rumania during the post–World War II years, a United States taxpayer was disallowed a "theft" deduction under Sec. 165(c)(3) of the 1954 Internal Revenue Code by the Commissioner of Internal Revenue for her loss by confiscation of valuable art objects and other personal property left with friends in Rumania by the taxpayer after the death of her husband, the United States Minister to Rumania in 1941.

The taxpayer in 1956 filed a claim for $295,716 with the Foreign Claims Settlement Commission citing certain decrees enacted by the Communist Government in Rumania after 1945, one of which confiscated goods "without a master", *i.e.*, those goods of all kinds which had been abandoned for one year or more by their owner whether known or unknown. The Commission awarded the taxpayer $103,445, and she received a payment of $33,782, which represented her pro rata portion of the $22 million of Rumanian assets blocked by the United States at the outset of World War II.

The court, relying on *Sabbatino* and other decisions, rejected the taxpayer's argument that the seizure of her property was in violation of Rumanian law and thus constituted a "theft" deductible under Sec. 165(c)(3) of the Internal Revenue Code, and held that such confiscations were under color of decrees issued by the Government of Rumania and would not constitute a "theft" regardless of how arbitrary they might have been.

Status of Forces Agreement—Criminal Jurisdiction

The case of Smallwood v. Clifford, 286 F. Supp. 97 (D.D.C. 1968) reaffirms the international law principle that a sovereign state has exclusive jurisdiction to punish offenses committed within its territory, unless it expressly or impliedly consents to surrender its jurisdiction.

Petitioner Smallwood, a Specialist Fourth Class in the United States Army stationed in the Republic of Korea, was accused and indicted by Korean authorities of having murdered a Korean National and of arson while off post, and, pursuant to the 1966 Status of Forces Agreement[4], he was incarcerated by the United States Army pending disposition of the criminal charges in the Korean court. His petition for

[4] T.I.A.S. 6127.

a writ of habeas corpus alleged that he was being illegally detained and that the United States Army did not have the authority to release him to the Korean authorities. The thrust of petitioner's argument was that, if the Status of Forces Agreement was invalid, the 1950 Taejon Agreement[5] between the United States and Korea which had provided that the "United States courts-martial may exercise exclusive jurisdiction over members of the United States Military Establishment in Korea," remains in effect.

In response to petitioner's argument that the Status of Forces Agreement with Korea was not ratified by the United States Senate, and that the method of trial of servicemen abroad under the Uniform Code of Military Justice and the Constitution cannot be altered by Executive Agreement, the Court found that the Status of Forces Agreement with Korea constituted only a unilateral waiver by Korea of criminal jurisdiction in certain limited cases such as offenses solely involving United States citizens or property, or an event arising out of an act or omission done in the performance of official duty. Thus, the Status of Forces Agreement embodied the consent of the Korean Government to a diminished role in the enforcing of its territorial laws without any corresponding or reciprocal commitment on the part of the United States, and the court held that Senate ratification was not necessary for the Republic of Korea to unilaterally grant jurisdiction to which the United States otherwise would not have any rightful claim.

As to petitioner's argument that the Korean system of criminal justice is inherently violative of his due process rights under the Fourteenth Amendment, the Court said:

> "Furthermore, the petitioner fails to point out to the satisfaction of this court by what authority the United States may dictate to a sovereign nation the procedure to be followed by that nation in the exercise of its primary jurisdiction over alleged violators of its criminal laws. Under international law, the United States is without authority to infringe upon that jurisdiction. The Supreme Court in Girard [354 U.S. 524 (1957)] was surely aware that the due process safeguards of the Japanese courts differed from those of the courts of the United States, yet the Court did not look upon this as a fatal defect in determining that Japan had the power to try Girard. Realistically, the question resolves itself into a balancing of the national interest justifying the stationing of troops abroad against the possibility of any deprivation of constitutionally protected rights at the hands of foreign local law which does not conform to American standards. It is the determination of this

[5] T.I.A.S. 3012.

court that the national interest outweighs any other considerations. To argue that under the applicable rule of international law, visiting forces retain jurisdiction is to close one's eyes to the historical fact that this matter is no longer left up to the implications of law but is carefully expressed in agreements which are explicit qualifications of consent to station visiting forces." [286 F. Supp. at 101–102]