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Act of State Doctrine - Antitrust Law. Occidental Petroleum Corp. v. Buttes Gas & (and) Oil Co.

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CASE NOTES

ACT OF STATE DOCTRINE — Antitrust Law. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *cert. denied,* 409 U.S. 950 (1972).

With the recent denial of certiorari by the U.S. Supreme Court, *Occidental Petroleum v. Buttes Gas & Oil Co.*[1] can take its place among the growing number of cases to raise the act of state doctrine of judicial restraint.[2] In doing so, *Occidental* may signal the end of one of the basic premises in the analytical development of the act of state doctrine and foreshadow the merger of what has been two distinct lines of cases under the doctrine.

Analysis of *Occidental* must begin with the classification of its factual content as it relates to the two lines of cases, then follow with an inquiry into the different analytical bases for the doctrine itself.[3]

An action was brought by the Occidental Petroleum Corporation against Buttes Gas and Oil Company, Clayco Petroleum Corporation[4] and their respective officers, in a private antitrust suit for treble damages and an injunction.[5] The complaint alleged an intricate conspiracy to restrain trade and monopolize "the exploration, development and exploitation of petroleum reserves of the territorial waters of the Trucial States"[6] in the Persian Gulf.

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[1] 331 F. Supp. 92 (C.D. Ca. 1971), *cert. denied,* 409 U.S. 950 (1972).

[2] The act of state doctrine is a rule of judicial restraint applied by American courts since at least 1796, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 230 (1796), whereby courts have declined to act when having to examine the validity of a foreign act of state. *See generally,* RESTATEMENT OF FOREIGN RELATIONS, §§ 41-43 (1962).

[3] The case has inspired a number of insightful and probing comments. *See,* 65 AM. J. INT'L L. 815 (1971); 5 VAND. J. TRANSNAT'L L. 251 (1971); 7 TEXAS INT'L L. J. 247 (1972); 12 VA. J. INT'L L. 413 (1972); and 3 RUTGERS CAMDEN L. J. 544 (1972). Unfortunately, however, most comments have failed to develop a clear distinction between the various cases which have applied the doctrine, an exercise which is necessary in the understanding of *Occidentals* historical perspective and future significance.

[4] A motion to dismiss Clayco and its president, Clayman, was granted on three grounds of lack of personal jurisdiction, improper venue, and defective service of process. 331 F. Supp. at 95-98.

[5] Clayton Act, §§ 4, 16; 15 U.S.C. §§ 15-26, (1970).

[6] 331 F. Supp. at 95. The Trucial States consisted of several Sheikdoms along the Persian Gulf, some of which were rich in oil, deriving the name "Trucial" from truces imposed upon them by Great Britain 150 years ago. N.Y. Times, Dec. 1, 1971, at 13, col. 1. *See* in general H. ALBAHARNA, THE LEGAL STATUS OF THE ARABIAN GULF STATES (1968). Britain recognized the "sovereignty" of the Trucial States, but exercised "protecting power in matters of external affairs," E. LAUTERPACHT, BRITISH PRACTICE IN

In 1969, the plaintiff, Occidental, was granted a concession in the United States to explore and extract any oil underlying the territorial and off-shore waters of the Sheikdom of Umm al Qaywayn. Shortly thereafter, Buttes received a similar concession from the adjoining Trucial State of Sharjah. At the time of the concessions, the Sheikdom of Sharjah asserted sovereignty to the island of Abu Musa located about 38 miles off the coast of the mainland, and in a strategic position in the Strait of Hormutz which is the mouth of the Persian Gulf.[7] Occidental and Buttes worked in cooperation, exchanging information from seismic tests in their respective areas until March 1970. At that time Occidental's tests indicated the existence of large quantities of oil lying approximately nine miles off the island of Abu Musa, and within their alleged concession area. Upon this discovery, Occidental alleges that Buttes embarked on a plan to gain the concession in the oil-rich area for themselves. The alleged plan included the inducement of Sharjah to claim territorial waters of 12 miles off Abu Musa by means of back-dated decrees, inducing Iran to claim sovereignty over the island, and finally inducing Britain to coerce the Ruler of Umm al Qaywayn to suspend the concession granted Occidental.[8]

I. THE PARTY/NON-PARTY DISTINCTION

Upon examination there emerge essentially two distinct types of cases which have arisen under the act of state doctrine.[9] The first line can be called the "foreign-party" cases. In these, a foreign sovereign has been an actual party to the

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INTERNATIONAL LAW 109 (1965). In other words, England exclusively determined the foreign policy of the Sheikdoms. More recently six of the Sheikdoms, including the two concerned with this case, have formed the "Union of Arab Emirates" and are now independent, both domestically and internationally from Great Britain. N.Y. Times, Dec. 3, 1971, at 12, col. 3; *id.*, Jan. 25, 1972, at 6, col. 1. Now many indications exist that Iran is filling essentially the same role as Britain had before the British withdrawal from the Persian Gulf in December 1971.

[7] The strategic importance of the island is vividly demonstrated by the dramatic reaction of Iraq to the occupation by Iranian troops on November 30, 1971. *See* N.Y. Times, Dec. 1, 1971, at 13, col. 1; *id.*, Dec. 2, 1971, at 19, col. 1; *id.*, Dec. 3, 1971, at 12, col. 6; *id.*, Dec. 8, 1971, at 11, col. 1; *id.*, Jan. 1, 1972, at 2, col. 4.

[8] 331 F. Supp. at 99-101. On the later point, Occidental claims that the British Royal Air Force buzzed the home of the ruler by airplanes, surrounded his house and threatened to exile him. Previously, Occidental claimed that the Royal Navy had boarded its sea-going equipment under force.

[9] An alternative analysis would be to breakdown the cases according to their subject content (i.e. expropriation, antitrust, contracts, etc.) but since the crucial element in the doctrine involves *who* the actor is, the party breakdown seems more appropriate.

suit either as a plaintiff,[10] as a defendant being sued either directly or through an agent,[11] or as a party to litigation involving private rights affected by its acts.[12] The other cases fall into a "foreign-non-party" category where the state's acts are questioned only collaterally in litigation between private citizens.[13] Because the states involved in the charges are not joined in the action, *Occidental* falls into the latter category.[14] The merger of the legal-philosophical basis of the two lines of cases has been accomplished by the gradual destruction, completed by *Occidental*, of the analytical foundation of the "foreign-non-party" line of cases.

II. The Analytical Distinctions

As early as 1796 the roots of the American doctrine were developed in *Ware v. Hylton*.[15] In refusing to invalidate the confiscation of money owed a British citizen by Virginia during the Revolutionary War, the court invoked the principles of national sovereignty and international comity.[16]

These same principles were called into use 100 years later, in a case which virtually all commentators rely upon as the classic statement of the act of state doctrine, *Underhill v. Hernandez*.[17] That court declared that "[e]very 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." This is an example of the national sovereignty approach

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

[11] Frazier v. Foreign Bondholders Protective Council Inc., 283 App. Div. 44, 125 N.Y.S.2d 900 (1953).

[12] National Institute of Agrararian Reform v. Kane, 153 So. 2d 40 (Fla. App. 1963).

[13] Oetjen v. Central Leather, 246 U.S. 297 (1918).

[14] In Occidental the defendant argued that Great Britain, Iran, Sharjah and Umm al Qaywayn were all "indispensible parties" to the case and required to be joined under Rule 19 of the Federal Rules of Civil Procedure. In considering possible remedies and how they would affect the above parties, the court decided that they were not "indispnsible parties" and that the action could be pursued in their absence, 331 F. Supp. at 107.

[15] 3 U.S. (3 Dall.) 199 (1796).

[16] I shall conclude my observations on the right to confiscate any British property, by remarking, that the validity of such a law would not be questioned in the Court of Chancery of Great Britain: and I confess the doctrine seems strange to me in an American Court of Justice. In the case of Wright and Nutt, Lord Chancellor Thurlow declared, that he considered an act of the state of Georgia, passed in 1782, for the confiscation of real and personal estate of Sir JamesWright, and also his debts, as a law of an independent country; and concluded with the following observation, that the law of every country must be equally regarded in the courts of justice of Great Britain, whether the law was of a barbarious or civilized institution, or wise or foolish. 3 U.S. (3 Dall.) at 230.

[17] 168 U.S. 250, 252 (1897).

to the act of state.[18] Significantly, *Underhill* falls into the "foreign-party" group of cases in which the sovereign is a party to the suit through its agent who is being sued.[19] Though most cases in this line pay homage to *Underhill* by citing the basic rule, its fundamental principles have been blurred. This has resulted from a lack of careful analysis of *Underhill* itself and of its English and American precedents which emphasized the importance of international comity to the national sovereignty premise.[20]

Modern analysis of the "foreign-party" cases finds the roots of the doctrine in *separation of powers*. The most explicit statement is found in *Banco Nacional de Cuba v. Sabbatino*.[21] The financial agent of the Cuban government brought an action in the United States courts to recover money paid for a sugar shipment over which the Cuban government claimed ownership by expropriation. It appeared that the issue was whether the act of state doctrine would apply when the act was a violation of international law.[22] The court skirted this question,

[18] This approach is not uniquely American. In English courts the doctrine seems to develop as a reaction to the abhorent thought of a jury of commoners sitting in judgment of the acts of a sovereign. *See* Blad v. Banfield, 3 Swans 605 (App.), (Chancery 1674). Here a Danish citizen was asking a permanent injunction to restrain proceedings for seizure of property of English subjects in Iceland pursuant to orders from the King of Denmark. The court remarked, "[n]ow after all this, to send it to a trial at law, where either the Court must pretend to judge the validity of the King's letters, patent in Denmark, or the exposition and meaning of the articles of peace; or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd."

[19] The defendant, Hernandez, was head of the anti-government force in Venezuela which on October 6, 1892 took command of the capital, and on October 23 was formally recognized as the legitimate government of Venezuela by the United States. 168 U.S. at 251.

[20] These principles have recently been recognized by Justice White dissenting in Sabbatino, 376 U.S. at 442. He is especially concerned that Underhill was settled "on the merits of plaintiff's claim under international law."

[21] *Supra*, note 10, at 423. "The act of state doctrine does have constitutional underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers . . . the doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *See also* Jimenex v. Aristeguieta 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1962); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892 (S.D.N.Y. 1968); and Metzger, *The Act of State Doctrine*, 66 AM. J. INT'L L. 93, (1972).

[22] There was a strong interest on this point in the international legal community, and a good deal of sentiment to suspend the doctrine in these types of cases if there exists a clear violation of international law. (Among those filing briefs of *amici curiae* generally supporting this view were the American Bar Association, the Executive Committee of the American Branch of the International Law Association, and the Committee on International Law of the Association of the Bar of the City of New York. This view has recently prevailed in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), discussed in note 23, *infra*. *See also* R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL

however, by declaring that it could not apply international law because "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."[23] The court did imply, however, that when issues of international law are explicit and not very important, the act of state doctrine might be overcome.[24]

III. THE DISTINCTIONS APPLIED TO OCCIDENTAL

It is the *Sabbatino* approach which is endorsed by the court in *Occidental*. "In sum, the doctrine is a reflection of the executive's primary competency in foreign affairs, and an acknowledgment of the fact that in passing upon governmental acts the judiciary may hinder or embarrass the conduct of our foreign relations."[25] Thus the *Occidental* court applied a line of reasoning developed in the series of "foreign-party" cases to which *Occidental* does not belong. In order to exercise judicial restraint, the court was forced to adopt this analysis because of the erosion of the doctrine's basis as developed in the "foreign-non-party" cases to which *Occidental* does belong.

The line of non-party cases began with *American Banana v. United Fruit Co.*[26] According to the *Occidental* court, "the facts of that case are strikingly similar to those now before the court."[27] United Fruit was being sued under the Sherman Act

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ORDER 64-138 (1964) for an exhaustive analysis; also J. White, dissenting, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 439 (1964).

[23] 376 U.S. at 428. This decision involved such a negative response that the Congress reacted by essentially overruling it in the so-called "Sabbatino Amendment," 22 U.S.C. § 2370(e)(2) (1970), which provides that "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 to property is asserted by any party including a foreign state (or 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 international law."

Subsequently, the Court overruled the application of the doctrine by the Court of Appeals in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) partly on the grounds that the Executive Branch had asked the Court not to invoke the doctrine—thus a complete departure from Sabbatino in this respect. Additionally, the Court instructed the lower courts to apply customary rules of international law to determine the validity of the expropriation of the plaintiff's property by the government of Cuba.

[24] "The greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches" *Supra*, note 10, at 428.

[25] 331 F. Supp. at 108-109.

[26] 213 U.S. 347 (1909).

[27] 331 F. Supp. at 109.

for treble damages for allegedly inducing the Costa Rican army to seize and maintain control of the plaintiff's banana plantation. In affirming the lower courts' refusal to try the case, Justice Holmes wrote: "A seizure by a state is not a thing that can be complained of elsewhere in the courts."[28]

The basis of the decision, however, was primarily a *conflict of laws* approach based solidly on the notion of international comity.[29] Holmes was quite clear: "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[30] This jurisdictional conflict of laws, based on the situs of the wrong, has been rarely invoked by the courts which followed. The jurisdictional aspect has generally been either distinguished[31] or greatly minimized.[32] For example many cases which followed *American Banana* in the "foreign-non-party" line generally ignored the conflict of laws rationale in favor of international comity.[33] On the other hand, in the antitrust cases which followed, the courts managed to clear the jurisdictional obstacle by not applying judicial restraint if the act "brought about forbidden results within the United States,"[34] or where "the conspiracy was laid in the United States, and was effectuated both here and abroad,"[35] or for acts by "persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends,"[36] or most recently by "the test which determines whether the United States law

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[28] 213 U.S. at 358.

[29] "For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with authority of another sovereign, contrary to the comity of nations, which the other states concerned justly might resent." *Id.*, at 365.

[30] *Id.* Holmes had used a similar rationale in a previous cause where an act of the U.S. governor of Cuba was brought into question. *See* O'Reilly do Camara v. Brooke, 209 U.S. 45 (1908). *See also* H. ZWARENSTEY, SOME ASPECTS OF THE EXTRATERRITORIAL REACH OF THE AMERICAN ANTITRUST LAWS 124-125 (1970).

[31] United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

[32] Oetjen v. Central Leather Co., 246 U.S. 289 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918).

[33] Justice Clark in Ricaud v. American Metal Co., 246 U.S. at 309 declared that application of the doctrine "rests at last upon the highest considerations of international comity and expediency. 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.'"

[34] United States v. Sisal Sales Corp., 274 U.S. at 276.

[35] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. at 706.

[36] United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

is applicable . . . focus[ing] on the nexus between the parties and their practices and the United States."[37]

As long as the cases which arose presented ways to avoid application of the jurisdictional doctrine, *American Banana* remained intact. But when *Occidental* appeared, with a factual situation so similar to *American Banana,* the court had to choose between completing the evolution of *American Banana* by taking the "foreign-non-party" cases out of the act of state doctrine altogether, or attempting to bring the two lines of cases together under one doctrine based on the separation of powers approach developed in *Sabbatino.*

Clearly, the court chose the latter. The thrust of this decision is exemplified by the endorsement of the "instructive precedent . . . found in *Frazier v. Foreign Bondholders Protective Council,* 283 App. Div. 44, 125 N.Y.S.2d 900 (1953)."[38] The court in *Frazier* declared that "[p]erhaps our courts should be even more sensitive to the involvements of a sovereign's action when the sovereign is not a party to the action and the adjudication as it affects its prestige and dignity partakes of the nature of an ex parte proceeding."[39]

The *Occidental* court could have easily avoided the issue by accepting any of Buttes' other motions to dismiss.[40] Instead it chose to confront the issue directly. This is especially intriguing in light of the fact that Buttes structured its motions to dismiss on the *jurisdictional* principle of the act of state doctrine.[41]

In conclusion, the ultimate consequence of *Occidental* seems to be the elimination of the *conflict of laws* roots of the act of

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[37] Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (1968), *cert. denied,* 393 U.S. 1093 (1969).

[38] 331 F. Supp. at 111.

[39] 238 App. Div. at 49, 125 N.Y.S.2d at 905 (1953).

[40] Besides the act of state doctrine, Buttes moved to dismiss: 1. On grounds that the court lacked jurisdiction because the act complained of had no substantial impact in the United States; 2. Because it would mean having to determine an international boundary dispute which the courts of the United States may not do; 3. Because under Rule 19(a) of the Federal Rules of Civil Procedure, joinder of Sharjah, Umm al Qaywayn, Iran and Great Britain is necessary, (*see* note 14 infra); 4. Because the complaint attacks activities undertaken to influence governmental conduct, which is not within the subject matter of the antitrust laws. 331 F. Supp. at 101-102.

[41] "The Buttes defendants in their briefs have contended that this defect of the complaint is jurisdictional. But it is clear from Ricaud v. American Metal Co., 246 U.S. 304, 308 (1918) . . . that this is not so; rather the questioning of sovereign acts by the complaint results in its failure to state a claim upon which relief may be granted. American Banana, *supra* 166 F. at 267. When confronted with this discrepancy of grounds at oral argument, counsel for the Buttes defendants contended finally that the court should 'in the exercise of its jurisdiction' dismiss the complaint." 331 F. Supp. at 113.

state doctrine and the downplaying of the *national sovereignty* aspect. If *Occidental* is followed, the "foreign-non-party" line of cases will merge with the foreign-party line, with the controlling principle, judicial restraint, based on the *separation of powers* analysis developed in the expropriation cases.

The next logical development in the evolution of the act of state doctrine will come when the courts are confronted with a clear violation of international law by a foreign state.[42] Meanwhile businesses operating abroad can expect an easier time invoking the doctrine now that the jurisdictional rule which proved so easy to avoid or ignore has been replaced by a more inclusive principle.

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[42] Such development may soon be forthcoming, *see* note 23 *supra*.