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INTERNATIONAL LAW — SOVEREIGNTY — JUDICIAL EXAMINATION OF FOREIGN ACT OF STATE UNDER INTERNATIONAL LAW—In retaliation for a reduction of its sugar quota by the United States¹ the Cuban government nationalized certain Cuban enterprises in which United States citizens held majority interests.² Defendant had earlier contracted to purchase a ship-

¹ 74 Stat. 330, 7 U.S.C. § 1158 (Supp. II, 1960).

² Law 851, Official Gazette of Cuba, July 7, 1960. For an English translation see 55 AM. J. INT'L L. 822 (1961). See also Allison, *Cuba's Seizures of American Business*, 47 A.B.A.J. 48 (1961); *id.* (Part II), 47 A.B.A.J. 187 (1961) for a treatment of this and similar Cuban laws adopted by the revolutionary government.

ment of sugar from one of the nationalized Cuban corporations. To obtain permission to remove the shipment from Cuban waters, defendant was forced to execute another contract with plaintiff's assignor, an agent of the Cuban government, which agreement embodied terms identical to those in the original contract with the exception that payment was to be made to plaintiff's assignor. Upon learning that a receiver of the nationalized corporation also claimed the right to them,³ defendant paid the proceeds of the sale into court, and plaintiff brought an action for conversion in federal district court. On defendant's motion for summary judgment, *held*, complaint dismissed. The nationalization decree violated international law and will not be recognized as having vested title to the sugar in plaintiff's assignor. *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D. N.Y. 1961).

The "act of state" doctrine⁴ provides that our courts will not inquire into the validity of official⁵ acts of foreign states which affect persons or property within the acting state when the act occurs.⁶ It is a judicially self-imposed limitation⁷ which is neither based on lack of jurisdiction⁸ nor required by international law.⁹ Consistently applied by the courts,¹⁰ its historical roots lie in an analogy to the immunity from suit granted

³ The New York Supreme Court had appointed a receiver under § 977 (b) of the N.Y. CIV. PRAC. ACT which authorizes the appointment of receivers for the New York assets of foreign corporations that have been dissolved or the property of which has been nationalized.

⁴ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). See also *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949); *Bernstein v. Van Heyghen Freres*, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947); *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940); *Hewitt v. Speyer*, 250 Fed. 367 (2d Cir. 1918).

⁵ *Hewitt v. Speyer*, *supra* note 4, at 371; *cf.* RESTATEMENT, FOREIGN RELATIONS LAW § 28a (1), comment *a* at 2 (Tent. Draft No. 4, 1960). *But see* *Bernstein v. Van Heyghen Freres*, *supra* note 4, at 249, which allowed examination of official acts with executive permission.

⁶ Note, *Acts of State and the Conflict of Laws*, 35 N.Y.U.L. REV. 234, 235 (1960). See generally RE, FOREIGN CONFISCATIONS IN ANGLO-AMERICAN LAW (1951).

⁷ *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954); Note, *Acts of State and the Conflict of Laws*, 35 N.Y.U.L. REV. 234, 239 (1960).

⁸ RESTATEMENT, FOREIGN RELATIONS LAW § 28d (1), comment *a* at 15 (Tent. Draft No. 4, 1960); Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826, 831 n.30 (1959).

⁹ I OPPENHEIM, INTERNATIONAL LAW 267, 268 (8th ed. Lauterpacht 1955); RESTATEMENT, FOREIGN RELATIONS LAW § 28d (1), comment *a* at 15 (Tent. Draft No. 4, 1960); Comm. on International Law, N.Y.C. Bar Ass'n, *Reconsideration of the Act of State Doctrine in United States Courts*, N.Y.C.B.A. REP. 9 (May 1959).

¹⁰ Cases cited note 4 *supra*. See also RE, *op. cit. supra* note 6; Comment, 58 MICH. L. REV. 100, 106 (1959).

foreign sovereigns.¹¹ It is characterized by deference to the executive branch of the government in areas where judicial action might adversely affect foreign relations,¹² and is thus similar to certain aspects of the Supreme Court's self-imposed "political question" limitation.¹³

*Bernstein v. Van Heyghen Freres*¹⁴ presents the most significant recent development in the traditional application of the doctrine. In that case the court accepted the principle of non-review of foreign acts of state because of executive predominance in the field of foreign affairs, but made it clear that it would feel free to examine such acts if the executive demonstrated an intention to remove judicial restraint.¹⁵ That dictum provided the basis for decision in *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij* where a published letter from the acting legal adviser of the Department of State was held to have lifted the bar to judicial examination.¹⁶ This analysis could have been used in the principal case: the executive had made known its position on the Cuban act, and had demonstrated an affirmative intent that such act not be recognized.¹⁷ The court, however, chose to break new ground by basing its holding on the proposition that the "act of state" doctrine does not bar examination of foreign acts of state where such acts violate international law.¹⁸ This is a substantial limitation on the scope of the doctrine as normally interpreted.¹⁹ The validity of the doctrine depends on an acceptance of the thesis that deference to the executive may be necessary before a foreign act should be condemned by the courts as a violation of our municipal law; but such deference is not required where the legality of the act is to be determined by international law standards.²⁰

¹¹ RE, *op. cit.* *supra* note 6, at 21; Zander, *supra* note 8, at 851; Note, *Acts of State and the Conflict of Laws*, 35 N.Y.U.L. REV. 234, 237 (1960).

¹² Note, *Acts of State and the Conflict of Laws*, 35 N.Y.U.L. REV. 234, 237 (1960).

¹³ See Comment, 58 MICH. L. REV. 100, 106-08 (1959), showing similarities and dissimilarities.

¹⁴ 163 F.2d 246 (2d Cir.), *cert. denied*, 322 U.S. 772 (1947).

¹⁵ *Id.* at 249.

¹⁶ 210 F.2d 375, 376 (2d Cir. 1954).

¹⁷ Principal case at 381. Judge Dimock was apparently aware of this possible approach. See *Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 177 F. Supp. 898 (S.D.N.Y. 1953), *aff'd*, 210 F.2d 375 (2d Cir. 1954).

¹⁸ "There is an end to the right of national sovereignty when the sovereign's acts impinge on international law." Principal case at 381.

¹⁹ The doctrine, as enunciated in *Underhill v. Hernandez*, 168 U.S. 250 (1897), is broad enough to include violations of international law. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) (dictum), supports this interpretation. *Contra*, *Anglo-Iranian Oil Co. v. Jaffrate*, [1953] 1 Weekly L.R. 246 (Sup. Ct. Aden 1952).

²⁰ "The basis for . . . recognition and respect vanishes, however, when the act of a foreign state violates, not what may be our provincial notions of policy but rather the standards imposed by international law." Principal case at 381. It might be argued that the true basis of decision was the fact that there was no possibility of executive embarrassment in this case, *i.e.*, that the court was tacitly employing the *Bernstein* analysis. See *ibid.* It appears more likely, however, viewing the stated grounds for decision and

It was the stern necessity of dealing amicably with foreign sovereigns which gave birth to the "act of state" doctrine.²¹ The judiciary does not wish to take responsibility for a course of action which may affect relations between this country and another²² when it has no proper method of evaluating the consequences.²³ This understandable caution should apply, however, only to situations where there is likely to be a clearly detrimental effect on foreign relations²⁴ or where the court's decision could be considered a quasi-sovereign act.²⁵ If these considerations are not present, there is no need for the injustice which results from a uniform refusal to review foreign acts of state.²⁶ When international law is applied, the ruling of the court can legitimately be identified as a manifestation of supra-national authority, and not as enunciating executive policy or binding the executive department to any position in foreign affairs.²⁷ The flavor of intergovernmental dispute²⁸ which is implicit whenever the executive department indicates that a court may examine a particular foreign act is thus avoided. Moreover, the cumbersome, time-consuming, and often futile "exhaustion of remedies" doctrine which now confronts a private litigant in this area²⁹ is replaced by a more expeditious court procedure which

the fact that the main thrust of Judge Dimock's reasoning (including the above quotation) came prior to an appraisal of executive attitude, that the court, in pointing this out, was merely taking precaution against possible reversal by a higher tribunal which might not agree with the basic premise advanced.

²¹ *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918).

²² Mann, *Judiciary and Executive in Foreign Affairs*, 29 GROTIUS SOCIETY TRANSACTIONS 143, 163 (1943).

²³ See JAFFE, *JUDICIAL ASPECTS OF FOREIGN RELATIONS* 8-75 (1933).

²⁴ Mann, *supra* note 22, at 163.

²⁵ Municipal laws are generally designed and enacted to promote sovereign policies of government and in that sense can be said to emanate from the sovereign. Thus, a judicial determination which utilizes these laws might be considered a quasi-sovereign act. The same cannot be said, at least to the same degree, for the use of international law, even though it has been incorporated into the municipal law of the state.

It has been suggested that if a foreign government objected that the court's decision reflected the policy of the forum only or an interpretation of international law at variance with its own, the case could then be lifted to an intergovernmental level and, with the consent of both governments, be litigated in the International Court of Justice. Hyde, Editorial Comment, *The Act of State Doctrine and the Rule of Law*, 53 AM. J. INT'L L. 635, 636 (1959).

²⁶ Note, *Acts of State and the Conflict of Laws*, 35 N.Y.U.L. REV. 234, 244 (1960). *But see* Comment, 1956 CAMB. L.J. 138, 139, suggesting that the weight of authority favors such refusal.

²⁷ Mann, *supra* note 22, at 162. See Zander, *supra* note 8, at 851.

²⁸ Hyde, *supra* note 25, at 636.

²⁹ A claimant must take advantage of any opportunities to air his claim which are afforded by the laws of the state where the contested act occurs. If he does not, the Department of State will be loath to espouse his claim and an international tribunal will not give him a hearing. Allison, *Cuba's Seizures of American Business*, 47 A.B.A.J. 48, 50-51 (1961). See generally 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 501-26 (1943). A municipal court's application of a legal remedy is not a quasi-sovereign

can better weigh the strictly legal aspects of what may well be the material fact in the case, the act of the foreign government.³⁰

Since the underlying reasons for application of the "act of state" doctrine are inappropriate where international law may legitimately be applied, there is every reason to hope that the Supreme Court will accept the limitation on its use proposed by the court in the principal case.³¹ Abdication of judicial function to an executive department unequipped to determine properly the rights of the parties is not satisfactory³² and is not necessary in cases like the present.³³ Many problems, of course, will emerge from an increased scope of judicial examination,³⁴ but they will be predominantly pragmatic and can be dealt with as they individually mature. The important thing, especially in international dealings, is that judicial power be not unnecessarily circumscribed, but rather exercised to the fullest reasonable extent.³⁵ Our courts' refusal to recognize foreign acts which violate international law will tend to encourage foreign investment and trade, and this in turn will speed development of an international "Rule of Law" and provide a reliable framework in which to conduct international business affairs.

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act when international law is used and is, therefore, not subject to the policy considerations which impel the executive department to apply the "exhaustion of remedies" doctrine.

³⁰ Hyde, *supra* note 25, at 637.

³¹ The more liberal executive attitude toward allowing judicial review in the closely-related sovereign immunity cases as evidenced by the recent adoption of the "restrictive theory" should be an important factor influencing the Court's decision. 26 DEP'T STATE BULL. 984 (1952). See generally Bishop, *New United States Policy Limiting Immunity*, 47 AM. J. INT'L L. 93 (1953); Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608 (1954).

³² Jessup, *Has the Supreme Court Abdicated One of Its Functions?* 40 AM. J. INT'L L. 168, 169 (1946).

³³ The required decisions in this case are distinctly judicial, *viz.*, the determination of the title to property through the application of legal standards.

³⁴ *E.g.*, whether international law has been sufficiently defined to be capable of determination exclusive of national aims and policies. See generally BRIERLY, *THE LAW OF NATIONS* 42-46 (5th ed. 1955). Also, whether our courts are "adequately equipped to deal with the burden of discovering (and applying) the international law on the subject." Zander, *supra* note 8, at 842, 846-47.

³⁵ See Mann, *supra* note 22, at 162.