Michigan Law Review

Volume 53 | Issue 2

1954

International Law - Sovereign Immunity - Act of State

Arthur M. Wisehart S.Ed.
University of Michigan Law School

INTERNATIONAL LAW—SOVEREIGN IMMUNITY—ACT OF STATE—In 1953 the government of Peru authorized the issuance of scrip certificates to holders of certain of its bonds. Plaintiffs were members of a class of former bondholders who were not among the distributees of the scrip under the terms of the Peruvian enabling act. They alleged that they were entitled to share in the scrip by reason of contracts with the government of Peru and that defendants tortiously had induced Peru to breach these contracts by excluding the plaintiffs from the terms of the legislative enactment. The defense interposed was that litigation of the cause would make it necessary for the court to pass on the validity of an act of a foreign government, and that this is beyond the power of the court. On appeal from an order to strike this defense, *held*, reversed. The validity of the acts of one sovereign government cannot be adjudicated in the courts of another; the defense therefore should be allowed. *Frazier v. Foreign Bondholders Protective Council, Inc.*, 125 N.Y.S. (2d) 900 (1953).

A general principle of international law is that the courts of a sovereign state have jurisdiction over parties properly before them and over property within the territorial sovereignty of the state.[1] When the sovereign state expressly or by implication grants immunity to certain parties or their property, however, its courts cannot take jurisdiction.[2] Such is the situation when the

[1] BISHOP, CASES AND MATERIALS ON INTERNATIONAL LAW 344 (1953).

[2] The Schooner Exchange v. McFaddon, 7 Cranch (11 U.S.) 116 (1812). Immunity from jurisdiction does not mean, however, that no legal obligation exists. Such an obligation can be given effect (1) if the foreign state waives its immunity from the jurisdiction of the national courts or (2) if the question is presented to an international tribunal. See

suit is against the state itself, the theory being that the state impliedly grants itself immunity in the absence of an express assent to the jurisdiction of the court.[3] Such also is the situation when the suit is against the government of a foreign state,[4] its ministers,[5] its agents,[6] or its property,[7] the theory then being that the state in which the court is sitting impliedly grants the foreign sovereign immunity from national judicial jurisdiction for reasons of international comity.[8] Quite a different situation is presented when, as in the principal case, although all of the parties clearly are within the jurisdiction of the court, one of the issues involves a determination of the legal consequences of an act of a foreign government. In such a situation the fact that the national court has jurisdiction does not answer the question of where it should look for the guiding rules of decision. If the state under whose laws the court functions has declared expressly what the rule of decision is to be, that declaration, of course, is binding on the court.[9] If there has been no express declaration by the state, however, and the transaction occurred within the territorial sovereignty of a foreign state, the court will act in accordance with principles familiar to students of private international law in choosing the applicable law.[10] When the transaction

Dickinson v. Del Solar, [1930] 1 K.B. 376; The Tinoco Claims Arbitration: Great Britain v. Costa Rica, 1 U.N. Rep. Int. Arbitral Awards 369 (1923).

[3] See Stanley v. Schwalby, 147 U.S. 508, 13 S.Ct. 418 (1898).

[4] See Oliver American Trading Co. v. Government of the United States of Mexico, (2d Cir. 1924) 5 F. (2d) 659.

[5] 1 OPPENHEIM, INTERNATIONAL LAW, 7th ed. by Lauterpacht, 711 (1948); 1 Stat. L. 117 (1790), 22 U.S.C. (1952) §252.

[6] Frazier v. Hanover Bank, 119 N.Y.S. (2d) 319, affd. without opinion in 281 App. Div. 861, 119 N.Y.S. (2d) 918 (1953). This was a suit by the plaintiffs in the principal case against one of the defendants, a New York bank, for specific performance of the contract under which plaintiffs allegedly were entitled to share in the distribution of scrip certificates. Although admitting that the bank had no immunity of its own, the court held that it was an agent of the government of Peru and that immunity should be given because the action was, in substance, against a foreign state. See also Lamont v. Travelers Ins. Co., 281 N.Y. 362, 24 N.E. (2d) 81 (1939); same, 294 N.Y. 827 (1945).

[7] Berizzi Bros. Co. v. S. S. Pesaro, 271 U.S. 562, 46 S.Ct. 611 (1926); Compania Espanola de Navegacion Maritima, S.A., v. The Navemar, 303 U.S. 68, 58 S.Ct. 432 (1938).

[8] A grant of jurisdictional immunity has been implied even when the United States was at war with the foreign state in question. Telkes v. Hungarian National Museum, 265 App. Div. 192, 38 N.Y.S. (2d) 419 (1942).

[9] See United States v. Pink, 315 U.S. 203, 62 S.Ct. 552 (1942).

[10] See Ricaud v. American Metal Co., 246 U.S. 304 at 309, 38 S.Ct. 312 (1918). Underhill v. Hernandez, 168 U.S. 250 at 252, 18 S.Ct. 83 (1897), is usually cited for the misleading but classic dictum that the courts of one government will not sit in judgment on the acts of another government within its own territory. In that case, involving a tort allegedly committed by the commander of successful revolutionary forces in Venezuela, the court applied the act of state doctrine in holding the defendant not liable on the theory that the action was not tortious where it occurred. Even if its view of the case be taken, it is submitted that the court, despite its protestations to the contrary, actually did sit in judgment on the acts of the foreign government in the sense that it determined the legal consequences of those acts in accordance with what it conceived to be the applicable law of the state in which they were committed. Since the suit was against a former official of a foreign government for action taken in his official capacity, it would seem that he should

involved was instigated directly by the government of the foreign state itself and within its own territory, the principles are the same as those referred to in the preceding sentence, but the "act of state doctrine" is the name given to the process of ascertaining the law applicable as the rule of decision.[11] Such considerations are the basis of the act of state doctrine rather than a judicial revulsion at the idea of giving extraterritorial effect to the *lex fori,* and therefore properly place it in the area of conflict of laws rather than in the area of international law, if we must pigeonhole. This is illustrated by those cases in which the courts apply local law, rather than foreign law, when the outcome indicated by the foreign rule of decision is sufficiently shocking.[12]

Although the defendants in the principal case admitted that it was not a proper situation for an application of the principles of sovereign immunity,[13] the court apparently was side-tracked by considerations pertinent to sovereign immunity cases and gave them as the basis of its decision.[14] Instead of indicating that the lower court should apply conflict of laws principles in determining whether there was a contract with the foreign state, what were the terms of the alleged contract,[15] whether there had been a breach of such contract according to the applicable rules of law,[16] whether such a breach had been occasioned by the action of the defendant, whether such action constituted a tort under the *lex loci delicti,*[17] and whether the act of the Peruvian legislature or the laws of the United States were declaratory of the *lex loci delicti* as the applicable rules of decision,[18] it indicated that the court could not decide the case on its merits if it involved passing on the legal consequences of the acts of the foreign government. Such a view is surely erroneous. It has the unfortu-

be accorded jurisdictional immunity in our courts for that reason, and that the act of state doctrine therefore was not necessary for the decision in the case. See Lamar v. Browne, 92 U.S. 187, 23 L.Ed. 650 (1875).

[11] See Salimoff v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933). Cf. Baglin v. Cusenier Co., 221 U.S. 580, 31 S.Ct. 669 (1911).

[12] See Vladikavkazsky Ry. Co. v. New York Trust Co., 263 N.Y. 369 at 378, 189 N.E. 456 (1934). Cf. Bernstein v. Van Heyghen Frères Société Anonyme, (3d Cir. 1947) 163 F. (2d) 246, cert. den. 332 U.S. 772, 68 S.Ct. 88 (1947). In the latter case, the act of state doctrine was applied to validate a racially-motivated confiscation decree of the Nazi government. Judge Learned Hand suggested that the result might have been different had the executive branch of our government repudiated the decree. The case is noted in 47 COL. L. REV. 1063 (1947).

[13] Principal case at 902.

[14] ". . . the plaintiffs are thinking within the dimensions of their local tort action, rather than of the preponderating international considerations." Principal case at 904.

[15] See Aymar v. Sheldon, 12 Wend. (N.Y.) 439 (1834).

[16] Hewitt v. Speyer, (2d Cir. 1918) 250 F. 367 (act of state doctrine applied to deny the imposition of an equitable lien on monies of a foreign state transferred to defendant within the territorial jurisdiction of that state and subject to a contract executed in the same state).

[17] GOODRICH, CONFLICT OF LAWS, 3d ed., 265 (1949).

[18] See American Banana Co. v. United Fruit Co., 213 U.S. 347 at 358, 29 S.Ct. 511 (1909). The case involved an attempt to give an extraterritorial effect to the Sherman Act. Justice Holmes indicated, at p. 358, that "persuading a sovereign power to do this or that cannot be a tort. . . ."

nate effect of extending international anarchy in the area of commercial transactions, where stability is especially important. Furthermore, if a consideration of the conflicts principles relevant should show that the New York law provides the proper rules of decision, the opinion in the principal case could result in giving an extra-territorial effect to the action of the Peruvian legislature.

Arthur M. Wisehart, S.Ed.