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Hunt v. Mobil Oil Co.: Act of State Doctrine - Applicability of Commercial Exception to Expropriation

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ACT OF STATE DOCTRINE — COMMERCIAL EXCEPTION

Hunt v. Mobil Oil, 550 F.2d 68 (2d Cir.), *cert. denied,* 432 U.S. 904 (1977).

A recent federal appellate decision, *Hunt v. Mobil Oil,*[1] and a subsequent district court decision, *Bokkelin v. Grumman Airlines,*[2] indicate judicial uncertainty about the commercial exception to the Act-of-State doctrine.

The Act-of-State doctrine deems nonjusticiable any claim arising from the official acts of a foreign sovereign.[3] An exception to this doctrine is said to arise when the sovereign's acts leading to the claim are of a purely commercial nature.[4]

1. 550 F.2d 68 (2d Cir.), *cert. denied,* 432 U.S. 904 (1977).

2. 432 F. Supp. 329 (D.C.N.Y. 1977).

3. "Every sovereign State is bound to respect the independence of every 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." Underhill v. Hernandez, 168 U.S. 250, 252 (1897). *See e.g.,* American Banana v. United Fruit Company, 213 U.S. 347 (1909); Continental Ore v. Union Carbide, 370 U.S. 690 (1962); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

4. "[T]he concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities." Dunhill v. Cuba, 425 U.S. at 695.

In *Hunt,* Libya had expropriated the plaintiff's oil fields and plaintiff sued seven other major oil producers,[5] alleging that they had conspired to cause the expropriation. The court held that the Act-of-State doctrine precluded judicial review because the plaintiff would have had the burden of proving that but for the alleged conspiracy, Libya would not have expropriated Hunt's oil fields. To prove such an allegation required an examination of Libya's actions, which was barred by the Act-of-State doctrine.

The Court dismissed the plaintiff's assertion that the commercial exception was applicable, finding that expropriations of property "are traditionally considered to be public acts of the sovereign removed from judicial scrutiny by application of the act of state rubric."[6] While the expropriation of Hunt's assets were clearly the political acts of a sovereign, the application of the Act-of-State doctrine based on a determination of whether an act is "political" or "commercial" is confusing. *Hunt* provided no guidelines by which such a determination can be made. A foreign nation may term an act "political" for propaganda purposes, as Libya did in this case,[7] yet commercial interests were undoubtedly important motivations for Libya.

The confusion of the commercial/political act analysis is illustrated by a New York federal district case decided after *Hunt,* that of *Bokkelin v. Grumman Aerospace.*[8] In *Bokkelin,* the plaintiff had contracted with the defendant to be defendant's sole agent for aircraft sales in South America. Plaintiff alleged that the defendant influenced Brazilian officials to deny plaintiff an importation license. The court found that the issuance or denial of a license is as much a sovereign act as the expropriation in *Hunt.*[9] Therefore, the commercial exception was inapplicable.[10]

The *Bokkelin* court's reasoning seems spurious. The Brazilian denial of the license was the equivalent of a business' refusal to contract. The differing modes of denial do not characterize one act as "governmental/political" and the other "commercial." The Court seems to have skirted the commercial exception in its effort to apply the basic rationale of the Act-of-State doctrine; *i.e.,* the avoidance of political embarrassment. An

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5. Mobil Oil Corp., Exxon Corp., Shell Petroleum Corp., Ltd., Texaco, Inc., Standard Oil Co. of California, British Petroleum Co., Ltd. and Gulf Oil Corp.
6. 550 F.2d at 77-78.
7. *Id.* at 73.
8. *Supra* note 1.
9. *Id.* at 333.
10. *Id.*

inquiry would involve "the question of whether Grumman, directly or indirectly, improperly influenced [Brazil's] decision. The answer to that question easily might embarrass the executive branch of our government in the conduct of our foreign relations."[11]

In light of *Hunt* and *Bokkelin,* there appear to be two major questions which courts must address if the commercial exception is to be given any substantive value. First, a decision should be made whether the commercial exception will apply to all commercial acts by foreign governments or only those inquiries which do not create problems in our foreign relations. *Bokkelin* seems to indicate the latter policy. Second, it should be determined which analysis a court should use in deciding whether a foreign government's activities are of a commercial nature. The present ambiguity allows courts to interject or withhold the exception depending upon the sensitivity of an inquiry. Recognition that the Act-of-State doctrine may be applicable to some commercial acts of a sensitive nature would be, however, a more realistic assessment of the constraints upon courts in foreign relations. Moreover, courts would then be free to develop an analytical framework to determine whether a government's act is commercial in nature. There would be no need for any purposeful ambiguity; courts would know that they may still impose the Act-of-State defense even if acts of a commercial nature be determined. The need to define "commerical activities" as the sensitivity of the inquiry demands would be alleviated.

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11. *Id.*