CASENOTES

NATIONALISATION

In Albertie v. Empresa Nicaraguense de la Carne 705 F.2D.250 (U.S. Court of Appeals for the Seventh Circuit 18 April, 1983) approved the traditional Western formulation that a Government effecting a nationalisation should provide "prompt adequate and effective compensation". However it noted that there was little agreement on the meaning of these terms.

The court rejected the plaintiff's proposition that prior payment was required under international law. "Prompt" means that the payment be made within a reasonable time after nationalisation.

PROPER LAW OF CONTRACT

The proposition that the choice of a proper law excludes any renvoi under that proper law was confirmed by the House of Lords: Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1983] 3 WLR 241.

EXTRATERRITORIAL JURISDICTION - NATIONALITY OF CORPORATIONS

Dresser Industries Inc. v. Buldridge 549 F.Supp 108: Casenote 77 AJIL 626.

In an endeavour to prevent the building of the Liberian - European pipeline, sanctions were imposed on a U.S. subsidiary incorporated in France, Dresser (France) for violations of regulations made under the Export Administration Act; 1979. An order for injunctive relief was requested on the grounds, inter alia, that the sanctions breached international law. The jurisdiction claimed over U.S. subsidiaries incorporated elsewhere was the subject of strong protests by U.S. allies. The court rejected the request for injunctive relief; however an administrative reivew remains available.

EXTRATERRITORIAL ORDER FOR DISCOVERY

Krupp Mak Maschinenbau G.M.B.H. v. Deutsche Bank AG. Judgement of Landgericht of Kiel (District Court) 30 June 1982: 22 ILM 740 (1983).

This was an appeal against a temporary order restraining the defendant from obeying subpoenas to produce documents from Germany and to give evidence thereon. The subpoenas were issued by the U.S. District Court for the Western District of Michigan in an investigation relating to the alleged unlawful conduct of the plaintiff in the sale by its subsidiaries diesal engines produced by it in the German Federal Republic. The U.S. court had rejected arguments of the defendant based on German bank secrecy laws both on the ground that there was no defence (See Societe Internationale v. Rogers 357 US 197 (1958): U.S. v. Vetco 644 F2d. 1324 9th Circ: 1981) and on its own interpretation of German Law.

The German court held that under German law the defendant had no right to disclose the information and documents sought; bank secrecy was subject to constitutional protection (Art 2 para 1 Basic Law). Only a lawful order issued by the competent German authorities could impair the right to bank secrecy. The fact that the defendant maintained a branch in New York did not mean that it was subject to local subpoena powers in relation to matters the subject of German jurisdiction.

This is yet another example of the collision of U.S. and foreign law where the U.S. seeks to exercise extraterritorial jurisdiction.

EXTRATERRITORIAL JURISDICTION

Compaignie Europeenne des Petroles S.A. v. Sensor Nederland B V. [1983]. Australian IL News 6 is reported in 22 ILM 66 (1983). A casenote appears in 77 AJIL 636 (1983).

EXTRATERRITORIALITY AND ACT OF STATE

Williams v. Wright Corporation 694 F.2d 300 (198?)

The parties were competitors in the sale of surplus military material to foreign governments. It was alleged that the defendant had monopolised the market; the defendant argued that the plaintiff would be required to produce evidence concerning the motives of foreign governments to satisfy its claims and therefore this fell within the "ministerial exception" which it claimed was established in Mannington Mills 595 F.2d 1287 (1983). The court rejected this proposition and denied that there was a "ministerial exception" to the Act of State doctrine. Act of state, the court stressed, is essentially based on the separation of powers doctrine. There was no allegation that foreign governments had conspired with the defendant, rather foreign governments were victims with the plaintiff. Nothing indicated that the foreign policy interests of the United States, as perceived by the executive, would be affected or hindered. The dictum in Hunt v. Mobil Oil Corporation 550 F.2d 68, 76 that a court may never examine the motivation of a foreign government was thus rejected. Reference may also be made to the two cases noted above in the comment on International Financial Law - Proposed Uniform Rules for Foreign Exchange Contracts where two differing positions have been taken as to the applicability of a defence based on Act of State in relation to the imposition of exchange control. See also casenotes below, Sovereign Immunity and Act of State.

EXTRATERRITORIALITY - AMICUS CURIAE BRIEF BY AUSTRALIA

Associated Container Transportation (Australia) v. The United States 22 ILM 824 (1983)

This was an appeal before the Court of Appeals for the second circuit from a decision by a judge of the New York District Court relating to anti trust investigations by the Department of Justice into ocean freight trade between Australia and the United States. The Australian Government argued in its Amicus Curiae brief that the inquiries by the Department represented an unjustified intrusion into Australian sovereignty and that these inquiries might adversely effect the ability of the Australian Meat and Livestock Corporation to discharge its statutory government functions. It was said that the Department was acting in breach of the Act of State Doctrine: (1983) 57 ALJ 258. The court held that the Noerr-Pennington doctrine (365 U.S. 127 at 135 (1961)) is not without exceptions. This provides that concerted efforts to influence public officials are generally immune from Sherman Act prosecution regardless of anti-competitive purpose or effect. It was therefore argued that the attempt by the appellants to gain Federal Maritime Commission approval of their shipping agreements were protected. The Court held that the Noerr-Pennington doctrine could only be raised after discovery, and then only if the Government chose to bring charges. The Court also held that the invocation of the Act of State doctrine to protect communications with the Australian and New Zealand Governments was also premature. In its traditional form, the Act of State doctrine precludes the courts of the United States from inquiring into the validity of the public acts of a recognised sovereign power committed within its territory. This is based not only on considerations of

international comity, but perhaps more importantly on the constitutional separation of powers doctrine. The Anti Trust Division had not asked the court to question the validity of actions taken by the Australian and New Zealand Governments; to obtain discovery the Justice Department merely needed to demonstrate a reasonable basis in believing the requested information was relevant to a legitimate anti trust investigation. The documents might reveal anti trust violations wholly unrelated to either the validity of actions taken by Australian or New Zealand Governments, or the motives of these foreign sovereigns (see Hunt v. Mobil Oil Corporation 550 F.2d 68 (1977)) which interprets the Act of State doctrine as prohibiting U.S. courts probing the motives of foreign governments. The order of the District Court was reversed.

IRAN - U.S. CLAIMS TRIBUNAL Casenotes in 77 AJIL 642-650 (1983).

JURISDICTION - CORPORATE NATIONALITY. Flexi Van Leasing v. Islamic Republic of Iran. Claim No.36, Order of 15 December 1982. General Motors Corporation v. Islamic Republic of Iran Claim No.94. Order of 18 January 1983. A corporation or other legal entity is one organized under the laws of the U.S. if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporations or entity equivalent to 50 per cent or more (Article VII (1) (b) of the Claims Settlement Agreement). Detailed evidence as to all shareholders is not necessary. Judicial notice was taken of U.S. government statistics showing stock ownership of publicly traded U.S. corporations has been less than 10 per cent. As stock ownership is in constant flux it may be measured on a periodic rather than daily basis. A corporate proxy statement filed with the SEC was an appropriate source of reliable evidence with respect to nationality. A prima facie showing that at least 50 per cent of the stock was owned by U.S. nationals continuously during the relevant period was necessary - this could be satisfied by proxy statements and a notarized affidant of a corporate officer stating the percentage of voting stock held by persons with U.S. addresses as at the Annual General Meeting.

JURISDICTION - DUAL NATIONALITY

Esphahavian v. Bank Tejorat. AWD 31-157-2. 29 March 1983.

The claimant was a dual national of the U.S. and Iran. Article VII(I) of the Claims Settlement Agreement defines "national" as a citizen of either Iran or the U.S. The tribunal held that its jurisdiction over dual nationals was that of the party's "dominant and effective nationality". Reliance was made on the Nottlebohm Case, Leichenstein v. Guatemala [1955] ICJ 4, and the Merge Case 14 R. Int'l Awards 236 (1955).

JURISDICTION - SUBJECT MATTER

Grimm v. Government of Islamic Republic of Iran AWD 25-71-1 11 February 1983.

Article 11(1) empowers the Tribunal to hear claims arising out of "debts, contracts ... expropriations or other matters affecting property rights". The widow of a company executive stationed in Iran claimed the respondent's failure to protect her husband fell within the tribunal's jurisdiction. This was held not to be within the jurisdiction granted by Article 11(1).

JURISDICTION-STATELESS VESSELS

U.S. v. Marino Garcia 679 F.2d 1373.

Any state has jurisdiction over a stateless vessel, even where there is no needs between the vessel and the country claiming jurisdiction. In the case,