Comity at the Court: Three Recent Orders Seeking the View of the Solicitor General

If the Justices are considering whether to grant a petition for certiorari, and they think the case raises issues on which the views of the federal government might be relevant—but the government is not a party—they will order a CVSG brief. "CVSG" means "Call for the Views of the Solicitor General." This "invitation" is naturally treated as a command by the Solicitor General, and signals that the Court is at least considering granting the Petition. In its most recent private conference, the Court ordered CVSG briefs in two new cases concerning the role of international judicial comity in private litigation. Together with another CVSG ordered in November on Executive assertions of foreign policy interests affected by private litigation, and a fourth likely grant being considered in private conference next month, the 2008 Term may already be taking an interesting shape for this site's readership. Here's a preview of the cases.

In *PT Pertamina v. Karaha Bodas Company, LLC*, No. 07-619, the Second Circuit granted an anti-suit injunction against litigation in the Cayman Islands after it had finally decided the merits of a claim. The Petition to the Court presents an array of circuit conflicts and questions for review, all centered around the basic question of when a district court can issue an anti-suit injunction and in what circumstances. (The long-standing divergence over this important question was previously discussed here on this site.) The Petition specifically asks "whether an injunction barring foreign litigation presents a grave intrusion upon principles of international comity that is justified only when necessary to protect the jurisdiction of the U.S. federal court or to further an important public policy." The decision of the

Second Circuit in *Pertamina* is in direct conflict with the decision of the Eighth Circuit in *Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd.*, No. 07-618, which is also pending before the Court and the subject of a contemporaneous CVSG. The Eighth Circuit refused to enjoin Japanese litigation. The conflict between the Second and Eighth Circuits stems around the doctrine of "ancillary jurisdiction," specifically whether a federal court loses the power to bar foreign litigation once it decides the merits of a claim and the resulting judgment is satisfied. But the Petition in Goss also raises the comity issue, questioning whether the court "erred in giving dispositive weight to concerns about international comity at the expense of the court's traditional duty to enforce U.S. law on U.S. soil and protect final judgments from relitigation."

Judicial comity is not the only current point of interest; more traditional notions of comity among nations is at issue in *Exxon Mobil Corp. v. Doe I*, No. 07-81, in which the Court ordered a CVSG brief last November. *Doe* involves a case under the federal Alien Tort Statute, regarding various human rights abuses by members of the Indonesian military hired to perform security services for Exxon Mobil. Both the U.S. State Department, and the Indonesian Ambassador to the United States, have urged the court that continuation of the suit would detrimentally affect foreign policy interests. The district court declined to dismiss the suit under the political question doctrine, and the D.C. Circuit dismissed the interlocutory appeal for lack of jurisdiction. The Petition In Doe asks whether the collateral order doctrine permits the immediate appeal of a denial of a motion to dismiss, when continuation of the suit threatens "potentially serious adverse impact on significant foreign policy interests." In post-Petition wrangling, counsel for the Exxon companies sought a stay of the discovery process in the District Court, ostensibly because that process was interfering with U.S.-Indonesian relations. The Chief Justice

refused to block the scheduled discovery, stating that the denial took into account a limit on the "current phase of discovery," but left open the possibility that Exxon could ask again for relief at a later time.

Finally, still pending is the Petition in *American Isuzu Motors Inc. v. Ntsebeza*, No. 07-919, previewed here on this site last November. It involves tort claims against 50 multinational corporations by a class of persons alive in South Africa between 1948 and 1993 who were affected by the apartheid regime. Again, the U.S. State Department opposes the lawsuit because of its effect on foreign relations, and the Petition to the Court asks, inter alia, whether the case should be dismissed "[in] deference to the political branches, political question or international comity." Interestingly, as noted in the prior post, the Petition also asks whether international treaties—specifically the Rome Statute of the International Criminal Court—can provide the legal standard to define a cause for "aiding and abetting" a violation of international law under the Alien Tort Statute. The Solicitor General has already filed a brief supporting review.

The best source for further discussion on these cases, and links to more documents and the decisions below, is the SCOTUSBlog. It seems that an interest in comity at the Court is clearly on the rise (not to be confused with "comedy" at the Court, which seems to be on the rise as well. On this latter point, see the interesting study by Professor Wexler from Boston University.)