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EXTRATERRITORIAL EFFECTS OF
CONFISCATIONS AND EXPROPRIATIONS*Ignaz Seidl-Hohenvelden***Introduction*

THE study of the problem of extraterritorial effects of confiscations and expropriations from the point of view of Comparative Law has special practical importance. There are hardly any codified rules applicable to foreign confiscations and expropriations, either in statutory law countries or in common law countries. Hence, decisions have to be based largely on generally accepted rules of public and private international law. Such general acceptance can only be proved by a comparative analysis of foreign as well as of domestic precedents.

These precedents vary, as conflicting maxims of international law may be applied to the taking of private property by a foreign state, which in turn may be either a confiscation, that is, taking without compensation or an expropriation, that is, taking against a just indemnity. The respect due to foreign acts of state seems to require that all taking of private property by a foreign state should be held effective. This, however, seems to be contrary to the domestic public policy tending to protect private property. Therefore, a third principle applicable to such cases is usually invoked. This decisive factor is the principle of territoriality which grants every state an exclusive right to determine the legal fate of all assets situated inside its borders.

By virtue of this principle, confiscations and expropriations of assets inside the borders of a foreign state are held effective by most domestic courts unless considerations of public policy prevail over all other arguments. By virtue of the same principle of territoriality domestic courts deny foreign confiscations all effect on domestic assets. Yet, in spite of this principle of the strict territoriality of all inroads on private property, foreign expropriations of domestic assets are sometimes tolerated.

I

CONFISCATIONS

A. Confiscation of Assets Outside the Confiscating State

The principle of territoriality suffers, however, no exceptions where foreign confiscations are concerned. Any state would consider it in-

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compatible with its own sovereign rights that assets inside its borders should be taken without indemnity by order and for the profit of a foreign state. This attitude does not only prevent the enforcement of foreign confiscatory, penal or political legislation, but applies even to quite inoffensive foreign tax laws.¹

In addition to this argument drawn from the notion of territorial sovereignty, courts sometimes stress other considerations supporting this solution. The enforcement of foreign confiscations is declared to be contrary to the domestic public policy of protecting private property as one of the basic human rights.² Sometimes foreign confiscations in connection with racial persecutions or with the seizure of enemy property are moreover considered contrary to domestic public policy by virtue of the principles of nondiscrimination³ or of neutrality.⁴

It results from the paramount importance of the principle of territoriality that countries confiscating domestic assets for their own benefit are not thereby prevented from considering similar foreign acts concerning domestic assets as being contrary to their public policy.⁵ Within its own territory a state may well assume rights which it would be unwilling to grant to others.

In view of this general refusal to tolerate foreign confiscations of domestic assets, it would seem logical that states should refrain from claiming extraterritorial effect for their own confiscatory legislation. But few states have shown such self-restraint.⁶ In most cases where courts have tried to interpret ambiguous foreign confiscatory decrees as limiting themselves to assets situated in the confiscating state,⁷ they finally

¹ *In re Visser: H. M. Queen of Holland (Married Woman) v. Drukker*, [1928] 1 Ch. 877, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES (hereinafter cited as ANN. DIG.) 1927-1928, No. 18. Genoa Court of Appeals, Jan. 14, 1932, ZEITSCHRIFT FUER AUSLAENDISCHES UND INTERNATIONALES PRIVATRECHT (hereinafter cited as RABELS Z.), 1935, p. 219, No. 31. Estate of Garabad Tahtabourounian, N.Y.L.J. of July 3, 1950, p. 3.

² ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS (hereinafter cited as BGE) 68, II, 377 of Dec. 22, 1942.

³ *Ibid.*

⁴ BGE 40, I, 483 at 486 of December 17, 1914; BGE 42, II, 179, especially 183-184 of April 17, 1916; BGE 44, II, 163 at 170 of April 19, 1918. Obergericht Zürich, Nov. 11, 1942; Obergericht Zürich, Sept. 25, 1942. Swedish Supreme Court, Sept. 25, 1944, Hopf Products Ltd. v. Paul Hopf and Skandinaviska Banken Aktiebolag, ANN. DIG. 1943-1945, No. 16; Swedish Supreme Court, Adelfu. Paul Hopf v. Skandinaviska Banken Aktiebolag, Oct. 16, 1944, 15 RABELS Z. 1949-1950, p. 497, No. 13.

⁵ Cf. French attitude in the Chartreux Cases with French decisions concerning Russian, etc. confiscations.

⁶ *Ingenohl v. Olsen & Co., Inc.*, 273 U.S. 541, 47 S.Ct. 451 (1927), ANN. DIG. 1919-1942, No. 55 Austrian Supreme Court, March 10, 1948, JURISTISCHE BLAETTER (hereinafter cited as JBL) 1949, p. 70 (Teachers League Case). LG Leipzig, June 3, 1947, ZENTRALJUSTIZBLATT FUR DIE BRITISCHE ZONE, hereinafter cited as ZJBL) 1948, No. 1026, subsequently reversed by OLG Dresden, July 1, 1948, ZJBL, 1949 No. 234.

⁷ *Buerger v. New York Life Insurance Co.*, [1927] 43 T.L.R. 601 C.A.; *A/S Tallina Laevauhisus v. Estonian State S. S. Line*, 80 LL.L.R. 99 at 111.

have had to invoke other arguments for refusing to enforce these decrees in respect to domestic assets, the confiscating state having subsequently made it quite clear⁸ that it intended to have its decrees applied not only to assets inside but also to assets outside its borders.

The principle of nonenforcement of foreign confiscations is sometimes blurred by the concept of state immunity. According to Anglo-Saxon theory it is sufficient for a foreign state to gain possession of domestic assets to prevent it from being sued for recovery. Although possession of domestic assets gained by a foreign state pretending to enforce its confiscatory decrees is not considered as a good title of property thereto,⁹ and although this possession may have been obtained by dubious means, the owner cannot recover his property¹⁰ unless the confiscating state abandons possession, e.g., by sale to a third party.¹¹

The respect of the territorial sovereignty of the state, where such property is situated, should prevent a foreign state from enforcing by illegal means a confiscatory decree, which would have been unenforceable in a legal manner. Such illegal acts should not be covered by sovereign immunity. Hence, in spite of their pleas of sovereign immunity Czechoslovak National Enterprises were rightly sentenced by Austrian courts to hand over goods deposited in their name,¹² and to refrain from using trade marks¹³ situated in Austria which they pretended to have acquired by virtue of the alleged extraterritorial effect of Czechoslovak confiscations.

The only legal basis on which a foreign confiscation of domestic assets can be made enforceable is the conclusion of a treaty to this effect between the confiscating state and the state where the assets are situated. On November 26, 1933, the Soviet Union concluded with the United States the so-called Litvinov Agreement whereby it ceded its confiscatory claims to the United States, which should use them for compensating Russia's prewar creditors. Based on this agreement, the United States succeeded in enforcing¹⁴ these confiscatory claims ceded by Soviet

⁸ E.g., Declaration of People's Commissariat for Justice of November 28, 1937, quoted in *United States v. Pink*, 315 U.S. 203 at 219-220, 62 S.Ct. 552 (1942).

⁹ *Government of the Republic of Spain v. National Bank of Scotland*, [1939] S.C. 413, ANN. DIG. 1938-1940, Nos. 77 and 90.

¹⁰ *The Jupiter* (No. 1) [1924] P. (C.A.) 236; *Civil Air Transport Inc. v. Chennault and Others*, (1950) Supreme Court of Hong-Kong, 3 INT. L. Q., 1950, pp. 418-420.

¹¹ *The Jupiter* (No. 3) [1927] P. 122.

¹² Vienna Tribunal of Commerce, June 21, 1948, *DIE WIRTSCHAFT, WOCHENAUSGABE*, August 21, 1948.

¹³ Austrian Supreme Court, May 10, 1950, reported in *OESTERREICHISCHE JURISTENZEITUNG*, (hereinafter cited as *OJZ*) Ev. Bl. No. 356, 1950.

¹⁴ *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758 (1937); *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552 (1942). These decisions have been severely criticized

Russia even where this meant dispossessing United States owners.¹⁵

These decisions do not imply, however, that the United States has abandoned the general principle of nonenforcement of foreign confiscatory decrees. This principle has become inoperative only where an executive agreement binding on the courts like any domestic law had forced them to abandon their constant policy. This policy has been reaffirmed in all subsequent non-Russian confiscation cases. There, the courts, unfettered by similar agreements,¹⁶ were free to refuse enforcement of the foreign confiscation.

The Litvinov Agreement had been concluded simultaneously with the recognition of the U.S.S.R. by the United States. Confusing these issues, some authors maintained that the enforcement of the Soviet confiscations was the consequence of the diplomatic recognition of the U.S.S.R. and that from now on either any government already recognized could claim extraterritorial effects for its confiscatory decrees¹⁷ or at least a newly recognized government for its confiscatory decrees issued prior to recognition.¹⁸ This is not the case. Neither the confiscatory decrees of the French Government nor confiscations decreed previous to the recognition of a newly recognized Haitian Government have been granted extraterritorial effect in the United States.¹⁹

Courts indeed often have refused extraterritorial effect to confiscatory measures of nonrecognized governments by stating that they could not enforce any measures decreed by nonrecognized authorities.²⁰ The subsequent recognition of such governments does not, however, force the courts to abandon the principle of nonenforcement of foreign confiscatory decrees as some writers thought.²¹ It merely implies that the courts from now on have to invoke the arguments of territoriality and public policy instead of the argument of nonrecognition.²²

by Borchard, "Extraterritorial Confiscation," 36 *AM. J. INT. L.* 275 (1942) and by Jessup, "The Litvinov Assignment and the Pink Case," *id.* at 282.

¹⁵ *United States v. New York Trust Co.*, (D.C. N.Y. 1946) 75 *F. Supp.* 583, 42 *AM. J. INT. L.* 720 (1948).

¹⁶ *Bollack v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France*, 263 *App. Div.* 601, 33 *N.Y.S. (2d)* 986 (1942); *ANN. DIG.* 1941-1942, No. 36. *Plesch v. Banque Nationale de la République d'Haiti*, 77 *N.Y.S. (2d)* 41, 43 (1948); 42 *AM. J. INT. L.* 739-741 (1948).

¹⁷ Ehrenzweig, *JBL* 1949, pp. 425-427, with respect to companies.

¹⁸ Radd, "Czechoslovak Nationalization Decrees: Some International Aspects," 41 *AM. J. INT. L.* 795 at 805 (1947).

¹⁹ *Cf.* note 16.

²⁰ *Zarine v. Ramava*, [1942] *I.R.* 148, *ANN. DIG.* 1941-1942, No. 20. *A/S Merilaid & Co. v. Chase National Bank*, 71 *N.Y.S. (2d)* 377 (1947); 42 *AM. J. INT. L.* 231 (1948).

²¹ *Cf.* notes 17 and 18.

²² *Obiter* in *A/S Merilaid v. Chase National Bank*, *supra* note 20, and decisions of New York courts between United States recognition of the U.S.S.R. and the United States

Apart from the very special case of the Litvinov Agreement mentioned above, there has been a constant jurisprudence throughout the past 150 years and in all countries to hold extraterritorial confiscations ineffective. Instances range from the American War of Independence,²³ the French Chartreux Cases,²⁴ the enemy property control measures in World Wars I and II,²⁵ the Soviet Russian Revolution,²⁶ and the Spanish Civil War,²⁷ and the German anti-Jewish measures,²⁸ to the Communist²⁹ and anti-German measures³⁰ after World War II, the latest development being the refusal of the Austrian courts³¹ to grant extraterritorial effect to the highly controversial Law No. 5 of the Allied Control Council for Germany.³²

The cases were brought either (a) by the confiscating state or its successors in title, or (b) by debtors or persons holding money for them.

Where a foreign state in order to obtain the confiscation of domestic assets tried to enroll the help of the domestic administration as in the *Navemar* case³³ or in Austria after 1945,³⁴ it was informed that such decisions were in the exclusive competence of the domestic courts.

Cases where the confiscating state appears as plaintiff admittedly suing for the handing over of domestic assets by virtue of its confiscation decrees are comparatively rare.³⁵ More often the foreign state or its successors in title appear as defendants, e.g., for using outside of their

federal court decisions upholding the Litvinov Agreement, e.g., *Vladikovkaszky Ry. Co. v. New York Trust Co.*, 263 N.Y. 363, 189 N.E. 456 (1934).

²³ *Folliot v. Ogden*, (1789) 1 HBL. 124.

²⁴ *Lecouturier v. Rey*, [1910] A.C. 262; *Baglin v. Cusenier*, 221 U.S. 580, 31 S.Ct. 669 (1911); RG May 29, 1908, *ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN* (hereinafter cited as RGZ) 69, 1. Swiss Federal Court, Feb. 13, 1906, *CLUNET* 1907, p. 213. Brazilian Federal Court, May 10, 1907, *CLUNET* 1907, p. 1171; Dutch Court of Cassation, March 5, 1908, *REVUE DE DROIT INTERNATIONAL PRIVE*, 1908, p. 843; Brussels Court of Appeals, May 20, 1910, *REVUE DE DROIT INTERNATIONAL PRIVE*, 1911, p. 732.

²⁵ Cf. notes 4 and 86.

²⁶ Cf. notes 10, 14, 15, 41-45, etc.

²⁷ Cf. notes 9, 33, 71, 76, 92, etc.

²⁸ Cf. notes 39 and 67.

²⁹ Cf. notes 11, 20, 77, etc.

³⁰ Cf. BGE 74, II, 224, of Oct 28, 1948, and notes 12, 13, 34, 52, etc.

³¹ Cf. note 13 and Austrian Administration Court, Feb. 2, 1950, *JBL* 1950, p. 192 (*Brewery Case*), note by Seidl-Hohenvelden in *CLUNET* 1950.

³² Cf. Borchard, "The Treatment of Enemy Property," 34 *GEORGETOWN L. J.* 389 at 402 (1946), and Schindler, "Besitzen konfiskatorische Gesetze ausserterritoriale Wirkung?" 3 *SCHWEIZERISCHES JAHRBUCH FUER INTERNATIONALES RECHT*, p. 67.

³³ 2 *HACKWORTH, A DIGEST OF INTERNATIONAL LAW* 449-450 (1942), *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 58 S.Ct. 432 (1938).

³⁴ *T. Coy (Car Factory) decision* by Federal Ministry of Property Protection and Economic Planning, *JBL* 1948, p. 352.

³⁵ Austrian Supreme Court, July 9, 1948, *OJZ Ev. BL*. No. 773, 1948. Official Reports of the Austrian Supreme Court, vol. XXI SZ (1946-1948) No. 114 (*Hosiery Firm Case*).

own territory a trade mark acquired by confiscation.³⁶ In many cases the claim of the foreign state to domestic assets has been camouflaged in order to circumvent the principle of nonenforcement of foreign confiscatory decrees. Confiscatory claims have been disguised as bankruptcy proceedings,³⁷ as custodianships under enemy property legislation³⁸ and as public administratorships.³⁹ All in vain—as the domestic courts consider themselves free to appreciate what constitutes a confiscation irrespective of these attempts at disguise.

Other cases do not involve an attempted direct enforcement of the foreign confiscatory decree. In this second category a debtor refuses to pay his creditor, whose property had been confiscated in a foreign country, by alleging that he had either already paid his debt to the confiscating authorities⁴⁰ or that he may be forced to do so in the future.⁴¹ He may also pretend that his debt has been extinguished by the foreign confiscatory legislation.⁴² Various as these pleas are, none is able to upset the rule of the nonenforcement of the foreign confiscations of domestic assets.

³⁶ Cf. note 13.

³⁷ Cf. Jägerskiöld, "Immunity of State-Owned Vessels in Swedish Juridical Practice During World War II," 42 AM. J. INT. L. 601 at 605 (1948). Swedish Supreme Court, June 10, 1942, RABELS Z., 1949, p. 497, No. 12.

³⁸ Cf. note 4.

³⁹ German Public Administrators:

Belgium: Trib. Comm., Brussels, June 9, 1938, Eismann v. Melzer, BELGIQUE JUDICIAIRE, 1938, p. 563.

Denmark: Maritime and Commercial Court, Feb. 17, 1939, 13 RABELS Z. 1940-1941, p. 822.

France: Trib. Comm., Seine, Jan. 18, 1940, Jellinek v. Levy, ANN. DIG. 1919-1942, No. 12; Trib. Comm., Seine, June 23, 1939, X v. Levit et Walter, ANN. DIG. 1919-1942, No. 13.

Great Britain: Frankfurter v. Exner Ltd., [1947] Ch. 629, 43 AM. J. INT. L. 384 (1949).

Netherlands: Dist. Ct., Rotterdam, Oct. 11, 1939, Anninger C. S. v. de Monchy Ltd., ANN. DIG. 1919-1942, No. 9, note.

Sweden: Supreme Court, June 11, 1941, Weiss v. Simon, ANN. DIG. 1919-1942, No. 57.

Switzerland: BGE 68, II, 381.

United States: Anninger v. Hohenberg, Supreme Ct., N.Y. County, Dec. 7, 1939, ANN. DIG. 1938-1940, No. 7. Loeb v. Bank of Manhattan Co., 18 N.Y.S. (2d) 497 (1939).

Czechoslovak Public Administrators:

Switzerland: Wichert v. Wichert, Oct. 28, 1948, BGE 74, II, 224.

⁴⁰ Wolff v. Oxholm, (1817) 6 M. & S. 92; OLG Hamburg, Jan. 24, 1950, RUNDSCHEIBEN DES AUSSCHUSSES ZONENMAESSIG GETRENNTER BETRIEBE (hereinafter cited as RUNDSCHEIBEN), No. 119/514.

⁴¹ Employers' Liability Assurance Corp. v. Sedgwick, Collins & Co., [1927] A.C. 95. Wherever the argument of double liability was upheld, the debt was held to be situated inside the confiscating country. Russian Reinsurance Co. v. Stoddard, State Superintendent of Insurance, 240 N.Y. 149, 147 N.E. 703 (1925), ANN. DIG. 1925-1926, No. 40.

⁴² Trib. Civil, Melun, Nov. 18, 1926, Ghan v. Orloff, CLUNER 1927, p. 667.

1. *Special case of companies.* In the case of foreign companies confiscated in the country of their place of incorporation, the application of this principle is complicated by the fact that under all conflict of law rules, companies owe their legal personality to the law of the country of their place of incorporation. In such cases, debtors of a company confiscated abroad or persons holding money for it may object to its creditors and shareholders that the company having lost its legal personality,⁴³ can neither sue nor be sued nor liquidated.

German decisions before World War II⁴⁴ have adopted this reasoning which prevents all practical use of the domestic assets of companies confiscated abroad. It has, however, not been applied to companies confiscated in Eastern Germany except in a single case.⁴⁵

Some courts have tried to interpret foreign confiscatory decrees concerning companies as leaving their legal personality unaffected.⁴⁶ Such interpretation did, however, soon become impossible in view of subsequent statements by the confiscating authorities.⁴⁷

Other courts, especially in France, granted these foreign companies a continued existence as domestic "sociétés de fait."⁴⁸ Confiscated East German companies could transfer their place of incorporation to Western Germany and continue to function there. The confiscation of companies by the Eastern Laender was held *ultra vires* as all company matters come under the exclusive legislative competence of the Reich.⁴⁹ In view of the virtually accomplished division of Germany into two states, I cannot follow this reasoning.

Besides, the continued existence of companies confiscated abroad seems economically undesirable. Usually they have lost most of their capital, and do no longer meet the minimum requirements for efficient management and control.

Practical as well as theoretical considerations therefore require that the loss of legal personality be recognized. The confiscated foreign com-

⁴³ *Hausner v. Banque Internationale de Commerce de Petrograd*, Dec. 10, 1924, BGE 50, II, 507.

⁴⁴ Kammergericht, Oct. 25, 1927, 2 ZEITSCHRIFT FÜR OSTRECHT, 1928, p. 1583; RG May 20, 1930, 129 RGZ 98.

⁴⁵ LG Mannheim, Feb. 11, 1948, BETRIEBSBERATER, March 15, 1948, p. 92.

⁴⁶ *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112. *Banque Internationale de Commerce de Petrograd v. Goukassow*, [1925] A.C. 150. LG Gettingen, Oct. 14, 1947, NIEDERSACHSISCHE RECHTSPFLEGE, 1948, p. 39. *Employers' Liability Assurance Corp. v. Sedgwick, Collins & Co.*, [1927] A.C. 95. OLG GELLE, May 28, 1948, *ibid.* p. 149.

⁴⁷ LG Krefeld, Feb. 26, 1948, ZJBL 1948, p. 279, No. 133.

⁴⁸ Trib. Comm. Seine, June 29, 1932, *Veuve Lelande v. Banque russe pour le Commerce étranger*, CLUNET 1934, p. 663.

⁴⁹ Cf. note 47.

pany received its universally recognized legal personality by the state of its place of incorporation. If this state now ends the legal personality, this also must be recognized anywhere, even if it was done by a confiscatory decree. However, by virtue of the principle of territoriality, no further effect than this may be granted to such foreign decrees. They remain inapplicable insofar as they pretend to confiscate domestic assets of the foreign company.

In spite of the loss of legal personality, the current affairs of such a company may be liquidated, either by appointing a public administrator⁵⁰ or by assimilating it to a deceased person, in whose name a curator may likewise sue⁵¹ and be sued.⁵²

However, a winding-up of the foreign company under domestic law is required to satisfy the company's creditors and to hand the residue over to its shareholders. This has been admitted by American,⁵³ Austrian,⁵⁴ Belgian,⁵⁵ French⁵⁶ and Swiss⁵⁷ decisions.

The use of domestic law for winding up a foreign company⁵⁸ rather than the law of its place of incorporation is justified by the principle of territoriality. By virtue of this same principle the powers of the liquidator are strictly territorial. He cannot liquidate assets which the confiscated company owns in third countries.⁵⁹

In the United Kingdom, until a recent decision,⁶⁰ winding-up had been limited to companies which had previously done business there.⁶¹

⁵⁰ Car Factory Case, cf. note 34; Austrian Administrative Court, VerwG. Jan. 25, 1950, OJZ 1950, p. 242 (Cartridge Factory Case).

⁵¹ Austrian Supreme Court, July 9, 1948, cf. note 35.

⁵² Vienna Court of Appeals, March 3, 1948, OJZ Ev. BL No. 307, 1948.

⁵³ Oliner v. American-Oriental Banking Corp., 282 N.Y. 748, 27 N.E. (2d) 40 (1940), by virtue of §977-b of the New York Civil Practice Act.

⁵⁴ Cf. note 50.

⁵⁵ Brussels Appellate Court, June 25, 1947, *Compagnie Belgo-Lithuanienne d'Electricité*, JOURNAL DES TRIBUNAUX, 1948, p. 104; Trib. Comm. Liège, March 25, 1938, *Van der Heyden v. Tanneries d'Azov*; REVUE PRATIQUE DES SOCIÉTÉS, 1939, p. 220.

⁵⁶ *Compagnie Nord de Moscou v. Phénix espagnol*, Paris (3e ch) June 13, 1928, CLUNET 1929, p. 119; *Soc. d'Assur. Phénix espagnol v. John Cockerill*, Cour Cass. (Req.) July 4, 1933, CLUNET 1934, p. 662.

⁵⁷ Federal Court, *Wilbuschewitsch v. Waisenamt, Zürich*, July 13, 1925, BGE 51, II, No. 44; *Erben Prochorow v. Obergericht Zürich (Sulzer SA)* Oct. 26, 1929, BGE 55, I, No. 47.

⁵⁸ As provided, e.g., in the Cartridge Factory Case, supra note 50.

⁵⁹ Brussels Appellate Court, July 11, 1938, in re *Banque Russo-Asiatique*, REVUE PRATIQUE DES SOCIÉTÉS, 1939, p. 189; Danish Maritime and Commercial Court, June 8, 1937, 13 RABELS Z (1940-41) p. 832; Swedish Supreme Court, Nov. 12, 1938, *Stockholms Enskilda Bank v. Amilakvari*, ANN. DIG. 1919-42, No. 56.

⁶⁰ *Banque des Marchands de Moscou v. Kindersley*, [1950] Ch.D. 2 All E.R. 105, confirmed [1950] C.A. 2 All E.R. 549.

⁶¹ *Russian and English Bank v. Baring Bros. Ltd.*, [1936] A.C. 405, in re *Tovarishestvo Manufactur Liudvig Rabenek*, [1944] Ch. 404.

British courts formerly also doubted whether shareholders could initiate or participate in British winding-up proceedings.⁶² The courts finally rejected⁶³ the proposition that the rights of shareholders which they held to be situated in the country of the place of incorporation of the company had become extinct by virtue of the principle that confiscations of assets situated inside the confiscating country should be held valid everywhere. The problem of the recognition of such confiscations and of the attribution of a situs to intangibles rendered necessary by this recognition will be dealt with in the next section.⁶⁴

B. Confiscation of Assets Inside the Confiscating Country

A confiscation by a foreign state may not only be brought to the notice of domestic courts in connection with its pretended effects on domestic assets. There is also the case of former owners claiming assets, which the foreign state had confiscated inside its own borders, but which later were brought within the jurisdiction of domestic courts.

If we follow the same principle of territoriality, whereby every state has an exclusive right to determine by itself the legality of any title to assets situated inside its borders, this principle which served so well to prevent the foreign state from extending its confiscations to domestic assets now seems to require that titles to property gained by confiscation of assets situated inside the borders of the confiscating state should be recognized as good titles everywhere.⁶⁵

The principle that due respect shall be given to foreign acts of state is another argument in favor of this solution. This respect of foreign acts of state continues to be extended by some courts even to the subsequently repudiated confiscations of Vichy France⁶⁶ as well as to the German anti-Jewish measures,⁶⁷ and that even after they were found criminal by the Nuremberg judgment.

⁶² *Russian and English Bank v. Baring Bros. and Co., Ltd.*, [1932] 1 Ch. 435-445.

⁶³ *Dairen Kisen Kabushiki Kaisha v. Shiang Kee*, [1941] A.C. 373.

⁶⁴ Cf. *infra* pp. 863-864.

⁶⁵ *Austrian Supreme Court*, Aug. 27, 1919, in *re Austro-Hungarian Bank*, *GERICHTSZERTUNG* 1919, p. 380; *Antwerp, Civil Tribunal*, Feb. 21, 1939, "Propetrol" "Petro-service" and "Petrolest" v. *Compagnia Mexicano de Petroleo and Tankage and Transport*, *ANN. DIG.* 1938-40, No. 11; *A. M. Luther v. Sagor*, [1921] 3 K.B. 532.

⁶⁶ *Perrin-Jarès ès qualités v. Masi*, *Monaco Trib. Civ.*, March 11, 1948, 43 *AM. J. INT. L.* 820 (1949).

⁶⁷ *Bernstein v. Van Heyghen Frères S.A.*, (2d Cir. 1947) 163 F. (2d) 246, 42 *AM. J. INT. L.* 217 (1948); *Bernstein v. Nederlandsche Amerikaanse Stoomvaart-Maatschappij*, 42 *AM. J. INT. L.* 726 (1948), and 43 *AM. J. INT. L.* 180 (1949); *Novello & Co., Ltd. v. Ernst Eulenburg, Ltd.*, [1950] C.A. 1 All E.R. 44, 49; *Austrian Supreme Restitution Commission*, Oct. 30, 1948, *OJZ Ev. Bl.* No. 47, 1949, *JBL* 1949, p. 18.

Considerations of political and economic expediency also strongly support the widely accepted solution, which prevents former owners of assets confiscated in a foreign state from claiming their restitution as soon as the assets are brought within the jurisdiction of domestic courts. Such restitutions would soon bring trade with some confiscating countries to a virtual standstill. Hence, in 1929, a British lawyer asked for more stringent and sweeping Soviet confiscation laws to prevent all such restitution claims, as this would greatly contribute to the promotion of Anglo-Soviet trade.⁶⁸

It must, however, be admitted that although this solution is in conformity with the principle of territoriality, it remains notwithstanding shocking to our notions of morals and equity that, e.g., a Russian refugee should see her own family portraits sold at Berlin⁶⁹ and London⁷⁰ auctions by successors in title to the confiscating state, without being able to reclaim her property.

Some countries, therefore, prefer to abandon the principle of territoriality. They consider the protection of private property as such a basic aim of their public policy that they do not only reject foreign confiscatory claims on domestic assets but refuse to recognize even titles acquired by confiscation of assets situated inside the confiscating state as being contrary to their public policy. A French court justified this paramount importance attributed to the principle of protection of private property by the fact that it is one of the basic human rights.⁷¹ Some support is lent to this view by the fact that the London Declaration of January 5, 1943, concerning property looted in Axis-occupied territories⁷² likewise disregarded the principles of territoriality and of the respect due to foreign acts of state. It must, however, not be forgotten that this was a wartime measure and that domestic policy, in this case, far from working in favor of the maintenance of normal trade relations, welcomed this opportunity of inflicting additional economic sanctions against the enemy in this indirect manner. Under normal circumstances, however, countries generally prefer the maintenance of trade relations with the confiscating state to the enforcement of moral principles by means of invoking public policy. Hence the cases following such ethical considerations do not at present constitute the prevailing

⁶⁸ 3 ZEITSCHRIFT FUER OSTRECHT, 1929, pp. 1160-66.

⁶⁹ LG Berlin, II, Dec. 11, 1928, *Schubatow v. Lepkes Kunstauktionshaus*, 3 ZEITSCHRIFT FUER OSTRECHT 1929, pp. 1366-70.

⁷⁰ *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718.

⁷¹ Trib. Comm. Marseille, May 25, 1937, *Potassas Ibericas v. Volatron*, CLUNET 1937, p. 535.

⁷² CMD. 6418 Misc. No. 1 (1934).

practice. It may, however, be hoped that they are the first signs of a future trend in this direction.

Domestic courts show special reluctance to recognize titles acquired by confiscation inside the confiscating state, if the victims are nationals of their own country. They may in this case rely on the fact that a state violates a rule of public international law if it confiscates property of foreigners. None the less, the United States⁷³ and some other countries⁷⁴ uphold the title of the confiscating state even against their own nationals. These nationals are unable to reclaim in domestic courts any property lost abroad through confiscation.⁷⁵ States adopting this attitude are all the same aware of the fact that the foreign confiscating state violated a rule of public international law. They maintain, however, that the only sanction for this international wrong lies in a claim for damages through diplomatic channels. French⁷⁶ and German⁷⁷ courts, however, have given their own nationals the possibility to reclaim their movable assets confiscated within the foreign country. French courts extended this even to goods produced in French-owned mines, after these mines were confiscated in the foreign state concerned.⁷⁸ In spite of the apparent soundness of invoking public policy in such cases we must not be blind to the practical and theoretical difficulties connected with putting it above the principles of territoriality and of respect of foreign acts of state. Besides, nonrecognition of such confiscations would often be tantamount to economic sanctions against the confiscating state. The principle of public policy itself thus is not exclusively in favor of such nonrecognition, the maintenance of international trade exchanges being as much in the national interest as the protection of private property.

Another case where the recognition of the title of the confiscating state to property confiscated inside its borders is particularly shocking arises when this foreign state has lost or never acquired possession of the asset which it now seeks to recover in domestic courts as its property.

⁷³ *Ricaud v. American Metal Co.*, 246 U.S. 304, 38 S.Ct. 312 (1918).

⁷⁴ *In re Russian Bank for Foreign Trade*, [1933] 1 Ch. 745; Austrian Supreme Court, cf. note 67, and a German decision, which however is contrary to current German practice, *LG Hildesheim*, Nov. 18, 1947, 15 *RABELS Z* (1949-50), p. 137.

⁷⁵ *Shapleigh v. Mier*, 299 U.S. 468, 57 S.Ct. 261 (1937).

⁷⁶ Aix Appellate Court, March 25, 1939, *Volatron v. Moulin*, *ANN. DIG.* 1938-40, No. 10; Nîmes Appellate Court, May 19, 1941, *Bloch v. Potassas Ibericas*, *LA PRADELLE REVUE DE DROIT INTERNATIONAL PRIVE* (1942) p. 389.

⁷⁷ *LG Kassel*, July 20, 1948, *AG Waibling*, June 26, 1948, *AG Dingolfing*, Dec. 7, 1948—all concerning Czechoslovak confiscations, reported in 15 *RABELS Z* (1949-50) pp. 138-40 and *OLG Nürnberg*, Sept. 19, 1949, *RUNDSCHREIBEN* No. 122/527 concerning East German confiscation.

⁷⁸ Cf. note 76.

To recognize its title in such a case may seem indistinguishable from enforcement of a foreign confiscatory claim on domestic assets and may be rejected on these grounds.⁷⁹ Besides, a restrictive interpretation of the notion of confiscation may lead to the same result.

For even if most courts still seem to adhere to the principle of recognizing the title of the confiscating state to property confiscated within its borders, this principle has to be very strictly interpreted in view of the many objections raised against it. Domestic courts are free to apply the restrictive interpretations given below, regardless of any interpretation by the confiscating country.

Due respect should only be given to acts of state of recognized governments. Confiscatory acts by unrecognized governments within their sphere of influence were rightly likened to acts by bandits and held to be without any legal effect.⁸⁰ This presupposes, however, that recognition does not continue to be withheld, while normal trade relations have practically been resumed with the country concerned. In such cases Swiss⁸¹ and American⁸² courts had to resort to the uneasy argumentation that equity requires the recognition of such confiscatory acts by a nonrecognized government, in order to protect such pre-recognition trade. For similar reasons recognition is held to be retroactive.⁸³

Although a state may issue confiscatory legislation whereby it purports to acquire the property of assets inside its borders even without taking actual possession of them, such actual taking of possession is necessary to complete a confiscation which is to be recognized abroad.⁸⁴

Due respect shall be given only to foreign acts of state made within the territory of the foreign state concerned. Confiscation of private property in occupied enemy territory is *ultra vires* and contrary to the

⁷⁹ *Etat Russe v. Ropit*, Trib. Comm. Marseille, April 23, 1925, CLUNET 1925, p. 395; Cour de Cass. (Req.), March 5, 1928, CLUNET 1928, p. 674; Trib. Civ. Mansourah (le ch), March 25, 1924, CLUNET 1925, p. 209.

⁸⁰ *A. M. Luther v. Sagor*, [1921] 1 K.B. 456; *Bounatian v. Société Optorg*, Trib. Civ. Seine (5), Dec. 12, 1923, CLUNET 1924, p. 133; *The Nueva Anna and Liebre*, 6 Wheat. (19 U.S.) 193 (1821); *Petrogradsky M.K. Bank v. National City Bank of New York*, 253 N.Y. 23, 170 N.E. 479 (1930), cert. den. 282 U.S. 878, 51 S.Ct. 82 (1930), ANN. DIG. 1929-30, No. 20.

⁸¹ Poitiers Appellate Court, July 26, 1937, *Rousse et Maber v. Banque d'Espagne*; cf. note 43.

⁸² *Salimoff v. Standard Oil Co. of New York*, *Salimoff v. Vacuum Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933), ANN. DIG. 1933-34, No. 8.

⁸³ Cf. *A. M. Luther v. Sagor*, [1921] 1 K.B. 456, being reversed on appeal; *A. M. Luther v. Sagor*, [1921] 3 K.B. 532, after the United Kingdom had recognized the U.S.S.R.

⁸⁴ *Don Alonso de Velasco v. Cornero* (1612), *sub nom.* Sir John Watts, quoted by A. N. SACK in LAW, A CENTURY OF PROGRESS, Vol. 3, pp. 363-364; *Frenkel & Co. v. l'Urbaine Fire Ins. Co. of Paris*, 251 N.Y. 243, 167 N.E. 430 (1929).

Hague Rules of Land Warfare.⁸⁵ Although such confiscation appears to be an act of state of the occupation authorities, it does not give them an internationally recognized title to such property.⁸⁶

The thorniest problem raised by the necessity of restrictively interpreting the principle set out above is the definition of the situs of intangibles. As in the case of tangible assets, the question whether the confiscation shall be held valid or not depends on whether the asset is situated in or outside the confiscating state. But while it is easy enough to determine the situs of tangibles, the situs of intangibles is not so easily established. The definition of the situs given by the confiscating state should be disregarded; otherwise, by declaring all intangibles connected in any way with confiscated property to be situated within its borders, such a state could considerably increase its confiscatory hauls.

In view of the conflict of theories and decisions concerning the situs of intangibles, a judge will often find equally good authority for holding intangibles to be situated inside or outside the confiscating country. In such cases he will follow the authority which will enable him to solve the case before him in the most equitable manner. The equity of the solution depends, however, largely on the economic facts of the case.

If the domestic assets of a foreign confiscated person are small compared to the number of its foreign and domestic creditors or shareholders, none of them would be much better off after the liquidation if all of them were allowed to press all their claims. Courts tend in such cases to exclude debts concluded in the confiscating country and shareholders living there⁸⁷ by considering these debts or shares to be situated inside the confiscating country, hence extinguished by virtue of its confiscatory legislation.

In other cases, considerable assets may remain after satisfaction of the domestic creditors and shareholders. I do not think that these assets should be considered to be *res nullius*,⁸⁸ since then the domestic courts,

⁸⁵ Article 46.

⁸⁶ Neutral states refused to recognize such titles (Papadopoulos of Péra v. Kon. Ned. Stoomboot-Maatschappij of Amsterdam and J. W. Whittall & Co. Ltd., District Ct. Amsterdam, April 17, 1925, ANN. DIG. 1925-26, No. 19, and Ct. of Appeals Amsterdam, March 13, 1928, ANN. DIG. 1927-28, No. 17) as well as the courts of the occupied state after liberation (Belgium, Ct. of Appeals Liège, Oct. 19, 1945, Delville v. Servais, ANN. DIG. 1943-45, No. 157) or even during the occupation (Norway, Dist. Ct. Aker, Aug. 25, 1943, Overland's Case, ANN. DIG. 1943-45, No. 156, Austrian Supreme Court, Oct. 27, 1947, OJZ Ev. Bl. No. 22, 1948).

⁸⁷ Obergericht Zürich, Dec. 19, 1928, Pettai v. Schinz, ZEITSCHRIFT FUER OSTRECHT, 1929, p. 1403, concerning creditors and cases mentioned in note 51 concerning creditors and shareholders.

⁸⁸ As suggested in *Russian and English Bank v. Baring Bros.*, [1936] A.C. 405.

while rejecting the foreign state's confiscatory claims as contrary to their public policy, would present their own state with the proceeds of this obnoxious confiscation. Here, the judge may tend to consider debts and shares to be situated in any place where assets of the debtor or of the company may be found. Such debts or shares thereby become domestic assets. In this case, none of the claimants would be excluded by virtue of the foreign confiscation.⁸⁹ The shares of West German shareholders of an East German company confiscated in Eastern Germany were declared void by West German courts in order to enable those shareholders to claim the company's West German assets.⁹⁰

Even where rules concerning the situs of intangibles are too definite to leave the judge such choice, he may, by invoking public policy, refuse to recognize the confiscation of intangibles which these rules would place inside the confiscating country. Legal fictions can more easily be set aside than facts when they thwart public policy.⁹¹ As far as tangibles are concerned, however, I cannot fully overcome my apprehensions against invoking public policy.

Such a course may be justified by ethical considerations, but its theoretical basis is slender. Besides, as political and economic factors tend to render it risky or impracticable, it has not until now found favor with the majority of the courts.

II

EXPROPRIATIONS

A. Definition

To what extent are the rules set out above for confiscations applicable to expropriations, i.e., to cases where the state taking the property pays a just indemnity?

B. *Expropriation of Assets Inside the Expropriating State*

As the foreign state usually acquires an internationally recognized title to assets situated inside its borders even by confiscation, i.e., when taking them without indemnity, it may all the more claim international recognition for the expropriation of such assets made against indemnity.

⁸⁹ Cour de Paris (3e ch), Jan. 3, 1944, *Banque Russe v. Technogor*, NIBOYET'S REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE, 1947, p. 79, OLG Braunschweig, Jan. 20, 1948, 3 DEUTSCHE RECHTS-ZEITSCHRIFT (1948) 251.

⁹⁰ AG Krefeld, May 25, 1949, RUNDSCHEIBEN, No. 107/451. The Swiss federal court, however, has refused a similar request made by Jewish owners of shares which had been confiscated in Germany pursuant to the German anti-Jewish legislation, 66 BGE 1940, II, 37, 15 RABELS Z (1949-50) p. 110.

⁹¹ Wortley in 67 HAGUE RECUEIL, 341, especially 413.

C. Expropriation of Assets Outside the Expropriating State

As far as expropriations of assets outside the expropriating state are concerned, most states have until recently considered the enforcement of foreign expropriations of domestic assets just as incompatible with their sovereignty as the enforcement of foreign confiscations.

We are, however, faced with the fact that during the Spanish Civil War, France tolerated the requisition of Spanish vessels begun by wireless orders on the high seas to be completed in French ports.⁹² During World War II, British⁹³ and United States⁹⁴ courts recognized decrees of the Norwegian and Dutch Governments-in-Exile, whereby the title of property of their nationals situated outside of Norway or of the Netherlands was transferred to the respective Government-in-Exile. These decrees were nonconfiscatory, as they contained an obligation to return the property to the owners at the end of the war. The above-mentioned cases cannot easily be brushed aside as being merely efforts to aid a wartime ally. The supreme court of neutral Sweden had also held a Norwegian decree transferring the ownership of a Norwegian tanker in a Swedish harbor as "not departing from the fundamental principles of Swedish Law."⁹⁵ After the war, the Austrian supreme court⁹⁶ as well as British⁹⁷ and Canadian⁹⁸ courts declared their readiness to grant foreign expropriations effect on domestic assets—provided that indemnity is found just.

In a similar way, section 115(b)(4) of the (American) Economic Co-operation Act of 1948 obliged the countries receiving Marshall Plan aid to locate and to put into appropriate use in furtherance of a joint program of European recovery, assets in the United States owned by their nationals. The implementation of this obligation seems to require that the United States recognize measures whereby the countries concerned expropriate such assets.⁹⁹

⁹² Cour de Poitiers, Dec. 20, 1937, *Société Cementos Resola v. Larrasquitu et Etat Espagnol*, CLUNIER 1938, p. 288.

⁹³ *Lorentzen v. Lydden & Co.*, [1942] 2 K.B. 202.

⁹⁴ *Anderson v. Transandine Handels-Maatschappij*, 36 AM. J. INT. L. 701-07 (1942); *State of Netherlands v. Federal Reserve Bank of New York and V. J. Archimedes*, (D.C. N.Y. 1948), 43 AM. J. INT. L. 181 (1949).

⁹⁵ *The Rigmor*, decision of March 17, 1942, 37 AM. J. INT. L. 141 (1943).

⁹⁶ In the *Hosiery Firm* case, *supra* note 35.

⁹⁷ *A/S Tallina Laevauhisus v. Estonian State S.S. Line*, [1947], 80 LL. L.R. 99, 111.

⁹⁸ *Laane and Baltser v. Estonian State Cargo and Passenger S.S. Line*, [1949] 2 D.L.R. 641, 44 AM. J. INT. L. 201 (1950).

⁹⁹ The government of the United States has, however, declined any obligation to assist in carrying out such measures. E.g. in article II, 1 (a) iii of E.C.A. Agreement between the United States and France of June 28, 1948.

These decisions seem hardly reconcilable with the principle of territoriality. We saw, however, that this principle is not the only one involved when a foreign state takes private property. In all these cases the respect due to foreign acts of state seems to be in favor of recognizing even confiscations. Considerations of public policy, which may well be opposed to foreign confiscations of domestic assets, lose much of their force in the case of expropriations, where the former owner is compensated for the loss incurred.¹⁰⁰ The principle of territoriality is thereby robbed of one of its main supporting arguments. Moreover, in these decisions the expropriations were directed exclusively against assets of nationals of the expropriating state. The same decrees were held unenforceable where they would have affected domestic interests. The principle of territoriality, therefore, finds itself further weakened by another, although controversial, argument. I refer to the doctrine that, on the strength of the allegiance which a national owes to his home country,¹⁰¹ this country may not only require him to hand over his assets held abroad but may actually gain a title to such assets, which should be recognized everywhere. It may also be said that *volenti non fit injuria*. A state entitled to determine by itself the legal fate of all assets situated inside its borders is perfectly free to cede this right partially to a foreign state.

The real reason which made some states, at least, abandon the principle of territoriality in respect to expropriation is, however, economical. Most states have expropriated private property in the course of "nationalization," although in varying extent. By accepting foreign expropriations of domestic assets they hope to gain in exchange recognition of their title to the foreign assets of domestic companies which they themselves have expropriated. The rule of strict nonrecognition of foreign expropriations would otherwise lead, e.g., to the appointment of a French Curator for the Dieppe Installations of British Railways, who would have to wind up and sell these assets for the benefit of the shareholders of the former Southern Railway Company.

A further argument in favor of the rule that foreign expropriation of domestic assets should be admitted lies in the very fact that it has been applied over some time by several countries and may therefore be considered to have become customary law. As all exceptions to a generally admitted rule, this rule breaking away from the principle of terri-

¹⁰⁰ In the above-mentioned English (cf. note 93) and United States (cf. note 94) cases, it was even said that public policy required the recognition of the expropriation decrees.

¹⁰¹ *Blackmer v. United States*, 284 U.S. 421, 52 S.Ct. 252 (1932).

toriality should be interpreted as restrictively as possible. As set out above, the rule shall apply only to domestic assets of nationals of the foreign expropriating state. United States courts have refused to apply it where interests of United States nationals or residents were concerned.¹⁰² The domestic courts should be the judge whether the indemnity paid by the foreign state is sufficient to transform an inadmissible confiscation into a permissible expropriation. British and Canadian courts have held a 25% indemnity insufficient for this purpose.¹⁰³ A mere promise of an indemnity should not be sufficient either. I disapprove of a French decision where the demand of the owner for payment of the compensation before enforcement of a Spanish expropriation decree was refused as being offensive to the Spanish Government as doubting its good faith.¹⁰⁴ I do side with writers on nationalization who ask that indemnities should be transferable if the beneficiary resides outside the expropriating country and should not be subject to excessive taxation.¹⁰⁵

D. Compensation Agreements

A delicate point is the case of the agreements concerning indemnities for expropriations suffered by foreign nationals in Eastern European states. Does, for example, Czechoslovakia, by expropriating a Czechoslovak company acquire a title to its British assets if this company, although belonging to British shareholders, is considered as having Czechoslovak nationality?

In my opinion, the terms of the Anglo-Czechoslovak Compensation Agreement¹⁰⁶ or any other agreement of this type may be interpreted as excluding any effect on assets situated in Great Britain. It speaks of compensation for British rights *affected* by various Czechoslovak measures of "nationalization." As long, however, as no indemnity has been paid, these measures constituted confiscations, which according to the rules set out above could in no way *affect* property in the United Kingdom. The sum agreed on as compensation, therefore, does not include compensation for these domestic assets. As long as no just compensation for these assets is offered, there can be no question of considering

¹⁰² Estate of Emanuel Kahn, 38 N.Y.S. (2d) 839 (1942) quoted by Lourie and Meyer, "Governments in Exile and the Effect of their Expropriatory Decrees," 11 UNIV. CHI. L. REV. 26 at 43 (1943).

¹⁰³ Cf. supra notes 97 and 98.

¹⁰⁴ Cf. supra note 92.

¹⁰⁵ Raddò, "Czechoslovak Nationalization Decrees: Some International Aspects," 41 AM. J. INT. L. 795 at 801 (1947).

¹⁰⁶ Compensation Agreement of Sept. 28, 1949, CMD. 7797.

them as having passed into the ownership of the Czechoslovak Government by virtue of expropriation.

When the rule of recognition of foreign expropriation of domestic assets is as restrictively interpreted as above, I do think that a case can be made for maintaining it. It is a solution which appears to be economically sound and does not seem inequitable.

I am aware of the fact that the present analysis of the problem of extraterritorial effect of confiscations and expropriations gives more weight to economical and ethical considerations than to principles of legal theory. However, as we have seen, some of the principles of legal theory which may be applied to the problem are in conflict with each other. I therefore have felt free to base my choice between them on these grounds outside the strict sphere of law, and I have felt all the more free in doing so in view of the great economic importance of the solutions arrived at. Incidentally, the economic soundness and relative equity of these solutions may well have brought about their almost general acceptance, as indicated by the present study of the problem in comparative law.