Michigan Law Review

Volume 63 | Issue 7

1965

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Prior to *Banco Nacional de Cuba v. Sabbatino*,[1] one of the United States Supreme Court's most controversial recent decisions touching on matters of international law, it had been held that American courts could not question titles to property acquired by virtue of a public taking decreed by a recognized foreign government and carried out within its territory.[2] This concept of judicial abstention, embodied in the "act of state doctrine," was held applicable in *Sabbatino* even though it was alleged that the asserted claim to the property stemmed from a confiscation[3] that violated customary international law.[4] This decision led Congress to incorporate into the Foreign Assistance Act of 1964 a provision substantially modifying the rule laid down in *Sabbatino*.[5] The *Sabbatino* Amendment for-

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* Foreign Assistance Act of 1964, § 301(d)(4), 78 Stat. 1013.

1. 376 U.S. 398 (1964). See generally Comment, *The Act of State Doctrine After Sabbatino*, 63 MICH. L. REV. 528 (1965).

2. *E.g.*, Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Underhill v. Hernandez, 168 U.S. 250 (1897). See Comment, 63 COLUM. L. REV. 1441 (1962); Note, 35 N.Y.U.L. REV. 234 (1960).

This concept of judicial abstention is illustrated by the following example. Assume that *P*, a United States citizen, owned movable property located in country *X* and that the government of *X* confiscated his property without compensation and resold it to *D*. If *D* then brings the property into the United States and *P* initiates an action to recover it, the court would be precluded from questioning *D*'s title once *D* has shown he acquired it in the course of the government-decreed confiscation.

3. In its strictest sense, "confiscation" denotes a public taking of property without adequate compensation. See RE, FOREIGN CONFISCATIONS IN ANGLO-AMERICAN LAW 12 (1951). For the purposes of the present discussion, however, confiscation signifies a public taking for which less than full value compensation was paid or which allegedly violated international law.

4. Customary international law refers to those principles which have derived their binding character from the fact that civilized nations adhere to them even though they have never been formalized in agreements. It is distinguished from conventional international law, which is based on treaties or compacts between states. See generally BISHOP, CASES ON INTERNATIONAL LAW 23-35 (2d ed. 1962). The Court in *Sabbatino* suggested that a court might adjudicate a claim on the merits if it were contended that a particular confiscation violated conventional international law. 376 U.S. at 428.

5. Foreign Assistance Act of 1964, § 301(d)(4), 78 Stat. 1013:

"[N]otwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation in violation of the principles of international law, including the principles of compensation and the other standards set out in this sub-section: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and suggestion to this effect is filed on his behalf in that case with the court, or (3) in any case in which the proceedings are commenced after January 1, 1966."

bids American courts to refuse, under the act of state doctrine, to decide the merits of any claim of title or other rights asserted on the ground that a foreign confiscation contravened international law, which Congress defined to include the principle of full compensation.[6] The statute affects only claims arising out of takings after January 1, 1959[7] and only if suit is filed prior to January 1, 1966.[8] It does not apply to rights claimed under short-term letters of credit issued in good faith before the taking.[9] Furthermore, the amendment does not apply if the President notifies the court that the interests of American foreign relations require that it not inquire into the circumstances of the particular confiscation.

The *Sabbatino* Amendment would seem clearly within the scope of congressional powers.[10] Indeed, it is arguable that Congress has an inherent power to enact legislation on any subject which relates

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The statute only forbids courts to apply the "federal act of state doctrine." However, there is no longer room for an independent doctrine of international law applied by state courts. Banco Nacional de Cuba v. Sabbatino, 367 U.S. 398, 374-76 (1964).

6. The "principles of compensation and . . . other standards" referred to in the amendment are included in previous legislation directing the President to suspend foreign assistance to any country that confiscates the property of United States citizens or corporations. See Foreign Assistance Act of 1963, § 301(e), 77 Stat. 386, 22 U.S.C. § 2370(e) (Supp. V, 1964). The 1963 law contains many provisions which the authors of the amendment did not consider to be encompassed under the "principles and standards" clause. For example, it requires that the victim of the confiscation be a United States citizen or corporation and that the confiscating government be allowed six months to begin negotiations with the United States before foreign assistance is withdrawn. See 110 CONG. REC. 18946 (daily ed. Aug. 14, 1964). Apparently Congress merely intended to indicate by this phrase that an American court should not consider an expropriation by a foreign government to be legal unless compensation equivalent to the full value of the property taken has been paid or guaranteed or it is otherwise justified under international law. It is unclear whether full compensation is required by international law. See note 24 *infra*.

7. The sponsors of the bill felt that some cutoff date was desirable; January 1, 1959 was chosen because it marked Castro's accession to power in Cuba and "the beginning of the greatest series of illegal takings of American property in recent history." 110 CONG. REC. 18946 (daily ed. Aug. 14, 1964).

8. The expiration date was included to provide the House of Representatives with an opportunity to hold full hearings on the legislation, after which Congress will consider adopting it on a permanent basis. H.R. REP. No. 1925, 88th Cong., 2d Sess. 16 (1964).

9. "The exclusion from the scope of the amendment of attempts by the former owner of expropriated property to recover from the nationalized entity who had purchased after the taking but pursuant to an irrevocable letter of credit issued prior thereto was inserted apparently in order to alleviate the opposition of at least one bank to the amendment." Metzger, *Act of State Doctrine Refined—the Sabbatino Case*, in THE SUPREME COURT REVIEW, 1964, at 223, 246 (Kurland ed.).

10. In *Sabbatino*, the Court said that the act of state doctrine, although not required by the Constitution, had "constitutional underpinnings." 376 U.S. at 423. The Court apparently meant that the separation of powers principle, which leaves questions of foreign policy in the hands of the political branches of the government, militates against deciding a case which could have an adverse effect on that policy when the political branches would prefer judicial abstention. It would be reading a great deal into the Court's statement to construe it as meaning that Congress could not modify the act of state doctrine. See Henkin, *The Foreign Affairs Power of the Federal Courts —Sabbatino*, 64 COLUM. L. REV. 805, 823 (1964).

to or affects our foreign relations.[11] The sponsors of the amendment, however, conceived of it as an exercise of the specifically delegated powers to define and punish offenses against the law of nations and to regulate foreign commerce.[12] It is doubtful that the law of nations clause is a sufficient delegation of power to support the amendment. The accounts of the Constitutional Convention suggest that Congress was given authority to define offenses against the law of nations only to enable it to clarify the elements of particular crimes it intended to punish.[13] Moreover, the few cases decided under the law of nations clause indicate that Congress can deal with violations of international law only by imposition of criminal sanctions.[14] The *Sabbatino* Amendment, however, is civil rather than criminal. Furthermore, the question of how much compensation, if any, must be paid an alien whose property is taken is presently an unsettled issue in international law.[15] However, given the purpose of the amendment to afford some protection to American foreign investors against confiscations and to prevent the United States from becoming a ready market for confiscated goods,[16] the commerce clause provides sufficient authority for its enactment.[17] Moreover, the fact that the executive branch of our government is primarily responsible for the conduct of foreign relations need not in any way restrict the full exercise of those powers specifically granted to the legislative branch by the Constitution.[18]

Although traces of the act of state doctrine can be found in

11. See Henkin, *The Treaty Makers and the Law Makers—The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 922 (1959). Professor Henkin admits that the Court has never explicitly stated that Congress has such a broad inherent power, but he feels that the authority can be justified on the basis of the Court's language in, *e.g.*, Perez v. Brownell, 356 U.S. 44 (1958); Burnet v. Brooks, 288 U.S. 378 (1933); and Fong Yue Ting v. United States, 149 U.S. 698 (1893). Another author, looking at the question from the viewpoint of American history, finds no reason for saying that any branch of the federal government has any inherent foreign affairs power. Patterson, *In re the United States v. The Curtiss-Wright Corporation* (pts. 1-2), 22 TEXAS L. REV. 286, 445 (1944).

12. See 110 CONG. REC. 18946 (daily ed. Aug. 14, 1964). The Constitution provides: "The Congress shall have the Power . . . To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences Against the Law of Nations." U.S. CONST. art. I, § 8.

13. See 2 MADISON, JOURNAL OF THE FEDERAL CONVENTION 544-46, 725 (Scott ed. 1898). *But cf.* CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 115 (1917).

14. See United States v. Arjona, 120 U.S. 479 (1886); United States v. White, 27 Fed. 200 (C.C.E.D. Mo. 1886).

15. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-29 (1964); note 24 *infra*.

16. 110 CONG. REC. 18946 (daily ed. Aug. 14, 1964).

17. See Mulford v. Smith, 307 U.S. 38 (1939); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (suggesting the commerce clause can be made the basis of a sort of international police power).

18. See generally CHEEVER & HAVILAND, AMERICAN FOREIGN POLICY AND THE SEPARATION OF POWERS (1952); CORWIN, THE PRESIDENT—OFFICE AND POWERS 207-74 (4th rev. ed. 1957).

Anglo-American decisions for three centuries,[19] international law does not forbid a domestic court to question the legality of an act of a foreign state in the process of resolving a controversy otherwise within the jurisdiction of that court.[20] Indeed, courts in several countries have adjudicated the merits of contentions that title to property was defective because it was acquired in the course of a confiscation which violated international law.[21] It has often been suggested, moreover, that the law of nations would become a more potent force in the world community if domestic courts systematically attempted to develop and apply rules of international law to confiscation cases.[22] On the other hand, several cogent policy considerations favoring application of the act of state doctrine irrespective of an alleged international law violation appear in the Administration's position paper opposing the *Sabbatino* Amendment.[23] First, there is no firm international law rule regarding the responsibility owed alien property-holders by a confiscating government.[24]

19. Although Underhill v. Hernandez, 168 U.S. 250 (1897), is regarded as the first case to have enunciated formally the act of state doctrine, much earlier courts had shown a reluctance to review the conduct of a foreign sovereign in his own territory. See, *e.g.*, Blad v. Bamfield, 3 Swan. 604, 36 Eng. Rep. 992 (Ch. 1674).

20. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964); 1 OPPENHEIM, INTERNATIONAL LAW § 115 (Lauterpacht, 8th ed. 1955).

21. *E.g.*, Anglo-Iranian Oil Co. v. Jaffrate, [1953] Int'l L. Rep. 316 (Aden Sup. Ct.); Anglo-Iranian Oil Co. v. S.U.P.O.R., [1955] Int'l L. Rep. 23 (Civil Ct. of Rome); Anglo-Iranian Oil Co. v. Idemitsu Kosan Kobuski Kaisha, [1953] Int'l L. Rep. 305 (High Ct. of Tokyo). Courts in some countries refuse to recognize a party's claim to property if it derives from a foreign confiscation violative of the public policy of the forum. See O'Connell, *A Critique of the Iranian Oil Litigation*, 4 INT'L & COMP. L.Q. 267, 267-68 (1955) (discussing French, German and Swiss practice.)

22. Goldie, *The Sabbatino Case—International Law Versus the Act of State*, 12 U.C.L.A.L. REV. 107 (1964); Jessup, *Has the Supreme Court Abdicated One of its Functions?*, 40 AM. J. INT'L L. 168 (1946); Stevenson, *The State Department and Sabbatino—"Ev'n Victors Are by Victories Undone,"* 58 AM. J. INT'L L. 707 (1964). Possible advantages of the application of international law by national courts are that domestic courts are convenient, respect for international law is strengthened when it, rather than diplomacy, is applied to problems, and the individual would be led to a greater awareness that international law exists for his benefit.

23. *Hearings on Foreign Assistance Before the Senate Committee on Foreign Relations*, 88th Cong., 2d Sess. 618-19 (1964). One frequently advanced reason why domestic courts should not apply international law to confiscation cases does not appear in the position paper. With courts in different countries deciding such cases and having no firm rules to guide them, one who buys confiscated property will not know where he can safely take it without being subject to an adverse judgment as to his title. See Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 AM. J. INT'L L. 141 (1960).

24. There is much disagreement regarding the amount of compensation that a government must pay aliens whose property is expropriated. Until fifty years ago the standard was clear: full, prompt, and effective compensation. See Re, *The Nationalization of Foreign-Owned Property*, 36 MINN. L. REV. 323 (1952). Most authors feel that some compensation is still necessary, even in takings arising out of today's social reform movements. *E.g.*, Mann, *International Delinquencies Before Municipal Courts*, 70 L.Q. REV. 181, 188 (1954); Rubin, *Nationalization and Compensation—A Comparative Approach*, 17 U. CHI. L. REV. 458, 460 (1950); see WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 34-35 (1959) (classifying the views of thirty-eight authors). One

Second, the matter of compensation for American investments lost through foreign confiscations is better resolved exclusively through diplomatic channels. Only in this way, the Administration argued, can the United States avoid the possible embarrassment that might arise from a court decision offensive to the confiscator or espousing a view on the legality of a given confiscation different from that publicly announced by the State Department. Furthermore, negotiations may eventually be necessary to settle the claims of all United States nationals, not merely the few whose property happens to become the subject of litigation in American courts.[25]

While these propositions might be persuasive if Congress had directed the courts to apply existing international law to every confiscation case, the arguments lose much force when addressed to the actual *Sabbatino* Amendment. First, the amendment avoids the difficult and presently insoluble problem of finding an international law standard of compensation by substituting the full value rule for the uncertain criteria of the law of nations.[26] Implicit in the concept of full compensation as used in the statute, of course, is the requirement that it be effective compensation,[27] paid or at least guaranteed before a case involving the confiscated property comes to judgment. There is no reason to believe that Congress would be unwilling to amend the full compensation provision in the event that the international law position on the matter should become more clearly settled at less than a full value level.[28] Given the present posture of international law, however, it is difficult to maintain that our government is treating an assignee of confiscated property unjustly or

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author doubts that any compensation is necessary unless the owners have been invited to bring their property into the country. Friedmann, *Some Impacts of Social Organization on International Law*, 50 AM. J. INT'L L. 475, 502-06 (1956).

25. The Administration's arguments are amplified in the Brief for the United States as Amicus Curiae, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), reprinted in 2 INT'L. LEG. MAT. 1009 (1963).

26. See notes 5, 6 & 24 *supra*.

27. Compensation, although formally paid, may amount to nothing in fact. In the Cuban taking of American facilities, for example, "compensation" was rendered in the form of thirty year bonds paying 2% annual interest. The interest was noncumulative and was to be paid only if the United States purchased during the year more than three million Spanish tons of Cuban sugar at not less than five and three-quarters cents per English pound. In the ten years preceding the confiscation, the price of sugar purchased from Cuban sources never reached that level. Only in one of those years did the United States purchase more than three million Spanish tons. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 402 n.4 (1964).

28. The other international law issues likely to arise in confiscation cases are fairly well settled. Examples of the settled doctrines are that a sovereign owes no international law duty to its own citizens and that a taking in accordance with an agreement with the owner's government is permissible irrespective of customary international law. See BRIERLY, LAW OF NATIONS 74-76 (4th ed. 1949); *cf.* Case of the S.S. "Wimbledon," P.C.I.J., ser. A, No. 1 (1923). If the defendant is an agency of the foreign government, there is the further question of the sovereign's possible immunity to suit. See generally 63 MICH. L. REV. 708 (1965).

inequitably when it warns him to keep the property outside the United States unless he has good title within the meaning of the amendment. The rationale of the Administration's opposition to the *Sabbatino* Amendment is further weakened by the provision in the amendment giving the Administration unrestricted authority to invoke the act of state doctrine whenever the executive deems it advisable in the interest of foreign relations.[29]

Under the *Sabbatino* Amendment, the United States may be accused of discrimination if act of state immunity is invoked only in certain instances. The President may be called upon to decide whether to preclude review of the merits of a case at a time when he would prefer to remain silent.[30] Moreover, the amendment is unlikely to provide substantial protection for American investments abroad because little confiscated property will ever come within the jurisdiction of United States courts.[31] Nevertheless, the substantial merits of the *Sabbatino* Amendment should not be overlooked. From the point of view of the Administration, the amendment is a nucleus around which a clear-cut policy can be formulated with full knowledge that the courts can be called upon to enforce it if confiscated property comes within their jurisdiction. For example, the Administration could announce its intention of invoking the act of state doctrine only if the confiscator enters into negotiation of a compensation standard with the government of the former owner soon after the taking. At least one commentator has taken the position that the President should invoke the act of state doctrine whenever a confiscation case comes before a court.[32] No matter how often the executive precludes review of the merits, however, the amendment has significant value in at least one respect: it directs each question in a confiscation case—the merits of a claim and the executive's interest in foreign relations—to that branch of the government most capable of evaluating it. If the conduct of our foreign relations requires the act of state doctrine as a barrier to hearing what might otherwise be an appropriate claim for relief, it is appropriate that those who design our foreign policy should assume the responsibility for invoking the doctrine.

Because of the embarrassment otherwise possible in our foreign relations, the Administration understandably prefers to have the act of state doctrine in force. It would probably prefer Congress to dic-

29. See note 5 *supra*. If a foreigner seeks to rely on the *Sabbatino* Amendment in our courts the Administration would presumably wish to consult that person's government before deciding whether to preclude judicial review.

30. See *Hearings on Foreign Assistance Before the Senate Committee on Foreign Relations*, 88th Cong., 2d Sess. 619 (1964).

31. *Id.* at 618-19.

32. See Metzger, supra note 9, at 247.

tate that, while the act of state doctrine remained in force generally, no court could refuse to consider the merits of a confiscation case if the executive requested adjudication.[33] In any event, it is clear that the Eighty-ninth Congress, when it considers enacting the *Sabbatino* Amendment or a modified version thereof as permanent legislation, will be faced with a problem requiring intensive study and a delicate balancing of conflicting interests.

33. Compare Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954), *reversing* 173 F.2d 71 (2d Cir. 1949), where the court did go to the merits of a party's title to property, acquired as a result of a confiscation by the Nazi government, after receiving notice from the State Department that American policy was "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of acts of Nazi officials. . . ." *Ibid.* The Supreme Court in *Sabbatino* expressly refused to pass on the validity of a court's hearing a case after receiving a *Bernstein*-type notice. 376 U.S. at 437. It is questionable whether the Court would uphold a case like *Bernstein* without a congressional directive to do so. See Metzger, *supra* note 9, at 241.