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COMMENTS

The Act of State Doctrine after *Sabbatino*

The United States Supreme Court recently decided, in *Banco Nacional de Cuba v. Sabbatino*,¹ that American courts must enforce a recognized foreign government's expropriation decree² even though the decree violates international law. The Court, contrary to the views of respected international lawyers,³ found this result dictated by the "act of state doctrine," which bars American courts from reviewing the validity of another nation's official acts.⁴ The decision, amid frequent revolutionary confiscations and national programs of expropriation,⁵ seriously draws into question the wisdom of further investments in developing countries.⁶ This is unfortunate because American foreign investments benefit the receiving country as well as the investor and ultimately contribute to international cooperation and world peace.⁷ This comment explores the meaning and scope of the act of state doctrine, as the Supreme Court applied it in *Sabbatino*.

1. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), reversing 307 F.2d 845 (2d Cir. 1962) [hereinafter referred to in text as *Sabbatino* and cited as principal case]. The major exception to act of state immunity for foreign acts of state occurs when the State Department relieves the court of the restraint upon its jurisdiction by official notification—the so-called Bernstein letter—that the executive does not object to judicial review of the foreign act in question. *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), reversing 173 F.2d 71 (2d Cir. 1949). In the principal case, the Court expressly refused to consider the scope or continuing validity of the *Bernstein* exception. Principal case at 420, 436.

2. "Expropriation" is the taking or using of property by public authority with adequate compensation, while "confiscation" is the taking of property without adequate compensation. See RE, FOREIGN CONFISCATION IN ANGLO-AMERICAN LAW 12 (1951). Normally, however, neither courts nor attorneys use these terms precisely. In the text, reference is made to Cuba's taking as an expropriation decree despite the Court's finding that it was confiscatory because the plan for compensation was illusory. Principal case at 401-02.

3. See, e.g., COMM. ON INT'L LAW OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, REPORT, A CONSIDERATION OF THE ACT OF STATE DOCTRINE IN UNITED STATES COURTS (1959); Hyde, *The Act of State Doctrine and The Rule of Law*, 53 AM. J. INT'L L. 635 (1959); Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959). But see Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 AM. J. INT'L L. 141 (1960).

4. See note 20 *infra* and accompanying text.

5. Seizures of private foreign investments have recently occurred in Brazil, Ceylon, Cuba, Egypt, Indonesia, Iraq and Iran, to name just a few. COMM. ON INT'L TRADE AND INV., SECTION OF INT'L & COMP. LAW, ABA, REPORT ON THE PROTECTION OF PRIVATE PROPERTY INVESTED ABROAD 2 (1963). See generally Dawson & Weston, *Banco Nacional de Cuba v. Sabbatino: New Wine in Old Bottles*, 31 U. CHI. L. REV. 63, 67-72 (1963).

6. See generally Lillich, *The Protection of Foreign Investment and the Foreign Assistance Act of 1962*, 17 RUTGERS L. REV. 405-07 (1963).

7. Remarks by Roger M. Blough, The William Penn Award Dinner of the Philadelphia Chamber of Commerce, May 19, 1964, in U.S. Steel Corp., *The Tie That Binds* 5-6 (undated pamphlet).

I. THE *Sabbatino* FACTS

In February and July of 1960, a New York commodity broker contracted to purchase sugar from C.A.V.,⁸ a Cuban corporation owned almost entirely by American nationals.⁹ When, on July 6, 1960, the United States Congress amended the Sugar Act of 1948¹⁰ to permit the President to reduce the sugar quota allotted to Cuba,¹¹ the Cuban Council of Ministers responded by authorizing the expropriation of American property in Cuba.¹² Pursuant to this decree, the Cuban government promulgated a resolution expressly nationalizing C.A.V. and its subsidiaries.¹³ As a condition of permitting the sugar to be transported from Cuba, the government exacted a second purchase contract from the broker, which it then assigned to Banco Nacional, a Cuban governmental agency. When the broker resold the sugar, a New York state court, finding C.A.V. to have been the rightful owner, awarded the proceeds to a New York receiver appointed to manage the assets of C.A.V.¹⁴

Banco Nacional then brought an action in a federal district court against both the broker and the receiver, alleging conversion of the sale proceeds. The broker defended by challenging Cuba's claim of title to the sugar, arguing that the purported expropriation failed to pass title to the sugar to the Cuban government because the taking violated international law. Banco Nacional, relying on the act of state doctrine, asserted that American courts may not question the validity of its title obtained by expropriation. The district court ruled that, while the doctrine precludes courts from testing the validity of the seizure under Cuban law or under the forum's public policy, it does not prevent such examination under principles of international law. Having found the taking to be invalid under international law because discriminatory, confiscatory, and retaliatory, the court granted summary judgment for the defendants.¹⁵ The Court of Appeals for the Second Circuit affirmed, holding that Cuba's

8. *Compania Azucarera Vertientes-Camaguey de Cuba*.

9. Principal case at 401.

10. Act of July 6, 1960, § 3, 74 Stat. 330, amending 61 Stat. 933 (1947).

11. The following day, July 7, 1960, the President greatly reduced the sugar quota allotted to Cuba. Proc. No. 3355, 25 Fed. Reg. 6414 (July 1960).

12. Law No. 851, July 6, 1960, 22 *Leyes del Gobierno Provisional de la Revolución* 29 (Cuba), English translation in 55 *AM. J. INT'L L.* 822 (1961).

13. Exec. Power Res. No. 1 of August 6, 1960, English translation in 193 *F. Supp.* 375, 382-83 n.14 (S.D.N.Y. 1961).

14. *Schwartz v. Compania Azucarera Vertientes-Camaguey de Cuba*, 28 Misc. 2d 355, 208 N.Y.S.2d 833 (Sup. Ct.), *aff'd*, 12 App. Div. 2d 506, 207 N.Y.S.2d 238 (1960) (memorandum decision). N.Y. Bus. Corp. Law § 1202(a)(4) authorizes the appointment of a receiver for the New York assets of nationalized foreign corporations.

15. 193 *F. Supp.* 375 (S.D.N.Y. 1961). Courts of other nations have reviewed expropriations under international law. See Mann, *International Delinquencies Before Municipal Courts*, 70 *L.Q. Rev.* 181 (1954).

expropriation violated international law on the narrower ground that the taking was not for a public purpose, but was designed instead to discriminate against the United States and its nationals.¹⁶ The Supreme Court reversed, holding that the act of state doctrine precludes judicial review of foreign acts of state regardless of any violation of international law.¹⁷

II. THE ACT OF STATE DOCTRINE

Under established principles of national sovereignty, a nation has absolute authority to govern within its own territory unless restrained by a rule of international law.¹⁸ Consistent with this principle, although not required by international law,¹⁹ the act of state doctrine provides that an act of a foreign state directed against persons or property within its territorial jurisdiction is immune from review by American courts.²⁰ An "act of state" requires the creation and publication of the sovereign's will, the physical imposition of the sovereign's will upon persons or property, and a judicial confirmation.²¹ It is "an act in which the state has determined or is seeking to determine an interest of its own as a state, as distinguished from an act in which the state is seeking to determine an interest of a private nature."²² Typical acts within the doctrine are executive

16. 307 F.2d 845 (2d Cir. 1962). See Falk, *The Case of Banco Nacional de Cuba v. Sabbatino Before the Supreme Court of the United States*, 9 How. L.J. 116, 120-22 (1963).

17. See note 1 *supra*. The Court concluded that "there are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens." Principal case at 428. Compare, McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 NETHERLANDS INT'L L. REV. 218, 243-53 (1959) and RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 190-95 (Proposed Official Draft, 1962) [hereinafter cited as RESTATEMENT], with Lissitzyn, *International Law in a Divided World*, INT'L CONCILIATION No. 542, at 46 (1963) and Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863 (1961).

18. *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.): "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." See BRIERLY, LAW OF NATIONS 162 (6th ed. 1963).

19. See 1 OPPENHEIM, INTERNATIONAL LAW § 115 (Lauterpacht, 8th ed. 1955).

20. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). See Comment, "Act of State" Immunity, 57 YALE L.J. 108, 111-15 (1947).

21. Reeves, *The Sabbatino Case: The Supreme Court of the United States Rejects a Proposed New Theory of Sovereign Relations and Restores the Act of State Doctrine*, 32 FORDHAM L. REV. 631, 647-49 (1964). In *Sabbatino*, the sovereign's will appeared in legislation and related resolutions; seizure occurred when Cuba refused to permit the loaded vessel to depart; and, finally, judicial confirmation was inherent in the legislation because it expressly precluded judicial review by Cuban courts. Thus, the act of state was complete.

22. INTERNATIONAL LAW IN NATIONAL COURTS 64 (Third Cornell Summer Conference on International Law 1960) [hereinafter cited as THIRD CORNELL SUMMER CONFERENCE]. "The expression, however, . . . obviously may, and is in fact often intended to, include legislative and judicial acts such as a statute, decree or order, or a judgment

and legislative measures giving effect to governmental decisions on major issues of policy, such as ownership of property, taxation, regulation of business enterprise, and the distribution of goods in the economy. Although foreign judgments presented for enforcement are not acts of state,²³ the seizure or sale of property pursuant thereto must be recognized in American courts.²⁴

An act of state, then, is an application of the right to govern; the act of state doctrine is a foreign sovereign's recognition of that right. Although not as widely accepted as the principle of sovereign immunity,²⁵ this doctrine confers broader immunity, extending beyond the sovereign to private parties claiming title under a governmental act.²⁶ The doctrine is generally regarded neither as a strict international obligation nor as a constitutional mandate, but as a judicial restraint, self-imposed to avoid embarrassing the executive in the conduct of foreign relations.²⁷ American courts have applied the doctrine strictly, even though the foreign government had ceased to exist before the suit was instituted²⁸ or had not been recognized by the United States at the time of the act in question.²⁹ Moreover, it has been applied even though the foreign state's act was illegal under its own laws,³⁰ illegal under international law,³¹ or contrary to the forum's public policy.³²

An exception to act of state immunity is made, however, if the litigation involves a gross violation of United States public policy and the Department of State expresses its approval of judicial review of the foreign state's act. In *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*,³³ the Second Circuit considered an act by the German government that, in 1937, had compelled the transfer of title of a German merchant fleet. The court

of a superior Court." Mann, *The Sacrosanctity of the Foreign Act of State*, 59 L.Q. REV. 42 (1943).

23. *Hilton v. Guyot*, 159 U.S. 113 (1895). "[F]oreign judgments which might equally be regarded as emanations of state, have been challenged even in United States courts on ground of fraud, fairness of procedure, existence of jurisdiction; and have also been denied conclusive effect when there has been a lack of reciprocity. Zander, *supra* note 3, at 833-34.

24. THIRD CORNELL SUMMER CONFERENCE 64.

25. See BISHOP, *CASES ON INTERNATIONAL LAW* 550-620 (2d ed. 1962).

26. *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918).

27. Principal case at 423. "It is a matter of international comity . . . not a matter of jurisdiction." THIRD CORNELL SUMMER CONFERENCE, at 122 (comment by Judge Fahy).

28. *E.g.*, *Bernstein v. Van Heyghen Freres S.A.*, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947).

29. *E.g.*, *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933).

30. *E.g.*, *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438, 444 (2d Cir. 1940). *Accord*, *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

31. *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918).

32. *Bernstein v. Van Heyghen Freres S.A.*, 163 F.2d 246, 249 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947).

33. *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), *reversing* 173 F.2d 71 (2d Cir. 1949).

held that the validity of the transfer was not open to question in American courts. However, upon receipt of a communication from the State Department to the effect that its policy was "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials," the court granted a rehearing and reversed its decision.³⁴

In the typical act of state case, the former owner of property sues the present owner, an assignee of the expropriating government.³⁵ The reluctance of a court to review the validity of the defendant's title reflects, in part, a desire to render titles secure, for if the plaintiff is allowed to prevail the loss would fall upon a third-party purchaser for value, who could then be left without effective remedy against the foreign government that sold the property. Therefore, the defendant is permitted to invoke the act of state doctrine.³⁶ In such cases, the foreign government whose act is questioned is not a litigant, nor is it directly affected by the decision. In addition to this typical case, it may occur that the plaintiff, rather than the defendant, will rely upon the doctrine to establish its right to property as against the pre-expropriation owner who has managed to regain possession. Here again the doctrine seems applicable because security of titles is equally as desirable to protect plaintiffs as defendants.³⁷ However, if the plaintiff receiving the benefit of the act of state doctrine is the sovereign itself, application of the doctrine can no longer be justified as securing titles because the expropriating state is not a purchaser for value. If rendering titles secure were the doctrine's only justification, it would seem equitable to hold that by submitting to the court's jurisdiction the sovereign has waived its protection. But, as the Court emphasized in *Sabbatino*, the doctrine is also intended to prevent disruption of the United States' relations with the acting foreign government.

In *Sabbatino* the policy of securing titles was not directly under consideration because it was the expropriating state itself, as plaintiff, that invoked the act of state doctrine in its suit to enforce its own expropriation decree.³⁸ The United States, as amicus curiae, nevertheless argued that the doctrine should apply in all appropriate cases,

34. *Ibid.* In *Sabbatino*, the State Department urged application of the act of state doctrine to the expropriation in question. Brief for the United States as Amicus Curiae, pp. 9-11, reprinted in 2 INT'L LEG. MAT. 1009 (1963). The Court expressly refused to consider the scope or the continuing vitality of the *Bernstein* exception. Principal case at 420, 436.

35. See, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918).

36. E.g., *National Institute of Agrarian Reform v. Kane*, 153 So. 2d 40 (Fla. 3d Dist. Ct. App. 1963). See generally Reeves, *supra* note 3; Zander, *supra* note 3.

37. Note, 75 HARV. L. REV. 1607, 1618 (1962).

38. THIRD CORNELL SUMMER CONFERENCE 72 (comment by Mr. Stevenson). The decision "in effect, requires that all the force of the United States' judicial and executive agencies be utilized to protect property confiscated in violation of international law except where the confiscating government has itself expressly agreed to the princi-

whether invoked affirmatively or defensively. The administration of the doctrine, it urged in its brief, should not encourage the private use of force or deception against the acting foreign government or its assignee, an obvious result if a distinction is drawn between the typical suit in which the doctrine is invoked by the defendant and a suit in which the doctrine is relied upon by plaintiff. On the separate question of whether the doctrine is properly applicable when the expropriating state relies on the doctrine, the United States argued that "An act of state dealing with title to property is nonetheless involved, and no beneficial purpose would be served by permitting Cuba's assignee for value, but not Cuba, to maintain suit on the title."³⁹

III. THE *Sabbatino* HOLDING

The Court did not discuss the question whether there is a meaningful difference between reliance on the act of state doctrine by a defendant and such reliance by a plaintiff, although it implied that there is none. The Court did specifically refuse, however, to distinguish between suits by sovereign states and those brought by assignees, because to do so would require a difficult examination in each case to determine if the private party suing as assignee had taken the property in good faith.⁴⁰ The clear implication is that the doctrine applies in any case where the foreign act or decree is the proper rule for decision, regardless of whether the acting state or its assignee is plaintiff, defendant, or totally unconnected with that particular litigation.⁴¹ The Court also rejected an attempt to challenge, by means of a counterclaim, the validity of Cuba's expropriation. The defendant, drawing an analogy between the act of state doctrine and sovereign immunity, had argued that the plaintiff had waived act of state immunity by filing the action, thus permitting a counterclaim.⁴² The Court answered that, "Since the act of state doctrine proscribes a challenge to the validity of the Cuban expropriation decree in this case, any counterclaim based on asserted invalidity must fail."⁴³

The Court asserted that the act of state doctrine derives neither from the inherent nature of sovereignty, nor from international law, nor from the Constitution; but because it reflects a "strong sense" among the judiciary that passing on the validity of the acts of foreign governments might "hinder rather than further this country's

ples it is violating." Stevenson, *The State Department and Sabbatino—'Ev'n Victors Are by Victories Undone,'* 58 AM. J. INT'L L. 707 (1964).

39. Brief for the United States as Amicus Curiae, p. 24, reprinted in 2 INT'L LEG. MAT. 1009 (1963).

40. Principal case at 437.

41. Cf. *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E.2d 798 (1938).

42. Principal case at 438.

43. *Id.* at 439.

pursuit of goals both for itself and for the community of nations as a whole in the international sphere,"⁴⁴ it does have "constitutional underpinnings." The Court specifically suggested that, in pending litigation, when international authorities conflict or the international legal issue touches "sharply on national nerves," American courts should refrain from fully exercising their jurisdiction. Thus, the fundamental role of the act of state doctrine, as envisaged by *Sab- batino*, is to prevent international conflicts.

Because prior Supreme Court decisions had enunciated the doctrine in sweeping terms,⁴⁵ with little analysis or explanation, a rather careful consideration of the holding seems appropriate:

"Therefore, rather than laying down or reaffirming an inflexible rule and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."⁴⁶

1. "*A taking.*" A country is free, absent a specific agreement,⁴⁷ to "take" for public use any property located within its territory.⁴⁸ A government may exercise this right in various ways, including eminent domain, taxation, and the police power. Under the act of state doctrine, a condition of recognizing the validity of a foreign act of state is that the act be completed by actual possession of the property;⁴⁹ an executory decree does not merit act of state immunity. The Court stated that Cuba's restraint of the loaded vessel and its insistence that a new contract be signed before releasing the vessel "must be regarded for these purposes to have constituted an effective *taking* of the sugar, vesting in Cuba C.A.V.'s property right in it."⁵⁰

44. *Id.* at 423. In our constitutional system the executive, rather than the judiciary or the legislature, is assumed to have primary responsibility for these matters.

45. See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897): "Every sovereign State is bound to respect the independence of every other 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."

46. Principal case at 428.

47. "[T]hat kind of agreement is so rare as to be practically non-existent." Metzger, *Property in International Law*, 50 VA. L. REV. 594, 608 (1964). See notes 78-82 *infra* and accompanying text.

48. See, e.g., RESTATEMENT § 190; FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 50-54 (1962).

49. See *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808).

50. Principal case at 414. (Emphasis added.) The treatment a government accords its own nationals is considered a domestic affair, while the treatment a government accords aliens is governed by international law and may give rise to international claims. For purposes of the act of state doctrine, however, the nationality of the victim is irrelevant, since the Court in *Sab- batino* refused to establish an exception to act of state immunity when international law is violated.

2. "Of property." No limitation on the kinds of property a government may take has ever been imposed under the act of state doctrine. In this respect, the only limitation is that the property be within the jurisdiction of the acting government.⁵¹

3. "Within its own territory." Under conflict of laws rules, executive foreign decrees are enforced only to the extent that such enforcement does not violate the public policy of the forum.⁵² When a decree is executed within the foreign state's own borders, however, American courts are required by the act of state doctrine to ignore the normal conflicts rules and to recognize the validity of the act as well as its effects.⁵³ On the other hand, if a state purports to transfer title to property located outside its borders, act of state immunity does not apply.⁵⁴ In *Sabbatino*, the act of state doctrine applied because the sugar was located within the Cuban territory at the time of expropriation.⁵⁵

4. "By a foreign sovereign government, extant and recognized by this country at the time of suit." The act of state doctrine applies only to acts of a regime recognized by the executive as the governing authority.⁵⁶ During a revolution, for example, when opposing factions each claim to be the sole legitimate government, the executive's official recognition of one of the claimants binds American courts to apply act of state immunity to the official acts of that regime.⁵⁷ When the expropriating state is a party to the litigation, the act of state doctrine is justified by the need to avoid disturbing the peace of nations.⁵⁸ It is obvious, therefore, that if the acting government no longer exists, there is little possibility of adversely affecting our foreign relations, and act of state immunity should not apply.⁵⁹

51. RESTATEMENT § 190. The Court rejected the defendant's argument that Cuba had merely attempted to expropriate contractual rights which had their locus elsewhere.

52. *E.g.*, *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918). See generally Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).

53. *Underhill v. Hernandez*, 168 U.S. 250 (1897); RESTATEMENT § 43.

54. See, *e.g.*, *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N.Y. 286, 20 N.E.2d 758 (1939), *aff'd per curiam*, 309 U.S. 624 (1940). Courts nevertheless have given extraterritorial effect to a foreign decree when it is required by an executive agreement. See *United States v. Pink*, 315 U.S. 203 (1942).

55. In *Sabbatino*, the Court said that any Cuban action with regard to property not within its jurisdiction would be ineffective. Principal case at 413 n.14. See *Rodriguez v. Pan American Life Ins. Co.*, 311 F.2d 429 (5th Cir. 1962).

56. *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); RESTATEMENT § 45.

57. *Oetjen v. Central Leather Co.*, *supra* note 56.

58. See note 44 *supra* and accompanying text.

59. This is certainly true if a new foreign government has repudiated the government whose act is challenged, for then it might be more of an affront to the new government to apply the acts of its predecessor as law than to refuse to do so. Falk, *The Complexity of Sabbatino*, 58 AM. J. INT'L L. 935, 943 (1964). In the *Bernstein* case, the acting government was no longer in existence, so it is arguable that the court of appeals should not even have discussed the act of state doctrine. THIRD CORNELL

The minimum prerequisite for establishing the existence of a government is that its agents be in control of the nation's administration, territory, and inhabitants.⁶⁰ But even when a regime is actually exercising sovereignty in the name of a state, it may not be recognized by other governments.⁶¹ Once recognition occurs, the regime acquires equal status with other recognized members of the family of nations and normally exchanges diplomatic representatives with the recognizing state. The transition of a regime from actual existence to recognition by other states has little relation to the authority of the ruling group over its own territory, but is related instead to matters of international diplomacy.⁶²

It has been argued that applications of the act of state doctrine should not be limited to recognized governments and that the courts themselves should determine the juridical status or existence of the government.⁶³ In 1962, however, the *Restatement of the Foreign Relations Law of the United States*, without citing authority, asserted that the doctrine applies only to acts performed "by a regime that is recognized as the government of that state by the state asked to examine the validity of the act."⁶⁴ This view contemplates that the determination of whether the acting government is existing and recognized be made by the executive branch.⁶⁵ In *Sabbatino*, the Court limited its holding to situations where the United States recognizes the acting government, thereby apparently adopting the *Restatement* view. But the Court did not expressly preclude the application of act of state immunity to acts of unrecognized governments; thus the controversy cannot yet be considered fully settled.

Under the *Restatement*, it is not necessary for the acting state to have been recognized at the time of the act in issue, although recognition must occur before entry of judgment in the case. This follows from the retroactive recognition principle whereby "such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence."⁶⁶ The Court, by adding to its holding the phrase, "at the time of suit," affirmed this element of the act of state doctrine.

The withdrawal of diplomatic representatives does not affect dip-

SUMMER CONFERENCE 75 (comment by Mr. Re). See note 1 *supra* and notes 33-34 *supra* and accompanying text.

60. *Williams v. Bruffy*, 96 U.S. 176, 185-86 (1877). Even when no government is recognized, the state may exist. See RESTATEMENT § 102, at 361-62.

61. 2 WHITEMAN, INTERNATIONAL LAW § 1, at 3, 17-18 (1963).

62. See generally WHITEMAN, *op. cit. supra* note 61, at 1-18.

63. RE, FOREIGN CONFISCATION IN ANGLO-AMERICAN LAW 58-65 (1951). See M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933).

64. RESTATEMENT § 45 [hereinafter referred to in text as *Restatement*].

65. See *Bernstein v. Van Heyghen Freres S.A.*, 163 F.2d 246, 253 (2d Cir. 1947) (Clark, J., dissenting).

66. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918).

lomatic recognition, nor is a country considered unrecognized merely because it becomes unfriendly.⁶⁷ It would seem, however, that if diplomacy is the appropriate remedy for takings that violate international law, as the State Department insisted,⁶⁸ the logical test for application of the act of state doctrine would not be recognition, but rather the maintenance of diplomatic relations.⁶⁹

5. "In the absence of a treaty or other unambiguous agreement regarding controlling legal principles." It could be argued that this element of the Court's holding seems to foreclose American courts from ever using the principles of customary international law to review foreign acts of state affecting property, because no review is permitted unless the acting state has recognized the "controlling legal principles"⁷⁰ by entering into an agreement which, by definition, would be determinative without resort to principles of customary international law. Besides treaties, conventions, protocols, and other "contracts" between states,⁷¹ agreements between a private party and a state can establish such controlling principles. For example, underdeveloped countries sometimes execute "concession contracts" with foreign nationals for the exploitation of natural resources. Often such contracts contain a clause in which the government agrees not to expropriate the property of the foreign entrepreneur for a period of time. If, during the term stipulated in the clause, the host country exercises its "sovereign right" to take the foreign national's assets, act of state immunity should not apply because there exists a controlling agreement.⁷²

However, the full scope of this "agreements" exception to act of state immunity is difficult to assess. Even in the absence of an agreement expressly binding the country whose act is challenged, a court might discover an "unambiguous agreement regarding controlling legal principles" in customary international law. For example, it is interesting to consider the effect of a United Nations' General Assembly resolution containing applicable legal principles.⁷³ The Gen-

67. WHITEMAN, *op. cit. supra* note 61, at 27.

68. Brief for the United States as Amicus Curiae, pp. 28-29, reprinted in 2 INT'L LEG. MAT. 1009 (1963).

69. Stevenson, *supra* note 38, at 710. Cf. Note, 112 U. PA. L. REV. 417 (1964).

70. Principal case at 428. However, the Court disclaimed the intention of broadly foreclosing American courts from considering questions of international law. *Id.* at 430 n.34. Moreover, at several points in the opinion, the Court relied upon international law. Laylin, *Holding Invalid Acts Contrary to International Law—A Force Toward Compliance*, PROCEEDINGS OF THE AM. SOC'Y OF INT'L LAW 33, 34-36 (1964).

71. For a brief survey of the existing treaty provisions affecting the security and protection of United States property and investment in foreign countries, see COMM. ON INT'L TRADE & INV., SECTION OF INT'L & COMP. LAW, ABA, REPORT ON THE PROTECTION OF PRIVATE PROPERTY INVESTED ABROAD 39-58 (1963).

72. Cf. Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572 (1960). But cf. Metzger, *supra* note 47, at 607.

73. In the United Nations during the past decade, member nations that need capital have nevertheless sponsored a series of resolutions intended to declare their un-

eral Assembly is not an international legislature, and its pronouncements are not law, but they constitute evidence of customary international law in the absence of vocal protests by disapproving members.⁷⁴ Moreover, there is some indication that, as underdeveloped nations acquire voting control of the Assembly, they are seeking to raise its resolutions to the status of law.⁷⁵ Thus, if a foreign government's expropriation were challenged under a relevant General Assembly resolution, it is not impossible that an American court would consider the resolution an "unambiguous agreement regarding legal principles" and refuse to apply the act of state doctrine. This result is possible not only if the acting government voted for the resolution but also if the resolution were passed by a large majority and the acting government had failed to object.

More difficulty inheres in estimating the effect, under the "agreements" exception in *Sabbatino*, of pronouncements by a multinational convention for the protection of foreign investments⁷⁶ that is adhered to by most members of the family of nations but not the country whose act is challenged. Such a treaty represents "the customs and usages of civilized nations" and, therefore, constitutes evidence of customary international law.⁷⁷ In such a case, it is perhaps unlikely, but not impossible, that an American court would find this to be an agreement containing controlling legal principles and would refuse to apply act of state immunity.

IV. FUTURE APPLICATION OF THE ACT OF STATE DOCTRINE

Because the Court restricted its holding to takings of property,⁷⁸ foreign acts of state outside the expropriation area may be reviewed by the courts even though there is no controlling written agreement. More important, even when an expropriation occurred within the territory of a "foreign sovereign government, extant and recognized at the time of suit," American courts still possess discretion to review the act's validity under principles of customary inter-

fettered sovereignty over the economic activities carried on in their countries. COMM. ON INT'L TRADE & INV., *op. cit. supra* note 71, at 10.

74. See generally Hyde, *Permanent Sovereignty Over Natural Wealth and Resources*, 50 AM. J. INT'L L. 854, 864-66 (1956); Sloan, *The Binding Force of a "Recommendation" of the General Assembly of the United Nations*, 25 BRIT. YB. INT'L L. 1 (1948).

75. See statement of A. B. Perera of Ceylon. U.N. GEN. ASS. OFF. REC., 16th Sess., 6th Comm. 131, (A/AC.6/SR.716) (1961); see other statements in the 6th Comm., 17th Sess., particularly those by representatives of Iran (U.N. GEN. ASS. OFF. REC., 17th Sess., 6th Comm. 144 (A/AC.6/SR. 762) (1962), and Ceylon (*id.* at 149, SR. 763).

76. In the type of multilateral treaty most frequently proposed, the participating nations would agree to certain basic rights that capital importing countries would then assure to investing aliens. COMM. ON INT'L TRADE INV., *op. cit supra* note 71, at 3.

77. *The Paquete Habana*, 175 U.S. 677 (1900).

78. Principal case at 428.

national law rather than to apply the act of state doctrine. The exercise of this discretion is to be governed by two broad standards. First, act of state immunity should apply when the consensus as to relevant international legal rules is insufficient to permit a court competently to litigate the issue; the greater the degree of codification or consensus concerning a particular area of the law, the more appropriate it is for courts to review foreign acts of state, since then it is easier to restrict itself to "the sensitive task of establishing a principle not inconsistent with the national interest or with international justice."⁷⁹ Second, act of state immunity should apply when the issue represents a battleground of conflicting ideologies; the greater the extent to which the aspects of international law in issue touch the political susceptibilities of states, the stronger the justification for exclusivity in the political branches, since decisions regarding such questions may carry important implications for our foreign relations.⁸⁰ These carefully formulated standards, together with the Court's pointed insistence that the scope of the act of state doctrine must be determined by reference to "the balance of relevant considerations"⁸¹ and its attempt to formulate a narrow holding,⁸² demonstrate that *Sabbatino* is not absolutist in nature.

The future application of the act of state doctrine must also be considered broadly in its relation to American foreign policy. The continuing cold war conflict, combined with the frightening development of nuclear weapons, make it imperative that international tension be relaxed whenever possible. Professor Falk argues that domestic courts can establish a "minimum trust in international relations" and thereby contribute to world peace by adjudicating legal controversies so as to protect the autonomy of different socio-political systems.

"Briefly the position is this: in general, municipal courts should avoid interference in the domestic affairs of other states when the subject matter of disputes illustrates a *legitimate* diversity of values on the part of two national societies. In contrast, if the diversity can be said to be *illegitimate*, as when it exhibits an abuse of universal human rights, then domestic courts fulfill their role by refusing to further the policy of the foreign legal system."⁸³

79. Principal case at 428, 430 n.34.

80. *Ibid.*

81. *Id.* at 428.

82. *Ibid.*

83. Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 16 RUTGERS L. REV. 1, 7-8 (1961) (Emphasis added.) (footnote omitted.) "Legitimate diversity" is a phrase used to suggest that there is no global consensus in favor of making a single substantive standard universal. Therefore, states are at liberty to adopt diverse national standards. Such diversity is legitimate, in this sense, with respect to the practice of

Members of the family of nations have organized their internal societies under different political and economic systems. Capitalist attitudes prevail in some parts of the world; socialist, in others. Underdeveloped countries stress the need for importing capital, while capital-exporting countries are primarily concerned with protecting foreign investors. Amid this diversity, however, there exists considerable consensus on matters of peace and human rights.⁸⁴ American courts can foster stability in international relations by refusing to interfere with a legitimate diversity of economic policies. Expropriation of private property, the question involved in *Sabbatino*, is such an economic policy. But when foreign acts of state abridge fundamental human rights, American courts should resist the policy of the foreign state and promote instead the world consensus. As suggested above,⁸⁵ the *Sabbatino* opinion largely reflects this viewpoint, and the Court's reasoning seems sufficiently flexible to permit future application of the doctrine in accordance with Professor Falk's theory. When governmental acts that violate human rights or other standards well-supported by a global consensus are challenged in American courts, the courts are free to reject act of state immunity.

V. THE ROLE OF LEGISLATION

The Court in *Sabbatino* held that the scope of the act of state doctrine is a matter of federal law,⁸⁶ binding upon both the federal and state courts. This is a logical corollary of the commitment of foreign affairs to the national government; if these important matters could be decided in fifty different ways by the states, great confusion would result. The Court also concluded that act of state immunity is a judicial doctrine, required neither by international law nor by the Constitution.⁸⁷ These conclusions suggest that a congressional

either socialism or capitalism, but not for the choice between upholding civil liberties or practicing genocide." Falk, *The Case of Banco Nacional de Cuba v. Sabbatino Before the Supreme Court of the United States*, 9 How. L.J. 116, 125 n.29 (1963).

84. Falk, *Jurisdiction, Immunities, and Act of State: Suggestions for a Modified Approach*, ESSAYS ON INTERNATIONAL JURISDICTION 1, 5-6 (1961).

85. See notes 79-82 *supra* and accompanying text. But the Court may have misapplied this theory because, while all nations recognize that aliens deprived of property should be given some compensation, the Court applied act of state immunity to Cuba's expropriation even though the compensation plan was illusory. Note, 8 A.B.A. SECTION OF INT'L & COMP. L. BULL. 28, 31-32 (1964).

86. The Court stated: "[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." Principal case at 425. Its declaration that the doctrine was federal law binding on the states amounted to a determination that judicially formulated federal common law could be controlling in state courts. See generally Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964).

87. Principal case at 423.

act requiring American courts to apply international law as the rule of decision in act of state cases would be upheld.⁸⁸ On October 7, 1964, the President signed into law the Foreign Assistance Act of 1964, containing a provision⁸⁹ overruling the *Sabbatino* precedent.⁹⁰ Introduced as a Senate amendment, the new legislation provides that American courts may not refuse to examine the validity of foreign acts of state alleged to be contrary to international law. Thus, a party who has suffered an expropriation in violation of international law may now bring suit to assert his claim to any of the expropriated property that later comes within the jurisdiction of the United States.

The new legislation is particularly interesting because of its restrictive terms. The provision extends only to takings of property occurring after January 1, 1959,⁹¹ and then only if international law has been violated. The act of state doctrine still applies, therefore, in the large category of act of state cases in which international legal principles are not violated. The legislation is also inapplicable if the case involves rights acquired pursuant to a short-term irrevocable letter of credit issued in good faith prior to the foreign state's expropriation. Moreover, the rule is temporary, not applying to any case in which the proceedings are commenced after January 1, 1966. Finally, act of state immunity will apply as before if the court receives a suggestion on behalf of the President to the effect that application of the doctrine in the particular case is required to protect foreign policy interests of the United States.

88. Henkin, *supra* note 86, at 823: "There can be little doubt that the Court would have to follow modifications in Act of State by act of Congress"

89. Foreign Assistance Act of 1964 § 301(d)(4), 78 Stat. 1013 (1964): ". . . notwithstanding 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 or other taking after January 1, 1959, by an act of that state 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 a 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."

90. 110 CONG. REC. 18935 (daily ed. Aug. 14, 1964) (excerpt from report of Committee on Foreign Relations). But the new law does not affect the result in *Sabbatino* itself. *Id.* at 18946 (Hickenlooper memorandum). The Executive Branch strongly opposed the measure. *Hearings on Foreign Assistance Before the Senate Committee on Foreign Relations*, 88th Cong., 2d Sess. 618-19 (1964).

91. This date marks Castro's takeover in Cuba. 110 CONG. REC. 18935 (daily ed. Aug. 14, 1964) (Washington Post editorial).

Carefully drafted legislation is probably more effective than sporadic judicial decisions in discouraging foreign seizures of property.⁹² It was argued that this modification of the *Sabbatino* decision will help deter expropriations by giving notice to the foreign state that the product of expropriations violating international law cannot be brought within the jurisdiction of the United States without risk of litigation.⁹³ But this provision, overshadowed by the violent debate on the reapportionment rider, was not subjected to thorough study and full hearings.⁹⁴ Complete review of the matter by the relevant congressional committees is planned for the Eighty-ninth Congress to determine the need for permanent legislation.⁹⁵

VI. CONCLUSION

While the *Sabbatino* case endorses the act of state doctrine, it does not formulate the absolute rule that, even though the foreign act of state is alleged to violate international law, an American court is powerless to act in the absence of a *Bernstein* letter. Rather, it holds that, while American courts may not review the validity of expropriations under customary international law, they may review all governmental acts, including expropriations, that violate "a treaty or other unambiguous agreement."⁹⁶ Moreover, *Sabbatino* urges courts to approach act of state cases flexibly, determining whether the policies underlying the doctrine would be served by its application in the particular case.⁹⁷ Even when the specific prerequisites for act of state immunity—execution of the act of state within the territory of a presently existing and recognized foreign government—are fulfilled, an American court may proceed to review the act's validity if it determines that a consensus of the world community of nations exists supporting the customary rule violated by the act in question and that the case has no important bearing on the conduct of foreign relations. The *Sabbatino* rule, therefore, seems to be in the mainstream of policy-oriented jurisprudence.

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92. See Laylin, *supra* note 70, at 36-38.

93. 110 CONG. REC. 18948 (daily ed. Aug. 14, 1964) (rebuttal to Executive Branch Position Paper).

94. 110 CONG. REC. 22656 (daily ed. Oct. 1, 1964) (conference report).

95. *Ibid.*

96. Principal case at 428.

97. See notes 79-82 *supra* and accompanying text.