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# The Sabbatino Case and the Sabbatino Amendment: Comedy— or Tragedy— of Errors

William Harvey Reeves\*

The issues and decisions in the *Sabbatino* litigation<sup>1</sup> and the significant concepts of the Sabbatino legislation<sup>2</sup> are here reviewed and considered in five parts. Part I discusses the mistaken beliefs of the Congress as to the reasons for proposing and enacting the Sabbatino Amendment. Part II then examines the relations between Cuba and the United States, explaining how Cuba's insult made possible the judicial errors in the *Sabbatino* decisions, which were reversed by the Supreme Court, and also prompted the subsequent Sabbatino legislation. In Part III, proof will be given of congressional misinterpretations of foreign law and foreign court decisions in considering and passing the Sabbatino Amendment. Part IV will then present some unanswered questions with respect to the Sabbatino Amendment's relation to the Constitution of the United States. Finally, Part V will offer a better method for accomplishing the desired results.

## I. THE MISTAKEN BELIEFS OF CONGRESS AS REASONS FOR PROPOSING AND ENACTING THE SABBATINO AMENDMENT

### A. Introduction

The *Sabbatino* opinion by the Supreme Court of the United States<sup>3</sup> has already taken its place among the famous controversial decisions of the high court. It had been eagerly awaited, for the decision in the federal court of the Southern District of New York and the unanimous affirming opinion of the Court of Appeals for the Second Circuit had already been the subject of wide comment. Much of that comment was laudatory of the new principle of law enunciated by the district court and approved by the court of appeals—that a governmental act by any country confiscating within its own territory a foreigner's property—an act of state contrary to international law—is null and void in that very country which has seized property under its own law and, therefore, the confiscating government can

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1. *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964); after the passage of Sabbatino Amendment, *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965), and supplementary opinion not yet reported.

2. 78 Stat. 1009, 1013, (1964), as amended, 22 U.S.C. § 2370(e)(2) (Supp. I, 1965).

3. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

acquire no title by its act of confiscation; and the courts of any other country may so declare. ". . . [W]e conclude that, since the Cuban decree violated international law, the appellant's title [Cuba's] is invalid. . . ."<sup>4</sup> The Supreme Court of the United States in an eight-to-one decision reversed the decisions of the lower courts in the *Sabbatino* case and restored the act of state doctrine to United States jurisprudence. This brought forth a further outpouring of comment and opinion—much of it unfavorable.

The decision in *Sabbatino* had hardly been handed down by the Supreme Court before Congress, reading the decision not as an exposition of United States law, as it then was and always had been, but rather as something new, revealing, if not a gross judicial error, at least a lack or weakness in our law, took steps to reverse the judicial rule.<sup>5</sup> Congress enacted the Sabbatino Amendment: "The amendment is intended to reverse in part the recent decision of the Supreme Court in *Banco de Nacional de Cuba v. Sabbatino*."<sup>6</sup> The amendment was attached as a rider to the Foreign Assistance Act then pending before the Congress. By this new legislation, Congress directed the courts of the United States to proceed as Congress understood the district court had proceeded and as the court of appeals had affirmed in *Sabbatino*. The direction by Congress to all courts of the United States was:

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 to property 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 subsection . . . .<sup>7</sup>

The Supreme Court had directed the courts to refrain from such judicial conduct, and from making such decisions based on a new principle of law. The Supreme Court had said:

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4. 307 F.2d at 869, (1962). The appellant was Banco Nacional de Cuba which the courts found was the agent of Cuba.

5. See Amendment to Foreign Assistance Act, introduced June 23, 1964, discussed in S. REP. No. 1188, pt. I, 88th Cong., 2d Sess. 24 (1964) [hereinafter cited as S. REP. No. 1188].

6. *Ibid.* The name of the plaintiff was Banco Nacional de Cuba. For text of Sabbatino Amendment as amended in 1965, see Appendix I, p. 541 *infra*.

7. Text in part of Sabbatino Amendment as amended in 1965. This added the words "to property" following the words "other right." This law contains certain exceptions. For the three circumstances to which the law would not apply, see text of law, Appendix I, p. 541 *infra*.

[W]e 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.<sup>8</sup>

Obedient to the direction of the Congress rather than the decision and mandate of the Supreme Court, the district court (on a new or renewed motion to dismiss the complaint) found that under the act of Congress the overruled decision of the court of appeals was controlling; the district court thus reinstated the underlying principle of its own overruled decision:

Congress determined that the national interests in the areas of foreign investment and international trade and commerce require the elimination of the act of state doctrine except where the president determines otherwise.<sup>9</sup>

Here is one of the strangest legal anomalies ever to occur in the United States, for although the Supreme Court's opinion was clear and unequivocal, lacking unanimity by the vote of but one Justice, that decision and opinion is not now the law of the land and never has been followed as a precedent, notwithstanding that the principle of law it confirmed had heretofore always been the accepted law administered in all courts within the United States. Rather the minority opinion<sup>10</sup> has become the ruling opinion and is now followed in the district court, whose decision the majority of eight Justices overruled. The mandate of the Supreme Court directed to the district court was never followed<sup>11</sup> and the Supreme Court's decision is a nullity in the very case it reversed.

The future legal historian will doubtless be able to place this case in its proper relation to the constitutional power of Congress, the jurisprudence of the United States, and United States foreign and domestic policy. But the future historian will not fulfill his reportorial role properly if he does not record the multifarious errors which were made in the decisions of this case. In fact, he must go farther, for out of those errors grew the certain fixed beliefs of Congress in considering the proposals which became the Sabbatino Amendment—beliefs which were conclusions without premises, not founded upon facts, and wholly erroneous.

The *Sabbatino* case began in judicial error and continued in judicial error. Many of these errors of the lower courts were corrected by the Supreme Court, while others became irrelevant or harmless under the Supreme Court's decision. Then Congress intervened and, ignor-

8. 376 U.S. at 428.

9. 243 F. Supp. at 972.

10. 376 U.S. at 439.

11. 243 F. Supp. at 961-62.

ing the decision of the Supreme Court, restated and adopted some of these errors as its own credo and expanded and enlarged others.<sup>12</sup>

B. *Reasons for the Sabbatino Amendment as Set Forth in Congressional Records*

The mind of a court can be determined from its opinion. What motivates the Congress is shown in various and sundry documents reflecting its opinions. The "legislative intent" is no more clear or cogent than is the "legislative belief and motive." The Congressional motives behind the Sabbatino legislation are to be found in the memoranda published by the Senate in the *Congressional Record* and the official report of the Committee on Foreign Relations in support of the amendment, variously called the "Hickenlooper Amendment" from the name of one of the Senators who sponsored it, the "Rule of Law Amendment" because of the sponsorship of a certain committee of business corporations which voluntarily associated and adopted this name for its group, or the "Sabbatino Amendment" because it was intended to overrule the Supreme Court decision in that case. Also the purpose of the Congress can further be studied in the hearings before the House Committee on Foreign Affairs and the subsequent conference reports.<sup>13</sup>

Although the amendment was introduced in the Senate, no public hearings were held, either when the Sabbatino Amendment was introduced or at any later time, though the Senate amended the bill slightly in 1965. The Senate memorandum referred to above, which is published in the *Congressional Record*, a report of the Senate Committee on Foreign Relations concerning the Foreign Assistance Act of 1964 in which there is brief reference to the Sabbatino Amendment,<sup>14</sup> and a conference report of 1965 giving the Senate's interpretation of the slight changes made in 1965, constitute the complete published record of the Senate's reasons for the introduction, sponsorship and final approval of this law.

The House of Representatives held no hearings on the bill when

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12. For specification of misconceptions by Congress, see pp. 433-47 *infra*.

13. The principal documents indicating reasons and intention of Congress in enacting the Sabbatino Amendment include 110 CONG. REC. 19546 (1964); 110 CONG. REC. 23674-82 (1964), and App. 5157 (1964); 111 CONG. REC. 20723 (1965); S REP. No. 1188, pt. I, 24; (concerning H.R. 11380); *Foreign Assistance Act of 1964 (Conference Report)*, H.R. REP. No. 1925, 88th Cong., 2d Sess. 16 (1964); S. REP. No. 170, 89th Cong., 1st Sess. 19 (1965); *Report on Foreign Affairs on H.R. 7750*, H.R. REP. No. 321, 89th Cong., 1st Sess. 31 (1965); *Conference Report on Foreign Assistance Act of 1965, H.R. 7750*, H.R. REP. No. 811, 89th Cong., 1st Sess. 21 (1965); *Hearings on H.R. 7750 Before the Committee on Foreign Affairs of the House of Representatives*, 89th Cong., 1st Sess. (1965) [hereinafter cited as *H.R. 7750 Hearings*].

14. The amendment under discussion will be referred to hereafter as the Sabbatino Amendment.

it was introduced in 1964, but the House Committee on Foreign Affairs held quite extensive hearings in 1965, though in the final analysis the House concurred with the Senate. These hearings, the conference report of 1964 and the committee reports, including a final conference report adopting the Senate's slight changes in 1965, reflect the purposes and intentions of the House of Representatives and its reasons for approving the Senate-introduced and -sponsored bill.

These are the documents from which one can read the mind of the Congress of the United States.

### C. *The Intention of the Congress*

The intention behind the Sabbatino Amendment was good. It was clearly the desire of Congress to take steps to discourage any foreign country from adopting as a national policy the confiscation of the property of United States nationals. The Congress had before it an aggravated case of the seizure by the Cuban Government without compensation of property located in Cuba owned by United States nationals. The intention of Congress—to *do something* about this very outrage and generally provide for the future protection of United States property invested abroad—was commendable. Also there was popular opinion that “there ought to be a law,” and Congress complied.

It is the reasons motivating the Congress which must be examined first. Three errors by Congress are outstanding: (1) Misinterpretation of the foreign cases cited and of the laws of foreign countries. (2) Erroneous belief that in passing the Sabbatino Amendment, Congress merely changed “presumptions” within the present power of United States courts but did not make a fundamental change of United States law, and that the amendment raised no constitutional questions. (3) Assumption that the Sabbatino Amendment would accomplish the desired results and was the best method for this purpose.

1. *First Error: Misinterpretation of the Foreign Cases Cited and of the Laws of Foreign Countries.*—Congress believed that many nations in the world, including most of the great trading nations, have, by their courts, determined that if some foreign country confiscates property of their nationals, those nationals may apply to their own courts (if jurisdiction over the confiscating sovereign or some part of the confiscated property can be acquired) and gain a decision that such foreign act, if contrary to international law, is null and void. This is how the lower courts had decided the *Sabbatino* case. There, Cuba, having wronged United States nationals by a confiscatory decree<sup>15</sup> and the physical seizure of their property in Cuba, had

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15. Public Law of Cuba 851, July 6, 1960, and three resolutions under the law

committed a breach of international law. The executive department of our Government had already said so in diplomatic notes.<sup>16</sup> Because the law of Cuba was contrary to international law, the lower courts in *Sabbatino* declared the law null and void, and ineffective to transfer title to the property seized in Cuba. This is the result which Congress approved and wished to achieve by the Sabbatino Amendment. Congress believed that many other nations had similarly repudiated, as part of their own jurisprudence, the act of state doctrine, or had made an exception to it as to foreign sovereign acts contrary to international law, and would have done so on the facts of the *Sabbatino* case had their own nationals been affected. Congress intended to do no more than to bring our jurisprudence for protection of foreign investment of United States citizens up to the level of judicial force which Congress believed other countries had exercised for this same purpose.<sup>17</sup> In this belief as to the jurisprudence and judicial determinations of other countries and the laws of foreign countries, Congress was wholly mistaken.

The litigants before the courts of foreign countries, as shown by the decisions of those courts, have sometimes asked a court to adopt the thesis that a confiscatory act of some other foreign government, the seizure of the litigant's property without compensation, is not a valid exercise of that other foreign government's authority and ought to be declared invalid by the courts of their country. But that thesis (now adopted by the United States in the Sabbatino Amendment) always has been rejected, in the final analysis, by all great independent trading nations.<sup>18</sup>

No great independent trading country in the world, other than the United States by the Sabbatino Amendment, has ever repudiated the act of state doctrine or made an exception to it, or permitted its courts to do so by declaring a fully executed act of state of another country

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designating the property to be seized. No compensation has been paid. United States courts have found reference to compensation in the law to be illusory. Law 851 and the first resolution are extensively discussed in the *Sabbatino* decisions. See 376 U.S. at 402-04.

16. State Dep't Release No. 397, July 16, 1960 to Cuban Ministry of Foreign Relations. See generally 43 DEP'T STATE BULL. 141-42, 171 (1960).

17. *E.g.*, Q. Would the amendment disrupt international commerce by creating new uncertainties about title to property in that commerce?

A. No. The amendment, after all, would only bring U.S. courts to the position of courts in a majority of the industrialized nations of the world. Quoted in *H.R. 7750 Hearings* 592; from memorandum entitled, "Rule of Law Amendment: 10 Questions and Answers," submitted in support of the amendment by principal witness for "Rule of Law Committee." Same memorandum was published as part of the statement of one of the Senate sponsors of the Sabbatino Amendment. 110 CONG. REC.—(1964).

18. For a discussion of foreign cases cited to the Congress by witnesses, see Part III, § A, p. 462 *infra*. For a digest of each foreign case cited as one on the principle of the Sabbatino Amendment, see Appendix II, p.541 *infra*.

to be null and void because in violation of international law. The laws of every one of these great countries in the world, as shown by the acts of their legislatures and the decisions of their highest courts, are wholly consistent with the decision of the United States Supreme Court in *Sabbatino*; there are no exceptions.<sup>19</sup>

The ultimate and conclusive proof of the fact on which any legal determination is made, and the law which is applied, can be found in the reading of the opinion of the court making the decision. Thirty-seven foreign cases were cited in memoranda submitted to Congress in support of the Sabbatino Amendment. A report or digest in the English language is available in many law libraries for most of these cited cases. Only a few would be somewhat difficult to secure and must be read in a foreign language.<sup>20</sup>

Of these foreign cases, only those involving a national of one country whose property had been confiscated in another country, are relevant and of interest. The legal question in such a case is: Did the one (not a citizen of the country where his property was located) who owned the property at the time of confiscation (that is, physical seizure with no, or inadequate, compensation) retain title to his property in the foreign country in spite of the will of the foreign government to transfer title to itself and the physical seizure of the property for such purpose?

A reading and analysis of all of these cases will show that whenever a court of an independent country<sup>21</sup> has found by its decisions such an exception to the act of state doctrine, that decision has been overruled by a higher court of that country; or in respect of one country, the lower courts which had made such decisions were deprived of jurisdiction to continue to hear and decide such cases.<sup>22</sup> It was the

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19. *Ibid.*

20. There is a series of volumes published either under the name, *International Law Reports* or *Annual Digest of International Law Cases*, which usually can be relied upon. But as to some cases, recital of facts is insufficient for complete analysis or case has not been reported. In such instances, reference to some of the foreign cases should be read in foreign law journals or official reports of decisions. Two Dutch cases are reviewed in a publication in the Netherlands, published in French, English and Dutch, *Nederlands Tijdschrift voor International Recht*. A few lower court decisions in Germany summarized in the *International Law Reports* appear to support an exception to the act of state doctrine. But the Allied Government in Germany repudiated these lower court decisions and deprived all courts of Germany from deciding such cases. For discussion, see Part III, p. 483 *infra*, and digest of particular cases, Appendix II, p. 546 *infra*.

21. There is only one case not overruled or repudiated within its own jurisdiction: *Anglo-Iranian Oil Co. v. Jaffrate*, [1953] 1 Weekly L.R. 246, [1953] Int'l L. Rep. 316 (Sup. Ct. Aden) [hereinafter cited as *The Rose Mary*]. But this decision was not of an independent country but of the British Protectorate, Aden. The case was later criticized and distinguished by a higher British court. For further discussion and testimony concerning this case before Congress, see Part III, p. 468 *infra*.

22. See note 20 *supra*.



highest governmental authority of that one country which took a series of such cases from its lower courts on the ground that such decisions were not in accordance with the fundamental law of that country. The courts of that country then confirmed.

Every case cited to the United States Congress in the Sabbatino hearings or mentioned by any report of Congress in respect to the Sabbatino Amendment will be analyzed in this memorandum. Many are wholly irrelevant to the issues in the *Sabbatino* case or in the Sabbatino Amendment. None is authority or precedent for the decisions of the district court or the court of appeals in the *Sabbatino* case.<sup>23</sup>

2. *Second Error: Erroneous Belief That in Passing the Sabbatino Amendment, Congress Merely Changed "Presumptions" Within the Present Power of United States Courts but Did Not Make a Fundamental Change of United States Law, and That the Amendment Raised No Constitutional Questions.*—The second great error which clearly appears to have motivated the Congress in passing the Sabbatino Amendment was Congress' unwarranted assumptions concerning the judicial power of the United States courts, the decisions of courts of other countries and the power of the executive branch of the United States. Some assumptions merely had no basis in precedent. Others were wholly erroneous. These assumptions included the beliefs: (1) That the courts of the United States had the inherent right and power to declare acts of state of any other country affecting titles to property there, of United States nationals, to be null and void if the courts of the United States should find such an act to be contrary to international law. (For a consideration and refutation of this assumption, see Part IV, p. 487 *infra*.) (2) That every court

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23. In reading foreign cases, care should be exercised as to nomenclature. "Act of state doctrine" relates to the international recognition of the validity of an act of a foreign country in the country where the act took place, but does not recognize any right of extraterritorial enforcement on property outside of the confiscating state at the time of confiscation. Discussion of an act *contra ordre publique* emphasizes that a foreign act of state will not be enforced extraterritorially (*i.e.*, on property not in the territory of confiscating country at time of confiscation but at that time under the jurisdiction of the forum state), if contrary to the law of the forum. The two are wholly consistent. It happens, however, that a large number of foreign cases cited to the Congress relate to requests for extraterritorial enforcement of confiscatory acts. They are wholly irrelevant to any discussion of the *Sabbatino* case or Sabbatino Amendment which refers only to *recognition* of the validity of an act *in* Cuba (or other foreign country), not to enforcement on property which at the time of confiscation was outside of the confiscating country. For further discussion of the act of state doctrine, see Part II, § D, p. 453 *infra*. See also *Republic of Iraq v. First Nat'l City Bank*, 241 F. Supp. 567 (S.D.N.Y.), *aff'd*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). For a general discussion of the cases cited to the United States Congress in the Sabbatino hearings, or mentioned by any report of Congress with respect to the Sabbatino Amendment, see Part III, p. 461 *infra*. For an analysis of each foreign case cited see Appendix II, p. 541 *infra*.

of every foreign country also had this same inherent right and power and that many of the courts of the countries of Europe had exercised this power to declare acts of foreign countries null and void or otherwise ineffective within that foreign country if that foreign act of state were prejudicial to their own citizens and their court found that national act to be contrary to international law. (For a refutation of this assumption, see Part III, p. 461 *infra*.) (3) That the courts of the United States have, however, never exercised this power (no court in the United States before *Sabbatino* had ever attempted to give such a decision) in deference to a "presumption" that any such decision would embarrass the executive department in the conduct of foreign relations. (4) That, however, the Department of State could dissolve this "presumption" by a declaration to a court, that United States foreign relations would not be impaired by such a decision, and thus enable the court to declare a foreign act of state to be contrary to international law and consequently invalid. (For a refutation of the assumption above and that immediately preceding it, see discussion directly below). (5) That any court's decision "on the merits" of rights, claimed or based upon a confiscatory decree contrary to international law, would necessarily be a determination that the confiscatory decree was invalid. (For refutation of this assumption, see "Glossary of some equivocal words," Part II, § E, p. 455 *infra*.)

Congress said:

The effect of the amendment is to achieve a reversal of presumptions. Under the *Sabbatino* decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy.<sup>24</sup>

The origin of most of the assumptions Congress relied upon or incorporated in the above quotation can be found in the first decision of the district court in *Sabbatino*. The judge framed the question which was before him, as follows:

The crucial question remains, however, whether this court can examine the validity of the Cuban act under international law and refuse recognition to the act if it is in violation of international law.<sup>25</sup>

By the hypothesis stated, if this question were answered in the affirmative, then the sugar company would still own the sugar, and

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24. S. REP. No. 1188, 24; 110 CONG. REC. 19546 (1964).

25. 193 F. Supp. at 380.

the law and the seizure under it would be ineffective to transfer title to Cuba. If the question were answered in the negative, the decision would be in favor of the agent of Cuba; Cuba would hold title to the sugar. This very question foreshadowed the judge's final decision, for he *did* examine the *validity* of the Cuban act of state, and upon finding the act contrary to international law, refused recognition of it and declared it to be invalid in Cuba to transfer title.

The judge's opinion shows his search for the proper rule to apply in order to do justice to the parties, and it indicates what he believed was the basis for his authority to apply the rule when found. The judge first sought guidance in decisions of United States courts; and although he could find no case which had decided the question, he believed that none precluded an affirmative answer. He dismissed United States cases with the remark, "To be sure, there are dicta in a few cases but they furnish little aid."<sup>26</sup> He then turned to decided foreign cases but found little comfort in them, though he did find "foreign forums have evidenced some willingness to examine the validity of foreign acts under international law . . . ."<sup>27</sup> The most encouragement, however, for an affirmative answer to his own hypothetical question came from secondary sources, for as he said, "by far the strongest support for such examination has come from legal commentators and textwriters [*sic*]."<sup>28</sup> The judge names a few of these commentators and textwriters, some of whom indeed do believe that the proper rule of law for the future should be an affirmative answer, that is, a foreign act of state contrary to international law should be declared null and void.<sup>29</sup>

A few months before the Sabbatino Amendment was enacted, however, the Supreme Court of the United States had categorically stated that the courts of the United States should make no effort to consider and should not question the *validity* of a fully-executed foreign act of state "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles . . . .";<sup>30</sup> and there was no relevant treaty with Cuba.

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26. *Ibid.*

27. *Ibid.*

28. *Ibid.*

29. *Id.* at 380 n.7. Although the judge names but two, there are others, two of whom, not mentioned, testified against the Sabbatino Amendment before the House Committee on Foreign Affairs. Testimony of Professor Stanley Metzger, *H.R. 7750 Hearings* 991-1032. See also, Metzger, *The Act of State Doctrine and Foreign Relations*, 23 U. PITT. L. REV. 881 (1962); Metzger, *Act-of-State Doctrine Redefined: the Sabbatino Case*, 1964 SUP. CT. REV. 223, Testimony of Professor Louis Henkin, *H.R. 7750 Hearings* 1060-79. See generally Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964); Henkin, *Act of State: Sabbatino in the Courts and in Congress*, 3 COLUM. J. TRANSNAT. L. 103 (1964).

30. 376 U.S. at 428.

In enacting the Sabbatino Amendment, Congress in effect adopted as law, which should be universally recognized, what were only the suggestions of legal commentators and text writers as to what the law of the future should be<sup>31</sup> in regard to foreign acts of state found contrary to international law. However, Congress in published statements based its reasons for the enactment of the Sabbatino Amendment, not on its intention to adopt untried rules suggested by commentators and text writers, but on other beliefs.

Now we must turn to the decision of the court of appeals in *Sabbatino*. This court corrected the belief by the district court that no United States court had passed on the question, and found instead that the act of state doctrine had long been a consistently recognized tenet of United States jurisprudence.<sup>32</sup> But the court of appeals also believed that it, or any other United States court, could make such a decision if the State Department declared that such a decision would not interfere with the conduct of international affairs. The court of appeals further believed that it had been "enlightened" as to the attitude of the State Department in the *Sabbatino* case by a certain series of letters which permitted it to make such a decision, and, therefore, being relieved from the "presumption," the court was enabled to, and did, affirm the lower court's decision.<sup>33</sup>

After the court of appeals' decision in the *Sabbatino* case, the United States Department of State denied that it had had any intention of advising the court it could make such a decision, and insisted that the series of letters if properly understood could not be so interpreted.<sup>34</sup>

Whether or not these particular letters were, when written, intended as significant advice to the court, the Congress believed, as did the court of appeals, that the State Department could have done so if it had wished, and in fact they believed the State Department had done so in another case at an earlier date. This belief was based upon a single incident: the "Bernstein letter."<sup>35</sup> This

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31. Over a half century ago, the United States Supreme Court gave a warning, in one of the very cases cited by the lower courts in *Sabbatino*, that legal writers should not be used as authority for what the law ought to be. The Supreme Court said in this case: "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

32. 307 F.2d at 855-56.

33. *Id.* at 858-59.

34. Brief for the United States as Amicus Curiae, pp. 39-43, 376 U.S. at 420 n.19.

35. Submitted by U.S. Dep't of State. Text in 20 DEP'T STATE BULL. 592 (1949). See also *Bernstein v. N. V. Nederlandsche-Amerikansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), *modifying* 173 F.2d 71 (2d Cir. 1949). In a previous case, Judge Learned Hand had dismissed a similar complaint on the grounds that the court could not pass on the validity of the acts of the German Government (Nazi). *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 249 (2d Cir.),

letter has been erroneously interpreted as advising a court that it could ignore or declare null and void an *existing* law of a foreign country. The letter did no such thing. The State Department has never attempted to relieve any court from the duty of applying the act of state doctrine. The "Bernstein letter" advised a court what were the *present* and existing laws of Germany (then under the Allied Occupation Government); it is no authority for establishing a presumption that the State Department can relieve the courts from following the act of state doctrine. A review of the facts of the case can leave no doubt that no exception to the act of state doctrine was accomplished either by the State Department or the courts in the *Bernstein* case.

One Arnold Bernstein, a German citizen, had, through a German corporation of which he owned a majority of the stock, successfully operated a fleet of ships from the United States to ports on the continent of Europe.<sup>36</sup> During the Nazi regime in Germany, he was arrested for violation of the currency exchange laws, convicted, and sent to jail. His fines were paid by proceeds from the sale of some of his ships. Later he was able to leave Germany and return to the United States, where, although not a United States citizen, he had resided for some time before his ill-fated business trip to his native country.

Shortly after the end of World War II, he instituted an action in the federal court for the Southern District of New York to recover some of his ships, then operated by the purchaser, and to cancel the mortgage held by a New York financial institution on those same ships. At the time of the commencement of his action, he had become a citizen of the United States.<sup>37</sup> Bernstein claimed that he had been deprived of his ships under duress as practiced under the "Nuremberg laws," known in the United States and the world generally as a series of Nazi enactments for the oppression and ultimate destruction of the Jewish population of Germany. Although Mr. Bernstein had not been convicted or sentenced under these laws, but under the foreign exchange laws which applied to all citizens, there was nevertheless the possibility that his loss of the ships was in some way connected with these infamous laws. He alleged duress,

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*cert. denied*, 332 U.S. 772 (Oct. 13, 1947). Judge Hand considered the new laws imposed on Germany by Allied Occupation Authority, but could not find as of the date of his opinion (July 10, 1947) that these required return of property seized under Nazi law. The dissenting opinion of Judge Clark recommended continuation of the case until the new laws of Germany were clarified. See note 39 *infra*.

36. Any statements of fact not appearing in the opinions above, cited in the *Bernstein* case, are from the pleadings and other documents filed in that case with the District Court for the Southern District of New York.

37. Mr. Bernstein was granted United States citizenship in 1940 after his ships had been sold.

but to recover his ships, he had to prove either a causal connection with the universally condemned Nuremberg laws or that the application of similar principles had deprived him unjustly of his ships. Also he claimed the Nuremberg laws to be null and void. The issue then was: Had title been transferred under, or by reason of, the Nuremberg laws and, if so, was this still to be recognized as a valid transfer by a United States court? The State Department was asked by Bernstein's attorney for an expression of opinion which was given, this being the "Bernstein letter," addressed by the acting legal adviser to Bernstein's attorney and dated April 13, 1949.

We must now consider the changes which had occurred in Germany prior to 1949, the date when the case was pending and the letter was sent. In 1945, Germany had unconditionally surrendered. The Allies soon had occupied the whole of Germany and, long before 1949, had organized the Government of Germany, which by the surrender and subsequently by the courts of Germany itself (after the establishment of the Federal Republic of Germany) was recognized as the sole legitimate Government of Germany succeeding the Nazi regime.<sup>38</sup> One of the first acts which this new Government of Germany did was to rescind the Nuremberg laws and, soon thereafter, to grant restitution of property transferred under them. Of special importance here is Military Government Law No. 59, under which was announced the Allied Government's policy of undoing forced transfers, and restituting identifiable property to persons wrongfully deprived of such property within the period from January 30, 1933, to May 8, 1945, for reasons of race, religion, nationality, ideology or political opposition to National Socialism (Nazism).<sup>39</sup> This policy, as enacted into law, applied generally despite the existence of any purchasers in good faith of property confiscated under Nazi law. Thus at the time when Bernstein made his plea, the laws of Germany provided that if he could prove he had been deprived of his ships unjustly under Nazi laws, those ships would be returned to him notwithstanding the good faith of the purchaser or of the company which held the mortgage. Since Bernstein had not been convicted under the Nuremberg laws, and since a substantial fund realized on the sale of the ships had been used to pay his fines, the purchasers and mortgagors claimed they had good title and that the Nuremberg laws were wholly irrelevant. The issues were never tried for the case was settled. But even assuming a trial with

38. *D. & W. GmbH. v. V. & V. GmbH.* (Joint Export-Import Agency Case), Bundesgerichtshof (I. Zivilsenat.), Jan. 10, 1956, 19 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 341 (Fed. Rep. Ger.), [1956] *Int'l L. Rep.* 783 (No. 23).

39. Military Gov't Law No. 59 on Restitution of Identifiable Property, *Mil. Gov't Gaz.-U.S. Zone*, Nov. 10, 1947. See reference to text of Bernstein letter, note 35 *supra* and accompanying text.

a wholly successful outcome for Mr. Bernstein with the return of the ships to him, such decision would have been strictly in accord with the laws of Germany. The same result would have occurred in Germany itself.

The "Bernstein letter" did not authorize any United States courts to declare null and void any existing and unrepealed laws of Germany.<sup>40</sup>

The assumptions or presumptions discussed above tend to conceal the more basic assumption on which they were founded. Congress in its statement of its intention in enacting the Sabbatino Amendment, and its interpretation of the expected results, apparently believed that the amendment would not change, that is, not enlarge, the inherent power of the courts of the United States nor would it cause any change in United States fundamental law.<sup>41</sup> This, the most basic assumption of all, will be considered later.

3. *Third Error: Assumption That the Sabbatino Amendment Would Accomplish the Desired Results and Was the Best Method for This Purpose.*—The third error motivating Congress to draft and enact the Sabbatino Amendment may be considered as one of omission rather than commission. Congress has passed an act which can accomplish in very small part, if at all, the desired purpose.<sup>42</sup> A simple law well within the domestic law of the United States, and touching no more of international relations than our courts have long been accustomed to consider, would have much more effectually accomplished the intention of Congress.<sup>43</sup>

The general purposes of the Sabbatino Amendment, as stated by Congress, were to protect American foreign investment and discourage foreign countries from confiscating within their own territory the property of United States nationals. These purposes were to be accomplished in two ways. The first was by means of a warning to foreign countries which might contemplate adoption of a national

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40. The Sabbatino Amendment would not have applied to the *Bernstein* case even if in existence at that time. The Sabbatino Amendment can be invoked only when the court finds a breach of international law has occurred. The treatment by a nation of its own citizens is not a violation of international law. Bernstein was a citizen of Germany at the time of his arrest and incarceration. In a recent case, the United States District Court for the Southern District of New York found that since the seizure by Cuba of the property in Cuba of a Cuban-owned Cuban corporation was not a violation of international law, the Sabbatino Amendment was not applicable. *F. Palicio y Compania v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966). See also 307 F.2d at 860.

41. See note 13 *supra*. A discussion of the Sabbatino Amendment in its relation to the fundamental law of the United States, particularly the Constitution itself, is included in Part IV, p. 487 *infra*.

42. Lowenfeld, *The Sabbatino Amendment-International Law Meets Civil Procedure*, 59 AM. J. INT'L L. 899 (1965).

43. See Part V, p. 532 *infra*.

policy of confiscation that if they did so, the great market of the United States would be closed to the sale of any of those goods confiscated from United States nationals.<sup>44</sup> Second, the policy was to be accomplished by advising the world that should any confiscated property come into the United States as property claimed by the confiscating government, or of anyone claiming title by such confiscation, that the United States national who had owned the property prior to its seizure in the foreign country would be able to take possession of it as his own, or in lieu thereof to secure the purchase price.<sup>45</sup> United States courts would declare there had been no change of title.

If there is knowledge that the former owner could recover the confiscated property in the United States, so the argument runs, no property would be brought in. If the first proposition, therefore, were effective, and confiscated goods were wholly withheld from the United States market, there would be no property for the former owner to recover in the United States. The goal of excluding confiscated goods from the United States market as a deterrent to wrongful acts against United States property abroad is not here criticized. There is no reason why appropriate legislation should not be framed to accomplish this purpose; but the Sabbatino Amendment will not do it.

In the first place, there is no national prohibition by the Sabbatino Amendment against sale in the United States of confiscated goods.<sup>46</sup> The power of the United States, in its executive capacity, to prevent goods whose importation is prohibited, from coming into the United States is not invoked. The former owner of confiscated property must in every instance start a proceeding in a court, claiming title to certain goods imported. This is not the way to enforce a national policy against a foreign country which is a wrongdoer. No one individual could, as the United States itself can, have representatives in every port to check every shipment as to origin and ownership. Even if that were possible, the cost of such a policy would always fall on the claimant under the Sabbatino Amendment; and cost of

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44. "The United States shall not become a thieves' market." This phrase appears in many places. It first appeared in the memorandum submitted by Senator Bourke B. Hickenlooper and published in the *Congressional Record*, Aug. 14, 1964. It was used in briefs and in oral argument before the Supreme Court in the *Sabbatino* case and appears in the decision of Judge Frederick van P. Bryan, *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (1965).

45. This was the result, approved by the Congress, of the lower court decisions in the *Sabbatino* case. 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962).

46. A United States district court has already decided that the Sabbatino Amendment does not apply to property confiscated by a country from its own citizens. This is not an act contrary to international law. *F. Palicio y Compania v. Brush*, *supra* note 40.



litigation can be great. Obviously, this cost of policing shipments to prevent importation of confiscated property should fall on the United States. Still worse, the law is dependent wholly upon the strict identification of the particular property. Such identification is difficult in Cuba where some sugar-producing companies are wholly or partially owned by United States nationals, some are wholly owned by Cubans, and probably others are owned in whole or in part by other foreigners.

More than five years have gone by since the property of *Compania Azucarea Verientes-Camaguey (C.A.V.)* in Cuba was seized and that one ship loaded with sugar sailed from Cuba to Africa. The right to receive the purchase price of that sugar in New York is still being contested between Cuba and C.A.V.

In 1963 the United States Government imposed a complete embargo over trade between Cuba and the United States.<sup>47</sup> One year later, in 1964, the Sabbatino Amendment was passed. Any effect which it might have had on Cuban trade with the United States was a nullity for already, by law, there was no trade with Cuba. Thus, up to this time at least, the Sabbatino Amendment may properly be considered as a private bill for the relief of C.A.V. as to one shipload of sugar, value 175,000 U.S. dollars. And even here it has so far failed to accomplish its purpose.<sup>48</sup>

But the Sabbatino Amendment is now a general statute<sup>49</sup> of the United States to be applied to commerce with any country if necessary. We may question how effective it will be in obtaining its inconsistent goals of preventing the United States from becoming a "thieves' market," and also restoring all confiscated goods which come into the United States to the owner of these goods before confiscation. Under the Sabbatino Amendment, taking Cuba as an illustration, a claimant to any sugar coming to the United States would have two tasks to perform in the field of legal evidence before he could be awarded the sugar or its purchase price; one task would be difficult, the other impossible. The claimant must first prove that a particular bag of sugar was his property and confiscated from him. After the 1960 crop of sugar had been exhausted, no sugar produced in Cuba could ever have been in the possession of this hypothetical claimant.<sup>50</sup> Even if the laws of evi-

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47. On July 8, 1963, the United States Government imposed Cuba Assets Control Regulations by Proclamation. 31 C.F.R. pt. 515 (1966).

48. The case is still in litigation and the purchase price is still being held in escrow. Lehman Bros. is now a party to the case and holds the proceeds. Sabbatino, a temporary receiver for C.A.V., who originally received the payment, is no longer a party to the case.

49. 79 Stat. 659 (1965), 22 U.S.C. § 2370 (Supp. I, 1965).

50. An Italian court held that a concessionaire of a confiscated oil field never had title to oil pumped from the ground after the company had been ousted from its oil producing facilities. The court held the former company could not acquire title to

dence were generously applied, however, and he could satisfy this first problem of identifying the sugar by showing that it had been shipped from the mill which had been seized from him (an obviously difficult task), he would meet an impossible cost accounting problem. He would have to show what proportion of the purchase price should be allocated to him as "former owner," what proportion represented the property interest of some other confiscated company as "former owner," (the job of which had been to furnish, however unwillingly, the raw material grown upon land seized from some sugar cane growers, and perhaps too, what proportion should be allocated to "the former owner" of supplies (twine, bags, fuel, etc.) sent to the mill, including any other costs necessary to produce a bagged quantity of sugar ready for shipment. The proper disposition of labor costs would have to be determined, for obviously the claimant would not have contributed to these.<sup>51</sup>

C.A.V. had none of these problems. As to it, the sugar was easily identified and all costs which had gone into creation of that ready-for-shipment sugar had already been paid or assumed by the company. That particular sugar, just two days before, had been the identifiable solely-owned property of C.A.V.

Wherever a sovereign government deals with its own citizens, however unjust or unfair the actions of the government towards those particular citizens may be, there is no breach of international law. The injured citizen cannot apply to any foreign government to sponsor his claim against his own government. The Sabbatino Amendment would not, therefore, apply to, or in any way prevent, the importation into the United States of sugar confiscated by Cuba from Cuban citizens, for the court in such an instance could not find any breach of international law. The Sabbatino Amendment, by its terms, applies only to a case in which a court can find a breach of international law.<sup>52</sup>

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goods *in future*. *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co. (Unione Petrolifera per l'Oriente S.P.A.)*, Civ. Ct., Rome, Sept. 13, 1954, [1955] 1 *Foro Italiano* 256, [1955] *Int'l L. Rep.* 23 [hereinafter cited as *The Miriella*]. This was one of the several reasons given by that court for upholding the title of the Iranian Government and rejecting the claim of title by the Anglo-Iranian Oil Company. While there might be controversy as to ownership of oil known to exist in the ground (*cf. N.V. de Bataafsche Petroleum Maatschappij v. The War Damage Comm'n, Ct. App., Singapore, April 13, 1956, [1956] Int'l L. Rep. 810*), there can be no argument over possession of sugar not yet grown.

51. The civil law principle *specificatio*, incorporated in various forms in the civil codes of some European nations, might give rise to the question as to whether or not a person who creates a new product out of materials to which he had not title can become the owner.

52. Sabbatino Amendment, first exception. The United States district court has already held that Cuba acquired good title to property and supplies of Cuban-incorporated, Cuban-owned cigar companies. The Sabbatino Amendment did not

A further question arises as to whether or not it was also the intention of Congress to prevent entry into the United States of property confiscated from citizens of some other foreign country. Assume then that property was confiscated by Cuba, which had been owned by citizens of, or corporations owned by citizens of, the mythical country, Graustark, meaning thereby any European country or any other capital-exporting country.

Graustark, as all of the countries of Europe, recognizes the act of state doctrine. Under Graustark's law, therefore, the Graustark citizen no longer has title to the property he held in Cuba, for the title has been transferred to Cuba. On behalf of that citizen and others, Graustark has demanded of Cuba reparations equal to the full value of the seized property. Now suppose some of the property seized from a citizen of Graustark comes to the United States and can be identified. May the citizen of Graustark sue in the United States courts under the Sabbatino Amendment? Under the laws of Cuba, the property is no longer his. Under the laws of Graustark, his own country, similarly the property is not his. But under the Sabbatino Amendment, as interpreted, the property would still belong to the citizen of Graustark, for the confiscatory act of state must be declared null and void and invalid to transfer title. This is what the Congress and a court have determined under the Sabbatino Amendment is a decision "on the merits." If the United States courts do take this case, might Graustark complain diplomatically that by this judicial action a United States court would be interfering with its national right to deal with Cuba exclusively in behalf of its own citizens? Also Graustark might believe, as the Attorney General of the United States has testified before the Congress,<sup>53</sup> that compensation, under the rule to be applied under the Sabbatino Amendment, might reduce compensation owed by Cuba to an amount less than the standard of "prompt, adequate and effective compensation."

Furthermore, would such an adjudication by a United States court violate the age-old rule that our Government will not espouse the claims of a citizen of another country for wrongs he claims have been done to him, not in the United States but by some third sovereign power?

If the courts do not accept such cases then the restrictions on importation of confiscated property are less; and the hopes that the Sabbatino Amendment can prevent the United States from "becoming a thieves' market" fade further.

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apply to the sale in the United States of cigars confiscated in Cuba. This trading occurred after confiscation in Cuba and before the United States embargo. *F. Palacio y Compania v. Brush*, *supra* note 40.

53. *H.R. 7750 Hearings* 1234.

With the limitations imposed by the Sabbatino Amendment itself, this clumsy method of denying the United States markets to confiscators could only be effective where the confiscated property was such as to belong solely to *one* company, one recognized as a national of the United States. This would be possible only with respect to unique unfungible property as works of art or, as to fungible goods, a monopolistic grant or concession such as oil or ore; the product is imported in the raw state or processed only by the company which produced the raw material. Even here the cost accounting problem of allocation might present difficulties.

As far as the Sabbatino Amendment is concerned, any quantity of unidentifiable sugar from Cuba could even now be arriving in the United States to be sold in this market. The importation of sugar from Cuba is prevented not by the Sabbatino Amendment but by the imposition of the embargo against all trade with Cuba invoked under the Trading with the Enemy Act.<sup>54</sup>

II. THE RELATIONS BETWEEN CUBA AND THE UNITED STATES. CUBA'S  
INSULT MADE POSSIBLE THE JUDICIAL ERRORS IN THE SABBATINO  
DECISIONS, WHICH WERE REVERSED BY THE SUPREME COURT,  
AND ALSO PROMPTED THE SUBSEQUENT SABBATINO  
LEGISLATION

In February, 1960, Farr, Whitlock & Company and C.A.V. entered into the first contract of those referred to in the *Sabbatino* case.<sup>55</sup> As this article is written, it is 1967, and the first decision under the Sabbatino Amendment has been handed down. An appeal from that decision to the United States Court of Appeals for the Second Circuit is now pending. Within the past six years, there have been four federal court decisions in this same case; two of them were overruled by the United States Supreme Court. Congressional legislation superseded the rule of law confirmed by the Supreme Court, however, and the fourth decision has been rendered by the district court on motion in the remanded case, on the basis of the Sabbatino Amendment.

This section of the article will discuss the *Sabbatino* litigation and Sabbatino legislation under the following topics: (a) The United States and Cuba—1959-1960. (b) The Insult and the Injury—The Confiscation and the *Sabbatino* Suit. (c) The Confiscator Before the Courts. (d) The Act of State Doctrine Defined by the Courts. (e) A Glossary of Some Equivocal Words.

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54. Note 47 *supra*.

55. 193 F. Supp. at 376; 307 F.2d at 849; 376 U.S. at 401.

A. *The United States and Cuba—1959-1960*

Late in 1958 Fidel Castro Ruz, popularly known by his first two names, as the leader of a revolutionary group, displaced the Batista Government of Cuba. The United States promptly recognized the Castro Government as the legitimate Government of Cuba.<sup>56</sup> Among the first laws which were promulgated by that Government was one recognizing the right of private property and promising protection of the Cuban courts to property-owners in Cuba.<sup>57</sup> Soon, however, acts directed against property and property-owners became increasingly common and the Cuban courts were slow, if not loathe, to correct these abuses. The United States, by the Department of State, protested recurring and uncorrected invasions of private rights of United States nationals.<sup>58</sup>

An increase of trade with Russia was one of the policies introduced by the new Cuban Government which committed a large part of the Cuban sugar crop to support this trade. The United States, looking with increasing alarm at the trend of the national policy, both political and economic, of this newly established and newly recognized Cuban Government,<sup>59</sup> reduced the Cuban sugar quota to the United States on the fear, expressed by the President of the United States, that the increased allocations of Cuban sugar to Russia might very well cause Cuba to be unable to meet the quota previously granted, and thus deprive the American people of the supply of sugar which they had come to expect.<sup>60</sup> The United States had paid for Cuban sugar per pound substantially above the world market. This was more per pound than the value fixed by Russia in the barter agreement with Cuba.

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56. Fidel Castro came to power in January, 1959. BUREAU OF PUB. AFFAIRS, DEP'T OF STATE, FOREIGN AFFAIRS OUTLINES, DEVELOPMENTS IN THE CUBAN SITUATION, Oct., 1962, No. 1. His Government was recognized Jan. 7, 1959, 40 DEP'T STATE BULL. 128 (1959).

57. On Feb. 7, 1959, an amended version of certain sections of the Fundamental Law of Cuba was published. An English translation was immediately issued by the General Legal Division of the Pan-American Union, Dep't. of Legal Affairs, under the authority of the Pan-American Union, General Secretariat, Organization of American States.

58. 42 DEP'T STATE BULL. 158 (1960).

59. *Hearings Before House Committee on Agriculture, on H.R. 12311, H.R. 12534 and H.R. 12624*, 86th Cong., 2d Sess. (1960). 193 F. Supp. at 383 n.15. See also 106 CONG. REC. 14679-81, 86th Cong., 2d Sess. (1960).

60. The proclamation by the President on July 6 reduced the sugar quota. Proclamation No. 3355, 25 Fed. Reg. 6414 (1960). The district court in *Sabbatino* characterized this action as: ". . . A reading of the legislative history, however, leaves no doubt that the basic reason for the legislation was to impose sanctions on a Government which Congress believed to be unfriendly and to place in the executive a bargaining tool to obtain a change in the relations of the Cuban State toward this country . . ." 193 F. Supp. at 383-84.

On the very day that the Government of the United States reduced the Cuban sugar quota, the Castro Government by a decree which was frankly stated to be in retaliation, announced its national policy of confiscating all private property in Cuba owned by United States nationals.<sup>61</sup> Thereafter, by three resolutions, the Cuban Government designated particular United States nationals' property, and from time to time seized such designated property, and excluded the owner and the owner's management from any such property. The decree expressing the national intention was thus some months in process of execution. A more complete nationalization of private business within Cuba followed in due course. This is the background of the intergovernment relations and the cause of the *Sabbatino* case and the Sabbatino Amendment.<sup>62</sup>

B. *The Insult and the Injury—The Confiscation and the Sabbatino Suit*

When insult is added to injury, the sense of wrong is intensified; the demand for some action to right the wrong becomes more insistent. So it was in the *Sabbatino* case. The injury which was the basis of the *Sabbatino* litigation—the wrong which the lower courts attempted to redress as to one shipload of sugar—was the confiscation by Cuba of more than a billion dollars worth of property of United States nationals in Cuba. This confiscation included that one shipload of sugar. Here was a wrong to be righted. The insult was the effort by Cuba itself, in the institution of a suit in a United States court, to recover the sale price of that very confiscated sugar, sold by Cuba to a broker within the United States.

The New York broker was the purchaser under two contracts for the same sugar. The first contract he had made with the sugar company which had produced the sugar—a company owned by United States nationals but incorporated in Cuba. Of course this contract was made before Cuba seized the sugar. The other contract was with an agency of the Cuban Government which then had possession of the sugar and could deliver it. The sugar company did not have any sugar in Cuba in its possession at this time, for Cuba had confiscated it.

The problem which faced the broker, when Cuba confiscated the

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61. The Cuban Council of Ministers adopted Law No. 851 on July 6, 1960. For full text, see 376 U.S. at 401-02 n.3.

62. Throughout the *Sabbatino* litigation and legislation, there have been no conflicting statements as to the facts in litigation. The political background and the particular facts of the *Sabbatino* case are set forth in the decisions. The issues litigated have been solely questions of law. There has been no trial; matters have been raised solely by motion.

sugar company's assets, and the sugar company could not perform its contract, was how to get enough sugar to fulfill his commitments. It was then that the broker made the contract with the representative of the Cuban Government to purchase a second time that very same sugar. This sugar was to be delivered to Africa and payment was to be made in New York (as had been provided under the first contract). In fulfillment of the second contract, the Cuban Government finished the loading of the ship supplied by the purchaser. The loading had been partially completed by the sugar company before seizure of its assets. After loading, and execution of the new contract, the Cuban Government permitted the ship to sail to Africa. Through a foreign bank, the Cuban agent forwarded to the broker in New York (the buyer) bills of lading with drafts attached. But the sugar company claimed that it was entitled to receive the purchase price. The problem which faced the broker (the buyer) then was how to pay for this sugar without incurring a double liability, a liability under each of the two contracts, although the broker had wanted and had received only one shipload of sugar. This sugar had been delivered by Cuba. To solve this dilemma, upon presentment of the draft with the bills of lading attached, the broker took the bills of lading, negotiated them, and forwarded them to his customer to obtain delivery of his sugar in Africa. In this way he fulfilled his own contract for the delivery of the shipment to Africa and in turn received payment. But he returned the draft unpaid to the collection agent of the Cuban Government. Then after some delay he paid the purchase price of the sugar to the temporary receiver of the sugar company's assets in New York.

The sugar company had induced him to make this payment to its temporary representative in New York by offering him a ten per cent discount in price and a guarantee to hold him harmless against any liability to the agent of the Cuban Government for failure to pay the draft for the purchase price of the delivered sugar; and, as still further protection to him, secured an order from the state court of New York, which had appointed the receiver of the New York assets of the sugar company, directing payment by the broker to that receiver. This initially successful endeavor by the sugar company to obtain the purchase price was the event precipitating the suit which became known as the *Sabbatino* case—Peter L. F. Sabbatino was the state court-appointed receiver for the New York assets of the sugar company. He received the purchase price.

Then Cuba sued the New York purchaser, the broker, for conversion of the bills of lading which he had negotiated in order to receive the purchase money from his own customers in Africa. Cuba,

in the same suit, also sued the receiver of the sugar company as one who had unjustly received the purchase price of the sugar due and owing to Cuba.<sup>63</sup>

Under the unvarying interpretation by the United States of national obligations assumed in mutual foreign relations, the seizure of property of United States nationals in Cuba by Cuba, caused Cuba immediately to become liable to the United States for the benefit of those nationals of the United States whose property Cuba had thus confiscated. "Prompt, adequate, and effective compensation" is the price demanded by the United States to satisfy the "forced sale theory" and resulting obligation of an executed nationalization by a foreign country of property in which nationals of the United States have an interest. Demands were made by the State Department—a diplomatic protest was sent to Cuba.<sup>64</sup> No payment by Cuba has been made.

The United States court of appeals in this case made a footnote to its opinion:

If there had been adequate compensation for the seizure, regardless of the other circumstances surrounding the expropriations, it would be very difficult to find any violation of international law.<sup>65</sup>

Cuba had seized possession of all the sugar company's assets in Cuba for which it had paid nothing. Cuba had parted with possession of that one shipload of sugar on a promise of payment of the contract price in New York. But the company, not Cuba, had received payment for that sugar. Until Cuba entered the United States courts, no part of this obligation could be collected by private legal action since no United States court had jurisdiction of Cuba, a sovereign government, nor of any of the property it had confiscated.

It was the insult by Cuba in demanding the purchase price of confiscated sugar and in entering our courts to collect that purchase price of a sale of that confiscated property to United States nationals to be paid in New York, that gave the courts jurisdiction over Cuba—at least a limited jurisdiction; and, in the same case, jurisdiction over the purchaser who readily admitted he owed the purchase price to someone; and jurisdiction over the recipient—the receiver—of that sum.

If Cuba had not with unbridled effrontery endeavored to sell—with the promise of receipt of payment in dollars in the United

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63. Statement of facts reconstructed from decisions in *Sabbatino*. *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd* 376 U.S. 398 (1964).

64. 43 DEP'T STATE BULL. 171, 316, 603 (1960).

65. 307 F.2d at 862 n.9.



States—the same sugar to the same purchaser who previously had contracted to buy it from the producing company, the validity of Cuba's acts—making a fully executed act of state—could not have been reviewed by a United States court. Neither could that effective slogan have been coined, "the United States will not become a thieves' market."

### C. *The Confiscator Before the Courts*

The situation before the United States district court was unusual. Here, an agent of the confiscator itself appeared in court and complained he had not been paid for property which Cuba had confiscated from a Cuban corporation, predominantly owned by United States nationals, and then sold to a United States partnership. Doubtless, if the Cuban Government had had any intimation that the drafts would not have been paid on presentation, it would have insisted on payment in Cuba before the sugar-laden ship was permitted to sail. After Farr Whitlock had failed to pay the draft accompanying the bills of lading, the sovereign Government of Cuba had no means to secure payment except to ask the court of another sovereign—the very sovereign Cuba had wronged—to help obtain that purchase price. The usual case involving a foreign confiscation is brought by a person who was the owner of the property before confiscation; he, wherever he may be, recognizing in another country the property taken from him, demands it from the persons whose title rests upon the confiscation decree. In such an instance, the confiscating government already has the purchase price. In the *Sabbatino* case, the confiscating government was the plaintiff; thus the usual roles of plaintiff and defendant in such a case were reversed.<sup>66</sup>

The judge of the district court who first decided the *Sabbatino* case characterized the anomalous situation over which he was asked to preside as

Plaintiff is not a private litigant who may have acted in good faith reliance on the decree but is the financial agent of the Cuban Government and in my view stands in the shoes of that government in seeking to enforce the nationalization measure in the courts of this country. It is only a short step from the last premise to the conclusion that the Cuban Government is seeking directly the aid of this court in implementing its decree. In such circumstances, it would be almost incomprehensible for the forum to implement a foreign violation of international law (assuming *arguendo* that the decree is so violative) by extending to the forum the operation of this international wrong.<sup>67</sup>

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66. One writer characterized the situation thus: "The *Sabbatino* case itself was a freak case, in that it was the plaintiff which claimed under an expropriation, and the defendant who, by sleight of hand, had taken possession of the proceeds of the expropriated property." Lowenfeld, *supra* note 42, at 900.

67. 193 F. Supp. at 381.

Thus did the court view the audacious act of the confiscator becoming a litigant in United States courts. Thus did Cuba, as plaintiff, voluntarily submit to the jurisdiction of the district court. Thus did the insult induce the creation of the new law applied.

The judge noted that there is at least "a short step" between the request to enforce a sales contract for the purchase of the sugar, the title of which under Cuban law was held by the Cuban Government, and a decree of the court refusing to recognize within the United States the validity *in Cuba* of the Cuban confiscation decree. It was this gap which the Sabbatino Amendment attempted to bridge.

Throughout the *Sabbatino* litigation, the Republic of Cuba appeared officially, voluntarily as a plaintiff, asking the court to give it satisfaction for a breach of a commercial contract in a failure to pay and for conversion of bills of lading. Unofficially in every court, Cuba appeared as a nation which had become communistic, the confiscator of United States property (of that very sugar which it had sold and for which it now sought the payment). The self-styled innocent and wronged plaintiff suing on a breach of a commercial contract was the exploiter, the wrongdoer who had possession of that sugar by its own misdeeds. Here was the insult which had been added to the injury.

#### D. *The Act of State Doctrine Defined by the Courts*<sup>68</sup>

The court of appeals in the *Sabbatino* case defined the act of state doctrine as follows:

The Act of State Doctrine, briefly stated, holds that American courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories. The action of foreign nations accorded this respect may be executive, legislative, or judicial in nature, although court judgments, because they ordinarily involve the resolution of private disputes and do not ordinarily reflect high state policy, do not usually come within this category . . . . This doctrine is one of the conflict of laws rules applied by American courts; it is not itself a rule of international law . . . . The act of state doctrine has had a place in American jurisprudence for a very long time. It may date from the Supreme Court's decision in *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293 (1808) . . . .<sup>69</sup>

The meaning and application of the act of state doctrine became the central legal question of the *Sabbatino* case.

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68. In comments about the *Sabbatino* case, some misunderstanding of the act of state doctrine has appeared. The definitions hereafter expressed are from the decisions of the courts of the United States. There is no inconsistency in these definitions, either with prior United States courts' decisions or those of the highest courts of other countries.

69. 307 F.2d at 855-56.

The court of appeals quoted a statement from another case:

[E]very 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. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>70</sup>

These definitions are wholly consistent with the statement of the United States Supreme Court in the *Sabbatino* decision. The issue raised was one that has been raised before in the United States and often in foreign countries: Does the court of one country recognize that the national will of another country has been accomplished where the national intention, as here, was a transfer of title? Or, may the courts of that country decide that the law, wholly executed in the other country, is not valid if contrary to international law? All countries whose courts had decided this issue heretofore had recognized the transfer of title by an act of state whether or not that act was contrary to international law; but all countries also recognized that any act of confiscation was wrongful under international law, as a violation of the rules of conduct to be observed toward foreigners and their property. A confiscator thus became liable for his wrong.

The district court in *Sabbatino* did not define an act of state, but comments concerning an act of state throughout the decision indicate no inconsistency with the definition of the court of appeals. The lower court stated:

The action centers about title to a sugar shipment which plaintiff, the financial agent of the Cuban government, asserts by reason of expropriation of the property of *Compania Azucarera Vertientes-Camaguey*, hereinafter C.A.V., a Cuban corporation, under a nationalization decree.<sup>71</sup>

The district court recognized that an act of state is effective only within the territory of the country executing it. To have it "enforced" in another country on property in that other country, the law must be compatible with the law of that other country or a treaty must have been negotiated requiring the courts to enforce the act extraterritorially. The district court said:

I come now to defendants' second claim. Regardless of what the intent of the nationalization decree may have been, I could not give effect to that decree if it purported to affect property interests in sugar which was located outside of Cuba at the time the decree took effect . . . . It is

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70. 307 F.2d at 856, quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

71. 193 F. Supp. at 376.

clear, however, that the decree purported to take effect before the ship carrying the sugar departed from Cuba.<sup>72</sup>

The purpose of the Cuban act is also defined by the district court.

[T]he decree assumed 'to order the nationalization, through compulsory expropriation, and, therefore, the adjudication in fee simple to the Cuban State, of all property and enterprises located in the national territory, and the rights and interest resulting from such property and enterprises . . . listed below.' (as in original)<sup>73</sup>

Yet, in spite of the clear definition indicating complete understanding on the part of the courts as to the meaning of an act of state, both in the judicial decisions and generally in discussion concerning the *Sabbatino* case, certain words and phrases seem to have been wrenched from their ordinary meaning.

#### E. *A Glossary of Some Equivocal Words*

Certain rather ordinary English words seem to have acquired new and different meanings in the course of the *Sabbatino* litigation and legislation. A glossary is needed which will give the meanings of these words or phrases as they are used in the decisions in *Sabbatino* and in congressional explanation and discussion. The two principal but simple words to consider are the words "recognize" and "enforce." A *Sabbatino* gloss of these two words will also explain what is a "valid act of state" as that phrase is now used, and an "executed act of state" as used in the *Sabbatino* case and in statements by the Congress or in testimony before the Congress. Two other phrases, "decision on the merits" and "rule of law," are used with new meaning.

1. "Recognize."—Prior to *Sabbatino*, this word had always been used both popularly and in legal terminology with dictionary meaning, "acknowledge formally as existing." It appears in the *Sabbatino* matters in two connections.

First, as applied to the Government of Cuba, the Castro Government was "recognized" by the United States Government. There are three stages of assertion of political control which affect recognition: (1) no-government, meaning anarchy, which status may accompany civil war or military occupation of an area for the time being; (2) de facto government, meaning one which has governmental control over an area and is capable of keeping order within that area but is not "recognized" as the legitimate government of that area; and (3) de jure government, meaning one which is "recognized" as the legitimate government of that country. The Castro Govern-

<sup>72</sup> *Id.* at 379.

<sup>73</sup> *Id.* at 379 n.4.

ment was "recognized" as the legitimate Government of Cuba by the United States.

Second, a *de jure* government within its territory can commit any act of state which any other government can commit, and its executed acts of state on persons and property in its jurisdiction and under its control have been "recognized" as valid throughout the world. This is a conflict of laws principle. As to Cuba in *Sabbatino*, the lower courts refused to "recognize" that Cuba had sovereign power to create a valid act of state to be executed or "enforced" by it within its own territory, if contrary to international law. This was a new concept in United States jurisprudence and inconsistent with the political recognition already granted. Heretofore, the validity of a recognized sovereign's acts within its own territory had always been recognized. The reversal of the *Sabbatino* case by the Supreme Court confirmed the act of state doctrine. The *Sabbatino* Amendment re-established the new idea.

2. "*Enforce.*"—An act of state in any country can be "enforced" by that country which enacted the law, only when the state has jurisdiction over the persons and property and *possession* or *control* over those persons and property on which it wishes to impose the national will. Here in the *Sabbatino* case, as admitted by all the courts, the national will of Cuba was to transfer title to the Government of Cuba without compensation, of all property in which nationals of the United States had an interest. Cuba had seized the sugar and had both jurisdiction and physical control over it and thus "enforced" the national will. The Supreme Court referred to this as an "executed act of state," and, however wrongful it was, and even if alleged to be contrary to international law, having been fully "enforced" by a "recognized" sovereign government, it was and is valid in Cuba.

Sometimes a country which has announced its national will wishes to impose that will upon assets in another country belonging to corporations of its own country. The country which wishes to impose the act of state has no jurisdiction over that property and certainly does not have the assets in its possession. While the act of state of one country generally has no extra-territorial effect in any other, if the act of state is in accord with the laws of the other country, that other country by comity may voluntarily "enforce" the foreign act of state within its own territory.

It is not the policy of the United States to "enforce" confiscatory decrees of a foreign country, which are contrary to international law, on persons or property within the United States. The United States Constitution, fifth amendment, provides that:

[N]o person shall . . . be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

This is the "*ordre publique*" of the United States. It is one of the basic tenets on which the United States was founded and has prospered. The United States has extended this protection to the private property situated within the United States of foreigners irrespective of where those foreigners live. Recently a United States court of appeals has reiterated the proposition that the fifth amendment to the Constitution applies to the property of foreigners.<sup>74</sup>

Although the United States generally refuses to enforce the confiscatory decrees of a foreign government on property within the United States, we have unfortunately not always been consistent in our application of this principle. In one notorious and flagrant exception, the United States enforced a confiscatory decree of another country on property which had been in the United States long before the foreign country enacted the confiscatory decree, which purported to change title to property not only within the confiscating government's jurisdiction but to that property within the United States jurisdiction. It was in 1933 that the President of the United States entered into an executive agreement with a representative of the Soviet Government. This agreement was known as the "Litvinov Agreement,"<sup>75</sup> under which the United States promised to "enforce" within the United States the confiscatory laws of the Soviet Government and take, without compensation, all property of Russian corporations then within the United States, property previously brought here for business reasons or perhaps for the safety believed to be afforded by the protection of the laws of the United States.

This willingness of the United States to lend its assistance to the Soviet Government in confiscating the property of Russian citizens held in the United States in the name of Russian corporations was intended to remove all controversy between the United States and the Soviet Government. The confiscated property was thereafter used to pay claims of United States citizens against the Soviet Government for its confiscation of their property in Russia.

Prior to this agreement, the Soviet Government had attempted to secure recognition of its title to privately-owned Russian property in the United States, but the courts in this country had consistently

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74. *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir.), *cert. denied*, 385 U. S. 898 (1966).

75. For the text of the agreement and discussion as to its application on property in the United States (which had not been in Russia at any time when the Soviet Government was in control), see *United States v. Pink*, 315 U.S. 203 (1942). For full explanation, both majority and minority opinions should be examined.

refused to *enforce* the Soviet decrees on property in the United States. The Litvinov Agreement required them to do so. Of course, courts in the United States had recognized transfer of title to Russia of property in Russia and in the control of Russia.<sup>76</sup> The necessity of enforcing confiscatory decrees on property in the United States was bitterly attacked, but a divided Supreme Court sustained the validity of this agreement, the minority stating its conviction that even an executive agreement could not cause the states composing the United States to change the basic policy that confiscatory decrees are not enforced within the United States.

There have been a few other minor alleged instances in which some have found a lapse from the basic United States policy. Even as to these, it has been arguable whether or not they really deprived anyone under the jurisdiction of the United States of his property without due process of law.<sup>77</sup>

"Recognition" of the imposition of the national will of a foreign country on persons and property within that country is not "enforcement" of a foreign confiscatory decree. Such "recognition" does not give effect to such a decree; it merely recognizes an effect which has taken place elsewhere.

The switch of words with different meanings is clearly shown to have occurred in the first *Sabbatino* decision by the district court. We may view the language used by the district judge as a syllogism. The major premise was expressed by the judge when he asked the hypothetical question: Whether or not he may "... refuse *recognition* to the act if it is in violation of international law." (Emphasis added.)<sup>78</sup> The judge thus considered the legal issue to be whether title to the sugar was held by the Government of Cuba, due to its fully executed act of state on that sugar, or whether the title remained in C.A.V., because the seizure by Cuba was contrary to international law, and therefore the legal conclusion in Cuban law—transfer of title—would

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

77. For example, at the beginning of World War II, the Netherlands, attacked by Germany, passed a decree transferring to itself all Dutch property, including all those outside of the Netherlands. (Norway made a similar decree.) United States courts upheld this decree because the court found that it was intended as a protective vesting, not to deprive the owner of his property and was not, therefore, a confiscation. *Anderson v. N.V. Transandine Handelmaatschappij*, 239 N.Y. 9, 43 N.E.2d 502 (1942). (England found the same as to the Norwegian decree, *Lorentzen v. Lydden & Co.*, [1942] 2 K.B. 202, *appeal dismissed*.) Some, too, found in the tangled legal problems arising out of the Spanish Civil War that in one instance transfer of title to the Loyalist Government of a Spanish ship was recognized where the evidence was hardly sufficient to show an "executed" act of state. But this property too was returned promptly to the former owner at the end of the war when the Franco forces triumphed over the Loyalists. *Compania Espanola de Navegacion Maritima, S. A. v. The Navemar*, 303 U.S. 68 (1938); *The Navemar*, 103 F.2d 783 (2d Cir. 1939).

78. 193 F. Supp. at 380.

not be "recognized." The judge's next statement on this subject was wholly irrelevant to the case: "If the Cuban nationalization decree is *not enforceable* in the courts of this country plaintiff cannot recover." (Emphasis added.)<sup>79</sup> Of course the nationalization decree was not "enforceable" in the United States without a treaty. No confiscatory act is enforceable in the United States without a treaty or executive agreement. But the judge was not asked to "enforce," in the United States, an act of state of Cuba. Cuba had already enforced that act of state on the sugar in Cuba. The judge sitting in the Southern District of New York could not "enforce" anything on that sugar. The sugar was not in the jurisdiction of the United States and not in the possession of the court.<sup>80</sup> The judge found correctly that whoever held title to the sugar should receive the proceeds of the sale of that sugar. The purchase price was not the "res;" the title to the sugar was the issue. However, having construed the phrase, "enforce" *in the United States*, as the equivalent of the phrase, "recognize" *what had happened in Cuba*, he comes to a conclusion which did not logically follow from his major premise:

Since the Cuban expropriation measure is a patent violation of international law, this court will not *enforce* it. It follows that C.A.V. owned the sugar which was sold in the present case. (Emphasis added.)<sup>81</sup>

This is not the first time in history that such a switch of words or phrases has occurred; Mr. Justice Holmes complained of this same type of transfer of meaning when, in his famous dissent in the *Northern Securities* case, he said: "Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act . . . ."<sup>82</sup>

3. "*Decision on the merits.*"—The next phrase which requires a special gloss is "decision on the merits." Until the *Sabbatino* decision, and the subsequent legislation, a "decision on the merits," as indicated by any good legal dictionary, meant a decision on the legal and equitable rights of the parties, rather than a disposal of the case on some technical consideration of pleading or rule of practice. These rules, sometimes called dilatory pleas, mean that

79. *Id.* at 379.

80. "Analysis of the doctrine [act of state doctrine] as thus stated by the Supreme Court indicates that invocation of the Doctrine rests upon the confluence of four factors: (A) the taking must be by a foreign sovereign government; (B) the taking must be within the territorial limitations of that government; (C) the foreign government must be extant and recognized by this country at the time of suit; (D) the taking must not be violative of a treaty obligation." *Menzel v. List*, 49 Misc. 2d 300, 308, 267 N.Y.S.2d 804, 813 (Sup. Ct. 1966).

81. 193 F. Supp. at 386.

82. *Northern Sec. Co. v. United States*, 193 U.S. 197, 403 (1904).



the merits of the case cannot be examined because some condition is lacking; usually circumstances are absent which, as found by a court, would prevent a fair trial on the merits, as where a necessary party is missing. Other matters raised by the original proceedings which might cause dismissal without trial of the issues might be prior jurisdiction in some other court, or failure to begin the case within the prescribed time (statute of limitations). As applied to an act of state of a foreign country, a "decision on the merits" heretofore had always meant a determination whether the foreign act of state was fully executed.<sup>83</sup> In the *Sabbatino* case, all of these factors showed a fully executed act of state, as the Supreme Court in *Sabbatino* found. This, before the *Sabbatino* Amendment, constituted a decision "on the merits."

Under the *Sabbatino* Amendment, the phrase "decision on the merits" now has an entirely different meaning, for under this new law as already interpreted by the district court, the meaning is that:

[N]o 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 to property is asserted by any party . . . based upon a confiscation or other taking . . .<sup>84</sup>

Under this language, the district court could have decided "on the merits" and in so doing could have made a decision conforming with the Supreme Court decision; but instead it recognized the new meaning. This new meaning of "on the merits" is not to be found in the act; there is nothing there to change the phrase "decision on the merits" from the meaning of a determination whether or not certain property has been subjected to a fully executed act of state (even if that act fails to conform to the tenets of international law) to the new meaning that no property rights are lost or acquired under a law contrary to international law. No other country has ever had such a law; no court has so defined "on the merits."

Prior to *Sabbatino*, any breach of international law created a liability to the country offended, or whose nationals had been offended. This liability could be discharged by payment for the value of property seized or the amount of damages created. Now under the *Sabbatino* Amendment, the courts must find that no title has passed. The original owner of the property still owns it and the extent of the liability of the confiscating sovereign, who attempted to take title, has not been determined nor is there any rule of law to determine it.

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83. See note 80 *supra*.

84. *Sabbatino* Amendment, see Appendix I, p. 541 *infra*.

4. "*Rule of Law*."—The phrase "rule of law" was assumed as a name or designation by a group of business corporations associated voluntarily as a committee calling themselves the "rule of law" committee.<sup>85</sup> Their purpose was to advocate the passage of the Sabbatino Amendment. But if "decision on the merits" has been correctly interpreted by the district court's recent decision under this amendment, no court in any great independent trading country has ever handed down a decision (unreversed or unrepudiated) "on the merits" in accordance with a "rule of law" when faced with an "executed" act of state contrary to international law.

Perhaps the premise from which the "rule of law" committee determines a decision "on the merits" can best be explained as a reversal of an old English equity maxim. "Equity considers as done, that which ought to have been done." In denying validity to a fully-executed foreign act of state, they have changed this maxim to "Courts will consider not done, that which ought not to have been done." But the question of "enforcement" is not solved. In the old maxim, the equity court would not make such a decision without jurisdiction necessary to carry its edict into effect over the recalcitrant person, or the property affected, and would put pressure on the person before the court who should have done the act which the courts found "ought to have been done," or else would do it for him. But in the reversal of this maxim, as applied internationally, there is no jurisdiction or control to wipe out that "which ought not to have been done." Perhaps the committee, calling itself the "rule of law" committee, should adopt a different name.

### III. PROOF OF CONGRESSIONAL MISINTERPRETATIONS OF FOREIGN LAW AND FOREIGN COURT DECISIONS IN CONSIDERING AND PASSING THE SABBATINO AMENDMENT

It is enlightening to see the birth and growth of an erroneous idea. When full-blown, the erroneous belief that foreign courts made exceptions to the act of state doctrine, when some other country had harmed their nationals, influenced the Congress. This can be shown by the statements concerning the foreign cases cited to the courts or to the Congress. Yet there is no creditable authority that the laws of any great independent trading nation have permitted courts of such a country to refuse to recognize the validity of titles changed under the laws of any other nation by a fully executed act of state, whether or not that act was within or without the tenets or principles of international law.

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85. *H.R. 7750 Hearings* 577.

First we may see (a) how the foreign cases were introduced into the *Sabbatino* litigation; then (b) what was said by witnesses before the Congress both by those who presented the foreign cases and by those who criticized the interpretation of these foreign cases; and lastly (c) the decisions themselves, analyzed for the facts involved, and the foreign court's final determination on the relevant facts.

#### A. Foreign Cases Introduced Into the *Sabbatino* Litigation

The district court began the citing of foreign cases in its decision in the *Sabbatino* case. The cases were cited in a footnote under this rubric in the text: "Foreign forums have evidenced some willingness to examine the validity of foreign acts under international law."<sup>86</sup> The court did not analyze the cases nor say what they held. The application of the act of state doctrine was left to inference.

The court of appeals cited a much longer list of foreign cases, and stated concerning them

The act of state doctrine appears to be well established among British courts.<sup>87</sup>

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Elsewhere, however, courts have been more willing to inquire into the legality of steps taken by foreign sovereigns.<sup>88</sup>

Not a decision in any case in that list determined that an act of state of any foreign country was "illegal," whether or not contrary to international law. In only one case did a court inquire into the legality of the act of state complained of under the laws of the country which had promulgated that act of state.<sup>89</sup> That court found the act of state complained of to be legal and not contrary to international law.<sup>90</sup> In a subfootnote,<sup>91</sup> a case of a court of a British Protectorate was cited which indeed did hold that an act of state of a

86. 193 F. Supp. at 380.

87. 307 F.2d at 855 n.6. In this footnote the court mentions *The Rose Mary*, [1953] 1 Weekly L.R. 246, [1953] Int'l L. Rep. 316 (Sup. Ct. Aden), as an exception to British decisions supporting the act of state doctrine. This case is no authority for such a conclusion. See Part III, § C, p. 468 *infra*.

88. *Ibid.* The word "legality" is used by the Court of Rome for its inquiry into the compatibility of the law with the Constitution of Persia. The court of appeals appears to have used the word as synonymous with "contrary to international law." Any law of a country duly enacted and enforced by its courts is obviously a law of the country and cannot be "illegal" under the laws of the country of which the questioned law is a part.

89. *The Miriella*, *supra* note 50. The Court of Rome found the nationalization of Iran to be legal in Iran. It was not contrary to that country's constitution.

90. *Ibid.* Since there was an indication that some payments would be made, the court found the oil nationalization law was not contrary to the generally accepted rules of international law.

91. *The Rose Mary*, *supra* note 87.

foreign country contrary to international law was invalid. This same case was cited by the district court<sup>92</sup> and appears in all lists of foreign cases. It is the one unappealed lower court case so holding,<sup>93</sup> which was not repudiated by its government. That this case, not decided by the court of an independent country, is discredited will be shown.

Both the majority and minority Supreme Court opinions cited foreign cases relating to the act of state doctrine.<sup>94</sup> The majority confirmed that English courts supported the act of state doctrine, but recognized this one inconsistent case of the British Protectorate. It cited other cases, however, under this statement: "Civil law countries, however, which apply the rule make exceptions for acts contrary to their sense of public order."<sup>95</sup> But none of the cases cited shows any such exception.

The dissenting opinion of the Supreme Court cites foreign cases under the following somewhat cryptic statement: "The courts of the following countries, among others, and their territories have examined a fully 'executed' foreign act of state expropriating property . . ."<sup>96</sup> However, the meaning is clarified by the statement at the end of the list of foreign cases:

The Court does not refer to any country which has applied the act of state doctrine in a case where a substantial international law issue is sought to be raised by an alien whose property has been expropriated.<sup>97</sup>

#### B. *Foreign Cases Discussed by Witnesses Before Congress*

The statement by Mr. Justice White, with the list of cases he cites, was presented to the Congress in support of the Sabbatino Amendment as shown by the testimony before the House Committee on Foreign Affairs.

Mrs. (Congresswoman) KELLY. ' . . . Can you give us a list of the countries that you refer to that have taken this action?'

Mr. McDOUGAL. 'We can submit you a list of those whose decisions are comparable to what is proposed in the Sabbatino amendment.'

Mrs. KELLY, 'Will you do that?'

Mr. McDOUGAL. 'Yes.'

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92. 193 F. Supp. at 380.

93. See note 21 *supra*.

94. 376 U.S. at 421 n.21, 440 n.1, 446 n.6.

95. *Id.* at 421-22 n.21.

96. *Id.* at 440 n.1.

97. *Id.* at 440-41 n.1.

(The following information has been submitted for the record:)

April 2, 1965

Hon. Edna F. Kelly,  
Committee on Foreign Affairs,  
U.S. House of Representatives,  
Washington, D.C.

DEAR MRS. KELLY: You were kind enough at the hearings of the committee on Tuesday to suggest that I might send you some further information on the attitudes in other countries about acts of foreign states in violation of international law.

The best statement on this I know is that of Justice White in the opening pages of his opinion in the *Sabbatino* case, a copy of which I enclose. You will note that Justice White summarizes:

'This country and this Court stand alone among the civilized nations of the world in ruling that such an issue is not cognizable in a court of law.'

Your courtesy is much appreciated.

Sincerely yours,

MYERS S. McDOUGAL,  
*Sterling Professor of Law.*<sup>98</sup>

The quotation from Mr. Justice White's dissenting opinion, with the interpretation by the witness, is susceptible of being construed as a conclusion that foreign courts do not follow the act of state doctrine if the sovereign act of state of one country is damaging to the nationals of another country and is found by the latter's local courts to be in violation of international law. An analysis of the cases and the decisions does not support such a conclusion.<sup>99</sup>

The Senate never held public hearings on the Sabbatino Amendment. However, when the amendment was introduced, one of the Senators who introduced it asked leave to present certain arguments in support of it in the *Congressional Record*. In this he answered an adverse, critical statement concerning the Sabbatino Amendment

98. *H.R. 7750 Hearings* 1047.

99. For list of cases see note 103 *infra*. Assuming, as we must, that the statement was understood to mean that the decisions in the eleven cases cited were exceptions to the act of state doctrine and that doctrine was not followed by the courts whose decisions were cited, the witness was in error. Only two of the eleven cases made exception to the act of state doctrine and neither is authority for failure or refusal to adhere to that principle because: (1) One case was decided in a British Protectorate on the basis of English law which a higher English court in another case decided was a misinterpretation of English law; and (2) The other case was a German lower court case purporting to invalidate an Allied seizure of German external assets. The Allied Command, then the government of Germany, removed all such cases from the jurisdiction of German courts, and required recognition of the transfer of title to all German external assets as embodied in surrender terms resulting in no exception to the act of state doctrine. Later decisions of a court in the Federal Republic of Germany indicate adherence to the act of state doctrine as general German law. For (1) above, see mention of case in testimony by principal witness in favor of Sabbatino Amendment and criticism by the Attorney General as to both cases, Part III, § C, p. 468 *infra*, and for discussion of (2) see Part III, § C, p. 485 *supra*, and also analysis of each case, Appendix II, p. 541 *infra*. The remaining nine cases either supported the act of state doctrine or were irrelevant.

which had appeared in the *Washington Post*. He inserted the full dissenting opinion of Mr. Justice White in the *Sabbatino* case, including the list of foreign cases, and added a memorandum referring adversely to the Supreme Court's decision in *Sabbatino* and mentioning favorably Mr. Justice White's dissent, and then appended a list of additional foreign cases under this statement:

Court decisions of Austria, Belgium, British Territories, Germany, France, Greece, Italy, the Netherlands, Switzerland, and the United Kingdom, briefly abstracted in appendix I, confirm both the majority's comment that most nations do not follow a rigid rule and Justice White's point that the holding in *Sabbatino* is unique. All of the named countries permit judicial inquiry into compliance of a foreign act with the standards of international law, and some permit measurement against the standards of public policy.<sup>100</sup>

An identical word-for-word memorandum to that submitted by the Senator, both as to comment and cases cited, was offered to the Committee on Foreign Affairs of the House of Representatives by the principal witness there in behalf of the *Sabbatino* Amendment.<sup>101</sup>

But the Committee on International Law of the Bar Association of the City of New York in urging the passage of the *Sabbatino* Amendment made the most unequivocal of all statements concerning the legal holdings in foreign cases. The committee's statement read:

At the same time, the *Sabbatino* Amendment adopts the so-called "international law exception" to the Act of State Doctrine invoked by Judge Dimock in the *Sabbatino* trial court to find against Banco Nacional. This concept also prevails in the courts of many other countries throughout the world, including Austria, Belgium, British Territories, Germany, France, Greece, Italy, and the Netherlands. (See Appendix I.)<sup>102</sup>

The committee's report contained an Appendix I consisting of a list of foreign cases with brief comments and occasional quotations.

In the face of this evidence, it can scarcely be denied that Congress had reason to believe that foreign courts frequently decided cases on the basis of exceptions to the act of state doctrine, and handed down decisions similar to those of the lower courts in *Sab-*

100. *Washington Post*, July 27, 1964, p. A14, quoted in 110 CONG. REC. 19546 (1964). See also 110 CONG. REC. 19546-60 (1964).

101. *H.R. 7750 Hearings* 593-96. The only difference in these two memoranda is that a page reference to a cited case in the *Congressional Record* is given as 275, while the memorandum in the *Hearings* lists this page number as 257. The correct page number is 257.

102. 20 RECORD OF N.Y.C.B.A. 294, 296-97 (1965) [hereinafter cited BAR COMM.] (submitted to the Committee on Foreign Affairs of the House). See *H.R. 7750 Hearings* 1315-25, 1316. One member of the committee dissented and was one of those testifying against the adoption of the *Sabbatino* Amendment in the hearings before the Committee on Foreign Affairs of the House. See testimony of Professor Louis Henkin, *H.R. 7750 Hearings* 1060.

*batino* and similar to the one which the district court has now handed down under the Sabbatino Amendment. But that this was an unfounded belief is easily demonstrated.

### C. Analysis of Foreign Cases

1. *Foreign Cases Cited in Dissenting Opinion.*—We may commence our inquiry as to the meaning of the foreign court decisions with the list of cases appended to the footnote of the dissenting opinion of Mr. Justice White. He lists eleven decisions,<sup>103</sup> in two instances listing both the higher and lower courts' decisions of the same case.

One case appears in every list submitted to the Congress. This is not surprising for it is the only case, in which any court not overruled by a higher court, or whose decision was not repudiated by the legislature of the country in which the court sat, that upholds the exception to the act of state doctrine.<sup>104</sup>

The principal witness in behalf of the Sabbatino Amendment, as part of his testimony to the Committee on Foreign Affairs of the House of Representatives, also included this one case in his memorandum, and referred to it when questioned by Congressman Fountain concerning the practice of other major trading countries of the world.

Mr. FOUNTAIN. 'How does the rule which you are proposing in this amendment compare with the practice of other major trading countries of the world?'

103. 376 U.S. at 440. Cases cited therein include *The Rose Mary*, *supra* note 87; *Volatron v. Moulin*, Cour de'Appel d'Aix, March 25, 1939, [1939] *Dalloz Hebdomadaire* I. 329, [1938-1940] *Ann. Dig.* 24 (No. 10) (Fr.); *Société Potasas Ibericas v. Bloch*, Cour de Cassation (ch. civ.), March 14, 1939, [1939] *Dalloz Hebdomadaire* I. 257, [1938-1940] *Ann. Dig.* 150 (No. 54) (Fr.); *N.V. Verenigde Oel-Maatschappijen v. Deutsch-Indonesische Tabak-Handelsgesellschaft m.b.H.*, Dist. Ct., Bremen, April 13, 1959, *aff'd*, Ct. App., Bremen, Aug. 21, 1959, [1963] *Int'l L. Rep.* 16 (Fed. Rep. Ger.); *Confiscation of Property of Sudeten Germans Case*, Amtsgericht Dingolfing, Dec. 7, 1948 [1948] *Ann. Dig.* 24 (No. 12) (Fed. Rep. Ger.); *Anglo-Iranian Oil Co. v. S.U.P. O.R.Co. (Unione Petrolifera per l'Oriente S.p.A.) (The Mriella)*, Civ. Trib. Venice, March 11, 1953, 78 *I Foro Italiano* I. 719 (1953), [1955] *Int'l L. Rep.* 19 (It.) *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co. (Unione Petrolifera per l'Oriente S.p.A.)*, Civ. Ct., Rome, Sept. 13, 1954, [1955] *Foro Italiano* I. 256, [1955] *Int'l L. Rep.* 23 (It.); *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha*, [1953] *Int'l L. Rep.* 305 (No. 20) (Dist. Ct. Tokyo), *appeal dismissed*, [1953] *Int'l L. Rep.* 312 (No. 20) (No. 20) (High Ct. Tokyo); *Senembah Maatschappij N.V. v. Republiek Indonesie Bank Indonesia*, Dist. Ct., Amsterdam, Dec. 22, 1958, [1959] 73 *Nederlandse Jurisprudentie* 218, 7 *Nederlands Tijdschrift voor International Recht* 285 (1960), *aff'd*, Ct. App., Amsterdam, June 4, 1959, [1959] 350 *Nederlandse jurisprudentie* 855, 7 *Nederlands Tijdschrift voor Internationaal Recht* 400 (Neth. 1960); *N.V. de Bataafsche Petroleum Maatschappij v. The War Damage Comm'n*, Ct. App., Singapore, April 13, 1956, [1956] *Int'l L. Rep.* 810. A digest of each case is given in Appendix II, p. 541 *infra*.

104. See *The Rose Mary*, *supra* note 87. Note that this was not a decision of an independent country, but of a British protectorate (Aden). It was later distinguished and criticized by a higher British court. For a comprehensive discussion of *The Rose Mary*, see text at p. 468 *infra*.

Mr. OLMSTEAD. 'There has been only one case, I think that was squarely in point. There have been a number of act of state doctrine cases in foreign courts.<sup>105</sup>

When Attorney General Katzenbach testified, he was asked this same question and gave a similar answer. Congressman Fulton prefaced his question to the Attorney General with a statement of his own belief that the Supreme Court decision in *Sabbatino* was contrary to the trend of judicial decisions throughout the world.

Mr. Fulton's comment and question were as follows:

Mr. FULTON: 'Here the United States in direct opposition to the main trading nations that have decided cases based on *Sabbatino* related facts. The United States has thus taken a course that is entirely different as to foreign expropriation than any other trading nations and I think we are wrong.

'I would like to state this: That no major trading country has applied an act of state doctrine in foreign expropriation cases where the prima facie case of violation of international law has been made out by the litigant. I would like one of your legal eagles to dispute that.'

Attorney General KATZENBACH: 'We will be happy to, Congressman.'<sup>106</sup>

Thereafter, the Attorney General supplied to the Congress a memorandum showing that the Congressman entertained an erroneous view of foreign law and giving an analysis of each case in Mr. Justice White's dissent and citing the first case in Mr. Justice White's list by name, saying that it<sup>107</sup>

. . . is the only fully reported decision standing squarely for the proposition that where property is nationalized by a foreign state without adequate compensation, the nationalization is illegal under international law and the forum state will not recognize the passage of title from the confiscating state to the third parties.<sup>108</sup>

Thus the principal witness *in favor* of the Sabbatino Amendment (who had signed a brief amicus curiae before the Supreme Court urging affirmance of the lower courts' *Sabbatino* opinions), and the Attorney General of the United States (who had argued the *Sabbatino* case before the Supreme Court urging reversal of the lower courts' decisions) who appeared before the congressional committee as a witness *against* the Sabbatino Amendment both agreed that there was only one case of all those cited which squarely supported the lower courts' opinions in *Sabbatino*. An examination of cases cited shows the correctness of this conclusion. This case was *Anglo-Iranian Oil Co. v. Jaffrate*, popularly known as *The Rose Mary* case because that was the name of the ship involved.

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105. H.R. 7750 Hearings 598.

106. *Id.* at 1257.

107. *The Rose Mary*, *supra* note 87.

108. H.R. 7750 Hearings 1257.



2. *The Decisions of Foreign Courts Considered.*—Why this case cannot be relied upon as authority for the rule applied is easily shown from the facts of the case.<sup>109</sup> The Anglo-Iranian Oil Company had, under concession agreement, extracted and refined oil within the country of Iran from 1933 to 1951. Then the Government of Iran, under the leadership of the aged and unstable Premier Mos-sedagh, breached the agreement, seized all of the property of the Anglo-Iranian Oil Company, transferred title to itself and operated the oil fields itself by an agency selling the oil for export. Although one foreign court found that this nationalization was not contrary to international law because some promise of compensation had been made, for our discussion we may assume that this was a typical nationalization decree and that courts would have been justified in finding, as some did, that there was no compensation, or at least inadequate compensation, and that the action for this reason was contrary to international law.

In 1952, five ships loaded with oil purchased from the Iranian Government set out for Italy. Another ship at about the same time began its voyage to Japan. One of the ships en route to Italy, namely *The Rose Mary*, never arrived. Its captain had received an ambiguous and contradictory series of orders from the owners and from the charterer, some of which directed him to break his voyage to Bari, Italy, and instead to enter the port of Aden. Forty miles off that port, he was met by a tug carrying the agent of the ship's owners, who directed the captain to go to Aden. A British R.A.F. airplane from Aden also came out and circled the ship, and ultimately the captain turned his ship to Aden. Immediately, the Anglo-Iranian Oil Company, as holders of the former concession in Iran, began legal action in Aden, claiming title to the oil; they argued that title had not passed to the Iranian Government because a confiscation without compensation was contrary to international law and invalid. The judge in Aden agreed with this contention and awarded the shipload of oil to the Anglo-Iranian Oil Company. That decision, holding invalid a foreign act of state which a court of another country finds contrary to international law, had the approval of, and was the goal sought by, the proponents of the Sabbatino Amendment.

However, a closer examination of this case will show it is no authority for such a conclusion of law. Two factors immediately appear: Aden was not an independent country, and not a great trading nation. The British colony of Aden occupies but seventy-five square miles; the urban population was 220,000 at approximately

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109. The facts of this case and all statements concerning the Colony and the Protectorate of Aden are taken from the report of the case itself and from *Aden and South Arabia*, BRITISH INFORMATION SERVICE, R 5671/65 (1965).

that time (Census of 1955)—seventy-seven per cent were Arabs; fifteen per cent were Indians and Pakistanis; seven per cent were Somalis; and three per cent were Europeans. Included in this three per cent were all the British servicemen giving the military support for Britain's obligation to protect the neighboring Arab tribal territories.<sup>110</sup> The area of the Protectorate which surrounds the colony of Aden on the landward side has a population estimated at a million, wholly Arab. The various tribes, each of which has, to a large extent, its own tribal autonomy, each by treaty requested the protection of Great Britain. By agreement with these tribes, the Protectorate will become an independent country in 1968.

But at the time of *The Rose Mary* case, a British judge sat in this Protectorate to determine commercial questions; most domestic questions were determined by Muslim law. Against this background, it is easy to determine that *The Rose Mary* decision is no guidance to independent great trading nations of the world. In the first place, the jurisdiction may seriously be questioned. Who wanted that ship to enter Aden harbor and why? This question is unanswered in the case. Aden did not want the oil, had not ordered it, and, in fact, had some quantity of oil which it bought and itself refined. The case was not to protect the rights of any national of the Protectorate. The purpose was obviously to prevent the Iranian Government from selling the confiscated oil to Italy. So in the first instance, the court of Aden set itself up to prevent Italy from becoming a "thieves market," a doubtful procedure internationally. Italy did not wish to be saved from this fate. When the other ships arrived in Italy, the courts there recognized the "act of state" when presented with adverse claims to the oil.

The captain of *The Rose Mary* testified that he had entered Aden because he was afraid he would be bombed. But the judge brushed this aside as no objection to his court's jurisdiction though no explanation was ever given why a warplane was sent out to find and encircle the ship. If the ship entered Aden involuntarily, the court should not have taken jurisdiction—that is a principle recognized in United States law both in early times and now.<sup>111</sup> Was diverting this ship from Italy itself a violation of international law against Italy? The action was solely to protect British interests. But stronger than all of these unanswered questions or suppositions is the fact that a later and higher court in England itself, in another and different case,

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110. The figures in text add up to 102%. This is explained by the fact that percentage figures are approximate and "rounded off." Explanation by British Information Service.

111. *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812); *Rich v. Naviera Vacuba S. A.*, 295 F.2d 24 (4th Cir. 1961).

stated that the judge deciding *The Rose Mary* case had based his decision on English decisions which he had misinterpreted.<sup>112</sup> Concerning this, the Attorney General pointed out, in testifying before Congress in regard to the Sabbatino Amendment:

Subsequent decisions in England, however, have criticized the result in *The Rose Mary* and have disagreed with the Aden court's rationalization of English precedents.<sup>113</sup>

One must observe that this decision by the court in Aden was never appealed; had there been an appeal, the final appeal would have been to the Privy Council of England. The Supreme Court of the United States in *Sabbatino*, as did the court of appeals, found that England upholds the act of state doctrine. Thus *The Rose Mary* cannot be relied upon as a precedent, yet it is the only decision unappealed and unrepudiated which has held that a court (of a protectorate in this instance, not an independent country) may declare null and void the law of an independent foreign country for any reason. This decision was never followed anywhere until *Sabbatino*. Also it is an obvious error to list the decision of *The Rose Mary* case as a decision of England.

The remaining, four ships loaded with Iranian oil bound for Italy ultimately arrived at their destination. In another suit, also by the Anglo-Iranian Oil Company, claiming title to the cargoes (as it had done in Aden), the courts of Italy upheld the validity of the transfer of title to the Iranian Government and from that government to the private buyers who had brought the oil to Italy. Italy protected the title of these buyers, repudiated the claim by the Anglo-Iranian Oil Company and confirmed the right of anyone to sell in Italy oil purchased from the Iranian Government which had acquired title to the oil fields by nationalization.

These cases are also cited by Mr. Justice White. The first case was in a court of Venice in regard to one shipload of oil. The relief asked was a temporary injunction against the sale of the oil. This was denied on the basis of the act of state doctrine, the court holding that enactments by a foreign country in its own territory are not contrary to public order in Italy. It observed:

The recognition in Italy of the validity of the effects which these acts had already had in Persia cannot be termed cooperation to make them become effective; it constitutes no more than an acknowledgement that the effects have indeed taken place.<sup>114</sup>

This case, with a case involving the other three ships, then came before

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112. *In re Claim by Helbert Wagg & Co.*, [1956] Weekly L.R. 183 (1 Ch.).

113. *H.R. 7750 Hearings* 1258.

114. *The Miriella*, *supra* note 103.

a higher court at Rome which upheld the decision of the lower court at Venice; after reviewing the nationalization law and the principles of the act of state doctrine, it came to the final decision that the acts were not contrary to international law because compensation had been promised.<sup>115</sup> Thus the Italian courts recognized good title, created by the nationalization laws of Persia or Iran.

The sixth shipload of this oil duly arrived in Japan and again title to the oil was claimed by the Anglo-Iranian Oil Company. The district court in Tokyo admitted that a rule of international law makes an act of confiscation—a seizure without compensation—a wrongful act, but it questioned whether or not the courts of a third state have the power to declare invalid such an act of another state.<sup>116</sup> Later the High Court of Tokyo stated that it would not pass upon the validity or invalidity of the Iranian law, admitting that such a determination resulted in denying ownership to the claimant, the Anglo-Iranian Oil Company.<sup>117</sup>

The principal witness in support of the Sabbatino Amendment before the congressional committee, in commenting upon these cases in Italy and Japan, stated,

There were two companion cases that arose out of the Iranian seizure. One in Italy and one in Japan. In those two cases they reached a contrary result on the merits.<sup>118</sup>

Similarly, the Attorney General of the United States, testifying against the Sabbatino Amendment, said,

The tribunals in other major trading countries have, on the same facts as were presented in *The Rose Mary*, reached diametrically opposite results.<sup>119</sup>

We may properly pause here to question the meaning of “on the merits.” Here five courts considered the same facts presented by the same plaintiff, presenting the same issues. Since the claimant was not a national of Iran (the confiscating country), its claim to continued ownership raised the “international law issue.” One lower court (of a protectorate with a trading community of only 220,000) found the act of state null and void, while four other courts (two

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115. *Ibid.* This one court in Rome found that the reference in the Iranian law to compensation was sufficient to render the law compatible with the principles of international law. Of course the Anglo-Iranian Oil Company had received no payment. None of the other foreign courts which considered the Iranian oil seizures based their decisions on a finding that compensation was intended.

116. *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha*, *supra* note 103, at 305.

117. *Id.* at 312.

118. *H.R. 7750 Hearings* 599.

119. *Id.* at 1258.

lower courts and two higher courts) found it valid. Inevitably, from these cases a decision "on the merits" must be to recognize the valid transfer under a fully executed foreign confiscatory act of state. If these cases in Italy and Japan were decided "on the merits," then *The Rose Mary* case could not have been correctly decided "on the merits."

For a discussion of the remaining cases cited in the decision of Mr. Justice White, reference is made to Appendix II<sup>120</sup> of this article where each case is briefly reviewed, showing that the laws of no country had ever rejected the act of state doctrine until the passage by the United States Congress of the Sabbatino Amendment.

As stated above, two identical memoranda of law were presented to the Congress, one in the Senate and the other to the Committee on Foreign Affairs of the House.<sup>121</sup> An examination of the cases listed in these two memoranda of law shows that only three of the cases cited therein were omitted from the longer list of foreign cases submitted by the Committee on International Law of The Association of the Bar of the City of New York. These three cases will be considered briefly; the remaining cases will be considered with those listed by the International Law Committee, included among which are the cases listed by Mr. Justice White.

3. *Three Cases in the Identical Memoranda Which Were Submitted.*<sup>122</sup>—None of these cases involved an executed act of state. In none of them was the property, the title or right to which was in

120. See p. 541 *infra*. An analysis of each case in Mr. Justice White's dissent can be found in the testimony of the Attorney General, *H.R. 7750 Hearings* 1257. For a complete analysis of all cases cited by any of the courts in *Sabbatino* prior to the Sabbatino Amendment, see Reeves, *The Act of State Foreign Decisions Cited in the Sabbatino Case: A Rebuttal and Memorandum of Law*, 33 *FORDHAM L. REV.* 599, 618-70 (1965).

121. See notes 100 & 101 *supra*.

122. *M. v. Aktieselskabet K. H.*, June 13, 1934, 145 *Entscheidungen des Reichsgerichts in Zivilsachen* 16, [1933-1934] *Ann. Dig.* 501 (No. 217) (Fed. Rep. Ger.); *Union des Republicques Socialistes Sovietiques v. Intendant Général Bourgeois ès Qualité et Société de La Ropit*, Cour de Cassation (ch. req.), March 5, 1928, [1928] *Sirey Recueil Général* I. 217, *CLUNER* 674 (1928), [1927-1928] *Ann. Dig.* 67 (No. 43) (Fr.) [hereinafter cited as *La Ropit*]. For a complete statement of the facts underlying the *La Ropit* case, see *The Jupiter* (No. 1), [1924] P. 236 (C.A.); *The Jupiter* (No. 2), [1925] P. 69 (C.A.); *The Jupiter* (No. 3), [1927] P. 250 (C.A.). These cases concerning another *La Ropit* ship which had escaped under the same conditions are summarized in [1925-1926] *Ann. Dig.* 136 (No. 100). Cf. *Compania Espanola de Navegacion Martima, S.A. v. The Navemar*, 303 U.S. 68, 75-76, 76 n.1 (concerning *The Jupiter*) (1938), and subsequent decisions in the same case, *The Navemar*, 24 F. Supp. 495 (E.D.N.Y. 1938), and 102 F.2d 444 (2d Cir. 1939). Issues became moot by recognition of different Spanish Government and return of ship to private ownership, 103 F.2d 783 (2d Cir. 1939). Case No. 1268/1937 (Ct. of 1st Instance of Piraeus), 4 (Delta) *Ephemeris ton Hellenon Nomikon* 560-61 (Athens 1937) [hereinafter cited *Ephemeris*].

dispute, at the time of the confiscation decree or at any time thereafter within the domain of the confiscating government. In the first case, the confiscator was France and the property, a bank account, was payable only in Danish crowns in Denmark. France had no jurisdiction over this account, and the court found that Danish law, not French law, was controlling of the rights to this account. In the second case, the confiscating government was the Soviet Government but the ship claimed was in France. In the third case, a creditor of Spain claimed that a ship belonged to Spain which was in Greece and had not been seized by Spain. In no one of these cases was the property affected by the law of the confiscating government.

To see the irrelevancy of these cases, one must remember that the act of state doctrine is based upon the independence of sovereigns and upon the conflict of laws rules. The first rule laid down by Mr. Justice Story in his work on conflict of laws published in 1834—a rule which antedated publication of the work (for the rule had been the law of the United States from its inception and is still the law of the United States regardless of the Sabbatino Amendment)—reads as follows:

It is plain that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others who are within its jurisdictional limits; and the latter only while they remain therein.<sup>123</sup>

The three cases come within that rule. The laws of one country can have force in another only by "comity"—that is, if the laws of one country are compatible with the laws of another, as reflected in its constitution, general laws, or public order, these foreign laws will be enforced. Other foreign laws will not be enforced. A brief review of the above-mentioned three cases will show conclusively that they are strictly within these ancient rules and neither offend nor are exceptions to the act of state doctrine.

(a). *M. v. Aktieselskabet K. H.*—In the first case mentioned,<sup>124</sup> the French Government after World War I, seized the property in France of a German partnership which had done business in France. This German organization had a current account in a Danish bank with a substantial credit balance which the French sequestrator requested be paid to him. The bank thereupon drew its draft on a French bank in compliance with this request. This payment was voluntary as the court found (in translation)

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123. STORY, COMMENTARIES ON CONFLICT OF LAWS § 7 (8th ed. 1883).

124. See *M. v. Aktieselskabet K.H.*, *supra* note 122. The following discussion of this case and the quotations are based on a translation of the original German report.

It needs no further discussion that defendant did not act 'in the name or under the direction of a French court or administrative body . . . when executing the French sequestrator's demand for payment.'

Of course, the French sequestrator was the proper person to receive assets of that German partnership but only those which were in France under French jurisdiction, the control over which could be taken under French law. This was not the situation, however, in regard to that Danish bank account situated in Denmark. The court found

Defendant maintained and still maintains its principal place of business in Copenhagen. The plaintiff's allegations, according to which it was agreed upon Copenhagen as the place of performance and exclusive venue in accordance with defendant's standard business terms, have not been contradicted by the defendant.

Later, and after the voluntary payment by the bank, a German court acquired jurisdiction in a suit by a partner of the German partnership to secure the full balance of the account. The Danish bank pleaded its payment as a defense but the German court held that a change in French law could not affect the obligations under Danish law of the Danish bank to pay only in Denmark and in Danish crowns. The court thereupon applied Danish law stating "Correspondingly the principles of the German conflict of laws consider the Danish law as applicable to defendant's obligation in the absence of any stipulation to the contrary." The Danish bank was thereupon required to make a second payment.

A similar problem has existed in the United States. Beginning a few years before the commencement of World War II, after Germany had shown evidence of its ruthless treatment of certain businesses within the German Reich and its expansionist policies outside of German borders, many New York banks, brokerage houses and corporate debtors faced the same problem which faced this Danish bank; they were met with adverse claims to bank and brokerage balances, and to securities held for, or corporate obligations payable to, a certain named foreign corporation or partnership. One demand would be by some German-appointed liquidator of that foreign business for payment of the accounts, or delivery of the property to him. The second claim would be by the officers of that company with which the New York banks and brokerage houses had done business and for whose business this liquidator had been appointed. In most instances, the former officers of the company had fled from Germany or Czechoslovakia or elsewhere.

The Legislature of New York in 1939 enacted two<sup>125</sup> bills to

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125. Civil Practice Act ch. 805, § 51-a (1939), as amended, N.Y.C.P.L.R. § 216(a) (1966); Laws of 1939 art. 28A, ch. 804, as amended, N.Y.C.P.L.R. § 1006 (1966).

protect such innocent obligors from the dangers of double payment of debts and delivery of securities or other property to one business entity while another also claimed the right to receive it; a further qualification was that personal jurisdiction could not be obtained over both claimants for an ordinary interpleader action. Some years later the Court of Appeals of New York State made the following statement concerning the purposes of one of these bills which had become a law of New York in 1939:

The enactment of section 51-a of the Civil Practice Act . . . was prompted by the existence of unsettled political conditions in Europe and the Orient at a time when business enterprises owned by political refugees were taken over by foreign liquidators appointed by their governments. In the confusion which followed there were instances where both refugees and liquidators made claim against New York businessmen, banks or insurance companies for the same debt. In those circumstances such New York debtors could not safely pay either claimant without a judicial determination of the question as to which claimant was entitled to be paid.<sup>126</sup>

In the German case cited above, by making the voluntary payment, the Danish bank assumed the risk of double liability. A confiscatory law is enforceable only on property within the jurisdiction of the confiscating state. The case merely exemplifies the legal principle that unless a debtor can secure an adjudication of adverse claims he is in serious danger of being forced to pay the same debt twice.

(b). *La Ropit* case,<sup>127</sup>—It is scarcely necessary to review this case, for the statement concerning it published in the two memoranda shows that it was not an exception to the act of state doctrine. When the Soviet Government was in control of only a small area around Moscow, it published decrees purporting to confiscate all ships of the Russian merchant marine. Many ships were in the port of Odessa and sailed immediately. They never returned. Years later, France recognized the Soviet Government as the legitimate government of Russia, and the Soviet Ambassador then asked the French courts to seize those ships long since in French ports, or trading out of French ports, and hand them over to the Soviet Government. Those ships had never been in the jurisdiction of the Soviet Government and most certainly had never been in its possession. Here the Soviet Government asked the French to do the confiscating for it, because it had no power to confiscate property on French soil. Of course, the Government of France refused, and the principles involved are contained in the quotation following, as it appears in the two memoranda submitted in behalf of the Sabbatino Amendment.

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<sup>126</sup>. *Solicitor for Affairs of His Majesty's Treasury v. Bankers Trust Co.*, 304 N.Y. 282, 291, 107 N.E.2d 448, 118 N.Y.S.2d 282 (1952).

<sup>127</sup>. See *La Ropit*, *supra* note 122.



The Supreme Court [of France] refused to apply Soviet law in a case involving a claim of the Soviet Russian Government to part of a nationalized merchant fleet which had escaped from Russia after the nationalization because confiscation without compensation was contrary to 'one of the fundamental principles of our social institutions.'<sup>128</sup>

(c). A *Greek* case,<sup>129</sup>—The third case mentioned is a Greek case. During the Spanish Civil War, the Loyalist Government passed a confiscation decree nationalizing all ships of the Spanish merchant marine. One ship, the *Inocencio Figaredo*, at the time of the decree, was not in any Spanish port nor thereafter did it ever come into the possession, or under the control, of any representative of the Spanish Government. It was in the charge of the captain who had remained loyal to the owners, and they had fled from Spain. In this case, the ship was not even claimed by the Spanish Loyalist Government. It was attached as property of the Spanish Loyalist Government by a creditor of that Government, who asked the Greek court to declare that title was in the Spanish Loyalist Government so that he could sell the ship and satisfy his claim against the Spanish Loyalist Government. Of course the court refused and succinctly stated, "Furthermore it is not established that this ship had been confiscated by the Spanish Government and is now in the possession of the Spanish Government."<sup>130</sup> There have been several cases recently concerning the Cuban seizures which have been decided quite in accordance with the principles set forth above and, of course, without exception to the act of state doctrine. For example, Cuba seized the well-known Cuban corporation, Cuban-owned *Ron Barcardi, S. A.* This company had assets in the United States at the time of the nationalization. The "nationalized" company, and those who had been officers of the company before nationalization, each claiming to be representatives of, or successors to, *Ron Barcardi*, claimed these United States assets. The federal court for the Southern District of New York decided that the nationalization of *Ron Barcardi* did not destroy the identity of the company, and therefore it could still sue in United States courts.<sup>131</sup>

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128. *H.R. 7750 Hearings* 595. See notes 100 & 101 *supra*. When the United States recognized the Soviet Government in 1933, the United States agreed (as France did not) to enforce *within* the United States the Soviet confiscatory decrees. This executive agreement was sustained as enforceable. The United States courts would doubtless otherwise have acted as always before and refused enforcement. See vigorous dissenting opinion of Chief Justice Stone in *United States v. Pink*, 315 U.S. 203, 246-51 (1942). See also Part II, § E, p. 455 *supra*.

129. See *Ephemeris*, *supra* note 122.

130. *Id.* at 561.

131. *Compania Ron Barcardi, S.A. v. Bank of Nova Scotia*, 193 F. Supp. 814, 815 (S.D.N.Y. 1961). Before the final order was entered awarding the assets to the "old" company, the "nationalized" company withdrew from the case as to these assets which

In a later case, this same United States federal district court was asked to enforce a confiscatory decree of Iraq upon property, which before the foreign decree and at all times since then, had been within the United States. The judge said:

Sabbatino, as well as the other 'act of state' cases, applies only to a taking within the territory of the foreign sovereign. We are here concerned with an attempted taking of property outside that territory . . .<sup>132</sup>

The judge further pointed out that:

The New York courts have consistently declined to enforce a cause of action based upon a foreign decree which purports to seize title, without payment of compensation, to property in New York.<sup>133</sup>

C.A.V. itself comes under this rule. It is a Cuban corporation, although predominantly owned by United States nationals. A creditor of C.A.V., operating under a New York statute for the preservation of external assets of foreign nationalized corporations, caused a receiver to be appointed for the New York assets of C.A.V. However, before the case was even argued before the Supreme Court, the receivership was dissolved and the old C.A.V. Company (not the nationalized company) was put in possession of those assets in New York which had never been confiscated because they had never been under the jurisdiction and control of Cuba since nationalization.

4. *The Report of the Committee of the Association of the Bar of the City of New York.*—This is the longest of the memoranda involving foreign cases submitted to the Congress in support of the exception to the act of state doctrine as ultimately propounded in the Sabbatino Amendment. The report of this committee is also the most explicit as to the committee's interpretation of the meaning of these cited foreign cases, for it definitely states that the international law exception to the act of state doctrine, which the Sabbatino Amendment adopts, "prevails in the courts of many other countries throughout the world."<sup>134</sup> The committee lists seven countries and the British territories referring to the list of cases in its Appendix I for its proof,<sup>135</sup> but with the exception of *The Rose Mary* case (discussed and shown above as thoroughly discredited), not another one of the thirty-four cases which the committee report cites is authority for any exception to the act of state doctrine.

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had continuously been outside of Cuba. The final order was entered without opposition and not reported.

132. *Republic of Iraq v. First Nat'l City Bank*, 241 F. Supp. 567, 572 (S.D.N.Y. 1965).

133. *Id.* at 575.

134. See note 102 *supra*.

135. BAR COMM., *supra* note 102, at 294, 296-97, 302.

While each case will be reviewed briefly in Appendix II to this article,<sup>136</sup> a few remarks here may be helpful in clarifying various situations to which the cases relate.

We may omit entirely the first case cited, for the committee in its statement indicates that the court in that case found the act complained of was not contrary to international law. The committee in its report said: ". . . (holding sufficiently definite provisions were made to compensate Germany for its interest in a power station which was partially nationalized by Austria)."<sup>137</sup> The Sabbatino Amendment exempts from its provisions any case wherein the court finds the act complained of is not contrary to international law.

(a). The "*Koh-I-Noor*" cases.<sup>138</sup>—These are cases of extra-territoriality. They reflect the rule that a confiscatory act has validity only in the country which promulgated it. L. & C. Hardtmuth was a partnership which had long done business in Czechoslovakia. It manufactured pencils which were widely distributed. In many countries, their trademark "*Koh-I-Noor*" was registered. After World War II, Czechoslovakia nationalized the company, and thereafter the nationalized company sought judicial confirmation of the claim that it was the successor to the original partnership and had a right to use the trademark "*Koh-I-Noor*" wherever it was registered. The courts of every country where the nationalized company raised this issue decided that a registered trademark under the laws of the country—a country foreign to Czechoslovakia—was an *external* asset of the original partnership and was not in any way reached by the foreign confiscation of the company. The committee cites the legal actions brought by this nationalized company under the laws of Austria, France, and Italy—all were the same, all confirmed that an act of

136. See App. II, p. 541 *infra*.

137. H.R. 7750 Hearings 1320. "In the following cases municipal courts have reviewed, under their own public policy or international law, takings of property by foreign states. Those cases which discussed the issue, from which excerpts are quoted below, recognized the principle that compensation is required." BAR COMM. 302, *supra* note 102. This proposition is conceded throughout the article. The *issue not* conceded in this article and *not* proved by any of the cases cited by the Committee of the Bar Association is their thesis that courts of one country do not recognize as valid fully executed acts of foreign states on property within their own jurisdiction and control if the act is contrary to international law.

138. *Koh-I-Noor, L. & C. Hardtmuth v. Koh-I-Noor Tuzkarna, L. & C. Hardtmuth*, Sup. Ct., Aus., June 2, 1958, [1958-II] Int'l L. Rep. 40. *Entreprise Nationale L. et C. Hardtmuth, Fabrique de Crayons Koh-I-Noor v. Fabrique de Crayons Koh-I-Noor L. et C. Hardtmuth*, (Ct. App. Paris) [1958-II] Int'l L. Rep. 50 (Fr.). *Registration of Trademark, Koh-I-Noor*, Fed. Trib., Ger., March 8, 1963, [1963] Neue Juristische Wochenschrift 1541, exemplifying the same principle but referring to a metal company, not pencil company. *Koh-I-Noor Tuzkarna L. & C. Hardtmuth Narodni Podnik v. Fabrique de Crayons Hardtmuth L. & C., S.r.l.*, App. Ct., Turin, June 17, 1958, [1958-II] Int'l L. Rep. 44 (It.).

state has no extra-territorial effect.<sup>139</sup> The laws of a foreign country purporting to effect a transfer of title to property in another country will not be "enforced" in that other country unless those laws are the same in principle as the laws of the country which is requested to enforce those foreign laws, or unless a treaty requires it.<sup>140</sup>

The rule of law expressed in the "Koh-I-Noor" cases is merely this: Confiscation of a business by one country does not transfer assets belonging to that company which were, at the time of the seizure, in a foreign country.

Patents, trade names and trademarks are property situated in the country which has granted registration of the patent, trade name or trademark. "*Koh-I-Noor*" and similar cases, therefore, merely show that the confiscation by Czechoslovakia did not transfer the title, nor permit the nationalized company to use the trademark in another country where that trademark was registered before the date of confiscation. Thus, trademarks come under the same rule as all other property not in the jurisdiction or under the control of the confiscating country. They are assets or property in the country which grants the registration.

This rule is the same in the United States. The United States has recognized that the seizure by its Alien Property Custodian does not transfer title to trademarks of the business seized, in those other countries where those trademarks were already registered. This has been confirmed by the United States Supreme Court on facts stated by the Court as follows:

Ingenohl had built up a great business as a cigar manufacturer and exporter having his factory at Manila. In 1908 he established a factory at Hong Kong and thereafter goods from both factories were sold under the same trademarks, the outside box or package of the Hong Kong goods having a label indicating that they came from there. The trade-marks were registered in Hong Kong and the cigars covered by them had acquired a reputation. In 1918 the Alien Property Custodian seized and

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139. One of these Koh-I-Noor cases was not of the pencil company but of a metal company using Koh-I-Noor as one of its trademarks. See note 138 *supra*. The committee using Koh-I-Noor case in Switzerland, Koh-I-Noor Bleistift Fabrik L. & C. Hardtmuth v. Fabrique de Crayons Koh-I-Noor L. & C. Hardtmuth, S.A.R.L., Fed. Trib., Sept. 13, 1957, [1957] Int'l L. Rep. 46. Decision characterized in report as: "Tho Czechoslovak expropriation decrees could not transfer assets situate in Switzerland. Trademarks and trade names constituted such assets." The committee also cites another trademark case, Zeiss v. Zeiss, Cour d'Appel Paris (First Chamber), April 2, 1963, [1964] Journal de Droit International (91 CLUNET) 616. See App. II, p. 552 *infra* for discussion of this case. See also Dralle v. Republic of Czechoslovakia, App. II, p. 543 *infra*.

140. The Litvinov Agreement with the Soviet Government was such an international agreement and the United States *enforced* the confiscatory decrees of the Soviet Government on property which had been placed in the United States by Russian corporations. *United States v. Pink*, 315 U.S. 203 (1942).

sold all the property 'wheresoever situate in the Philippine Islands . . . including the business as going concern, and the good will, trade names and trade-marks thereof, of Syndicat Oriente,' being the above mentioned business of the plaintiff in the Philippines.<sup>141</sup>

In this case the seizure was by the Alien Property Custodian under his war powers; in the case cited by the committee the confiscation was by the Communist seizures in Czechoslovakia. The question in both cases was: Did the seizure of the business give any rights to trademarks of the business previously registered in another country? The Hong Kong court refused to recognize the right of the purchaser of the business from the Alien Property Custodian to use the trademarks registered in Hong Kong. The seizure had no extraterritorial effect. Under British law, a judgment in favor of the former owner of the business for costs in the case was rendered in Hong Kong against the purchaser. The former owner of the business, and under the Hong Kong decision still the owner of the trademark there, brought suit in the Philippines to recover costs due him under the Hong Kong judgment. In this suit, the Hong Kong judgment was attacked and the Supreme Court of the United States reviewed it. Mr. Justice Holmes, speaking for a unanimous court, said:

If the Alien Property Custodian purported to convey rights in English territory valid as against those whom the English law protects he exceeded the powers that were or could be given to him by the United States . . . . The validity of the section of the Code of Civil Procedure is drawn in question, and also the construction of Trading with the Enemy Act which is treated as purporting to authorize what in our opinion it could not authorize if it tried.<sup>142</sup>

An examination of the cases cited by the committee will indicate that nearly half of them are cases of just this sort—that is, they involve a request by a confiscating country for extra-territorial enforcement on property which was not in the jurisdiction or under the control of the confiscating government. These cases are completely irrelevant to any exception to the act of state doctrine. To create a valid act of state as to particular property, it must be an executed act of state and at the time of the expropriation the property must be within the territory of the confiscating country and under its control.<sup>143</sup>

(b). *Military Occupation Cases.*—The committee cites four cases where the seizure complained of was not by any *recognized* government, either *de facto* or *de jure*, but by an occupying military

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141. *Ingenohl v. Olsen & Co.*, 273 U.S. 541, 543 (1927).

142. *Id.* at 544-45.

143. The type of case mentioned above relating to foreign property of a confiscated company has been the subject of various articles: for example, I. Seidl-Hohenveldern, *Austria: Nationalization of Foreign Joint Stock Corporations in Country of Registry:*

power.<sup>144</sup> The rights of a hostile occupying military power are governed by the Hague Convention on the rules of land warfare. This is a multilateral treaty signed by 103 countries.<sup>145</sup> The committee's own definition of act of state indicates that only a recognized government can commit an act of state, and the acts complained of in these four cases were not acts of state. As part of its recommendation for improving the Sabbatino Amendment, the committee suggests, "The statute might be amended to read 'recognized foreign state . . .' since the Act of State Doctrine has been invoked only as to acts of recognized foreign states."<sup>146</sup> The committee cites as its authority the Supreme Court decision in *Sabbatino*.<sup>147</sup>

Since one of these cases appeared in the list attached to the dissenting opinion of Mr. Justice White, the Attorney General testified concerning it as follows, emphasizing that it had been wrongly classified as an *English* case.

The second 'English' case cited by Mr. Justice White is *N.V. de Bataafsche Petroleum Maatschappij v. The War Damage Comm'n* (Singapore Ct. App. [1956] Int'l L. Rep. 810). This case is inapposite to a discussion of the act of state doctrine, for no act of state was involved. The Japanese forces, while occupying the Dutch East Indies in World War II, had exploited some private oil concessions and some of the oil was traced to storage tanks in Singapore. The private owners of the concessions prevailed over the claim of the local government who desired to seize the oil as enemy-owned. At no time had the Dutch Government, the local government of Singapore, or the British Government recognized Japan either de facto or de jure as the government of the invaded area where the oil wells were. <sup>148</sup>

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*No Effect on Assets Located Abroad*, 4 AM. J. COMP. L. 242 (1955); Sommerich, *Foreign Confiscation and Public Policy*, 3 AM. J. COMP. L. 87 (1954) (referring particularly to the *Dralle* case).

144. Belgium: *Deville v. Servais*, Ct. App., Liège, [1943-45] Ann. Dig. 448 (No. 157).

Also cited in both memoranda referred to in notes 100 & 101 *supra*.

British Territories: *N. V. de Bataafsche Petroleum Maatschappij*, *supra* note 103.

Also cited in both memoranda, notes 100 & 101 *supra*.

The Netherlands: *Hunzedal Ltd. v. Smit*, Dist. Ct., Amsterdam, Jan. 3, 1940, [1919-42] Ann. Dig. Supp. 33 (No. 20).

Switzerland: *Rosenberg v. Fischer*, Fed. Trib., June 3, 1948, [1948] Ann. Dig. 467 (No. 150) (Swit.). Also cited in both memoranda, notes 100 & 101 *supra*.

145. Hague Convention of 1907, including Convention IV. See 1 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776-1909, 2269 (1910).

146. *Supra* note 102, at 308; *H.R. 7750 Hearings* 1324.

147. The United States Supreme Court had stated that the act of state should be recognized unless changed by treaty. 376 U.S. at 428. See also *The Netherlands v. Federal Reserve Bank*, 90 F. Supp. 655, 667 (S.D.N.Y. 1951): "The 'acts of state' doctrine has never been applied to official conduct of an enemy nation in territory beyond its boundaries under its temporary wartime military occupation." That part of this judgment, which held that a military occupant could not transfer good title, was affirmed. The rest of the judgment was reversed, 201 F.2d 455 (2d Cir. 1953).

148. *H.R. 7750 Hearings* 1258.

(c). *The Zeiss case*.—This was one of another series of cases relating to trademarks in courts of various countries in Europe and in England and Egypt.<sup>149</sup> Only one of these cases was cited in the report of the committee of the Bar Association of the City of New York and that was the French court of appeals' decision in *V.E.B. Carl Zeiss Jena v. Firm Carl Zeiss*.<sup>150</sup> It was appealed and the final determination was made by the Court of Cassation.<sup>151</sup> The other *Zeiss* cases were tried and decided both before and after the French decision to which the committee report referred.<sup>152</sup>

The firm of Carl Zeiss and Carl Zeiss Foundation had their principal place of business in Jéna (Jéna), Thuringia, Germany. This area of Germany was first seized by the American troops which thereafter evacuated the area under the terms of the Yalta Agreement; the area was then occupied by Soviet troops under Soviet occupation authorities. That area is now part of East Germany. Most of the managers of the firm and the foundation left Jéna with the American troops and set up business at Heidenheim, West Germany. The Soviets created the "Peoples owned" Zeiss Company out of the old Zeiss factory at Jéna. That company and the Zeiss company at Heidenheim contested in six countries the issue as to which had the right to use the Zeiss trademark. Although up to this time there is no final decision in England on that issue, in no country has the Soviet-created Zeiss Company been permitted to use the trademark. The courts of the various countries, in reaching consistent conclusions, emphasized different features of the case, but each decision was harmonious with United States law.<sup>153</sup> There was no act of state issue in the *Zeiss* cases for, as stated in the committee's

149. In the Netherlands, *Zeiss v. Zeiss*, *supra* note 139, and in Germany, Egypt and Austria. Reference to these last can be found in a digest prepared by M. Magdalena Schoch, United States Dep't of Justice, in MacChesney, *Judicial Decisions*, AM. J. INT'L L. 671, 687 (1959). There was also at that time a case pending in England between the same parties on the same issues, on which no final decision on the ultimate rights of the parties has been made. 1 All E.R. 467 (1965); 2 All E.R. 536 (1966).

150. *Zeiss v. Zeiss*, *supra* note 139.

151. *V.E.B. Carl Zeiss Jéna v. Firma Carl Zeiss*, Ct. of Cassation, 3 JOURNAL DU DROIT INTERNATIONAL (CLUNET) 622 (1966), *supra* note 102, at 305, also reprinted in *H.R. 7750 Hearings* 1322. See also *Zeiss v. Zeiss*, *supra* note 139.

152. See Appendix II, p. 552 *infra*, for statement of facts. Issues are taken from discussions in various courts.

153. The issues in the *Zeiss* cases before the courts of six countries were not the same as in *Sabbatino*. The *title* to property seized in a foreign country was not the issue. The issue was which of two companies had the right to use the Zeiss trademark which, as to either of the companies, would be an asset in a foreign country. Even if one considers that the Zeiss company had been nationalized in "Eastern Germany" and there had been no contention that the Zeiss company which had moved to Heidenheim was the true successor of Zeiss, there still would have been no issue of any exception to the act of state doctrine or an issue on which the *Sabbatino* Amendment would have had any effect, for a confiscatory act has no extraterritorial effect.

own report, an unrecognized government cannot commit an act of state, and this fact was considered of importance by some courts in the *Zeiss* cases, although it nowhere appears determinative. A principal issue was which of two contending companies was the "old" Zeiss or the successor of it, and which company had the right to use the foreign registered trademark.

(d). *Greece*.—The committee cites the country of Greece in its list of those countries in which it alleges the concept also prevails which the Sabbatino Amendment is designed to create in the United States. However, in the committee's supporting list of cases, no citation is made to any Greek case.

(e). *Federal Republic of Germany*.—The committee report cites three decisions of German courts,<sup>154</sup> each of which appears to support the thesis that German courts, administering German law, make "an exception" to the act of state doctrine when the foreign act of state which is found to be contrary to international law purports to affect property of a German national in the territory of that foreign country committing the act of state. One of these three cases definitely made such a decision;<sup>155</sup> it found that property of a German had been "confiscated" in Czechoslovakia and later came into Germany. It was recognized by the claiming party, from whom the property had been taken, and the court restored the property to her, holding the foreign seizure ineffective to transfer title because the act of state, under which it was seized, was contrary to international law. The two other cases cited are not final decisions as to the title of the property under consideration, but the court in both instances clearly indicated its adherence to the thesis that title to property belonging to Germans and situated in a foreign country was not changed by a confiscatory act of the country in which that property was located.

However, none of these three cases can be accepted as "an exception" under German law to the act of state doctrine, for at the time

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154. Confiscation of Property of Sudeten Germans Case, Amtsgericht Dingolfing, Dec. 7, 1948, [1948] Ann. Dig. 24 (No. 12) (Ger., Am. Zone); Expropriation Case Soviet Zone of Germany [1949] Ann. Dig. 19 (Ct. App., Nuremberg 1949). Confiscation of German Property in Czechoslovakia Case, Fed. Sup. Ct., Ger., Jan. 29, 1953, [1953] Int'l L. Rep. 31.

155. Confiscation of Property of Sudeten Germans Case, *supra* note 154, was decided in the Amtsgericht of Dingolfing in Bavaria. The Amtsgericht has sometimes been translated as "county court;" more accurately, it is a local court of limited jurisdiction from whose decisions there is no appeal. Perhaps it might properly be referred to as a small claims court. The decision was not officially reported and can be found only in the works of law commentators. There is doubt that the property here was seized by any official act of the Czechoslovakian Government, but as the court decided the case on the basis that there was a seizure of property and that this seizure was a "confiscation," that interpretation is accepted here.



they were handed down they were contrary to the law of Germany.

This curious conflict between the court decisions and the German law which the courts were obligated to administer is easily explained when one observes that the decisions—there were in fact several other similar cases not cited—were decided in Germany after World War II and before Germany again became an independent nation, *i.e.*, the Federal Republic of Germany; thus, these cases were decided under laws imposed by the Allied Government. During a period after World War II, the government of Germany was that of the Allied powers and the laws of Germany were those imposed by the Allies. Germany had unconditionally surrendered and its territory was under joint occupation of the victorious Allies. The laws of Germany included not only the terms of the surrender but also the Potsdam Agreement on Reparations, the Paris Agreement,<sup>156</sup> together with such administrative laws as were necessary for carrying these laws into effect. The Allies had determined, and Germany as the vanquished nation had agreed, that the Allies should take German external assets as reparations. The Potsdam Conference provided:

Each signatory Government shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control . . . .<sup>157</sup>

Of the three cases cited by the committee, two were seizures of Sudeten Germans' property within Czechoslovakia; the other was a seizure of German property within the Soviet zone of occupation. These seizures in Czechoslovakia were prior to the Communist coup of 1948 and were taken as part of the Allied reparations. Russia was to have, in addition to the external assets of Germany within Russia, certain German assets within Germany itself. Section 1 of the Potsdam Agreement provided: "Reparation claims of the U.S.S.R. shall be met by removals from the zone of Germany occupied by the U.S.S.R. and from appropriate German external assets . . . ." <sup>158</sup>

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156. Potsdam Agreement. Tripartite Conference at Berlin, Potsdam Conference, July 17, 1945, released by the White House, August 2, 1945, 13 DEP'T STATE BULL. 153-61 (1945). Paris Agreement. Conference at Paris from November 9, 1945, to December 21, 1945, Agreement executed January 14, 1946, released by the White House, January 15, 1946, 14 DEP'T STATE BULL. 114-24 (1946).

157. *Ibid.*

158. See note 156 *supra*. If the property was taken in the Soviet zone for reparations, German courts had to recognize the change of title. If, however, this was a "confiscation" not recognized by the Allies as part of the reparations, then the seizure was not an act of state. "East Germany" was not recognized and no title transferred under German law. Whatever political force within a particular territory an "unrecognized" government has, its acts within that territory need not be considered as valid—not as an act of state—by any country which has not "recognized" it as either, or both, the *de facto* or *de jure* government of that territory. Only a government can make a valid act of state. "East Germany" is recognized by the Soviet Government

Other sections added additional property to be sent to Russia from the Western zones.

The Allied Governments took office with these rules imposed as the law of Germany and immediately took administrative steps to accomplish them.<sup>159</sup> In spite of these facts, however, certain local German courts tried various methods of thwarting this purpose by attempting to restore to the former owners identifiable property brought into Germany. In most instances, the value of the property was negligible; a second-hand sewing machine was the sole property discussed in the one fully-decided case, some used household furnishings in another. Also, most but not all of these cases were brought in lower courts in which the decisions were not even published and from which no appeals could be taken. However, after some of these decisions had been made, the Allied Government of Germany undertook to stop these local court efforts to flout the law and defy the surrender terms imposed on Germany by passing Decree Law HICOM No. 63 which took from all German courts the right to decide cases concerning German property taken in reparation.<sup>160</sup>

One of the very cases of the three cited by the Bar Association committee was decided after this law was in effect. The court did not decide "title" but remanded the case to the lower court to determine exactly how possession had been acquired. The court was fully aware of Law No. 63. It said:

The purpose which Law No. 63 is designed to serve quite distinctly favours an interpretation that the property of Sudeten Germans shall be considered 'German property.' While Control Council Law No. 5 provides for the expropriation of persons owning property situate abroad, even where such

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as a separate autonomous state but is not recognized by the Federal Republic of Germany or the United States and other countries. "East Germany" cannot, therefore, create a valid "act of state" as to countries which do not recognize it. Also an unrecognized government has no legal capacity to sue in the courts of any country which has not "recognized" it as an existing government of a particular state. The refusal to entertain a suit by a non-recognized government is the same under New York law. See *Russian Socialist Federated Soviet Republic v. Cibrario* 235 N.Y. 255, 139 N.E. 259 (1923).

159. This was done under Control Council Law No. 5, 1945. An explanation of Control Council Law No. 5, the necessity thereafter for changing the law and imposing HICOM Law No. 63 (Official Gazette 1951, 1107) is contained in a statement under the title of *True Meaning of the "Divesting Law,"* [July 1-Sept. 30, 1951] U.S. HIGH COMM'R FOR GERMANY, 8TH QUARTERLY REPORT ON GERMANY 54-58, by the High Commissioner for Germany and published under the United States seal with the authority of the United States High Commissioner for Germany. This document was printed by the Publishing Operations Branch of the United States Army.

160. *Ibid.* Also for discussion of the decisions in Germany, and the effect on the German courts, of Law No. 63 of the High Commissioners for Germany, see Graue, *Germany: Recognition of Foreign Expropriations*, 3 AM. J. COMP. L. 93 (1954). The *Dingolfing* case cited by the committee is reviewed. Also Law No. 63 is discussed in one of the cases cited by the committee.

property is situate outside territory subject to the jurisdiction of the Control Council, Law No. 63 does not provide for any expropriation but confines itself to sanctioning the validity, within the Territory of the Federal Republic, of liquidations of German property which have taken place or are still to take place in foreign countries.<sup>161</sup>

The German courts finally held that the transfer of all Sudeten German property seized in Czechoslovakia must be recognized.

The act exempted from the jurisdiction of the German courts all issues connected with German property outside of German territory such as it was on December 31, 1937. The Bundesgerichtshof held that Czechoslovakia is a foreign state and that the Sudeten Germans are Germans in the meaning of the act, and that, as a consequence, the property of the Sudeten Germans is German property. Thus, all complaints based on illegality of Czech expropriatory measures must be dismissed for lack of jurisdiction.<sup>162</sup>

The Allied Government of Germany clearly expressed the purpose of Law No. 63 as an implementation of the general Allied policy toward German reparations:

[I]t appeared desirable to protect all persons who had acquired German assets, taken as reparations, as well as the owners of restituted property, from any risk of having to defend their title against attack by former German owners if such property should be brought into Germany, no matter how remote such risk, and how devoid of a legal basis such attack might appear.<sup>163</sup>

A clearer statement of the repudiation of these courts' decisions can scarcely be imagined.

The committee cites these cases under the heading, "Federal Republic of Germany."<sup>164</sup> This is not wholly accurate, for Germany was not an independent country in regard to Germany property, either internal or external, seized as reparations by the Allies. Germany was bound by the surrender terms and the implementing agreements. The cases were cited by the committee as an exception to the act of state doctrine, *but they were not in accord with the law of Germany* and in reality were only sporadic efforts to evade Allied reparation agreements. They are a terrible example of what the courts of other countries may do if some foreign country believes its nationals have been injured by some act of the United States. The Sabbatino Amendment now makes possible this type of retaliation against the United States on the determination of any local court in the world.

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161. Confiscation of German Property in Czechoslovakia Case, *supra* note 154.

162. 8 BGHZ, 378 (Jan. 29, 1953). See also Graue, *supra* note 160.

163. See 8TH QUARTERLY REPORT ON GERMANY, *op. cit. supra* note 159, at 55.

164. 20 RECORD OF N.Y.C.B.A. 294, 304 (1965). See also H.R. 7750 Hearings 1321.

None of the other German cases cited by the committee support any exception to the act of state doctrine.

#### D. Conclusion

All of the foreign cases cited in testimony and memoranda are briefly digested in Appendix II.<sup>165</sup> *Not one case of all of those cited* is authority for the proposition that any independent nation in the world has ever eliminated from its jurisprudence the principle of law embraced in the act of state doctrine, permitted its courts to ignore it, or made any exception to it. Under the Sabbatino Amendment this country and the courts of this country will now stand alone among the civilized nations of the world in ruling that the issue of the validity of a fully executed foreign act by one state in its own territory is an issue which is justiciable in a local court of law of another State.

#### IV. THE SABBATINO AMENDMENT IN RELATION TO THE CONSTITUTION OF THE UNITED STATES: UNANSWERED QUESTIONS

The Sabbatino Amendment creates many questions which the courts must answer; many of these questions ultimately must be answered by the Supreme Court of the United States.

##### A. *Does the Sabbatino Amendment Impair the Independence and Sovereignty of the United States?*

The principles embodied in the Constitution of the United States long antedate that document. In fact the Constitution was to preserve the principles proclaimed thirteen years before. It was for these truths, self-evident to our forefathers, that the American Revolution was fought. By this revolution, the United States achieved and still holds absolute national freedom and absolute sovereignty. This independence was first proclaimed, not by the United States, but by a confederation of thirteen independent states in the year 1776. "That these United Colonies are, and of Right ought to be Free and Independent States."<sup>166</sup>

What the founding fathers meant by "Independence" and "Sovereignty" which first were won on the battlefield, then confirmed by the adoption of the Constitution, has been explained many times. Two of the best known definitions are by Chief Justice Marshall and Mr. Justice Story, who sat together on the high court. Marshall said:

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165. *Infra* p. 541.

166. Declaration of Independence.

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.<sup>167</sup>

Story, in his famous textbook on the *Conflict of Laws*, gives the following definition:

The first and most general maxim or proposition is that which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it. A state may therefore regulate the manner and circumstances under which property, whether real or personal or in action, within it, shall be held, transmitted, bequeathed, transferred, or enforced; the condition, capacity, and state of all persons within it; the validity of contracts and other acts done within it; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice in all cases calling for the interposition of its tribunals to protect and vindicate and secure the wholesome agency of its own laws within its own domains.<sup>168</sup>

Inseparable from independence and sovereignty is the equality of all independent nations. This principle of absolute equality was considered by Chancellor Kent to be universally acknowledged by the great international law writers of his day. After reviewing them, the best known of which were Grotius and Vattel, Kent states under the heading "Right of Interference with other States" that:

1.—Nations are equal in respect to each other, and entitled to claim equal consideration for their rights whatever may be their relative dimensions or strength, or however greatly they may differ in government, religion, or manners. This perfect equality, and entire independence of all distinct states, is a fundamental principle of public law. It is a necessary consequence of this equality that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government or religion, or a course of internal policy, to another.<sup>169</sup>

This principle of equality of nations was early confirmed as a basic principle by Chief Justice Marshall:

No principle of general law is more universally acknowledged, than the

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167. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812).

168. STORY, *op. cit. supra* note 123, at § 21.

169. KENT, *COMMENTARIES ON AMERICAN LAW* 21 (14th ed. 1896).

perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. . . . As no nation can prescribe a rule for others, none can make a law of nations . . . .<sup>170</sup>

This principle has continued to the present and has been written into the Charter of the United Nations. Article II, Section 1 of the United Nations Charter reads:

The Organization and its Members, in pursuit of the Purposes stated in Article I, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

Thus whatever limitations the United States places upon the sovereignty of Cuba, by that very act that same limitation is placed upon the sovereignty of the United States. Whatever wrongs Cuba has done to the nationals of the United States, it is still the recognized Government of Cuba and a member of the United Nations. The fact that it owes the United States Government perhaps a billion to a billion and one-half dollars for damages suffered by nationals of the United States does not change this situation.

By a court's decision under the Sabbatino Amendment, we have denied to Cuba the attributes of absolute independence, that is, absolute sovereignty. "There is an end to the right of national sovereignty when the sovereign's acts impinge on international law."<sup>171</sup> The decision in which that statement was first made was overruled by the Supreme Court. Now the Congress has overruled the Supreme Court and reinstated the principles of that lower court decision.

The court of appeals, in what is now the ruling decision in *Sabbatino*, said: "[T]he very proposition that something known as international law exists carries with it the implication that national sovereignty is not absolute but is limited."<sup>172</sup>

Under this decision of the court of appeals, now approved by the Congress, under the Sabbatino Amendment, no nation has the sovereign power to pass a valid law and enforce it, transferring titles to property of aliens, which the courts of some other country may not declare to be contrary to international law, and therefore null and void within the territory of that country which had passed the act. "Refusal by municipal courts of one sovereignty to sanction the action of a foreign state done contrary to the law of nations will often be the only deterrent to such violations."<sup>173</sup>

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170. *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825).

171. 193 F. Supp. at 381.

172. 307 F.2d at 860.

173. 307 F.2d at 868.

With this condemnation of Cuba—that it is not a wholly sovereign state, as the words “independence and sovereignty” had always meant; that it cannot validly enact and execute an act of state contrary to international law which transfers title to property of United States nationals; and that it must bow to the determination of courts of other countries as to the validity or invalidity of any such national attempt—the United States at the same time places itself in the same subservient position to courts of other countries as our courts have placed Cuba.

The United States has always claimed that whether or not it, as a sovereign state, might have in any way violated international law, any constitutional act of its legislature, or any decision of the Supreme Court, or any executive act if within given powers, was valid within its own territory and must be so recognized by every other nation. The validity of the act cannot be questioned by our courts and, until the *Sabbatino* case, our courts had never questioned the validity of the executed acts of state of any other sovereign country. Of course the United States by any act against foreigners or their property might subject itself to an international claim and if it submitted to an international court, might even be required to pay damages, as it has in the past.

The Constitution of the United States does not guarantee to foreigners that they or their property will not be subjected to acts contrary to international law. The proof that the United States has always insisted it had the right to enact laws contrary to international law, which were valid as to private property within the United States and which would support judicial decrees that would be recognized outside of the country as valid, in regard to all such property within the United States, can be shown in many ways. There are no exceptions. The following instances are illustrative:

(1). *Decision on Validity of Seizure Under United States Law—Not International Law.*—In a number of cases foreigners have claimed our executive department had seized their property in a manner contrary to international law. In such instances, when they brought suit, the decision of the United States court based liability upon the question whether or not the act of state by the United States itself was *contrary to United States law*. International law is the law of the United States *only* insofar as it has not been changed or superseded by congressional action or treaty.<sup>174</sup> Executive action, even if authorized by the laws of the United States, may be contrary to international law as also may a decision of a court. If the seizure was under the law of

174. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820); *The Over the Top*, 5 F.2d 838, 842 (1925).

the United States, which at that time was the same as international law, the foreigner received redress not because of a violation of international law, even though it was such a violation, but because the seizure was contrary to United States law. Since in such cases United States law and international law were the same, these statements as to the right and power validly to change the United States law so that it does not conform with international law are dicta. They do, however, clearly show the understanding by the courts of the law of the United States in this respect. Among these are the following well-known statements:

*This usage [international law] is a guide which the sovereign follows or abandons at his will; the rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him, without obloquy, yet it may be disregarded. (Emphasis added.)*<sup>175</sup>

If it be the will of the government to apply to Spain any rules respecting captures, which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. *Till such an act be passed*, the court is bound by the law of nations, which is part of the law of the land. (Emphasis added.)<sup>176</sup>

A quotation from a case frequently quoted and cited in the *Sabbatino* case, but only in part, reads:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and *no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations . . . .

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, *in the absence of any treaty or other public act of their own government in relation to the matter.* (Emphasis added.)<sup>177</sup>

In the first paragraph of the above quotation, the theme of the first sentence (unmodified by the restriction in the sentence immediately following it) runs like a *leit-motif* through the *Sabbatino* litigation. That first sentence is a half paragraph and states a half truth, a very dangerous half truth. From the incomplete idea expressed, the unwarranted conclusion has been deduced that local courts of the United States have the duty to "apply" international law and that in so doing they may and should disregard any foreign act of state—

175. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814).

176. *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

177. *The Paquete Habana*, *supra* note 174, at 700, 708.



legislative, judicial, executive—found to be contrary to international law, or declare that foreign act to be null and void.

The premise is untrue and the conclusion unsound. The plain fact of the matter is, local courts of the United States or of any other nation may *not* apply international law. Local courts apply only local law of their country, or if relevant, that of a foreign country. The Supreme Court in the very case relied upon, confirms that any local court, in seeking to find what is applicable United States law, must determine first, if there is a relevant controlling legislative act or an executive act or judicial precedent or clause in a treaty. If a court finds none of these, any court of the United States may then, but only then, properly find that a relevant provision of international law is local law of the United States and thus the law of the forum and apply this tenet of international law, not because it is international law, but because it is the law of the United States. In any case, where foreign law is relevant to an issue before United States courts, the same rule applies. In determining the law of a foreign country, the United States courts determine what is the relevant local law of that foreign country. The lower courts in *Sabbatino* failed to do this.

(2). *Refusal of Jurisdiction of Diplomatic Claims.*—When the executive has acted strictly in accordance with the laws of the United States, even though those laws may be violative of international law and action under them equally wrongful, the courts of the United States have no jurisdiction to declare that any damage has occurred. Such a complaint by a foreigner of wrongdoing by the United States Government against him or his property is a diplomatic claim only. The courts of the United States can neither declare the law and the actions under it null and void nor return the property to the foreigners, nor grant compensation for the damage caused by the law or the act.

There is no power in this Court to declare null and void a statute adopted by Congress or a declaration included in a treaty merely on the ground that such provision violates a principle of international law. . . . When, however, a constitutional agency adopts a policy contrary to a trend in international law or to a treaty or prior statute, the courts must accept the latest act of that agency.<sup>178</sup>

(3). *Prior United States Rejection of Sabbatino Amendment Principles.*—The consideration and rejection of the principle embodied in the Sabbatino Amendment can be seen from the successive drafts of the proposed Convention for the Protection of Foreign Property put forward by the Organization for Economic Cooperation and De-

178. *Tag v. Rogers*, 267 F.2d 664, 666, 668 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960); see also *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966).

vement (O.E.C.D.). In the 1962 edition, Article V appears on page 25 under the heading "Breaches of the Convention." This is divided into two sections as follows:

- (a) The breach of this convention shall entail the obligation of the party responsible therefore to make full reparation.
- (b) Each party shall have regard to the principle that any measures taken by any state, whether or not a party to this convention, which are in conflict with the provisions of Article II or III thereof shall not be recognized within the territory of that party as valid.

The provisions contained in Articles II and III prohibit the taking of foreign property without compensation, a circumstance which has throughout this article been considered a breach of international law. Section (b) of Article V above therefore clearly appears to embrace the principle desired and expected to be enforced under the Sabbatino Amendment. This is further shown by the notes and comments immediately following section (b) in relation to this one feature.

This provision, however, was not acceptable to the experts of the interested countries. The 1966 proposed draft of the O.E.C.D. conventions, upon which, however, the O.E.C.D. Council has not yet taken a position, contains no such provisions, and Article V is limited merely to section (a) which remains unchanged.

(4). *Departure From Non-United States Precedent.*—In the *Sabbatino* case itself, the court of appeals observed that no international court had ever demanded return of property taken contrary to international law, but admitted that international courts enter judgments only for money damages against countries which have been found to have acted contrary to international law.

It has been argued that the wrong under international standards is not in the taking but in the failure to pay compensation for the taking. It has been pointed out, moreover, that international tribunals have never granted restitution of the property taken. Therefore, the argument runs, the expropriator possesses good title to the property seized subject to a duty to pay damages for the injury caused. But international tribunals are not the sole custodians of international law. As we stated earlier in this opinion, municipal courts also play a part in the development of that body of law. . . . Furthermore, municipal courts are competent to give a restitutory remedy. In fact, the New York court which holds the proceeds from the sale of sugar involved in the present case is in such a position.<sup>179</sup>

The lower court's justification for the *Sabbatino* decision omits the significant fact that no municipal court had ever tried to restore prop-

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179. 307 F.2d at 868. For discussion of the possibility of municipal courts' giving a restitutory remedy, see Part IV, § D, p. 508 *infra*.

erty and not been overruled, and that no decision of any independent nation of the world has ever been so decided. This reasoning was the basis on which the Supreme Court overruled the court of appeals, stating that Cuba had title under its act of state, and of course owed prompt, adequate and effective compensation in accordance with United States standards.

(5). *Decisions Against United States in International Tribunals.*—In a number of instances, foreign countries have accused the United States of a breach of international law, and the United States has consented to an adjudication by an international tribunal. Perhaps the best known case is that of the *Norwegian Shipowners*.<sup>180</sup> At the beginning of World War I, various Norwegians had contracted for the building of ships in United States shipyards. The United States as a wartime measure requisitioned the rights of all the Norwegians in their contracts for ships, in whatever state of completion each ship then was, or if the keel had not been laid, the United States substituted itself for the Norwegian contractor. The United States made payment to the shipowners which Norway, in their behalf, protested as inadequate. An international tribunal found that the United States had violated international law by failure to pay adequate consideration. The tribunal entered an award against the United States which was paid. No question was raised as to the title of the ships, and certainly no ship was seized in any foreign port on the ground that if there was a breach of international law, no title had been transferred.

One international tribunal found that six cases of the United States Supreme Court had been decided contrary to international law and awarded damages which were paid. The title to the property, under each Supreme Court decision, however, was not affected.<sup>181</sup>

Now we must read the Sabbatino Amendment and the decision of a United States court under it as if some other nation had done to the United States as we have done to Cuba. Whatever power the United States has over Cuba as a sovereign, this same power resides in every country in the world over the United States. This fact that the Sabbatino Amendment is of very limited efficacy and, if applied against the United States, would likewise be of limited efficacy does not

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180. *Norwegian Shipowners' Claims (Norway v. United States)*, 1 U.N. Rep. Int'l Arb. Awards 307 (1922).

181. See Part IV, § I, p. 524 *infra*. See also [1910] FOREIGN REL. U.S. 600 (1915). Identical Circular of Secretary of State P. C. Knox, transmitted with letter dated Nov. 3, 1909. See also [1907] FOREIGN REL. U.S. pt. 2, 1165 (1910): "Nor are instances lacking of the submission of questions to a mixed commission which have been passed upon by the Supreme Court of the United States sitting as a court of appeal in prize cases and in which the United States has by virtue of an adverse decision of a mixed commission reimbursed the claimants."

answer the question. If the amendment is of any use against a country which the courts of the United States have held to be a violator of international law, the amendment reciprocally is of equal use to any country accusing the United States of a breach of international law.

Two questions are immediate and important: (1) Does the Sabbatino Amendment impair the independence and sovereignty of Cuba? If so, it also impairs that of the United States. (The equality of nations means nothing less.) If the answer is affirmative, (2) Did the people of the United States, the citizens in whom resides the sovereignty, the power and dignity of the United States, ever grant to the government they created, the power to impair the independence and sovereignty of the United States?

But the government of the people, by the people and for the people is a tripartite government. The executive department protested vigorously the enactment of the Sabbatino Amendment. Of course the President did sign the Foreign Aid Bill to which the Sabbatino Amendment was attached as a rider, but there is no reason to believe that the executive department changed its view as to the desirability of this amendment.

The supreme judicial power of the United States, the Supreme Court, has not yet spoken on this question, so it is Congress alone of the three departments of government which has shown enthusiastic approval of its own act in creating and adopting the Sabbatino Amendment, and this brings us to the next question.

*B. Does the Constitution Give to the Congress the Sole Right to Act as Agent of the United States in Granting Extraterritoriality to United States Courts Over the Acts of Other Countries, and Reciprocally Similar Authority to the Courts of Foreign Countries Over Acts of the United States Government?*

Specifically can Congress in the name of the United States extend to every nation, and to the courts of every nation, the right and power to determine the validity of the laws of the United States as applied within the United States on property of their nationals within the United States? A state or nation and the *government* of that state or nation must not be confused. They are separate. In the United States, sovereignty is in the people. The people created a form and system for orderly government. That government is the agent of the sovereign people.

The government of the colonies by Great Britain was not an agency for the benefit of the colonists. In the interests of the mother country,

that government exploited the colonists. It was agent for England and had little concern for the colonists' lives and fortunes.

. . . whenever any Form of Government becomes destructive of these ends [life, liberty and the pursuit of happiness], it is the Right of the People to alter or to abolish it, and to institute new Government . . . .<sup>182</sup>

The Government of the United States was established in 1789, deriving its just powers from the consent of the governed. The distinction between the sovereignty of the United States and the frame of the government which, as the agent of the sovereign, rules within its territory and conducts its foreign relations, is well expressed in the preamble to the Constitution.

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

To assure that there would be no usurpation of sovereign functions by the Government of the United States, the ninth and tenth amendments were inserted and read as follows:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Whoever may be elected or appointed to an office created by the Constitution may then exercise the power granted to him as an officer of the United States Government for the orderly administration of the state. No person has the authority either as an individual or as a member of a body created by the Constitution, to exercise any governmental powers not granted by the sovereign people. The Government of the United States is one of limited authority.

The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both government and State are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof.<sup>183</sup>

The Constitution sets up the frame of government which shall govern the state.

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182. Declaration of Independence.

183. Virginia Coupon Cases, 114 U.S. 269, 290 (1884).

What is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand.

What are Legislatures? Creatures of the constitution; they owe their existence to the constitution; they derive their powers from the constitution, it is their commission; and therefore, all their acts must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves, in their original, sovereign and unlimited capacity. Law is the work or will of the legislature, in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature.<sup>184</sup>

The Constitution of the United States has no extraterritorial effect. The Government of the United States cannot authorize any of its officers to interfere or change the laws of any foreign country:

The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.<sup>185</sup>

This is true as to every country in the world. Nations treat with each other on a nation-to-nation basis, and international persuasion can, and always has, followed the general rule from diplomatic protest to war. In order that the United States' high-minded intentions toward Cuba in helping it to freedom from the colonial rule of Spain should not be misinterpreted, the Congress of the United States, on April 20, 1898, passed a resolution which contained the following provisions:

1. That the people of the Island of Cuba are, and of right ought to be, free and independent.

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4. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people.<sup>186</sup>

The resolution also demanded that the Government of Spain relinquish its authority and government which it had exercised in the island of Cuba and withdraw its land and naval forces from Cuba.

Now for the first time in the more than the half century of rela-

184. *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795).

185. *In re Ross*, 140 U.S. 453, 464 (1891).

186. Resolution of April 20, 1898, 30 Stat. 738-39.

tions between the United States and Cuba, the United States by the Congress and the courts has advised Cuba that it cannot enact any valid law affecting the rights of nationals of the United States in Cuba which does not have the sanction of the municipal courts of the United States.

Is this the position of the United States? Do the Congress and the courts singly or together have the authority under the Constitution to create such an international attitude between two sovereign states?

[Y]et, it is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its government, and not to the State, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name.<sup>187</sup>

To permit the validity of the acts of one sovereign State to be reëxamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'<sup>188</sup>

The question must be answered: Does the Constitution of the United States grant to the Congress and to the courts the extra-territorial power which they have attempted to exercise in the enactment of the Sabbatino Amendment and the decision under it? But questions, relating more directly to internal rather than international affairs, arise under the Sabbatino Amendment.

C. *Has the Congress, in Enacting the Sabbatino Amendment, Limited the Powers Granted to It by the Constitution and Also Encroached Upon the Prerogatives of the Executive and Judicial Branches of the Government?*

The Constitution of the United States provides that the power of government is to be exercised by three independent branches or departments.

The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them.<sup>189</sup>

187. Virginia Coupon Cases, *supra* note 183, at 290.

188. Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918). Compare above with statement in court of appeals decision in *Sabbatino*: "Refusal by municipal courts of one sovereignty to sanction the actions of a foreign state done contrary to the law of nations will often be the only deterrent to such violations." 307 F.2d at 868.

189. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 329 (1816).

The mere establishment of a government based upon three great divisions is not self-operating.

It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.<sup>190</sup>

It was recognized at an early date that it was the Congress which would have to show restraint in its activities not to encroach upon the other departments of government.

The power of making laws is the supreme power in a state, and the department in which it resides will naturally have such a preponderance in the political system, and act with such mighty force upon the public mind, that the line of separation between that and the other branches of the government ought to be marked very distinctly, and with the most careful precision.

The Constitution of the United States has effected this purpose with great felicity of execution, and in a way well calculated to preserve the equal balance of the government and the harmony of its operations.<sup>191</sup>

In deciding the *Sabbatino* case, the Supreme Court gave a definite warning that the act of state doctrine must be considered against the background of the Constitution.

The act of state doctrine does, however, have 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations.<sup>192</sup>

Seldom has one department of government encroached upon another either deliberately or inadvertently. Each has recognized that the United States Government has two outstanding features: it is a government of only delegated powers; and it is a government of checks and balances. It is not surprising, therefore, that instances of one government department's endeavoring to usurp the authority of another, or to control its functions, have been rare. However, one must remember the "court packing" plan<sup>193</sup> of the days of the great depression. This was an effort of the executive department—the President of the United States—through enactment of the Con-

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190. *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880).

191. *KENT, op. cit. supra* note 169, at 221.

192. 376 U.S. at 423.

193. See proposal for the reform of the federal judiciary, submitted to Congress on Feb. 5, 1937. *N.Y. Times*, Feb. 6, 1937, p. 1, col. 6. See also *N.Y. Times*, Feb. 6, 1937, pp. 8-10, 16 (editorial).



gress, to change the trend of decisions of the Supreme Court. Although proposed by a very popular President, in a period of great economic crisis, and in the face of some very unpopular decisions of the high court, the attempt was defeated.

There is a case decided by Mr. Justice Marshall, acting as a circuit judge of a state court, which concerns an effort by a legislature of a state to make by legislation, decisions which as judicially determined should only have been made by the courts of that state. Concerning this legislative effort, Mr. Justice Marshall said:

The bill of rights of this state, which is declared to be a part of the constitution, says, in the fourth section, 'that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other.' The separation of these powers has been deemed by the people of almost all the states as essential to liberty. And the question here is, does it belong to the judiciary to decide upon laws when made, and the extent and operation of them; or to the legislature? If it belongs to the judiciary, then the matter decided by this act, namely whether the act of 1789 be a repeal of the 9th section of 1715, is a judicial matter, and not a legislative one. The determination is made by a branch of government, not authorized by the constitution to make it, and is therefore, in my judgment, void.<sup>194</sup>

In this case, considered by Mr. Justice Marshall, the legislature of a state had directed the courts of that state to assume that a certain previously enacted local law had been repealed and therefore should not be applied to any pending case. The United States Congress, in passing the Sabbatino Amendment, sought to impose this same type of restriction on all United States courts, not in relation to laws of the United States, but to the laws of any foreign country. Justice Marshall's question, quoted above, is relevant to this congressional action which directed all courts in the United States in determining title to property in a foreign country to ignore certain laws (those failing to meet a certain standard; conformity with international law) of that country and apply others, without regard to the laws in effect within that country—" . . . does it belong to the judiciary to decide upon laws when made, and the extent and operation of them; or to the legislature?"

This division of governmental powers exists unchanged today, just as it did at the time of the founding fathers. But a few years ago, the eminent lawyer and scholar, Arthur T. Vanderbilt, wrote a book entitled *The Doctrine of the Separation of Powers and its Present Day Significance*,<sup>195</sup> which stressed the idea that separation of powers

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194. *Ogden v. Witherspoon*, 18 Fed. Cas. 618 (No. 10,461) (C.C.D.N.C. 1802).

195. VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* (1953).

keeps the checks and balances necessary to a democratic government. He felt that the rise of Hitler was possible because the Weimar Constitution had failed to create a government of checks and balances. And it is significant that the act of Cuba in confiscating the property of United States nationals, the dramatic and damaging incident which was the original cause of the Sabbatino Amendment, was under a law which forbade the courts to hear any complaints of the victims.

In a review of Justice Vanderbilt's book, there is the following statement:

To the absence of sanctions against presidential government in the Weimar Constitution, blame for the ascendance and despotism of Hitler is attributed. To the distrust with which judicial interference came to be regarded in France is ascribed their consequent constitutional separation of judicial and administrative functions and jurisdictions. In a survey of the written constitutions of twenty Latin-American nations, it is found that all subscribe to the doctrine of separation of powers but that the reason why power has been concentrated and individual rights impaired is that these countries have a long history of revolts and revolutions, as a result of which strong military leaders have achieved power through means outside the framework of the established government. Following the survey of constitutional doctrine in these many countries, Justice Vanderbilt observes that there is no more depressing a fact than the lack of understanding to be found in regard to the relation between the separation of powers and the rule of law, and the relation between the rule of law, as a substitute for force and tyranny, and individual freedom and dignity of man.<sup>196</sup>

There can be little doubt that by the Sabbatino Amendment the Congress has encroached upon the other departments of government.<sup>197</sup> More curiously, the Congress has encroached upon itself. It has permanently banned itself from the exercise of certain powers granted to it by the Constitution—the sovereign people—and has attempted to exercise power over the act of a foreign state; such powers were never given to it.

1. *Encroachment by Congress on Congress.*—Until the passage of the Sabbatino Amendment, Congress could validly enact any law affecting the rights and property of nationals of other countries within the United States even though such a law, not contrary to the Constitution, was contrary to international law, or might be so considered by a foreign court. Now Congress has made a pronouncement that no such act is valid, even though, until the Sabbatino Amendment, no court in the United States or in any other country could declare it

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196. Gardiner, Book Review, 4 AM. J. COMP. L. 144 (1955).

197. For discussion of the Sabbatino Amendment in relation to separation of powers of government, see Cardozo, *Congress Versus Sabbatino: Constitutional Considerations*, 4 COLUM. J. TRANSNAT. L. 297 (1966).

null and void. Congress has permitted the determination of the validity of its own acts to be determined by the courts of any foreign country.

The Congress has amended the Constitution of the United States. That document was created for the benefit of the governed, not for the benefit of foreigners.<sup>198</sup> Claims by a foreigner that he had been damaged in the United States by an act of the United States in conformity with United States law but contrary to international law could be a diplomatic claim only. Now our Government is for the benefit of the foreigner as well as the governed, and, under the Sabbatino Amendment, the foreigner's court can make such determination.

If Congress has now stultified itself by permitting foreign courts to veto its actions, done under the authority of the Constitution, has not Congress broken faith with the citizens of the United States in granting to other countries a privilege—a privilege even if strictly bounded by the terms of the Sabbatino Amendment? But the Congress has done even more than this, for it has seriously affected and changed the powers of the other two departments of government.

2. *The Effect of the Sabbatino Amendment on the Courts.*—A short while ago, if one had said that the Congress of the United States would enlarge the jurisdiction of United States courts to include an extraterritoriality throughout the whole world and then direct the United States courts how to decide cases involving the sovereign acts of foreign countries, he would scarcely be believed. But we need not frame our own definitions on the Sabbatino Amendment's effect on the courts, for a court itself has told us:

(2) The direction to the courts is mandatory. It is provided that 'no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination' in a case which it describes. These words are not prospective as had been urged. They are mandatory in their intention and effect and require the courts to give retroactive effect to the directions of the Amendment.<sup>199</sup>

In the fact [sic] of a constitutional assertion of power by Congress, the courts have no choice but to accommodate their administrative practices to the congressional direction.

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198. The United States, however, has extended to foreigners the protection of the Constitution. "Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the Government within our borders—and even to some without. This country's present economic position is due in no small part to European investors who placed their funds at risk in its development, rightly believing they were protected by constitutional guarantees; today, for other reasons, we are still eager to attract foreign funds." *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966).

199. *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 964 (1965).

I hold (1) that this is a case within the purview of the Hickenlooper Amendment; (2) that the Amendment is supervening law which must be applied here despite the opinion of the Supreme Court in *Sabbatino*; and (3) that I am therefore required to make a determination on the merits giving effect to the principles of international law as the Amendment provides.<sup>200</sup>

Congress not only legislated a new rule of law, different from the law under which Farr Whitlock had legally negotiated a contract for a shipload of sugar, but it overruled the Supreme Court in this case. This apparently was intended.

Under this congressional mandate, the courts of the United States must pronounce title to land and personal property within the jurisdiction of another sovereign power.<sup>201</sup> It is useless to say that the decision does not affect titles to property in Cuba; that was its obvious intent. No one has doubted that the sugar discussed in the *Sabbatino* case was in Cuba and that title to it was transferred under the laws of Cuba. It is familiar constitutional law that when an act of the Congress is declared unconstitutional, it is null and void; the rights of all parties, who have been affected by executive action under the law and have protested that the law was unconstitutional, return to the *status quo ante*. If money has been paid under protest, it will be returned. Only one decision of the United States Supreme Court in any one case is sufficient to accomplish that result. The law is invalid. Under the *Sabbatino* Amendment, the law of Cuba which transferred title to all property in Cuba owned by United States nationals is declared invalid in Cuba. Title to sugar owned by C.A.V. is not the only title which by this decision remains unchanged. If the Cuban confiscation law did not transfer title, the United States owners of property before the confiscation still own the land as well as the personal property, such as the sugar.

The *Sabbatino* Amendment and the subsequent decision enlarge the jurisdiction of all courts in the United States to give them the privilege to determine title to land and to personal property everywhere in the world if a law purporting to deprive the owner, a United States national, of title is found contrary to international law and if somehow the court can find some basis of jurisdiction. Every other country now has a precedent to invoke the same as to any property of its nationals in the United States.

We may note that heretofore,

The title of land cannot be affected by a judgment of any state not the situs of the land . . .<sup>202</sup>

200. *Id.* at 971.

201. The *Sabbatino* Amendment purports to apply only to titles but is not limited to titles to personal property.

202. 2 BEALE, CONFLICT OF LAWS ¶ 450.8, at 1423 (1935).

It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which the land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances.<sup>203</sup>

There never has been any prior variation of this law in the United States.

The title under Connecticut is of no avail, because the land in controversy is ex-territorial; it does not lie within the charter-bounds of Connecticut, but within the charter-bounds of Pennsylvania. The charter of Connecticut does not cover or spread over the lands in question: of course, no title can be derived from Connecticut. Here then the defendant fails.<sup>204</sup>

Assuming that Congress has the constitutional authority so to enlarge the jurisdiction of United States courts, a collateral question arises. Is it a proper exercise of constitutional authority for Congress to grant to the courts of the United States jurisdiction to determine title to land in foreign countries (even if the United States decision is contrary to the laws of that country) and not at the same time grant to United States courts the necessary power to enforce the decision? The way to enforce a decision in favor of a title holder, who has been ousted from possession, is for the court to throw out the usurper and put the rightful owner into possession. But when a United States court determines a title controversy to property in a foreign country in favor of a United States citizen not then in possession, that decision cannot be enforced by the present power of the United States courts; it can only be enforced against the will of that foreign country by the intervention of armed force. It is not to be presumed that Congress, in passing the Sabbatino Amendment, intended to compel the executive to take such an action. But the dilemma is this: the decision of the court is but a futile expression of opinion, or it is a judgment which can be enforced internationally only by armed forces.

A specious plea may be made that because the Government of Cuba appeared by its agent in United States courts as the owner of property in Cuba, those courts had jurisdiction to hand down a judgment against Cuba not interpreting the laws of Cuba but repudiating them. The analogy here appears to be that when the courts of one jurisdiction have before them the owner of land in another jurisdiction as a party to a case involving equitable title, the courts may direct the apparent owner of land which lies in another jurisdiction to convey that property to someone who in justice should have the

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203. *McGoon v. Scales*, 76 U.S. (9 Wall.) 23, 27 (1869). See also *Clarke v. Clarke*, 178 U.S. 186, 191 (1900); *Brine v. Insurance Co.*, 96 U.S. (6 Otto) 627 (1877).

204. *Van Home's Lessee v. Dorrance*, *supra* note 184, at 305.

title. There are, however, several controlling reasons why such a contention if made in relation to the *Sabbatino* case would be fallacious.

Cuba, by its agents, entered the courts of the United States not as a hostage but as a litigant. The issue was a right to receive a certain sum of money as purchase price for sugar which was never within the United States or under its control. The case was not decided as a conflict of laws case; had it been, the law of Cuba would have prevailed. So said the United States Supreme Court. The courts deciding the *Sabbatino* case were under no illusion as to title to that property under Cuban law. The decision made by the lower courts and now re-established under the *Sabbatino* Amendment did not direct the litigant, Cuba, to transfer title of the sugar to C.A.V.; such a decision would have admitted that Cuba had title to the sugar but had wrongfully acquired it. The decision by the lower courts was, and now is, in spite of the reversal by the Supreme Court, that Cuba had no title.

The courts of the United States have no authority to demand that Cuba change any of its laws to conform to a decision of United States courts which is inconsistent with those laws. A diplomatic request of course could be, in fact may be said to have been, made by the Department of State, the only proper agency of the United States Government to make such a request.

The converse of this proposition may be examined. When the United States appears in an action abroad, held before the courts of some foreign country, the executive department of the United States, through its Department of Justice, appears legally in the action as an agent of the United States of America. Nothing that agent can be compelled to do outside of his authority as a litigant to determine the rights of the United States in a particular case can bind the United States itself. The United States by no decision of a foreign court, except in specific matters to which it has consented to be bound, can be compelled to take a legislative or executive action. In no case can a foreign court coerce the Congress of the United States. As much as the Congress has damaged the position of the United States abroad by the *Sabbatino* Amendment, it is scarcely to be believed that Congress would be willing to subscribe to the broad proposition that whenever the United States Government appears, by the Department of Justice, in the courts of a foreign country, the decision of those courts would supersede the enactments of the Congress over persons and property within the United States.

3. *The Effect of the Sabbatino Amendment on the Executive.*—The greatest encroachment by the *Sabbatino* Amendment is on the

executive. The first effect which must be noted is that effect on the recognition of sovereign governments and the negotiation of treaties. Under the legislative enactment, couched in cryptic words at once both undefined yet specialized, the United States can give hereafter only a qualified recognition to foreign states. It must reserve to itself the right, and assert the power, to declare null and void any enactment of any foreign state which the courts of the United States may find to be contrary to international law, if that enactment affects title to property of United States nationals. Hereafter every treaty should also then carry this reservation, and in creating any treaties the right of that other country, reciprocally to declare acts of the United States contrary to international law to be void, should be included as a necessary privilege to that other country.

With the passage of the Sabbatino Amendment, the duty of the State Department to try to collect compensation from foreign governments for any property they have seized from United States citizens becomes undefined. Prior to this new law, the State Department would demand "prompt, adequate and effective" compensation. This was the recognized duty of the State Department. In the interests of the United States as well as in the protection of United States nationals, whose property may have been seized, the United States has made lump-sum settlements with foreign countries and has divided this amount among the United States nationals who were deprived of their property abroad. In its position as a branch of the executive, the Department of State has recognized that, in its sound discretion, it must determine how near to the ideal of "prompt, adequate, and effective" compensation it can come in obtaining from foreign countries an offer of settlement, and accept such an offer when convinced it can obtain no more.

Now the Congress by the Sabbatino Amendment has changed the rules. It has placed a limitation upon the amount which United States nationals may receive. It has done this in two ways. First, it has done so by declaring that United States nationals still own all of their property in Cuba. Surely the Government of Cuba does not owe as much for property to which it has no title as it would for property to which it has title. Congress has replaced the basic concept of confiscation (that of a "forced sale" of the property, under which the confiscating government owes the full value of the property) with some undefined concept of damages for wrongful occupation of property. Perhaps this could be defined as the difference between the amount due from a *forced sale* as against the amount due on a *forced lease*.

The second way the amount of compensation due has been reduced by the Congress is that Congress has substituted for the United States'

rule of "prompt, adequate and effective" compensation, the rule that the amount due is that which would be required under international law. This is a lesser amount. The Attorney General of the United States pointed this out to the Congress in his testimony as follows:

I think that this committee should be extremely hesitant to adopt into law an amendment which in my judgment could not fail to have the effect of jeopardizing the protection of investments abroad by U.S. citizens and U. S. corporations.

I think that would be the effect of this amendment, and I will tell you why: The United States has taken the position throughout our history that when an investment owned by Americans abroad has been nationalized, that that can only be done if full, fair, and prompt consideration for that, for the full value of that investment, is given and given in currency that is convertible into dollars or given in dollars.

I think that is the rule that the United States should promote. It is the rule the State Department consistently has promoted, and it has a good deal of support in international law. But that rule in international law has to a considerable extent been weakened in recent years. It has been weakened by the fact that a number of countries, debtor countries, countries which are being invested in, have taken the position that that rule was too harsh.<sup>205</sup>

The courts that considered that [Sabbatino], including the Supreme Court of the United States, said there was considerable doubt as to whether or not international law really did provide that a country nationalizing and expropriating would have to make fair, prompt, and effective compensation. They recognized this had been our position, but they said it was extremely doubtful that was the position of international law. That in itself, that opinion in itself, has weakened the protection of foreign investment abroad.<sup>206</sup>

Prior to the time this testimony was given, C.A.V. had filed with the Department of State a claim for the full value of its property in Cuba.<sup>207</sup> C.A.V., with all other persons and corporations who are nationals of the United States and had investments in Cuba, may now also file claim with the United States Foreign Claims Settlement Commission.<sup>208</sup> But how much shall C.A.V. now claim?

If the amount of losses is less by the Sabbatino Amendment than it was before this amendment became the law of the United States, the Treasury Department may also be required to revise its rules in regard to the tax benefits it permits corporations whose property has been confiscated abroad. Their losses, by the Sabbatino Amendment, may not be as great as they may have claimed.

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205. *H.R. 7750 Hearings* 1234-35.

206. *Id.* at 1250; see also Sabbatino Amendment for reference to compensation in considering violation of international law, *Appendix I*, p. 541 *infra*.

207. *Schwartz v. Compania Azucarera Vertientes—Camaguey de Cuba*, 39 Misc. 2d 63, 70-71, 240 N.Y.S.2d 247 (Sup. Ct. 1962).

208. International Claims Settlement Act § 501, 78 Stat. 1110 (1964), 22 U.S.C.A. § 1643 (1964).



Congress has also changed the basis for what was formerly known as diplomatic claims. The Supreme Court in *Sabbatino* expressed the universal theory concerning the position of one country, wronged by the action of another country. The Supreme Court said:

The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another. Because of its peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal.<sup>209</sup>

What is now the position under the Sabbatino Amendment? Have the United States companies which had property taken from them in Cuba, but still have title under the Sabbatino Amendment, a direct cause of action against the Republic of Cuba?<sup>210</sup> If so, of what value is it? Is it the duty of the United States under the recent court decisions to put them in possession, or, in lieu thereof, pay the value of the land and buildings and personal property out of its own tax-collected funds, since it cannot execute judgment of the court? May the United States make a lump sum settlement and convey a good title to Cuba without the consent of the individual United States property owners who still have that title in Cuba? Other unanswered questions necessarily arise.

The Sabbatino Amendment and the district court decision under it have changed and confused the duties, the powers and the authority of the executive department.

*D. Has the Congress the Constitutional Power to Establish Local Courts in the United States as International Courts, Without the Consent of Other Countries Affected?*

Courts of the United States can give judgment against the United States in favor either of citizens or foreigners only if the United States has consented to be sued and has violated some obligation or duty as defined by the laws of the United States. Should a foreigner, or his country on his behalf, complain to the United States of damage resulting from a law of the United States which was contrary to international law, the courts of the United States cannot assume jurisdiction. They are powerless to give relief. The courts can

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<sup>209.</sup> 376 U.S. at 422-23.

<sup>210.</sup> *American Hawaiian Ventures, Inc. v. M.V.d. J. Latuharhary*, 257 F. Supp. 622 (D.N.J. 1966). In this case, a company whose property had been confiscated in Indonesia had attached a ship belonging to Indonesia, claiming the Sabbatino Amendment gave a direct cause of action against a confiscating government, and deprived that government of the plea of sovereign immunity. The court held against the claimant and in favor of the Government of Indonesia.

declare an act of Congress unconstitutional and therefore null and void. They cannot, however, declare an act of the Congress null and void merely because it is contrary to international law.<sup>211</sup>

Prior to the Sabbatino Amendment a breach of international law could become a judicial issue only in courts which by the consent of the contesting parties had the authority to hand down a judgment because of damage created by some act (judicial, legislative, or executive) contrary to international law. On several occasions, when some foreign country has accused the United States of an act damaging to its nationals and contrary to international law, local United States courts have been clothed with the authority of an international court, provided that (1) the complaining government consents to jurisdiction and (2) the particular court has received specific congressional authorization to hear the case. In some of these cases, the court has found against the United States; in others it has dismissed the complaint on the ground that there was no violation of international law by the United States.<sup>212</sup> In this specific situation, one court, thus entrusted with the right to hear and determine a direct claim against the United States under international law, explained its unusual position for its acquisition of powers, which no court of the United States could normally exercise, as follows:

From this it follows that the court is not to be hampered in its consideration of this case by other municipal jurisdictional statutes, of the United States, and that the ordinary limitations of the jurisdiction of this court, which find their basis in other statutes of the United States, such as the Tucker Act, are not applicable in the consideration of this case. Furthermore, by the same reasoning, decisions based upon the municipal laws of the United States are inapplicable to the case at bar upon any point in which the statutes upon which such decisions are based are contrary to the principles of the law of nations. The position of the court is not different than it would be if we sat as an arbitration tribunal, chosen by agreement of the nations involved, to decide the questions here presented upon the basis of the law of nations as applied to the facts in the case.<sup>213</sup>

Congress has stated in the Sabbatino Amendment that no court of the United States shall decline to consider a case "on the merits" where the affront to a United States national has been caused by an act contrary to international law affecting title to property. But Cuba has not consented to such a determination. Has Congress the power to create an international court and condemn Cuba for a breach of international law without the consent of Cuba?

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211. *Tag v. Rogers*, *supra* note 178 and accompanying text.

212. *United States v. Diekelman*, 92 U.S. 520 (1875); *Royal Holland Lloyd v. United States*, 73 Ct. Cl. 722 (1932); *Johnson v. United States*, 36 Ct. Cl. 290 (1901).

213. *Royal Holland Lloyd*, *supra* note 212, at 736-37.

The district court which first decided the *Sabbatino* case and the court of appeals which affirmed, both acted as international courts although no such authority has been granted to them. The issue to be decided was the *title* to certain property in Cuba, but neither court attempted to decide what the title of particular property was *under existing Cuban law*; the Supreme Court found that title was clearly in Cuba.

Instead of determining title to property which, when the title was fixed under Cuban law, was within the jurisdiction of Cuba and under its control, the lower courts found that Cuba had committed an international delinquency and that they should give a decision for the party injured by that international wrong. Only an international court can make such a decision and enter a judgment based upon a breach of international law.

The lower courts then decided upon a "restitutory" remedy. Because of this international wrong, the sugar ought still to belong to C.A.V. Not even international courts have ever given a "restitutory" remedy; they have given only money damages. Here, however, another anomaly arose; the courts had no jurisdiction of the *res* which it wished to restore to C.A.V. So to accomplish the desired result, they in effect entered a judgment in rem "in absentia." The *res* was not before the court; it never had been. Then these lower courts in lieu of a return of the *res* awarded the purchase price to C.A.V.

Local courts in any country, when called upon to determine the effect of foreign law, have competency only to decide what is the law of the country, its application within that country and the legal consequences of such action there. This is what the Supreme Court did in *Sabbatino*. Local courts have no competence to award a judgment based upon a finding that the foreign country has committed an international delinquency. This is the function only of an international court.

Once again we must look to the reciprocal effect upon the United States. The United States has always been careful to reserve to itself the right to grant to any court, whether domestic, foreign or international, the judicial power to hold the United States liable for a breach of international law. But here again Congress has created a precedent against the United States interest. By the *Sabbatino* Amendment, the consent of the United States is no longer necessary. Any country may now permit its local courts to act as international tribunals to determine the validity of any act of Congress within the United States, affecting the property rights of that country's nationals, and hand down what it would now consider a proper judgment against the United States. This decision it would then enforce by ordering

a remedy similar to that issued by the lower courts in the *Sabbatino* case.

E. *May the Congress Pass a Law Which Discriminates in Favor of Sellers and Against Buyers Without Regard to the Domestic Interests of the United States?*

The Sabbatino Amendment requires courts to ignore the act of state doctrine whenever the act complained of violates international law, except in one specific instance—that is, where the executive department of the Government, represented by the President of the United States, decides that in the interest of foreign relations the courts must apply the act of state doctrine and recognize as valid in a foreign country the complained of executed act of state.<sup>214</sup> Should the President exercise this power, then the confiscated property of nationals of the United States can be brought into the United States and sold here as the property of the confiscating government. That may rankle, but that was the law of the United States before the Sabbatino Amendment and is still the law of the great independent trading countries of the world.

No provision is made in the Sabbatino Amendment for the relief of the United States in the event that the confiscated property is urgently needed in the United States economy. The President may not, under the Sabbatino Amendment, declare that, in the interest of the United States, the material which has been normally shipped into the United States from a certain source before the confiscation, is still urgently needed.

Sugar, oil and perhaps a few other commodities are produced in such abundance and from so many sources that perhaps the industry of the United States would normally not be seriously affected by the operation of the Sabbatino Amendment depriving industries of the United States—the buyers of the foreign product—of their customary source of supply of those commodities. But there may be types of commodities, and circumstances of international trade, which would badly hurt the economy of the United States; for instance, in a defense or war effort, needed supplies (which would otherwise willingly be sold to the United States) may be prevented from entering the United States because, by a confiscatory act, they no longer belong to United States nationals, but have become the property of the unfriendly confiscating government. If the confiscating government's title is not recognized, the property of course will not be brought in.

The Sabbatino Amendment permits the seller of goods under a contract of sale, who is deprived of the goods before delivery by

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214. The Sabbatino Amendment, App. I, p. 541 *infra*.

confiscation, in turn to deprive his buyer of these goods unless there is a readily available alternate market in which the customer can supply his needs. Under the facts of the *Sabbatino* case, Farr, Whitlock & Company suddenly found itself with commitments to its own customers but with only a worthless contract with C.A.V., a contract which C.A.V. could not perform. A ship, half loaded by C.A.V., had been supplied by Farr, Whitlock & Company to pick up the sugar in Cuba under contract. The very action of the company, in immediately making a contract with the confiscating government to buy the sugar which it needed but which C.A.V. could not supply, is proof that our problem is not merely a theoretical or hypothetical one. If C.A.V. was under no liability to deliver the property because prevented by *force majeure*, could Farr, Whitlock & Company use this same defense as against its customers to whom it had promised quantities of sugar in reliance upon its contract with C.A.V.? Certainly, if the Republic of Cuba had believed that a court of the United States would find it not entitled to receive the purchase price, it would most certainly have not sent the sugar, or would have demanded payment in advance. This would have placed Farr, Whitlock & Company in a position where it in turn would have defaulted to its customers or supplied them perhaps at higher cost from other sources or paid twice for the same sugar. Must full protection of the United States be afforded only to a United States national who exports goods from a foreign country to the United States and not be afforded to the other United States nationals who buy?

The sugar in the *Sabbatino* case did not enter the United States market. But in the normal course of trade, the United States buyers of raw material from a foreign source plan to deliver much of it within the United States market. Perhaps the raw materials from a foreign source have been relied upon in the American market and needed; and the *Sabbatino* Amendment would grant to the United States foreign investor, who has been subjected to confiscation, a method by which he can deprive the American market of goods which have been sent from a particular source—the confiscating country. In fact, that is the announced intention of the Congress in the *Sabbatino* Amendment. Confiscated goods shall not be sold in the United States market.

Congress, and the court that interpreted the will of Congress, found that the *Sabbatino* Amendment was based upon the constitutional power of Congress relating to the trade of the United States with foreign countries. "This power like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution."<sup>215</sup>

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215. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

The power of Congress to regulate trade of the United States cannot be questioned. But that is not the problem here. Congress, by the Sabbatino Amendment, in no way prohibited imports into the United States. Of course, it could have. Rather it left the decision as to whether confiscated goods should be prevented from entering the United States market to those United States nationals who had owned those goods at the time of confiscation. Our first question, therefore, is: Does Congress have the power to delegate its authority to regulate the commerce of the United States to private citizens of the United States and, more particularly, to that limited class of United States nationals who have foreign investment?

The language of the Sabbatino Amendment is broad. The courts shall not decline the protection of this act to anyone who has a right to bring an action in the courts of the United States and claim identified property as his own. And this leads to our second question: Does Congress have the power to delegate its authority to regulate commerce with the United States to *foreigners* whose investments have been confiscated in a foreign country?

F. *Can the Congress Change the Universal Rule That a Judgment "In Rem" Is "Good" as Against the World?*

The judge of the district court in the first *Sabbatino* case had argued by analogy,

Even if one were to suppose a requirement of international law that a state afford full faith and credit to the acts of another state, such a requirement clearly would not extend to an act of state which was in violation of international law.<sup>216</sup>

But an analysis of this supposition leads to a conclusion wholly opposite to that which the judge drew from it. Of course, the reference is to the constitutional provision,

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.<sup>217</sup>

But what did this provision mean? The first law which Congress passed on this subject in 1790<sup>218</sup> made no mention of any extraterritorial effect of public acts of a state. It was not until 1823 that any case was decided in the United States Supreme Court which dis-

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216. 193 F. Supp. at 381.

217. U.S. CONST. art. IV, § 1.

218. 1 Stat. 122 (1790).

cussed whether or not this constitutional provision required one state to *enforce* judicial determinations made in another state.<sup>219</sup> There was no question of extraterritorial enforcement of Cuba's acts in the *Sabbatino* case. Therefore, if the United States courts had applied the "full faith and credit" clause to the public acts of Cuba, the import of such application would merely have been (1) a convenient method of proving the act of state of Cuba and the legal results in Cuba of that act; and (2) recognition of the validity of Cuba's acts of state in Cuba on persons and property located there (*i.e.*, under its jurisdiction and within the dispositive dominion of its courts). As to the first, the ordinary rules of proof of foreign law were sufficient in the *Sabbatino* case. No question was raised in any court as to the meaning and purpose of Cuba's Public Law 851,<sup>220</sup> the resolutions under it and the acts of Cuba's agents taken in accordance with the law and the resolutions. All courts found that Cuba had seized the sugar and an agreement to extend "full faith and credit" could not have proved more. This leaves but one question, the central question of the *Sabbatino* case: the recognition of validity of Cuba's act of state in Cuba. Here there is ample precedent that, on this one feature of "full faith and credit," every great independent trading country of the world has always extended to every other such country this recognition. There are no exceptions in the cases in the United States (*until Sabbatino*), and there are no exceptions in the cases of the great independent foreign countries.

But the district court by discussing analogies invites a consideration of cases analogous to the facts of the *Sabbatino* case. Here the strongest possible analogy to the acts of Cuba is to actions in rem. All of the elements of such an action were present. There was no trial in Cuba of the rights of the parties. Cuba singled out the property it wished to seize and seized it. The Cuban courts confirmed that Cuba had title. The action was notorious. All interested parties knew of it though the parties were not before the court. The very law, under which that shipload of sugar was seized, denied to C.A.V. adjudication of its claim to title; unheeded protests were made as to the unfairness of the acts. These proceedings fit under Chief Justice Marshall's definition of an action in rem.

I have always understood that where the process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding in rem, to which all the world are parties.

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219. *Mills v. Duryee*, 11 U.S. (7 Cranch) 302, 305 (1813) (dissent of Johnston, J.).

220. Public Law of Cuba 851, July 6, 1960. For discussion of this law, see 376 U.S. at 402-04.

Continuing, after mentioning the courts which could have jurisdiction:

. . . in consequence of the seizure which vests the possession, and of a general proclamation of that fact, every person is a party to the proceeding, and his interest is bound by the sentence . . . .<sup>221</sup>

In the early days of our Republic, there was little foreign investment by United States nationals. Most of the property belonging to American citizens which came within the jurisdiction and control of a foreign government was ships seized while they were pursuing their trading voyages. Many of these seizures, the Supreme Court found were contrary to international law, but the Supreme Court consistently extended "full faith and credit" to the foreign court to the extent of recognizing the validity of the transfer of title of these ships wrongfully seized, the condemnation of which was made by foreign courts, although the owners could not appear in the courts. These cases universally hold that a judgment *in rem* is "good" as against the world.

A judgment *in rem*, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere. As said by Chief Justice Marshall: "The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of coördinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no coördinate tribunal is capable of making the inquiry."<sup>222</sup>

In the case from which the above quoted statement by Chief Justice Marshall is to be found, a vessel owned by United States citizens, with a cargo owned in large part also by United States citizens, was captured on the high seas by a French privateer and condemned as a prize under the Milan Decree of France because, as alleged, it was trading to a dependency of England. The ship and the goods were sold, and some of those goods ultimately came to Philadelphia where they were claimed by the person who had owned both the ship and the goods prior to the condemnation by the French court. The analogy to the *Sabbatino* case is clear; there C.A.V. claimed title to sugar which a court of Cuba had determined belonged to Cuba by a Cuban decree.<sup>223</sup> As to the validity of the decree under

<sup>221</sup>. *Mankin v. Chandler*, 16 Fed. Cas. 625, 626-27 (No. 91030) (E.D. Va. 1823).

<sup>222</sup>. *Hilton v. Guyot*, 159 U.S. 113, 167 (1895).

<sup>223</sup>. At the time the confiscation decree was enforced on the property of C.A.V., C.A.V. had pending in the courts of Cuba an action which the courts then dismissed on the ground that C.A.V. no longer owned any property in Cuba but that the title to this property was in the state. See *Schwartz v. Compania Azucarera Vertientes-Camaguey de Cuba*, 39 Misc. 2d 63, 70-71, 240 N.Y.S.2d 247, 252 (Sup. Ct. 1962).



which the ship had been seized on the high seas and taken to a French port, Chief Justice Marshall said,

That the sentence is avowedly made under a decree subversive of the law of nations, will not help the appellant's case, in a court which cannot revise, correct or even examine that sentence . . . . It is true, that in this case, there is the less difficulty in saying, that the edict under which this sentence was pronounced, is a direct and flagrant violation of national law, because the declaration has already been made by the legislature of the Union.<sup>224</sup>

The Chief Justice pointed out that if the condemning court had made an error it could correct that error, but so long as there was no correction by the court or the legislature of the country under which the condemnation took place, the United States court was bound to recognize the transfer of title.

Probably the most famous case relating to foreign judgments in rem ever to occur in the United States involved the little vessel, Schooner Exchange, owned jointly by several United States citizens. This vessel was seized by France under a decree which the Government of the United States considered as contrary to international law. Then by a series of circumstances, the ship, armed, with name changed and manned by a naval crew as a unit of the French navy, put into the port of Philadelphia and was claimed by those citizens who had owned the vessel before seizure. The attorney for the former owners argued, as C.A.V. did, that the United States court must award to them the seized property. He said:

But consider the inconveniences on the other side. Your own citizens plundered. Your national rights violated. Your courts deaf to the complaints of the injured. Your government not redressing their wrongs, but giving a sanction to their spoliators. The argument of our opponents allows no remedy to the citizen, although dispossessed of his property, within the limits of our own territory.<sup>225</sup>

Nevertheless, the argument of the opposing United States attorney prevailed. He said:

This was one of the seizures under the Rambouillet decree. We do not justify that decree, but we say, that whenever the act is done by a sovereign, in his sovereign character, it became a matter of negotiation, or of reprisals, or of war, according to its importance . . . .<sup>226</sup>

In actions in rem, the judgment of condemnation itself is the "act of state;" it is the final imposition of the national will even though

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224. *Williams v. Armroyd*, 11 U.S. (7 Cranch) 266, 272 (1813).

225. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 74, 81 (1812).

226. *Id.* at 77.

the general policy may have been prepared by the legislature or the executive. The court of appeals in *Sabbatino* said:

The actions of foreign nations accorded this respect . . . . [recognition of acts of state] . . . . may be executive, legislative, or judicial in nature, although court judgments, because they ordinarily involve the resolution of private disputes and do not ordinarily reflect high state policy, do not usually come within this category.<sup>227</sup>

A study of the early prize cases, a few of which have been cited above, shows a consistent adherence to that principle of law now usually referred to as the "act of state doctrine." A comparison, however, of these earlier cases with later similar decisions shows that an "act of state" is now more closely and more narrowly defined. Many of these early cases arose during the period of struggle between England and France—the Napoleonic Wars—and some of the actions by foreign countries at that time would not now be considered an act of state. Napoleon was not King of Prussia, though he made decrees from Berlin, nor was he King of Italy when the Milan decrees were made, though he bestowed that title of "King" on his son. Now by treaty, The Hague Convention<sup>228</sup>—to which all the great nations are parties—no country need recognize as valid uncompensated forced transfers made by a conqueror within a conquered country. Transfers by a military occupation are not valid unless the convention is observed. Only a sovereign government recognized as such can unqualifiedly commit an act of state.

Jurisdiction, too, is more closely defined than in the earlier cases. Chief Justice Marshall himself assisted in creating and applying the rule, now universal, that a court which has no jurisdiction cannot condemn a prize; its decree, adequate in form, is not valid unless the property condemned was within its jurisdiction and under its dispositive control.<sup>229</sup> Also the property, whether it remained within the country or moved outside, must continuously have been within the possession of the condemning government or of one who derived title from the prize condemnation. When one considers that this narrowing of the definition to the minimum required of one sovereign country in recognition of the sovereignty of another, one is not surprised that in several of his cases, Chief Justice Marshall felt he was

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227. 307 F.2d at 855.

228. The Hague Conventions of 1907, including Convention IV to which is annexed the rules of land warfare. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776-1909, 2269 (1910).

229. *Rose v. Himely*, 8 U.S. (4 Cranch) 143, 160 (1808). "Can this court examine the jurisdiction of a foreign tribunal?" *Hudson v. Guestier*, 8 U.S. (4 Cranch) 175, 176 (1808).

exploring an unbeaten path with few, if any, aids from precedent or written law and complained that the legislature of the United States had not done as much as it might have done in more closely defining the areas where recognition of the validity of a foreign act was necessary for the reciprocal protection of the rights of sovereignty of the young republic.<sup>230</sup>

It has universally been said that a judgment in rem is good as against the world. The act of state doctrine is a part of this same principle whenever it applies to movable property. The *Sabbatino* case applies to movable property. The same principles apply as to an action determining title to a *res*.

Petitioners concede that the expropriation decree, if lawful and effective under the Constitution and laws of Mexico, must be recognized as lawful and effective under the laws of the United States, the sovereignty of Mexico at the time of that decree being exclusive of any other. *Oetjen v. Central Leather Co.*, 246 U.S. 297; *Ricaud v. American Metal Co.*, 246 U.S. 304; *American Banana Co. v. United Fruit Co.*, 213 U.S. 347; *Underhill v. Hernandez*, 168 U.S. 250; *Hewitt v. Speyer*, 250 Fed. 367; *Earn Line S.S. Co. v. Sutherland S.S. Co.*, 254 Fed. 126; *Oliver American Trading Co. v. United States of Mexico*, 5 F.(2d) 659; *Compania M.Y.R.R., S.A. v. Bartlesville Zinc Co.*, 115 Tex. 21; 275 S.W. 388. The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law, though valid under the law of the situs of the land. For wrongs of that order the remedy to be followed is along the channels of diplomacy. 'A citizen of one nation wronged by the conduct of another nation, must seek redress through his own government.'<sup>231</sup>

Does the Congress of the United States have the power to pass a valid law permitting every court in the United States to re-examine every judgment in rem of every other country in the world and determine the validity of that foreign country's judgment by deciding whether or not the decision was made in accord with the tenets of international law?<sup>232</sup> Conversely, does the Congress of the United States have the power to permit the courts of every other country in the world to re-examine every judgment in rem of the United States courts and determine the validity of any judgments in rem within the jurisdiction of the United States? And what shall the Congress, the executive branch and the judiciary do if local foreign courts "invalidate" judgments in rem of United States courts?

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230. *The Schooner Exchange v. McFaddon*, *supra* note 225, at 81; *Williams v. Armroyd*, *supra* note 224, at 272.

231. *Shapleigh v. Mier*, 299 U.S. 468, 471 (1937).

232. See note 246 *infra* and accompanying text. Six decisions of the United States Supreme Court found by an international court to be contrary to international law. The losing party was reimbursed for the lost sustained by reason of the United States Supreme Court decisions.

G. *Is the Sabbatino Amendment New Substantive Law  
or a New Rule of Adjective Law?*<sup>233</sup>

The Sabbatino Amendment, as stated in the reports of the congressional committee recommending its passage, was intended to reverse in part the results of the decision of the Supreme Court of the United States in the *Sabbatino* case.<sup>233</sup> The Supreme Court had held, conventionally with United States precedent, that the courts of the United States must recognize that a transfer of title from C.A.V. to Cuba had been accomplished under Cuban law even if that law, and seizures under it, were contrary to international law. The Sabbatino Amendment, as obviously intended and now interpreted, permitted a court on the same state of facts to come to the opposite conclusion—that no title had been changed because Cuba's acts were contrary to international law.

Here is a change of decision on the identical facts in the same case; nothing has been added, nothing has been taken away but the results are diametrically opposed. The Supreme Court held Cuba *had title*. Under the Sabbatino Amendment, the district court has held Cuba *had no title*. Is the Sabbatino Amendment itself a new substantive law or is it merely the cancellation of a long-established and long-followed rule of adjective law, which prevented courts from making a decision "on the merits" as to the validity of a foreign act of state? The question may seem technical, but it has far-reaching implications.

We may start our inquiry with the brief dictionary definition of substantive law:

That part of law which creates, defines, and regulates rights, as opposed to 'adjective or remedial law,' which prescribes [the] method of enforcing the rights or obtaining redress for their invasion.<sup>234</sup>

Adjective law is not immediately concerned with the ultimate rights of the parties, but rather with the conditions which are necessary before a court will undertake to determine the merits of the action. This may be termed the *right* of one party to prevent a determination "on the merits." Adjective law is:

The aggregate of rules of procedure or practice. As opposed to that body of law which the courts are established to administer, (called 'substantive law') it means the rules according to which the substantive law is administered.<sup>235</sup>

Any case which is dismissed by a court either temporarily (with

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233. S. REP. NO. 1188, 88th CONG., 2d Sess. 24 (1964).

234. BLACK, LAW DICTIONARY 1598 (4th ed. 1951).

235. *Id.* at 62.

a chance to return to court upon the fulfillment of conditions) or permanently, without determination as to the fundamental rights of the parties as they are alleged in a complaint and answer, or otherwise indicated in other pleadings, has been disposed of by an application of a rule of adjective law. Historically, these rules have had different names in different jurisdictions—dilatory pleas, pleas in abatement, pleas in bar, demurrer, or merely the rules of civil practice, the terms of which must be met before a litigant is entitled to a consideration of claim to fundamental rights which he seeks to enforce.

To determine whether or not the Sabbatino Amendment is a rule of substantive law governing the disposition of a case or is a new rule of adjective law removing a bar which would prevent a court from making such a determination, the proper category can be measured by the answer to this one question: Does an independent sovereign government—any or every independent sovereign government—have the sovereign right and power validly to enact a law and validly to enforce within its own territory that legislative act, adversely affecting the person or property rights of a foreigner within its jurisdiction if that law or actions taken under it are contrary to international law?

If we are to admit that a sovereign government has such a power and that Cuba exercised that power, then the Sabbatino Amendment is a change of substantive law. If, however, we decide that a sovereign government has no power validly to adopt a law or course of action contrary to international law, then the Sabbatino Amendment is a new rule changing a previous rule of adjective law.

If Cuba had the power to transfer title under a law contrary to international law, it had done everything necessary to accomplish that result. The United States has always claimed that it, as an independent power, has the right and the power to affect the personal property of foreigners in the United States and that the result must be recognized even though the action internationally gives rise to a diplomatic claim against the United States. If Cuba also had this right, then the Sabbatino Amendment, which denied this right to Cuba, is a change in Cuban law. But Congress has no authority whatsoever to legislate for Cuba. If it has attempted to do so—to change the substantive law of Cuba—its purported efforts are a nullity.

Even the states of the United States are independent from one another and one state may not legislate for another:

Would the people of any one State trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of

any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests?<sup>236</sup>

But there are only two kinds of law: substantive and adjective law. If the Sabbatino Amendment is not substantive law, it must either be adjective law or affect an existing rule of adjective law. As adjective law, the Sabbatino Amendment must mean that no sovereign state has ever had the sovereign authority validly to pass and validly to enforce a law which the courts of some other country have found to be damaging to their nationals and contrary to international law. Thus, in passing the Sabbatino Amendment, Congress has merely struck down the prohibition that the act of state doctrine exercises on the actions of courts, and has permitted courts to determine what have always been the rights of parties (that is, ownership of property by foreigners within any country continues unaffected by any national act contrary to international law).

Congress sought to encourage foreign investment by removing the bar of the act of state doctrine to a determination on the merits of suits arising out of foreign confiscations in violation of international law.<sup>237</sup>

But if the Sabbatino Amendment and its interpretation is a surprising new revelation as to limitation on powers of all states, including, of course, the United States, we will now have to accommodate our judicial procedures to recognition hereafter of what must be the following premises:

1. There has existed from time immemorial an unwritten provision of the Constitution of the United States that Congress may not pass, the executive may not execute, and the judiciary may not uphold, any law contrary to international law which adversely affects the property of foreigners in the United States.

2. All courts of the United States must now, at the request of any foreigner, examine a designated act of the Congress affecting the claimant's property to determine whether that act is contrary to that unwritten section of the Constitution now found by the Congress and the courts to exist, *i.e.*, that Congress may not enact any valid law which is contrary to international law.

3. Every foreigner now has a direct cause of action against the United States on a plea that he has been damaged by an act contrary to the unwritten provision of the Constitution that the United States Government may not validly apply an act which is contrary to international law because that act is also contrary to United States law, under which all foreigners and their property in the United States have conventionally been protected. The remedy is restitution of any property taken.

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236. *South Carolina v. United States*, 199 U.S. 437, 455-56 (1905).

237. 243 F. Supp. at 972.

4. Since under the Sabbatino Amendment the courts of the United States have declared a law of a foreign sovereign to be null and void, the Congress of the United States must now submit to the determination of any foreign court, that any law passed by Congress affecting property of a foreigner which some foreign court considers contrary to international law is null and void within the United States.

Our dilemma is this: If the United States Congress cannot change laws of Cuba, then the Sabbatino Amendment must be adjective law. If it is adjective law, then the act of state doctrine is a dilatory plea preventing a determination "on the merits."

H. *Does the Congress of the United States Have the Authority To Reverse a Decision of the Supreme Court of the United States?*

In any legislative enactment, the Congress of the United States is, and always has been, subject to two limitations. Congress, as one of the three agencies of government has only such powers as are delegated to it in its agency agreement—the Constitution of the United States. Congress, as an agent for the sovereign people, has absolutely no powers beyond those expressed or clearly implied from the expressed powers set forth in that document.

The second limitation on Congress is determined within the Constitution itself with regard to Congress' special role as one of the governing agents of the United States. It may not step from that role. Also, it is prohibited from enacting any law which is proscribed by the amendments to the Constitution.

Within these limitations, has the Congress the power to reverse a decision of the Supreme Court? No instance of such an attempt has been presented as precedent, and we may assume that never before has Congress attempted to do such a thing. Once, however, a state of the United States passed a law reversing a decision of a federal district court. In a controversy<sup>238</sup> between a group of citizens of Connecticut and the Commonwealth of Pennsylvania, each claiming to be the proper party to receive prize money for the capture of a British ship during the Revolution, a district court had awarded the prize money to the Connecticut citizens, reversing the previous decision of a local state court. The legislature of the Commonwealth of Pennsylvania then awarded the prize money to itself and directed its officers to take needful action to confirm the right of Pennsylvania to hold the money which was then held by the treasurer of that state. The Connecticut citizens invoked the aid of a United States court of appeals and Mr. Justice Marshall, sitting as a circuit judge, found

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238. *United States v. Peters*, 9 U.S. (5 Cranch) 65 (1809).

that the legislative action of Pennsylvania could not be permitted to stand, for as he said, if a state legislature can reverse decisions of a federal court, "the [C]onstitution itself becomes a solemn mockery."<sup>239</sup> But some of the questions raised in that case are not irrelevant to the questions of the propriety of the Sabbatino Amendment—a legislative enactment not of any state legislature, to be sure, but an enactment of the supreme legislative body of the United States itself.

We may now pertinently paraphrase some of the questions asked by Mr. Justice Marshall in this matter.

If the ultimate right to determine the jurisdiction of the courts of the Union is placed by the Constitution in the Congress of the United States, then the Sabbatino Amendment concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation then the determination by the Congress concerning the jurisdiction of the Supreme Court cannot be permitted to prejudice the question.

The Supreme Court of the United States in the *Sabbatino* case had before it two claimants to certain property which was never within the jurisdiction of the United States. That Court applied the law of Cuba, a sovereign state. It held that the title of that property—a shipload of sugar—was in the Cuban Government when that ship was permitted to leave Cuban territorial waters. In thus deciding, the Supreme Court applied the law known as "the law of the place where" (*lex loci rei sitae*). The other claimant to the title of that property was the sugar company which had produced the sugar seized by a fully executed act of state; its claim to title was that the act of state was contrary to international law and therefore the title continued unchanged.

To the Supreme Court, this issue was a legal issue; to the Senator who introduced the Sabbatino Amendment, it was a policy question. He said: "We think it perfectly proper that the Congress of the United States should have the last word on this important policy question."<sup>240</sup>

Here is the issue: In a litigated matter between two claimants, based upon an adverse claim to property, shall the final determination of what law should properly be applied, and the final conclusion as to the legal rights of the parties, be made by the Congress of the United States or by the Supreme Court of the United States?

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239. *Id.* at 77.

240. Letter in *The Washington Post*, Aug. 5, 1964, signed by Bourke B. Hickel, United States Senator from Iowa.



I. *In Passing the Sabbatino Amendment, Has Congress Changed Long-Established National Policies of the United States? Was This Intended?*

The possible ramifications of the Sabbatino Amendment are tremendous. Its use and application raises many questions, some of them mixed questions of constitutional power and of national policy. A few may be considered.

1. *Does the Sabbatino Amendment Supersede the Connally Amendment?*—When the United Nations was established as an organization, the International Court was established as a separate but coordinate organization. The United States adhered to the International Court but with a reservation: "(b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."<sup>241</sup>

The United States invoked this reservation when Switzerland endeavored to secure a judgment against the United States on the ground that the seizure of the General Aniline and Film Company was a seizure of Swiss assets contrary to international law. The action by the United States was to prevent a decision by the International Court.<sup>242</sup> We have learned too that a reservation by the United States can on the principles of the equality of nations and reciprocity, be used against us by any nation which we endeavor to bring before the International Court.

No issue can be brought before the International Court in any event except on a complaint that the country named as defendant has violated international law. Under the Sabbatino Amendment, the courts of the United States, local national courts, heard and determined an issue based on a claim of violation of international law. Now the Congress on these same principles of equality of nations and reciprocity has subjected the United States to a determination as to the validity of its national acts by the courts of every country. Nor can Congress expect that if any foreign nation objects to the treatment of its nationals by the United States that that foreign nation will refrain from declaring the United States act of state null and void. Nor is the foreign state likely to confine such condemnation and decision to acts of the United States intended to transfer title, but will declare null and void any act of state of the United States which that foreign court finds contrary to international law.<sup>243</sup> One

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241. T.I.A.S., No. 1598 (1946); [1957-1958] I.C.J.Y. 212.

242. *Interhandel Case*, [1959] I.C.J. Rep. 6.

243. The first public criticism of the Sabbatino Amendment appeared in an editorial in *The Washington Post*, p. A14, July 27, 1964. The editorial was entitled, "Drag on Foreign Policy" and within it, the editorial writer said: "If American courts sat in judgment of foreign governments, their courts would increasingly sit in judgment of

must assume jurisdiction—if United States courts can “sit in judgment” and condemn, as invalid, acts of foreign countries, foreign countries can find the same jurisdiction and power to make adverse decisions concerning acts of the United States.

2. *Has Congress Created Two Different Rules as to Judgments; One for Seizures at Sea Which Are Contrary to International Law, and One for Seizures on Land Which Are Contrary to International Law?*—Some fifty years ago, the United States Senate summarily rejected a suggestion that an international court, sitting as a prize court to hear and determine a complaint by a person or government whose ship had been seized and condemned as a prize by a court of another country, could, if it found the seizure had been contrary to international law, declare that seizure and court condemnation to be null. The effect of this suggestion, if implemented, would be similar to the Sabbatino Amendment although in the earlier instance confined to the narrow admiralty question. The Sabbatino Amendment as now interpreted lays down a general rule that any act of state which transfers title to property of a foreigner contrary to the rules of international law can be declared null and void.

The circumstances under which the Senate had once rejected this very proposition were as follows. In 1907 an effort was made by many nations, of which the United States was one, to include in the Hague Conventions a new convention to be known as XII, to establish a court of prize.<sup>244</sup> Any party who felt himself aggrieved by

ours. Even if such a practice did not lead to chaos, the United States has an interest in holding fast to a sound principle which it has established—a principle that, as the Supreme Court has said, is conducive to promotion of the rule of law among nations.”

Senator Hickenlooper's answer to this can be found in a letter to the same publication, Aug. 5, 1964, and also in 110 CONG. REC. 19546 (Aug. 14, 1964).

244. XII. Convention relative a l'établissement d'une Cour internationale des prises.  
*Titre I. Disposition Generales*

Article 8.

Si la Cour prononce la validité de la capture due navire ou de la cargaison, il en sera disposé conformément aux lois du beligérant capteur.

Si la nullité de la capture est prononcée, la Cour ordonne la restitution du navire ou de la cargaison et fixe, s'il y a lieu, le montant des dommages-intérêts. Si le navire ou la cargaison ont été vendus ou détruits, la Cour détermine l'indemnité à accorder de ce chef au propriétaire.

Si la nullité de la capture avait été prononcée par la juridiction nationale, la Cour n'est appelée à statuer que les dommages et intérêts. National Archives, 13 Numerical File, 1906-1910, Cases 40/794, Dep't of State.

Official Translation of Article 8.

If the Court pronounces the capture of the vessel or cargo to be valid, they shall be disposed of in accordance with the laws of the belligerent captor.

If it pronounces the capture to be null, the Court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo has been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account.

If the national Court pronounced the capture to be null, the Court can only be asked to decide as to damages. [1907] FOREIGN REL. U.S. 1256 (1910).

the seizure and condemnation of his ship as prize by some foreign state could resort to this court. The gravamen of any such complaint would necessarily be that the seizure and condemnation was not in accordance with international law. The United States was favorable to the establishment of such a court. But it emphatically objected to the proposal that such a court should have the privilege of declaring an act of condemnation by any court, including of course by a court of the United States, of no effect to transfer title. The United States Senate passed a resolution as follows:

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the convention for an international prize court signed at The Hague on the 18th day of October, 1907, and at the same time to the ratification, as forming an integral part of the said convention, of the protocol thereto, signed at The Hague on the 19th day of September 1910, and transmitted to the Senate by the President on the 2d day of February 1911;

Provided that it is the understanding of the Senate and is a condition of its consent and advice that in the instrument of ratification the *United States of America shall declare that in prize cases recourse to the International Court of Prize can only be exercised against it in the form of an action in damages for the injuries caused by the capture.* (Emphasis added.)<sup>245</sup>

Also in connection with the proposal for the prize court, Secretary of State Knox composed and dispatched a circular letter to all the participant countries stating the position of the United States. That position was that, should any court in the United States, including the Supreme Court, condemn a ship as prize—an enemy ship or a neutral ship aiding the enemy—the condemnation and transfer of title must be recognized as valid. If the proposed international prize court found that the condemnation by our courts was contrary to international law, the prize court's judgment would be limited to a determination of the damages which the court found that the losing party, the owner of the ship or cargo condemned, had suffered by reason of being deprived of his property due to a judgment of United States courts which was contrary to international law.

Secretary of State Knox did not claim infallibility for our courts and freely admitted that shortly after the Civil War, an international court whose jurisdiction had been agreed to by the United States had found that some half a dozen decisions of the Supreme Court of the United States were contrary to international law and that the owners of these ships and cargoes which had been seized and condemned by the United States contrary to international law had

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245. CHARLES, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776-1909 (1910). Resolution of the Senate, Feb. 15, 1911.

been unjustly deprived of their property. Damages were assessed and paid by the United States. Thus the reservation by the Senate meant that no international court could declare a decision of the Supreme Court of the United States to be null and void on the ground that the court in reaching its decision had failed to observe the tenets of the law of nations. The following direct quotation from the State Department letter expressed the United States position as of that time.

Questions involved in the following cases upon which decisions had been rendered by the Supreme Court of the United States were afterwards submitted to arbitration by the United States under the British-American Claims Convention, sitting under article 12 of the treaty of Washington, dated May 8, 1871, for decision 'according to justice and equity.'

1. Questions which the international tribunal decided adversely to the decision of the Supreme Court of the United States, which international decisions were obeyed by the United States: *The Hiawatha*, 2 Black, 635, 4 Moore's International Arbitrations, 3902; *The Circassian*, 2 Wallace, 135, 4 Moore, 3911; *The Springbok*, 5 Wallace, 1, 4 Moore, 3928; *The Sir William Peel*, 5 Wallace, 517, 4 Moore, 3935; *The Volant*, 5 Wallace, 179, 4 Moore, 3950; *The Science*, 5 Wallace, 178, 4 Moore, 3950.

2. Questions in which the decisions of the international tribunal upheld the decision of the Supreme Court of the United States: *The Peterhoff*, 5 Wallace, 28, 4 Moore's International Arbitrations, 3838; *The Dashing Wave*, 5 Wallace, 170, 4 Moore, 3948; *The Georgia*, 7 Wallace, 32, 4 Moore, 3957; *The Isabella Thompson*, 3 Wallace, 155, 3 Moore, 3159; *The Pearl*, 5 Wallace, 574, 3 Moore, 3159; *The Adela*, 6 Wallace, 266, 3 Moore, 3159.

It is therefore evident that the demands of justice would be satisfied by submitting the question involved to impartial international determination, for although the controversy is based upon the decision of a national court of justice, the judgment of the international tribunal while satisfying the claimant and settling the principle of international law involved, *would not affect the validity of the national judgment within its jurisdiction*. The national decision would remain in full force so far as the nation is concerned, in that it is not reversed by an international tribunal; but the international law properly applicable to the case would have been determined by an international tribunal, thus establishing for the community of nations the correct principle of international law. (Emphasis added.)<sup>246</sup>

Although the prize court jurisdiction is admittedly a narrow one, a wholly similar situation arises when a ship, a small boat, automobile, or airplane is seized while allegedly engaged in smuggling, and is forfeited on proof of the illegal activities carried on by it. Here, too, is a transfer of title without compensation which is in accordance with international law only if the allegations as to illegal activity are indeed true.

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246. [1910] FOREIGN REL. U.S. 600 (1915), papers relating to the foreign relations of the United States with the annual message of the President transmitted to Congress, December 6, 1910, Circular Note of the Secretary of State in relation to Provisions of the Proposed International Prize Court.

Now the Congress of the United States should clarify the Sabbatino Amendment by answering the question: Did the Congress in passing the Sabbatino Amendment intend to repudiate the position taken by the Senate in 1907 and overrule its resolution? There is no international prize court. The well-meant efforts to establish one failed, but the Sabbatino Amendment permits any court in the United States to declare any act of state of another country, which purports to transfer title, found to be contrary to international law, to be null and void, and reciprocally every court of every other country has precedent to assume this same privilege.

Did the Congress of the United States in passing the Sabbatino Amendment desire to clothe every local court of every country with the authority proposed for an international prize court in 1907? If so, can the Congress justify a law which permits the courts of every country to declare null and void a decision of the United States Supreme Court if it is found to be contrary to international law, and snatch back the condemned property wherever it can be found from the one who, under the decision of our Supreme Court, had title? Has the Congress the constitutional power to do such a thing?

Did Congress intend to create two different types of law, one for seizures at sea (in war or peace) and another for seizures on land in war (under The Hague Convention) or in peace (with no treaty) under the Sabbatino Amendment?<sup>247</sup> In short, is the act of state doctrine still valid as to seizures at sea, though contrary to international law, when approved by a prize court, and subject to an "exception" for seizures contrary to international law on land unless governed by treaty?

3. *Has Congress by Passing the Sabbatino Amendment Granted the Right and the Power to Cuba by its Local Courts to Declare the Act Reducing Cuba's Sugar Quota to the United States to be Null and Void?*—This question was considered sufficiently important by two of the lower courts in the *Sabbatino* case to be given consideration. For example, the decision by the United States Court of Appeals for the Second Circuit, which by the most recent decision of the *Sabbatino* case is now the ruling law of that case, stated:

The appellant seeks to justify retaliatory confiscation by the Cuban government by asserting that the United States was the first offender against international law by an attempt to coerce Cuba through the reduction of American purchases of Cuban sugar. If the United States had seized Cuban assets in this country without compensating the owners, we might find some merit in this contention, for then Cuba would be treating

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247. See 376 U.S. at 428. See note 145 *supra* concerning the validity of transfer of title to material requisitioned by a hostile army as subject to the Hague Convention.

American nationals exactly as the United States was treating Cuban nationals. Cf. Restatement, Foreign Relations Law of the United States, 205 (Proposed Official Draft, 1962). But, whether she was wise or unwise, fair or unfair, in what she did, the United States did not breach a rule of international law in deciding, for whatever reason she deemed sufficient, the sources from which she would buy her sugar.<sup>248</sup>

This is a most remarkable statement in the light of the Sabbatino Amendment (passed after this opinion was given) which became the basis of re-establishing this opinion overruled by the Supreme Court of the United States. (i) If the action of the United States was "unfair" to Cuba (as the court hypothetically admits it might have been) in reducing the sugar quota of Cuba, then it was an act contrary to international law. International law is a code of conduct to be adhered to by all countries in dealing with foreign countries and their nationals. (ii) Here a United States court passed on the conformity with international law of an act of the Congress of the United States enacted at the request of the executive. If the court found the reduction of the sugar quota contrary to international law, the court could have done nothing about it. In case of an issue, it would have had to enforce the law in the United States whether or not the court believed it to be contrary to international law. Therefore, the court of appeals' decision was gratuitous since the court had no authority to make a determination of this issue. (iii) Cuba denounced this law as aggression. "Aggression" is contrary to international law. Would a formal determination by Cuba that the reduction of the sugar quota was contrary to international law render that law null and void? If so, has Congress, by passing the Sabbatino Amendment, subjected the United States to liability to Cuba for resulting national damage to that state? It would seem logical to assume that, although the Sabbatino Amendment relates solely to transfers of property contrary to international law, other countries could and would find other types of national acts contrary to international law also to be null and void. (iv) A United States court declared a United States act to be in accordance with international law. That same United States court held an act of a foreign country to be contrary to international law and, therefore, null and void, though it was valid under the laws of that country.

4. *Has Congress by Passing the Sabbatino Amendment Repudiated the Adherence of the United States to the United Nations?*—The only veto permitted in the United Nations is that of the Security Council. But in passing the Sabbatino Amendment, Congress has permitted every court sitting in the United States to declare an act of a foreign

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248. 307 F.2d 845, 866.

country affecting property of nationals of the United States to be null and void if found contrary to international law. Congress claims it has this right; it has claimed further that no nation can pass a law which is not sanctioned by the United States as in accordance with international law if it affects United States nationals. This would seem a gross exaggeration of what Congress has done, or intended to do, were it not that the court of appeals in the *Sabbatino* case itself had said so. In justification of its action in declaring the law of a foreign country null and void, ineffective within its own country, the court stated: "Refusal by municipal courts of one sovereignty to sanction the action of a foreign state done contrary to the law of nations will often be the only deterrent to such violations."<sup>249</sup>

The United Nations is based upon the independence and equality of all of the nations which are members.

J. *Can the Congress Create a Rule of World Order or Can Such Rules Be Established Only by Treaties or By International Organizations Based on Treaties?*

A peaceful, prosperous world order has been the utopia of which men have dreamed for ages. To men of good will, this ideal has meant a world in which nations were safe from armed aggression and economic oppression from each other; where every citizen of every country would have his freedoms protected and a sufficiency on which to live in human dignity. A world order created by force has frequently been tried in the history of the world but has always failed; it has never been able to maintain itself, and, still worse, its ideals have been based upon national aggrandizement and exploitation. Creating a world order by agreement has been a long, slow, frustrating process. But this is the method sponsored by our own Government from its beginnings. Chief Justice Marshall set down his views of the world order of his day,

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.<sup>250</sup>

Only the man without hope or vision would admit that there has been no progression toward a proper world order. Our ideals in this respect

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249. *Id.* at 868.

250. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 74, 85 (1812).

have recently been well stated by a former United States Government official:

Mankind is now divided by two competing concepts of world order—one based on coercion—the other based on consent. Because of the kind of society we are at home, because of the kind of order we seek abroad, we cannot simply impose our views on other peoples. Our method of building a world order is much more difficult than the Communist method, but it is also much more durable. It is through free association with other nations in bilateral, regional, and global diplomacy.<sup>251</sup>

To achieve a prosperous world, capital is necessary. The nations which have capital, sometimes called the capital exporting nations, are willing to share their capital with those nations which need it to raise their standard of living to the level necessary for the maintenance of human dignity. But the terms on which the capital is offered and the terms on which it is accepted must be both fair and enforceable. To this end, the United States has made treaties with some fourteen foreign nations, each treaty containing a clause,

Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for public benefit, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.<sup>252</sup>

Congress, impatient with the slow march toward an acceptable world order and without the consent of any foreign country, has imposed at one stroke through the Sabbatino Amendment a restriction on the sovereignty of every nation, and decreed that the courts of the United States may impose sanctions against any other country which in the opinion of those courts failed to maintain the standards set down by the United States courts. The Congress has, without consent, and yet without an affirmative use of force, thus attempted unilaterally to create terms of a world order.

The world order has not progressed farther than a decentralized structure of nation states bound together by bilateral and unilateral treaties. On this, the constituent nations of the world order work out their co-existence based upon reciprocity. In a recent speech, a well-known authority on international law has said:

Reciprocity is the most important sanction of an international law of co-existence based on a decentralized structure of nation states. Except for

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251. Gardner, *Pursuit of World Order*, quoted in 52 A.B.A.J. 529 (1966).

252. Treaty of the United States with Kingdom of Greece, art. VII(3) (signed Aug. 3, 1951, ratified July 21, 1953), T.I.A.S. No. 3057.



the very limited authority of the United Nations with regard to control over the use of force, and leaving aside the recently qualified theory of Kelsen that war and reprisals used by states are sanctions of international law used in behalf of the international community, reciprocity is the principal guarantor of respect for the territorial and jurisdictional aspects of national sovereignty.<sup>253</sup>

In passing the Sabbatino Amendment, the Congress of the United States has repudiated reciprocity as the principal force in world order. Can such a law have the effect desired by Congress upon world order? Has Congress alone the power to attempt such a result?

## V. A BETTER WAY TO ACCOMPLISH THE DESIRED RESULTS

### A. Assumptions Reviewed

The Sabbatino Amendment is an expression of United States foreign policy. It is a concrete effort by Congress to protect United States foreign investment from confiscation—an act of state contrary to international law. Congress believed that if all foreign countries wherein United States nationals had investments were warned in advance that those countries could not market in the United States property confiscated from United States nationals, confiscation of property of United States nationals would be less likely to occur.

The method to enforce this foreign policy of the United States under the Sabbatino Amendment is that any confiscated property imported into the United States will still be deemed to be the property, not of the confiscating government, but of the one who was owner prior to confiscation. An act of confiscation in a foreign country would, by decision of a court in the United States, have no validity to transfer the title in the land of the confiscator.

The weakness of the scheme is that its *enforcement* is left to the victimized United States nationals whose property has been seized abroad. This property might or might not be imported into the United States. Yet, the only method of enforcement is if a victim of confiscation by a foreign country can find this property in the United States, he can commence an action in the nature of a replevin. In such an action, he would claim title and right to possession, and prove by acceptable legal proof, his title prior to the confiscating act; only then can a court find the transfer of title abroad invalid and restore the property or its proceeds to him. Thus the confiscating government or one claiming title by the confiscation is prevented from selling the confiscated goods in the United States.

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<sup>253</sup> Friedmann, *The Relevance of International Law to the Processes of Economic and Social Development*, in 1966 PROCEEDINGS, AM. SOC'Y INT. L. 11.

### B. *The Purpose of the Sabbatino Amendment*

The Sabbatino Amendment was intended by the Congress to act as an embargo. That this was the intention is summed up dramatically in the slogan often quoted by its adherents, "The United States shall not become a thieves' market." But if an embargo was intended, this hit-or-miss scheme of invoking the Sabbatino Amendment is not an effective method of enforcing an embargo. Obviously the way to prevent importation of any goods into the United States is a national prohibition against the importation of the goods. This the Sabbatino Amendment does not do; it does not prohibit the importation of any goods into the United States whatsoever. The Sabbatino Amendment is not a criminal statute. It authorizes the imposition of no penalties.

If Congress wishes to continue, as a national policy, a warning to potential confiscators that they cannot sell in the United States property confiscated from United States nationals, the Sabbatino Amendment must be replaced by a strict, well-defined embargo. Anything short of a national prohibition, properly defined as to the type of trade to be prevented, with criminal penalties for violation, lacks the support of the United States Government itself and can only be inefficient in accomplishment and costly to the very persons it was intended to help.

1. *Means to Attain the End.—(a). Definition of "Property" in Effectuating Congressional Purpose.*—Now one must consider what property must be excluded from the United States market. The only words in the Sabbatino Amendment which can be used as a definition of property to be excluded is the reference to goods the title to which is ". . . based upon . . . a confiscation or other taking . . . by an act of that state in violation of the principles of international law."<sup>254</sup> This definition is not sufficient; in some instances it is far too broad and in others far too narrow.

(1). *"A Confiscation or Other Taking" of Property, Considered As Too Broad a Definition.*—Confiscated goods, under the Sabbatino Amendment, are to be excluded, but no provision is made to limit the operation of the statute to those confiscated goods which before confiscation belonged to a national of the United States. Any foreign corporation, not a national of the confiscating country, which can bring an action in replevin in the United States can invoke the Sabbatino Amendment. If the goods which this foreign corporation claims as its property were seized by a foreign country in a manner contrary to international law, and the complaining corporation was not

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<sup>254</sup> Amendment to the Foreign Assistance Act of 1964, as amended in 1965. See App. I, p. 541 *infra*.

a national of the confiscating government, and can prove its claim as to prior ownership of the goods, United States courts, under the Sabbatino Amendment, shall not “. . . decline on the ground of the federal act of state doctrine to make a determination on the merits . . . ,”<sup>255</sup> thereby determining the foreign corporation is still the owner. Thus the foreign policy of the United States, in the warning to nations not to confiscate *anyone's* property who is not a national of the confiscating country itself.

Current newspaper articles have indicated the possibility of foreign corporations causing the United States to enforce an embargo against a foreign country which may have made no offense against the property rights of United States nationals.

Union Miniere du Haut Katanga threatened legal action against purchasers of products from a provisional Congolese operating mineral company. Union Miniere issued the warning in response to seizure of its assets and properties in the Congo by the government of the African state on New Year's Day.<sup>256</sup>

It is not necessary to show that Miniere in fact had any outstanding contracts with United States nationals or that United States nationals have bought, or will desire to buy, Katanga copper. This controversy between a Belgian company and the sovereign state of Katanga is here used only as an illustration of what may happen. We may suppose that, in this situation, or any similar situation which may at any time arise, a foreign corporation—as in our hypothesis the Belgian company Miniere—finds Katanga copper in the United States and commences an action in replevin to recover it. If the copper found here had already been paid for, a successful suit would cause the United States purchaser to pay twice for the copper or go without that copper. After commencement of such a suit, no copper from Katanga would be brought into the United States—that is what the Sabbatino Amendment intends—and the United States could not alleviate its present existing shortage of copper from that source.

In the past, various foreign corporations have sought to induce countries, other than the ones of which they were nationals, to institute just such an embargo, in the same manner contemplated by the Sabbatino Amendment. Nationals of one foreign country have urged other foreign countries to close their markets to property confiscated from them by a third country. No country has ever instituted an embargo against a foreign country at the request of a foreign corporation. Illustrations of unsuccessful attempts to accomplish such a result are found in the cases cited to Congress when it was considering the

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255. *Ibid.*

256. Wall St. J., Jan. 4, 1967, p. 4, col. 2.

Sabbatino Amendment. (a) The Anglo-Iranian Oil Company asked the courts of both Italy and Japan to declare confiscation by Iran of the oil fields and installations nationalized from that company, an act of state contrary to international law and, therefore, to be null and void and, by so declaring, to create an embargo against Iranian oil. Both Italy and Japan refused to do so. (b) Various companies whose oil wells were seized by Mexico requested both the Netherlands and Belgium to create this same Sabbatino-type embargo against Mexican oil. Both countries refused. (c) Dutch Indonesian tobacco growers asked the courts of Germany to do the same but Germany also refused. Now, under the Sabbatino Amendment, United States courts must comply.<sup>257</sup> The United States is to treat confiscation by foreign countries of corporations, not nationals of the United States, in the same manner that they would treat confiscation of property invested abroad by United States nationals.

Of course the President, under the Sabbatino Amendment, can direct United States courts in any suit which might be begun by *Miniere*, or other foreign corporation similarly situated, to recognize the transfer of title of the copper from *Miniere* to the State of Katanga, and thus create no embargo against the trade in copper between the United States and Katanga.<sup>258</sup> But here the foreign company has been permitted to embarrass the executive department in its conduct of foreign relations, for the President must weigh the domestic needs for copper against the diplomatic offense to other countries and, perhaps in the interests of United States nationals, appear to condone the confiscatory act of a foreign sovereign state. The United States Supreme Court in the *Sabbatino* case foresaw this difficulty. "Often the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically."<sup>259</sup>

At about the same time that the daily news carried the information of the controversy between the State of Katanga and the Belgian corporation, the same newspapers informed the United States public that the United States had instituted a boycott or embargo against trade with Rhodesia.<sup>260</sup> Whether the latter is a wise or unwise United States policy is a controversial question, but at least one can notice the difference in the manner in which the national policy of the United States is invoked. Here the United States instituted a national

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257. For discussions of the instances designated herein as (a), (b), and (c), see Part III, p. 461 *supra*.

258. See App. I, p. 541 *infra*.

259. 376 U.S. at 436.

260. N.Y. Times, Jan. 6, 1967, p. 1, col. 8.

policy at the request, and on the recommendation, of the United Nations—an organization set up by multilateral treaty for mutual national interest—and thus the policy represents an action taken by treaty under the auspices of an international organization.<sup>261</sup>

The United States had also established as its foreign policy, under the Trading With the Enemy Act, a complete embargo on trade between the United States and Cuba, China, North Korea and North Vietnam. Confiscation of the property of United States nationals is a serious contention between the United States and Cuba and also, but to somewhat a lesser extent, between the United States and China. The problem only arises incidentally, however, in the other two countries. However, the United States has been singularly unsuccessful in persuading other nations, though they be members of the United Nations, to adopt a similar national policy in regard to trade with these countries.

Comparing and contrasting United States experience with national embargoes and considering the possibilities for the future, it is suggested that any embargo law replacing the Sabbatino Amendment be confined, in the first instance, to situations in which nationals of the United States have been wronged; embargoes against countries which have done no specific wrong to property rights of United States nationals should be left to the Executive, as before the Sabbatino Amendment, and to obligations assumed under unilateral and multilateral treaties.<sup>262</sup>

It would seem to be good national policy for the United States, or for any other independent nation, to interrupt its own economic life by a boycott, an act of cold war, only when its own duly-appointed representatives have determined that such an action is in the national interest. The national interest can be the narrow one within the confines of the country itself or the broader one as a member of an international organization. National policy of the United States, however, should not be dictated by a foreign corporation.

(2). *A Confiscation or Other Taking of Property Considered as Too Narrow a Definition.*—But on the other hand, in many situations we cannot limit our prohibitions against importations merely to those confiscated goods which formerly have been the property of nationals of the United States. There are several reasons for this, and the confiscatory decrees in Cuba illustrate them. The two great exportable

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261. United Nations Participation Act of 1945, 59 Stat. 619 (1945), 22 U.S.C. § 287 (1965). See U.N. CHARTER art. 41.

262. The United States and Indonesia have recently entered into an agreement, similar to those already made with a number of other countries, to insure United States investors that any investments in Indonesia will not be subject to confiscation. See N.Y. Times, Jan. 14, 1967, p. 35, col. 2.

products of Cuba were tobacco and sugar. Much of the tobacco industry was in the hands of Cubans as was also a substantial amount of the sugar industry. The federal courts have recently held that sale in the United States of tobacco products which Cuba confiscated from Cubans did not entail a breach of international law.<sup>263</sup> Here the validity of the act of state in Cuba was recognized. This trade was ended only by the embargo imposed under the Trading With the Enemy Act. Except for this act, tobacco and sugar confiscated from any Cuban could now be brought into this country. Permitting some trade, perhaps even considerable trade, is not the way to impose an effective embargo. The whole idea is to affect Cuban industry so adversely that Cuba will pay for the confiscated properties, or, perhaps still better, would not have confiscated them in the first place if it could have foreseen that the result would have been complete cessation of trade with the United States.

(3). *Conclusion as to Definition.*—If we wish to use prohibition of trade with a foreign country as United States policy, the embargo (1) should be invoked only if United States interests are affected and (2) when this happens, the embargo should be complete as to trade with the offending country subject, however, to certain exceptions.

2. *Exceptions.*—The Sabbatino Amendment has only one exception—that it shall not be applicable

... 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 courts.<sup>264</sup>

But what if this sudden cutting off of foreign supplies to the United States causes loss and damage to American buyers and to manufacturers and producers who are dependent upon property from that source of supply and have been the buyers from those very United States nationals whose foreign investment has been confiscated? Suddenly the merchandise from that source may be em-

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263. *F. Palicio y Compania v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966).

264. One other exception may be termed an interim provision that the Sabbatino Amendment shall not apply "... 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 . . ." 78 Stat. 1013 (1964), as amended, 79 Stat. 658-59 (1965), 22 U.S.C. § 2370(e)(2). Note also that the Congress interpreted the Amendment of 1965 to make it clear "that the law does not prevent banks, insurance companies, and other financial institutions from using the act of state doctrine as a defense to multiple liability upon any contract or deposit or insurance policy in any case where such liability has been taken over or expropriated by a foreign state," *Conference Rep. on Foreign Assistance Act of 1965*, H.R. 7750, H. R. REP. 811, 89th Cong., 1st Sess. 21 (1965). For full amendment, see App. I, p. 541 *infra*.

bargoed. Should there not be some protection for the domestic interests of the United States? At the time of the confiscation in Cuba, Farr, Whitlock & Company made a contract to buy the confiscated sugar to supply its own customers when C.A.V. was unable to fulfill its contracts. It is respectfully suggested that the Sabbatino Amendment is seriously defective in not granting any method of protection to United States purchasers, and to those relying on them, when confiscation deprives them of their expected supplies, and an exception to protect this domestic economy should be written into any new law on the subject.

3. *Embargo and Return of Property to the Despoiled Foreign Investor.*—One feature which seems to have caught the imagination of the public is that C.A.V., the despoiled foreign investor under the *Sabbatino* decision of the lower courts, and then under the Sabbatino Amendment, was granted the proceeds of the property which emotionally was “its” property. The feeling is natural; the property had been, and still should be, its property; it seemed a sort of natural justice that C.A.V. have possession or be awarded the purchase price of that one shipload of sugar.

In an embargo this result can easily be obtained. If any goods are found in the United States, brought there against the prohibition of the embargo, these goods are smuggled goods or contraband. Any court may condemn and declare them forfeit to the United States. With title to these goods in the United States, a provision of our embargo law could provide that if any United States national could prove he or it was the owner of the goods prior to nationalization, a type of proof now required by the Sabbatino Amendment, the property could be awarded to him. The difference here would be that the embargo itself would be imposed as a policy of the United States and the goods would belong to the United States at the time of the return. If so desired, we could extend this same right to foreigners who could provide similar proof.

Of course, to give to a former owner “its” property, which had entered the United States illegally, creates a preference.<sup>265</sup> In the *Sabbatino* case itself, C.A.V. seeks to be paid 100% of the sale price for the shipload of sugar taken by Cuba. No other United States nationals who were investors in Cuba have thus far received anything. C.A.V. would share the money it receives with no one. The award, however, to C.A.V. of the purchase price of that shipload of

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<sup>265</sup> Note comment by the Attorney General concerning proportionate sharing of funds for compensation by all who have suffered from nationalization. *H.R. 7750 Hearings* 1236.

sugar, as determined by the two lower courts in *Sabbatino*, had popular approval, and so if awarding a return of confiscated property or its proceeds is a preference, as it clearly appears to be in such an instance, this would be considered "just."

### C. *Would Such an Embargo Be a New Law?*

When provisions of a new law are considered to make the purposes of the Sabbatino Amendment effective, it will be found that such a law differs but in few aspects from the powers which can be exercised by the United States Government now under the Trading With the Enemy Act and have been exercised against Cuba. The one most significant difference lies in the obvious intention of the Congress in the Sabbatino Amendment that United States markets should be *immediately* closed to the sale of confiscated goods if any of these have been confiscated from our nationals.

At the time of the enactment of the Sabbatino Amendment, Congress knew that an embargo had been created against Cuba under the Trading With the Enemy Act.<sup>266</sup> But certain of the Congressmen expressed their displeasure that so long a time had passed between the confiscations by Cuba and the imposition of an embargo under the Trading With the Enemy Act by the Executive. In spite of their knowledge that no trade then existed with Cuba, rather than modify the Trading With the Enemy Act to include other features such as the return of smuggled property to the wronged United States national, Congress wished an entirely new act, which would take effect without exercise of the Executive's discretion.

Thus, in any new law creating an embargo against trade with a country which has failed to heed the warning of the results of confiscation of property of United States nationals, the law must establish a method by which it is "triggered" and the embargo becomes effective. Perhaps the State Department might be entrusted with the duty of announcing an embargo had been placed in effect as soon as convinced that a foreign country had confiscated foreign investments of United States nationals. Perhaps it would be best for Congress itself to retain this privilege and provide that the law could be placed in effect only by joint resolution or, if Congress were not in session, by the joint action of certain Congressional committees, or perhaps by either method.

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266. The Trading With the Enemy Act of October 6, 1917, 40 Stat. 411 (1917), as amended, 50 U.S.C., App. § 1 (1965). As to embargo against Cuba, China, North Korea, and North Vietnam, see Foreign Assets Control Regulations, 31 C.F.R. pts. 500, 505, 515 (1966).



#### D. Conclusion

A law to accomplish, more efficiently than the Sabbatino Amendment, what Congress wished to accomplish would be an embargo which (a) is not international law and does not impinge on international law—it is purely domestic law; (b) would be strictly within the powers of Congress under the commerce clause of the Constitution; (c) would contain within itself the definitions of “confiscation” or “acts in contravention of international law” and determine what disposition should be made of property seized because brought into the United States against the prohibition; (d) would not impinge upon the sovereignty of any nation nor require any court to make exceptions to the act of state doctrine, a tenet of sovereignty; (e) would raise few, if any, constitutional questions; (f) would not interfere with the prerogatives of the State Department in bargaining with any nation for compensation of United States nationals whose property that country had confiscated; (g) would not attempt to limit the sovereignty of the United States or of any country in the world since it would operate within the confines of the United States; and (h) would not be inconsistent with the laws and governing principles of all the great independent trading nations.

If we institute a law more effective than the present one to warn potential confiscators that the United States will not become a thieves' market, we may provide for the future, but we have not solved our present problem. How may compensation be secured to reimburse those United States nationals whose property Cuba confiscated? Not under the Sabbatino Amendment, for the courts will have no more confiscated property or proceeds from such property to award. Not by private suit against Cuba by the injured party for confiscation of his property in Cuba, for our courts have no jurisdiction over a sovereign state for such a claim.<sup>267</sup> Not by a seizure of Cuban Government property in the United States for distribution to the wronged United States nationals, for there is not in this country enough Cuban Government property to pay a fraction of a per cent of the amount Cuba owes.<sup>268</sup> If any substantial payment is to be made to United

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267. In the *Sabbatino* case, the Government of Cuba commenced suit by an agent in a United States court and thus subjected itself as litigant to the jurisdiction of the court. Discussion of possible defenses and counterclaims in such a situation is not mentioned in this article. For reference to permissible counterclaims against a sovereign government, see *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398, 438 (1964). Cf. *National City Bank of New York v. Republic of China*, 348 U.S. 354 (1955).

268. “The Cuban Government total of \$19.6 million includes realizable assets of some \$14.6 million, but \$12.3 is subject to counterclaims of New York banks. . . .” Testimony of G. D’Andelot Belin, Esq., General Counsel, Treasury Department, on

States nationals who invested in Cuba, it will be collected through diplomatic channels. There is no other peaceful way.

#### APPENDIX I

The following is a copy of an amendment to the Foreign Assistance Act of 1964, as amended in 1965.

This amendment is variously known as the "Hickenlooper Amendment," the "Sabbatino Amendment" and the "Rule of Law Amendment." 78 Stat. 1013 (1964); as amended, Sept. 6, 1965, 79 Stat. 658-59 (1965), 22 U.S.C. § 2370(e)(2) (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 to property 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 subsection: *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 to property 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.

#### APPENDIX II

##### Summary and Digest of All Foreign Cases Presented to the Congress in Support of Sabbatino Amendment

In this Appendix, a summary of the facts and digest of the decision is given, by country, for each foreign case presented to the Congress during its deliberations on the Sabbatino Amendment. These cases were presented in three separate documents, with considerable overlapping of the cases. The documents are listed below, each followed by an identifying abbreviation, which will be used in the review of each case to show in what document or documents it appeared. Some cases appeared in all three.

1. Copy of foreign cases listed in dissenting opinion of Mr. Justice White, 376 U.S. 398, 439 (1964), submitted with letter by witness before the Committee on Foreign Affairs of the House of Representatives, identified as *Dis. Op. Hearings on H.R. 7750 Before the House Committee on Foreign Affairs*, 89th Cong., 1st Sess. 1047-48 (1965) [hereinafter cited as *H.R. 7750 Hearings*] (testimony of Myers S. McDougal).

2. (a) Memorandum submitted in the Senate in 1964 by Senator Bourke B. Hickenlooper, who asked permission to print it in the *Congressional Record*, along with other material, including Mr. Justice White's dissenting opinion, 110 *CONG. REC.* 18935, 18944 (1964).

(b) Identical memorandum submitted by a witness before the Committee on Foreign Affairs of the House of Representatives in the hearings held in 1965. *H.R. 7750 Hearings* 594-96 (testimony of Cecil J. Olmstead).

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H.R. 10327, before the Inter-American Affairs Subcommittee of the House Foreign Affairs Committee, Aug. 4, 1964.

Since (a) and (b) are identical, both are identified as CONG. MEMO.

3. Report of the Committee on International Law of The Association of the Bar of the City of New York containing recommendations for the passage of the Sabbatino Amendment, filed with the Committee on Foreign Affairs of the House of Representatives, identified as BAR COMM. RECORD OF N.Y.C.B.A. 294-309 (1965). See also H.R. 7750 *Hearings* 1315-25.

Many of the cases cited in the three documents above noted were also cited in the three decisions in the *Sabbatino* case, including the dissenting opinion by Mr. Justice White. All foreign cases relating to the act of state doctrine cited by any of the courts in the *Sabbatino* case were digested extensively in Reeves, *The Act of State—Foreign Decisions Cited in the Sabbatino Case: A Rebuttal and Memorandum of Law*, 33 *FORDHAM L. REV.* 599 (1965) [hereinafter cited as *FORDHAM*].

#### AUSTRIA

*In re Rhein-Main-Donau Ag.*, Const. Ct., Aus., June 24, 1954, [1954] *Int'l L. Rep.* 212. BAR COMM. A certain power station in Austria, two-thirds owned by the German Reich and one-third owned by the "Land of Bavaria" was taken over by the Soviet Army of Occupation and certain land and buildings were transferred later to the Austrian Ministry of Transport. Austria subsequently nationalized the installations. Certain persons were designated by the Austrian courts as trustees of the owners and on behalf of the German Reich as part owner took action against Austria. They contended that the law providing for the nationalization of properties which included this power station was a violation of international law in that it failed to provide for adequate compensation and consequently, as the Austrian Constitution recognized the rules of international law to form an integral part of the Austrian federal law, that the court should declare this nationalization invalid as unconstitutional. The action was brought in the court of the country alleged to have confiscated the property. The court rejected both arguments.

Although admitting that confiscation without compensation is contrary to international law, the court held: 1. There was no violation of international law, since the nationalization law promised future compensation. A future law would deal with the amount and mode of payment. 2. Even if the nationalization law had been found to be in conflict with the rules of international law this would not have resulted in its unconstitutionality, and, therefore, the court could not declare the act to be null and void. Title had been validly transferred by the nationalization of the station.

NOTE: Normal rule as to international claims is that local remedies must be exhausted (or proof presented that there is no local relief) before an international claim can arise. This action must be considered as an effort to exhaust local remedies. Here the local court gave no relief, holding that the action of the government was not violative of international law. An Austrian court refused to declare an Austrian law to be null and void.

*Koh-I-Noor, L. & C. Hardtmuth v. Koh-I-Noor Tuzkarna L. & C. Hardtmuth*, Sup. Ct., Aus., June 2, 1958, [1958-II] *Int'l L. Rep.* 40. BAR COMM. Hardtmuth was a partnership doing business in Czechoslovakia. It made pencils under the name "Koh-I-Noor" and distributed them widely. This Czechoslovakian partnership was the owner of certain trademarks which were registered in Austria. It was nationalized. Certain of the partners had left Czechoslovakia and had established a French limited company to carry on the business in Austria which had previously been carried on by the Czechoslovakian partnership. The partners who had come to France asked for a declaratory judgment of the Austrian court that the nationalized Czechoslovakian company was not the lawful owner of the enterprise in Austria nor entitled to be regarded as the owner of the trademarks registered in Austria by the original Czechoslovakian partnership. The defendants, on the other hand, speaking for the nationalized company, contended that Austria should recognize them as the successor of the partnership and should also recognize that they were the owners of the trademarks registered in Austria. The court held against the representatives of the nationalized company on the ground that the nationalization of Hardtmuth in Czechoslovakia and the con-

confiscation of the partners' shares in the firm could not have any legal effect in Austria or affect property in Austria. The partners who had moved to France and set up a company were regarded as the true owners of the enterprise entitled to claim the trademarks registered in Austria.

Here a foreign court refused to enforce extraterritorially a confiscation decree on property outside the domain of the confiscating country. This action is in accord with the act of state doctrine.

*Danuvia Feinmechanische und Werkzeugfabrik Nationalunternehmen v. Seiberth*, Sup. Ct., Aus., Feb. 3, 1954, [1954] Int'l L. Rep. 38. BAR COMM. Under Hungarian law a certain Hungarian company manufacturing machinery had been nationalized. Prior to the decree of nationalization and the transfer of the assets of the company to the nationalized enterprise, that Hungarian company had sent certain machinery to the defendant in Austria. The nationalized company in this case claimed that machinery as successors in title to the Hungarian company. The court held that the Hungarian decree was confiscatory and was, therefore, ineffective to transfer any title to property outside of Hungary. The assets in Austria still belonged to the company as it existed before nationalization. Therefore, anyone who held property of that company in Austria held it for the company or creditors of the company as it was before nationalization.

This again is a case of extraterritoriality. Even in the very cryptic statement contained in the document presented to Congress by the Committee of the Bar Association it was clear that the decision in the case was not a repudiation of, or an exception to, the act of state doctrine. This case was characterized as "holding confiscatory Hungarian nationalization of a Hungarian firm did not affect property located in Austria."

*Lederer-Ponzer v. Rautenstrauch*, Sup. Ct., Aus., May 31, 1951, [1951] Int'l L. Rep. 204 (No. 47). BAR COMM. The defendant in this case did business in Vienna and bought goods from a partnership carrying on business in Czechoslovakia. The defendant had not paid for these goods when the business of the partnership from which he had purchased the goods was confiscated by the Czechoslovakian authorities. This partnership (not the nationalized company but its predecessor) assigned its claim to the plaintiff for its unpaid purchase price for the goods received by defendant before the seller had been nationalized. The assignee sued in the Austrian court to collect the purchase price. The court held that the confiscation of the Czechoslovakian partnership affected only the assets of that partnership within the confiscating state. The debt due and collectible in Austria was not an asset subject to the confiscation decree in Czechoslovakia.

*Dralle v. Republic of Czechoslovakia*, Sup. Ct., Aus., May 10, 1950, [1950] Ann. Dig. 155. CONG. MEMO; BAR COMM. The firm of Georg Dralle manufactured cosmetics in Hamburg, Germany. A branch of this firm had been established in Bohemia, which later became a part of Czechoslovakia. The branch office was the registered owner, by consent of the head office in Hamburg, of certain trademarks registered in Austria. The branch office was nationalized in Czechoslovakia and the nationalized firm then laid claim to the trademarks in Austria, owned by its predecessor. The court held that the Czechoslovak nationalization decree, although valid in the territory of Czechoslovakia, had no extraterritorial effect, and that, accordingly, the respondents were not entitled to use, in the territory of the Austrian Republic, trademarks owned by their predecessors in title. The nationalized firm, therefore, was enjoined from using the trademarks in Austria.

*Summary as to Austria*: There were five Austrian cases cited, one of which was brought by a foreigner in the courts of Austria claiming damages from Austria by reason of a confiscation. The court held there was no violation of international law involved, or, even if there was such a violation such seizures were not contrary to the constitution. For similar decisions in the United States, see *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, *cert. denied*, 385 U.S. 898 (1966). and *Tag v. Rogers*, 267 F.2d 664, 666-68 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904

(1960). The remaining four cases were extraterritorial cases holding only that a "confiscatory decree" of one country has effect only on assets within the confiscating country and within the control of that country.

*Conclusion as to Austria:* No cited cases show any exception to the act of state doctrine.

#### BELGIUM

*Deville v. Servais*, Ct. App., Liege, Oct. 19, 1945, [1943-1945] Ann. Dig. 448 (Bel.) CONG. MEMO; BAR COMM. This case does not involve an act of state. The German occupying authorities in Belgium had caused to be made what they called a compulsory "sale" of a certain lorry to the occupation authorities. The defendant in this case purchased the lorry from the German authorities at an inadequate price. The original owner claimed the lorry, which was awarded to him. The alleged "sale" was held to be not valid.

The Bar Association Committee which cited this case on page 308 in the Appendix of its report states as a recommendation: "The statute [Sabbatino Amendment] might be amended to read 'recognized foreign state . . . ' since the Act of State Doctrine has been invoked only as to acts of recognized foreign states." The German occupation authority was not a recognized state. It, therefore, by definition was incapable of committing an act of state. A further reason why this case is irrelevant appears in the case itself, the court stating:

The transaction cannot, moreover, be looked upon as a requisition of means of transport since, in the first place, it lacks the form of a requisition and, further, it contravenes the rules laid down in Articles 52 and 53 of the Annex to the Hague Convention [No. IV] . . . .

In short, any transfer of property from a resident of an occupied country to an occupying hostile military authority is not valid unless it conforms to the rules of the Hague Convention on the rules of warfare. The rule is a multilateral convention which is signed by 103 nations of the world, including the United States. The Supreme Court of the United States had indicated in the *Sabbatino* case that its opinion as to "validity" would not apply in a case which was covered by a treaty (as is this case).

"Propetrol," "Petroservice," et "Petrolest" v. *Compania Mexicana de Petroleo and Tankage and Transport*, Civ. Trib., Antwerp, [1938-1940] Ann. Dig 25 (No. 11) (Bel. 1939). BAR COMM.; *FORDHAM* 653. This case was cited to courts and to Congress in the Sabbatino matter with the designation "But see," indicating that it complied with the act of state doctrine. This case involves shipments of Mexican oil by the Mexican nationally-created corporation which dealt in the oil confiscated in Mexico. The quotation below is from the case as reported in the *Annual Digest*:

In the case of '*Propetrol*,' '*Petroservice*' and '*Petrolest*' v. *Compania Mexicana de Petroleo and Tankage and Transport*, the Civil Tribunal of Antwerp held . . . that a decree of the Mexican government expropriating without compensation installations, etc., belonging to foreign oil companies in Mexico, could not be questioned in a Belgian court on the ground that it violated the principles of Belgian public order. An application to allow the seizure of oil cargoes exported from Mexico which had been confiscated in this manner and were lying in port at Antwerp was rejected.

*Summary as to Belgium:* Two cases cited, one does not involve an act of state and is otherwise wholly irrelevant. The other case supports the act of state doctrine.

*Conclusion as to Belgium:* Belgium recognizes no exception to the act of state doctrine.

#### BRITISH TERRITORIES

*Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary)*, Sup. Ct., Aden, Jan. 9, 1953, [1953] 1 Weekly L.R. 246, [1953] Int'l L. Rep. 316. DIS. OP.; CONG. MEMO; BAR COMM.;

FORDHAM 621. For nearly twenty years the Anglo-Iranian Oil Company, predominantly a British business concern, had under a concession agreement extracted and refined oil within the area of Iran. In 1952, the concession was "nationalized" and the government undertook to carry on this business and sell the oil for its own account. This case relates to one shipload of oil purchased from the Iranian Government and loaded in Iran for a voyage to Bari, Italy. After receiving conflicting instructions from owner and charterer of the ship, the captain finally obeyed the order to break his voyage and put into the Port of Aden, a British colony in the British Protectorate of Aden. There the Anglo-Iranian Oil Company, under process of law, seized the oil on the ship, claiming title, *i.e.*, that the confiscation of the oil concessions in Iran did not transfer title of the extracted and refined oil to the Iranian Government, because the confiscation was contrary to international law. In this one case, of all those relating to confiscatory acts of state which are admitted to be a breach of international law, the court agreed with the claimants and made an exception to the act of state doctrine, holding that the oil still was the property of the Anglo-Iranian Oil Company. This was the same type of exception to the act of state doctrine made in the original *Sabbatino* case and now codified under the Hickenlooper Amendment. This case in Aden was never appealed.

The Attorney General of the United States, in testifying against the Sabbatino Amendment before the Committee of the House admitted that the case was decided as an "exception to the act of state doctrine," but pointed out that it was, nevertheless, a very doubtful authority because it was based upon an English case which a higher English court in a later and different case had criticized. The statement by the Attorney General is as follows:

The court held that the former owners were entitled to the oil which had remained their property and to which the Government of Iran had acquired no title. The court distinguished prior English cases applying the act of state doctrine on the ground that the property here was that of a British corporation, whereas in the earlier cases the property belonged to subjects of the state which had confiscated it. In reaching this conclusion, the Aden court also relied on a series of continental decisions. Subsequent decisions in England, however, have criticized the result in *The Rose Mary* and have disagreed with the Aden court's rationalization of English precedents. See *In re Helbert Wagg & Co.* (1956) ch. 323, (1956) 2 W.L.R. 183, H.R. 7750 Hearings 1257-58.

More detailed examination of the decision in Aden shows citation of several other English cases on which the judge relied, and which were also misinterpreted. Two of these were also presented to the Congress: *Wolff v. Oxholm* and *In re Fried Krupp A.G.* (for analyses see pp. 562-63 *infra*). The court also misapplied two French cases: *Société Potasas Ibericas v. Bloch*; *Union des Républiques Socialistes Soviétiques v. Itendant Général Bourgeois ès Qualité et Société La Ropit* (for analysis of each case see pp. 551, 554 *infra*).

For further reasons why this case, *The Rose Mary* case—the only one cited holding an exception to the act of state doctrine—is not significant authority, see p. 468 *supra*.

*N.V. De Bataafsche Petroleum Maatschappij v. The War Damage Comm'n*, Ct. App., Singapore, April 13, 1956, [1956] Int'l L. Rep. 810. DIS. OP.; CONG. MEMO; BAR COMM.; FORDHAM 652. This case does not involve an act of state. The seizure of oil was made by the Japanese military authorities during the time when they temporarily held control of the area of certain oil wells. This case is irrelevant because (a) Japan, as a hostile military power, cannot be considered as a *de facto* or *de jure* government in the area dominated by armed forces (The Association of the Bar of the City of New York has itself said only a recognized state can commit an act of state,) and (b) military actions are governed by treaty. Concerning this case the Attorney General of the United States testified before Congress as follows:

The second 'English' case cited by Mr. Justice White is *N.V. de Bataafsche Petroleum Maatschappij v. The War Damage Comm'n* (Singapore Ct. App. (1956) Int'l L. Rep. 810). This case is inapposite to a discussion of the act state doctrine,

for no act of state was involved. The Japanese forces, while occupying the Dutch East Indies in World War II, had exploited some private oil concessions and some of the oil was traced to storage tanks in Singapore. The private owners of the concessions prevailed over the claim of the local government who desired to seize the oil as enemy-owned. At no time had the Dutch Government, the local government of Singapore, or the British Government recognized Japan either de facto or de jure as the government of the invaded area where the oil wells were. *H.R. 7750 Hearings* 1258.

*Summary as to British Territories:* Two cases only were cited: *The Rose Mary* case, in which a British judge sitting in a court of the Protectorate of Aden held that the confiscation by Iran of the property of an English company, Anglo-Iranian Oil Company, was invalid because the act was contrary to international law. The other case did not involve an act of state at all but was an act of war governed by the Hague Convention.

*Conclusion as to British Territories:* A British court in a territory in an unappealed decision found that an act of state contrary to international law was invalid. This is contrary to all other British authority. The other case is irrelevant to a discussion of the act of state doctrine.

#### FEDERAL REPUBLIC OF GERMANY

Confiscation of German Property in Czechoslovakia Case, Fed. Sup. Ct., June 29, 1953, [1953] Int'l L. Rep. 31 (Fed. Rep. Ger.). CONG. MEMO.; BAR COMM. Both the plaintiff and defendant in this case were "Sudeten Germans," domiciled in Czechoslovakia during the Second World War. In 1945, and while the plaintiff was a prisoner of war, the defendant moved into a flat of which the prisoner-plaintiff was still legally the tenant and in which there was some of his furniture. When leaving for Germany the defendant took with him certain of this property which he alleged had been given to him by the Czechoslovakian authorities as reward for his services as a "recognized anti-Fascist." Before the German court, the former prisoner of war claimed his right to the articles on the ground that it was against the *ordre public* of Germany to recognize the confiscation. Here it must be remembered that when Germany surrendered, it agreed that as part of reparations the Allies might take all external German assets. This was also the law in the United States. The Allied High Commission, to protect all persons who received German external assets, in 1951 passed a certain law known as Law No. 63 which deprived all German courts of the privilege of determining title to "external German assets" which later came into Germany. The court returned the case to the lower court for a determination of whether or not these assets were governed by the *lex rei sitae*, admitting in its statement that external assets of Germany were taken "for the purpose of satisfying claims against Germany" and that Czechoslovakia was a foreign state within the meaning of Law No. 63, and the property here was owned by Germans in Czechoslovakia. In the decision of the case the court further admitted: "The purpose which Law No. 63 is designed to serve quite distinctly favours an interpretation that the property of Sudeten Germans shall be considered 'German property.'" And further stated: "It follows that the question as to what constitutes German property must be determined in accordance with the legislation of the individual enemy countries carrying out such liquidations."

The only question here was whether or not the defendant had acquired the property pursuant to these laws. In short, the court was required to hold that if the Czechoslovakian authorities had seized the property under Czechoslovakian law as reparations, the courts of Germany must recognize the title. This is in accordance with the act of state doctrine. The only other possibility would be that Czechoslovakia had never, as the plaintiff contended, seized the property and given it to defendant. The court ended its opinion by saying: ". . . having regard to Law No. 63, it now becomes relevant to arrive at a precise clarification of the factual events resulting in the expropriation and transfer."

If the defendant's title rested on an act of state by Czechoslovakia, German courts

were required to hold the title valid. For a discussion of the law of Germany when under the government of the Allies, see page 484 *supra*.

Expropriation of Insurance Companies Case, Higher Ct. App., W. Berlin, Dec. 15, 1950, [1951] Int'l L. Rep. 197 (Fed. Rep. Ger.). BAR COMM. The defendant insurance company, incorporated in Germany, was the owner of certain mortgages on real property situated in a part of Saxony which, on the conclusion of hostilities in World War II, became occupied Soviet territory. By an ordinance of the Soviet authorities, all property owned by insurance companies and situated in the Soviet occupied territory was confiscated and was vested in the state enterprise which was the plaintiff in this case. Some of the company's mortgage debtors were resident in West Berlin, and thus not under the control of the Soviet authorities. The question was whether or not they were liable to pay their mortgage debts to the original mortgagors or to the newly established state enterprise which claimed to be the successor. The case held that the validity of the ordinance, purporting to confiscate property of the defendants, was confined to the Soviet-occupied territory, and therefore, as the mortgage debts were owing by persons not in the territory, these debts were assets outside of occupied Soviet territory and could not be collected by the Soviet-created company. The court then held:

Having regard to these principles embodied in the legislation of Berlin, no court exercising jurisdiction in Berlin can recognise legal results based on measures which violate constitutional principle, good morals or the object of existing legal enactments.

This case is one of extraterritoriality. Money due to the original company was still due to the original company and not to the company built by the confiscated assets of the old company.

Expropriation (Soviet Zone of Germany) Case, Ct. App., Nuremberg, Sept. 19, 1949, [1949] Ann Dig. 19 (Fed. Rep. Ger.). BAR COMM. The facts of the case as set forth in the *Annual Digest* are:

The applicant claimed an interim injunction to restrain the respondents from disposing of goods sent to them in the American zone of occupation by a firm in the Soviet zone of occupation which had previously belonged to the applicant and which had been expropriated without payment of compensation.

The applicant received the relief for which he had brought suit—an interim injunction to prevent the recipients from disposing of the property. No subsequent case is cited to show whether there was final determination of title, *i.e.*, which of the two claimants had the right to receive the goods, sell them and receive the proceeds. However, the court in its decision went beyond the findings necessary for the granting of an interim injunction and expressed strongly its conclusion that an expropriation in the Eastern zone, without payment to the owners, would not be recognized in the American zone as effective to transfer title. The case, however, is equivocal for one very important and unresolved factor. Was the alleged "expropriation" an act of state? On the other hand, was the "expropriation" authorized under the German Reparations Agreement?

The court stated: "In the present case the court is concerned with the extent to which it is entitled to go behind the validity of the effectiveness of the decree of the government of Saxony." Certainly at the date of this case, 1949, Saxony was not recognized by anybody as an independent nation. If, then, the "expropriation" was based upon a decree of the Government of Saxony, the American zone need not recognize its validity. Again, if the property had been expropriated by the Soviet Government as an independent state, there would be no act of state for none of the Allies then recognized any "occupation zone" as a state. The Allies recognized Germany as a nation under occupation.

On the other hand, if this property had been seized in the Soviet zone as reparations (the reparations agreement covered all Germany), then a decision failing to recognize transfer of title was contrary to the law of Germany as it then stood, for the law of Germany included the Potsdam Agreement, which stated in Section 9(4):



Reclamation claims of the USSR shall be made by the removal from the zone of Germany occupied by the USSR and from appropriate German external assets.

The reasoning of the court, too, is faulty. The court said:

In this connection the Court need not decide whether the decree (from the Soviet zone) is valid, but what legal effect has to be given to it in the Western zones. International law recognizes that in principle the sovereign acts of a State are effective only within the sphere of power of that State.

The court then follows this argument with a conclusion stating:

Where assets previously situate in the East find their way to the West after expropriation, we must examine the question whether the firm which has been expropriated in the East can still be regarded as the owner of these assets in the West.

The court then offers a solution:

The applicant can rely on the invalidity of the expropriation of assets situate in the country of expropriation only by praying in aid the rules of *ordre public* . . . .

The court here appears to try to straddle the proposition and say that it will recognize the authority of a country within its own territory, but if goods there find their way out of that country the title within the expropriating country is not recognized outside. This can only be classified as a legal solecism. One Austrian commentator has expressed the impossibility of such an argument succinctly as follows:

As a matter of principle, expropriation, however unjustified, is effective where the property is within the territory of the expropriating state at the time of expropriation, and it remains so even if the property is subsequently brought into the territory of another state: in other words, a title cannot revive once it has been extinguished. There may be states where property rights are constitutionally protected, but still an expropriation in another state does not constitute such a violation of the 'ordre public' (public policy) in these states as to justify a judicial failure to recognize the principle of territoriality . . . . Views of Ignaz Seid-Hohenreldern quoted by Graue, *Germany: Recognition of Foreign Expropriations*, 3 AM. J. COMP. L. 94 (1954).

Lastly, the date of the case must be considered. The decision was in 1949. Although the occupation law was in force at that time, it was not until 1951 that the Allied occupation took from all German courts the privilege of determining any matters involving German assets transferred to the Allies by the German Peace Treaty, the Potsdam Conference, the Paris Reparations Agreement and the occupation laws of Germany. In summary, therefore, it is impossible to determine, first, what the final decision as to title might have been, second, whether or not an act of state was involved, and third, if a final decision based upon the reasoning of this court would have been contrary to German law, then in force, imposed by the occupation authorities.

Confiscation of Property of Sudeten Germans Case, Amtsgericht of Dingolfing, Dec. 7, 1948, [1948] Ann. Dig. 24 (No. 12) (Fed. Rep. Ger.). DIS. OP.; CONG. MEMO; BAR COMM.; *FORDHAM* 663. The excuse given by the Hitler Government, first, for occupation of a part, and then, the whole of Czechoslovakia, was that the persons of German nationality living in the western part needed the protection of the German Reich. These were known as Sudeten Germans. Many wrongs were committed on the Czechoslovakians, including the atrocity of the annihilation of the town of Lidice and its inhabitants. When Czechoslovakia acquired independence and before the coup which turned it into a Communist country, it decreed that the Sudeten Germans could not be tolerated within the confines of that country which had reestablished its independence, and these German citizens were required to return to Germany. Czechoslovakia seized these properties of the Sudeten Germans as German external assets and the Allies approved. The laws of Czechoslovakia considered them as "external

assets" and the Allies approved. Against this background, the facts of this case show that two women in course of being deported as enemy nationals (Sudeten Germans) were sent to a concentration camp. Each brought with her a sewing machine which a guard at the camp took. When the women were sent into Germany, one of them asked for the return of her sewing machine and, for reasons unexplained, was given, not her own machine, but the one which had belonged to the other woman. Upon arriving in Germany the woman who had no sewing machine, recognizing the machine brought in by the other, claimed it and it was awarded to her.

As an illustration of an act of state, this is a very doubtful case, for there is a question as to whether or not it was the intention of Czechoslovakia to consider these sewing machines as "external assets" and confiscate them. Certainly one was returned on request. Furthermore, the action of a guard at a concentration camp in taking the machines when the owners arrived in camp could hardly be considered an act of state. Nevertheless, the Court of First Instance in the Bavarian town of Dingolfing chose to consider this failure to return both sewing machines, and each to the proper person, as a "confiscation," a policy of the state. It held such confiscation to be contrary to international law and also a violation of "natural law" which the court held was superior to the power of any state. The "confiscation" was, therefore, null and void.

There is no doubt that this case is a decision that a confiscation is null and void within the confiscating country and this is, indeed, an exception to the act of state doctrine. But it is equally clear that this case was decided contrary to the laws of Germany, then enforced by the American occupation authorities and that to avoid any repetition of such a case, of which there were several, the American occupation authorities, being then the government of that part of Germany, passed a law known as Law No. 63 which, in accordance with the Peace Treaty and other factors concerning the use of German external assets as reparations, deprived all the courts of Germany of the power to make any decision relating to any part of the external assets of Germany which might find their way back into the territory of the German Reich. German courts were not allowed to thwart the policy of the Allies. Also it is incorrect to cite this case as a case of the Federal Republic of Germany. There was no Federal Republic of Germany in 1948. This cited case was contrary to the laws then in force in Germany. The laws of the Federal Republic of Germany, when it came into existence, supported the act of state doctrine as indicated in another case cited to the Congress. See p. 550 *infra*.

Registration of Trademark Koh-I-Noor, Fed. Trib., March 8, 1963, [1963] Neue Juristische Wochenschrift 1541 (Fed. Rep. Ger.). BAR COMM. Although this case also relates to the trademark "Koh-I-Noor," the parties to the action were not the same claimants discussed in the previous cases relating to the use outside of Czechoslovakia of that same name. This trademark "Koh-I-Noor," with one other trademark, was also used by a metal company, not the pencil company which appeared in the previously mentioned "Koh-I-Noor cases." The original company here was a partnership in Prague and had extended its financial interests to various other countries. The manner in which this was done was complicated and for the purposes here will be simplified by omitting certain details. The issues in this case, however, and the law applied, were the same as the issue and applicable law in the Koh-I-Noor pencil company cases; that is, a nationalized Czechoslovakian partnership has no extraterritorial right to trademarks used by its predecessor. This is, of course, no exception to the act of state doctrine.

The significant facts of the case are as follows: In 1902 a partnership was organized in Czechoslovakia to manufacture certain metal goods. The partnership prospered and the original partners created other partnerships in various other countries: 1904, Dresden; 1919, New York (as a corporation, not a partnership); 1921, Barcelona; 1922, London. In regard to these various partnerships and in one case a corporation, the courts of Germany found:

These enterprises which were independent from a legal point of view were connected with the parent firm in Prague by a personal union and were granted the

right to use, each for a certain territory all of the trademarks of the parent company.

The court also found that these partnerships were controlled by the partners of the Prague firm.

When Czechoslovakia was seized by German forces under the Hitler Regime just prior to World War II, the partners of this firm fled to New York because they were Jewish. The so-called "protectorate" of Bohemia and Moravia seized the property and put it under a "trust administratorship." As such the company was operated with "The Greater German Reich" listed in the commercial register as a public partner in the firm. When the succeeding independent Government of Czechoslovakia arose after the war, it, of course, refused to consider that a company could exist in that form and nationalized the company. Omitting certain business details which are irrelevant to this main issue, one may say that the partnerships outside of both Czechoslovakia and Germany continued to operate and do business and after the war these partnerships sought to register the trademarks in Germany. This registration was opposed by the nationalized Czechoslovakian company on the ground that it, and not the former partnership, was the successor to the Czechoslovakian partnership and as such had the sole right to register the names "Koh-I-Noor" and another in Germany. The final decision was that the nationalized Czechoslovakian company could not use the original trademarks outside Czechoslovakia and could not register them in Germany. German law recognized only the right of the companies which had previously used the trademark in other countries and these were permitted to register that mark in Germany.

Thus the case is one of refusal by the courts of Germany to enforce any foreign confiscation decree in Germany. The nationalization of the former German property in Czechoslovakia, property which in turn had belonged to independent partners driven out by the German Reich, had conveyed no extraterritorial authority and the nationalized company could not appropriate to itself the original trademarks previously in use outside Czechoslovakia whether or not they had previously been registered in Germany and whether or not that Czechoslovakian company had attempted to register them at a prior date.

*N. V. Verenigde Deli-Maatschappijen v. Deutsch-Indonesische Tabak-Handelsgesellschaft m.b.H.*, Ct. App., Bremen, Aug. 21, 1959, [1963] Int'l L. Rep. 16 (Fed. Rep. Ger. 1959) DIS. OP.; BAR COMM.; FORDHAM 662. The manner in which this case has been cited is indicative that those who cited the case recognize that the decision supports the act of state doctrine.

The Government of Indonesia first had placed controllers, or receivers, in charge of Dutch enterprises in that island country and then had confiscated the properties, the date of confiscation being December 31, 1958. Tobacco grown on one of the confiscated estates was sent to Germany for sale. The Dutch company which had previously held the property on which the tobacco had been grown demanded that the tobacco be given to it as its property. (The request here was the same as that made in the *Sabbatino* case by C.A.V.) The court was asked to hold the act of state of Indonesia null and void and ineffective to transfer title. The German courts recognized the validity of the acts of the Indonesian Government in Indonesia and, therefore, the title of its property sent to Germany for sale. This case was decided by the courts of the Federal Republic of Germany.

*M. V. Aktieselskabet K. H.*, June 13, 1934, 145 Entscheidungen des Reichsgerichts in Zivilsachen 16, [1933-1934] Ann. Dig. 501 (No. 217). CONG. MEMO. After World War I the Government of France appropriated all of the assets in France of a certain German partnership which had before that war done business in France. This German partnership had a bank account in a Danish bank. The liquidator of the French assets of the German concern demanded of the Danish bank a balance standing on the books of that bank in the name of the German partnership which had done business in France. The Danish bank complied with this request and paid the balance of the account to the French liquidator. Thereafter the German company, in a German court, sued the Danish bank for the balance which was standing in the name of the German

company and recovered. The principle on which the case was based was that seizure of the German assets in France was a "confiscation," but the relationship between the Danish bank and the German company was covered by Danish law. Therefore, the Danish bank owed the balance of the account to the German entity as it was prior to the confiscation. The voluntary payment by the Danish bank did not discharge the bank's obligation to its depositor.

The Digest of the case fails to show that by the deposit agreement between the Danish bank and the German firm, its depositor, that performance (payment on demand) was to be only in Denmark and only in Danish crowns. The bank account was an external asset not collectible by the French liquidator since his authority only extended over assets in French jurisdiction. The court said: "Correspondingly the principles of the German conflict of laws consider the Danish law as applicable to defendant's obligation in the absence of any stipulation to the contrary."

*Summary as to Germany:* Seven cases were cited. Of these, one court held, and the courts in two cases assumed, that German property seized abroad by the Allies would be returned to the original owner if the property came into Germany, on the ground that seizure of German external assets by the Allies as reparations was confiscation and, therefore, null and void. After a number of such cases had been determined by lower courts, the Allies then governing Germany reiterated their position that such decisions were contrary to German law as administered and imposed by the Allies, and deprived all courts of Germany of jurisdiction to hear any claim to property formerly situated abroad and owned by Germans, and then brought into Germany as the property of another. The remaining cases either supported the act of state doctrine or were extraterritorial cases only and were not an exception to the act of state doctrine. One case, upholding the act of state doctrine, was decided by German courts after the establishment of the Federal Republic of Germany.

*Conclusion as to Germany:* No case of those cited is authority for the proposition that under the laws of Germany an act of state of a foreign country can be declared null and void because contrary to international law.

#### FRANCE

*Société Potasas Ibericas v. Nathan Bloch*, Cour de Cassation (ch. civ.), March 14, 1939, [1939] *Dalloz Hebdomadaire* I. 257, [1938-1940] *Ann. Dig.* 150 (No. 54) (Fr.). *DIS. OP.*; *CONG. MEMO.*; *BAR COMM.*; *FORDHAM* 641.

*Volatron v. Moulin*, Cour d'Appel d' Aix, March 25, 1939, [1939] *Dalloz Hebdomadaire* I. 329 [1938-1940] *Ann. Dig.* 24 (No. 10) (Fr. 1939). *DIS. OP.*; *CONG. MEMO.*; *BAR COMM.*; *FORDHAM* 642.

The *International Digest* states concerning the case of *Societe Potasas Ibericas v. Bloch*, "The facts of the case are not clear." However, reference to the report in *Dalloz Hebdomadaire* of these cases indicates that there is no real question concerning the facts of either of the two cases which are on the same state of facts. One of the witnesses before the Congress stated that the two cases were based upon "substantially the same facts." *H.R. 7750 Hearings* 595.

During the Civil War in Spain, the owners of certain potash mines in Catalonia closed the mines and resided in France. The predominant stock ownership and management of the company owning these mines was French and Swiss. The local government at Catalonia wished to use these mines and passed a local decree that they would be seized if the owners did not return and open them. The owners refused to do so. Thereafter certain shipments of potash were received in France and were each claimed by the holder of the bill of lading for the particular shipment. These shipments were identified as material from the mines and the property was claimed immediately on behalf of the mine owners. In one case the company sued in its own name and in another a court-appointed agent represented the company. The defendant in each case was the holder of the bill of lading of the shipments which had been made. He was

identified as an agent of the government of Catalonia. In at least one of the cases the shipment was at first awarded to the holder of the bill of lading solely on the ground that he held the bill of lading, and proof offered by the mine owners as to the ownership or right of possession was not accepted. However, this decision was reversed. It was found in one of the cases (the *Volatron* case) that the holder of the bill of lading "refused to reveal in what manuer he came to possess the merchandise, from whom he received it and at what price." On the argument of the appeal the rejected proof to prove ownership by the mine owners was accepted as controlling and the shipments in both cases were awarded to the mine owners. In neither case was there any evidence of any official act by a government in nationalizing the mines. No "act of state" or actions taken under such sovereign act were before the court. Nor does it appear that any such act had been taken. The evidence was merely that someone had shipped potash from these mines, and on the evidence this was awarded to the owners of the mines. After this decision, the Government of Spain at Valencia "temporarily" nationalized the mines. The date of this nationalization decree was subsequent to the date when the shipments of potash had been received in France. Then the local government of Catalonia where the mines were situated passed a local decree that this "nationalization" of the mines should be retroactive to a time prior to the shipment of the potash from Spain to France. The higher French court refused to recognize any transfer of title under such a plea stating: "The retroactive character of such a provision cannot in respect of French law affect acquired rights particularly regarding goods which have previously been landed in French territory."

The act of the persons, whoever they may have been, who seized the mines and shipped the potash was without any government authority and the property was not within the jurisdiction of Spain nor in its official possession when the act of state occurred and, of course, Spain's efforts to transfer title to property in France, the title to which had been confirmed under the laws of France, was a mere abortive effort of extraterritoriality.

V. E. B. *Carl Zeiss Jena v. Firm Carl Zeiss*, Cour d'Appel Paris (First Chamber), April 2, 1963, [1964] *JOURNAL DU DROIT INTERNATIONAL* [hereinafter cited as *CLUNET*] 622. *BAR COMM.* The report of the Committee of the Bar Association of the City of New York, which cited this case to Congress, states in parentheses after the citation "text of decision on file in library of Ass'n of Bar of City of New York." This 50-page opinion of the Court of Appeal of Paris appears never to have been published. But from that decision an appeal was taken to the highest appellate court of France, the Court of Cassation, and the decision of that court, affirming the decision of the Court of Appeal of Paris is reported at 3 *CLUNET* 622 (1966). At the time, however, when the Bar Association submitted its report, the same parties which were parties to the case cited, had litigated the same issues there presented in other countries, namely, Germany, Egypt and Austria. Comments on the cases in these three countries can be found in a digest prepared by M. Magdalena Schoch, United States Department of Justice, 53 *AM. J. INT'L L.* 687 (1959). Another case between the same parties and on the same issues had been decided in the Netherlands and can be found reviewed (in French) in 91 *CLUNET* 616, 621 (1964), and it also is included in the article above mentioned. There was also at that time a case pending in England. The decision of that Court of Appeal can be found in 1 *All E.R.* 467 (1965) and the decision of the House of Lords, 2 *All E.R.* 536, 591 (1966), which sent the case back for trial. There is no final decision in England on the issues presented.

The *Zeiss* cases exist against the background of Germany's unconditional surrender, Allied occupation and the subsequent defection of Russia as one of the four powers which, violating the role assigned to it as an occupying power over part of Germany with the other Allies, continued to hold that area and made efforts to set up a new country, "East Germany," which it has recognized as an independent country although its existence as a nation has not been recognized by the countries making up the former Allies. Because the issues have been argued in Germany (both East Germany and West Germany), Austria, the Netherlands, France, Egypt and England, any one

of the cases can be relied upon for the facts. Since the issue was which of two contending companies could use the Zeiss trademark in Germany and other countries, decisions of the East German courts would be irrelevant; and the English courts have not yet arrived at a final decision.

The facts of the case are important. The firm of Carl Zeiss and the Carl Zeiss Foundation had for many years prior to World War II existed in Germany with principal office and place of business at Iéna (Jéna), Thuringia, Germany. It had plants in other parts of Germany and also one in Austria. There were two organizations, because at the death of the founder, Carl Zeiss, in 1848, a "foundation" had been set up to secure and administer certain funds. The income from this foundation was used to promote scientific studies, particularly mathematics at the local university, and for other charitable purposes affecting particularly the employees and former employees of the Carl Zeiss works.

The area in which Iéna was situated was first seized by United States troops in occupation of Germany by the Allies, but in accordance with the Yalta Agreement, United States troops evacuated the area in April, 1945, and Russian troops took over the occupation. Most of the persons constituting the top management of the Zeiss firm left Iéna with the American troops and took considerable equipment with them. They then set up their business in Heidenheim in what is now West Germany. The Russians, upon entry, appear to have seized part of the equipment of the plant (an irrelevant circumstance here) and at some later date after the plant had been rehabilitated and had begun to operate, the Russians then "nationalized" the Zeiss firm Volks Eigener and foundation in Iéna, giving them the name of "Volkseigener Betrieb." This was translated in the decision in the Court of Appeal as "*entreprise propriété du peuple*." This enterprise in subsequent litigation was then designated "V.E.B. Zeiss and Foundation Iéna."

The managers of the older company which had set up business in Heidenheim were thereafter known as "Firm Zeiss and Foundation Heidenheim." Each of these two "Zeiss" firms contended that it was the legitimate successor of "Zeiss" as it had existed before the war and was, to the exclusion of the other, entitled to use the name "Zeiss" and the Zeiss trademarks wherever they were registered in the countries of Europe or elsewhere.

The division between East and West Germany became more and more acute and after the Soviet Government on June 12, 1964, "recognized" East Germany as a new and independent state, the governments of the United States, England and France undertook to counteract the effects of this action by stating their collective position in regard to this action by Russia. On June 26, 1964, these three countries simultaneously issued a tripartite declaration regarding the agreement between the Soviet Government and the so-called German Democratic Republic (East Germany). The tripartite declaration indicated it had been signed after consultation with the Federal Republic of Germany, then an independent government no longer under the control of the occupying forces of the Allies. Article 3 of the agreement stated:

3. The Three Governments consider that the Government of the Federal Republic of Germany is the only German government freely and legitimately constituted and therefore entitled to speak for the German people in international affairs. The Three Governments do not recognize the East German regime nor the existence of a state in eastern Germany. Dep't of State Press Release No. 300, June 26, 1964; 51 DEP'T STATE BULL. 44 (1964). See also AM. J. INT'L L. 995 (1964).

Of the five countries, the courts of each determined that the Zeiss company which had left Iéna with the American troops and set up business in Heidenheim was the continuation of the original Zeiss and had the authority to use the Zeiss trademarks. The issues which were discussed in these various cases were briefly: (1) There was no act of state since East Germany is not recognized as a state; (2) The occupying authorities of Russia could not commit an act of state since they lacked authority to do so under the Allied agreements by which the country was governed by the Allies; (3) Even if the seizure of the Zeiss plants in Iéna could be considered an act of state, it had no extraterritorial effect and the confiscated company had no claim on extraterritorial assets; (4) Zeiss, Heidenheim, was the successor to the Carl Zeiss firm and

Foundation and the V.E.B. Iéna Foundation was not; (5) The Zeiss registered name and trademark was a "German extraterritorial asset" which the Allies had confiscated as such, and thus property could be restored by individual Allied countries in accordance with their own national interests. (This was particularly stressed in the French case.)

In all of the above there was no exception to the act of state doctrine, even assuming that an act of state was involved.

The similarity of this decision to the decisions in the United States involving the Bank of China is striking. The Bank of China had operated from Shanghai for years and after the Communists came into China in 1949 continued to operate there. However, many of the officers of the Bank of China left Shanghai and moved by various stages to Taiwan when the Communists came in. After some indecision by United States courts in an apparent endeavor to postpone a final decision pending more stable political conditions, the United States courts found that the migrating Bank of China then existing under the Taiwan Government was entitled to receive bank accounts held for "Bank of China" by the Wells Fargo Bank in San Francisco. *Bank of China v. Wells Fargo Bank & Trust Co.*, 104 F. Supp. 59, *modified*, 209 F.2d 467 (9th Cir. 1953).

*Enterprise Nationale L. & C. Hardtnuth, Fabrique de Crayons Koh-I-Noor, L. & C. Hardtnuth, Cour d'Appel Paris, June 25, 1958, [1958-II] Int'l L. Rep. 50 (Fr. 1958). BAR COMM.* The facts of this case are the same as the facts presented to the Austrian court and to the courts previously mentioned. In brief, a partnership which had done business under the name of L. & C. Hardtnuth had carried on business in Czechoslovakia for many years and was nationalized by a decree of the Czechoslovakian government. The partners thereupon left Czechoslovakia and formed a partnership and later a corporation in France to carry on the business of the former partnership. The issue here again was as in all the other cases involving this company, would the nationalized company in Czechoslovakia be permitted to use the trademarks in France? The court held that the nationalization would not have any effect outside of the territory of Czechoslovakia and that the nationalized company could not use the trade names which were an asset of the company not in Czechoslovakia and not affected by the Czechoslovakian confiscation.

*Jellinek v. Levy, Trib. Comm., Seine, Jan. 18, 1940, [1940-1942] Ann. Dig. Supp. 24 (Fr. 1940). BAR COMM.* Three persons were proprietors of a textile business at Brno, Czechoslovakia, and did business under the firm name of Jellinek and Seidl. They had sent to one Victor G. Levy in France certain quantities of goods which he had sold on their account and he had certain other pieces of cloth available unsold. The date of this case was 1940 and the partnership mentioned, being Jewish, had been seized by Germany while governing Czechoslovakia. Levy who held the cloth had received a demand from a person of German nationality claiming to represent the Czechoslovakian partnership or its successor. Thus the holder of the cloth was subject to adverse claims. He was willing to hand back the cloth upon payment of a certain amount due him but, of course, wished to give it to the proper person and receive the amount due him. The court found that the confiscation by Germany in Czechoslovakia of the partnership would have no extraterritorial effect, because the partners were "non-Aryan persons." The former partners were entitled to the cloth and such interests as they had before their business in Czechoslovakia had been confiscated. The court ordered the cloth to be delivered to them subject to the amount due Levy.

*Union des Republiques Socialistes Soviétiques v. Intendant Général Bourgeois ès Qualité et Société La Ropit. Cour de Cassation (ch. req.), March 5, 1928, [1928] Sirey Recueil Général I. 217, CLUNET 674, [1927-1928] Ann. Dig. 67 (No. 43) (Fr.). CONG. MEMO; FORDHAM 640.* This case does not involve an executed act of state. On January 26, 1918, the Bolshevik government of Russia, later known as the Soviet Government of Russia (U.S.S.R.), by a decree of that date nationalized the Merchant Marine of Russia. At that time the U.S.S.R. had control of very little Russian territory. Under the decree mentioned, it purported to nationalize a maritime company known as La Ropit. At the time in question the ships belonging to La Ropit were based in

Odessa, over which at that time the predecessor of the U.S.S.R. had no political control whatever. The ships left Odessa and never returned to the jurisdiction of the Soviet Government. Instead they sailed to France where they were operated by persons who had previously done business in Russia under the name "La Ropit." After France recognized the Soviet Government politically, the French ambassador brought suit in France to gain possession of some of those ships which were then in French ports. At that time the Soviet Government had never had these ships under its jurisdiction and had never had possession of them. The date of the case involving these ships was a little more than ten years after the decree of confiscation. The French court was not asked to *recognize* a confiscation of any property in Russia. It was asked to *enforce* in France a Soviet confiscatory decree relating to these ships. This it refused to do. The case is, therefore, a pure question of refusal to enforce a confiscatory decree extraterritorially.

*NOTE:* It will be remembered that by an executive agreement entered into with the U.S.S.R. known as the Litvinov Agreement the United States Government did *enforce* in the United States the Soviet decrees of confiscation of property of Russian companies nationalized in Russia. *United States v. Pink*, 315 U.S. 203 (1942).

For a complete statement of the facts underlying the *La Ropit* case, see *The Jupiter* (No. 1), [1924] P. 236 (C.A.); *The Jupiter* (No. 2), [1925] P. 69 (C.A.); *The Jupiter* (No. 3), [1927] P. 122, *appeal dismissed*, [1927] P. 250 (C.A.). These cases, which concerned another of the *La Ropit* ships which had escaped under the same conditions, are summarized in [1925-1926] Ann. Dig. 136 (No. 100). *Cf.*, *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 75-76 n.1 (1938) (concerning *The Jupiter*), and subsequent decisions in the same case, *The Navemar*, 24 F. Supp. 495 (E.D.N.Y. 1938), *rev'd*, 102 F.2d 444 (2d Cir. 1939). The issues became moot by recognition of a different Spanish Government and the return of the ship to private ownership. *The Navemar*, 103 F.2d 783 (2d Cir. 1939) (per curiam).

*Summary as to France:* Five cases of French courts cited; every one of them related to an effort of a foreign government to persuade the courts of France to hand over property or recognize right to property which had never been in the jurisdiction or under the control of the confiscating government.

*Conclusion as to France:* No one of these cases shows an exception to an act of state doctrine. The decisions are conventional, are in accord with the United States law before the Sabbatino Amendment, and would not be affected in any way by the Sabbatino Amendment.

#### GREECE

Case No. 1268/1937, Court of First Instance of Piraeus, *Ephemeris Hellinon Nomicon*, 4 Dclta 560. CONG. MEMO; FORDEAM 648.

*NOTE:* A Greek case identified as one discussed by a Greek writer is cited CONG. MEMO. In the text of the report of the Committee of The Association of the Bar of the City of New York (BAR COMM.), Greece is mentioned as one of the countries which makes an exception to the act of state doctrine, but no Greek case is cited in the list of cases given in support of that statement.

In this case a ship, the *Inocencio Figaredo*, flying the Spanish flag, while lying in the Greek port of Piraeus, was attached by a creditor of the Spanish Popular Front government during the time of the Spanish Civil War. His claim that this ship was the property of the Spanish Popular Front government was based upon a decree requisitioning all Spanish ships. His complaint against the Spanish Government was based upon an alleged breach of a contract (charter party) with the Popular Front government. At no time did the Spanish Government claim title to the ship or any control of it. The evidence showed that the ship which was attached had not been in any Spanish port since the requisition decree nor in control of the Spanish Government. The captain testified he was employed by the owners who were not then in Spain. The courts dismissed the case on the ground that the ship was not the property of the Spanish Government, saying: "Furthermore it is not established that this ship



has in fact been confiscated by the Spanish Government, and is now in possession of the Spanish Government." Here there was no "executed" act of state. There was no jurisdiction by Spain. The case is not an exception to the act of state doctrine.

*Summary as to Greece:* One case only cited. It does not involve an executed act of state, but is a pure case of extraterritoriality in which a foreign country was asked to enforce within its own territory an unexecuted act of state of a foreign country.

*Conclusion as to Greece:* No case cited showing any exception to the act of state doctrine.

#### ITALY

Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., Civ. Trib. Venice, March 11, 1953, 78 II Foro Italiano I. 719, [1955] Int'l L. Rep. 19 (It. 1953). DIS. OP.; CONG. MEMO; BAR COMM; FORDHAM 623. This is another case involving oil sold by Iran. The Anglo-Iranian Oil Company requested the Civil Court of Venice to grant an injunction against the delivery of the oil in one ship which had loaded the confiscated oil in Iraq and had arrived in Venice. The court refused to grant such an injunction. In its decision it was careful to state the principles on which the decision was based, *i.e.*, the act of state principle. The court said:

The recognition in Italy of the validity of the effects which these acts had already had in Persia cannot be termed co-operation to make them become effective; it constitutes no more than an acknowledgment that the effects have indeed taken place, *i.e.*, accepting the effects produced, which in themselves—and considered separately from their cause—are in no way contrary to public order.

In short, where legal effect under the laws of other countries was given to events which had happened outside of Italy, those effects were recognized in Italy.

Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., Civ. Ct., Rome, Sept. 13, 1954, [1955] II Foro Italiano I. 256, [1955] Int'l L. Rep. 23 (It.). DIS. OP.; CONG. MEMO; BAR COMM.; FORDHAM 624. The previous case was appealed to the Civil Court of Rome. The lower court had dealt with the oil carried in one ship; this court also considered the oil in three other ships which had arrived in Italy from Iran. The court at Rome affirmed the court at Venice that the claimant, the Anglo-Iranian Oil Company, had no title to the oil but that the purchaser who had bought the oil from the National Iranian Oil Company, the Government agency of Iran had good title. It was the only case of those cited where the court felt it necessary to inquire if the action was legal under the laws of Iran. It found that the action was legal there. It considered cases throughout the world and mentioned particularly judgments of Antwerp and Anheim (Belgium) and of the district court of New York (U.S.A.) which it found "definitely denied that any foreign court is entitled to decide on the lawfulness of an expropriation carried out by a foreign government." It mentioned also the decision of the Court of Tokyo, September 21, 1953, which had already handed down a decision concerning this very act of confiscation and the oil produced from the confiscated properties, holding the seizure by Iran had transferred title to the oil, but on further consideration the court's final determination rested on its decision that the seizure of the oil was not a "confiscation" because some future indemnity had been promised. The act was not, therefore, contrary to international law.

Koh-I-Noor Tűzkarna L. & C. Hardtmuth Narodni Podnik v. Fabrique de Crayons Hardtmuth L. & C., S.r.l., ct. App., Turin, June 17, 1958, [1958-II] Int'l L. Rep. 44 (It.). BAR COMM. This is another one in the series of actions brought by a nationalized Czechoslovakian company to secure the use of the trademarks which that company had used before nationalization. In Italy the court decided as courts of other countries had decided that trademarks registered in Italy were assets of the corporation in Italy and were not reached by the confiscation of the seized company in Czechoslovakia. It

points out that the decisions in Switzerland, the United States and the United Kingdom were all similar in refusing to grant extraterritorial effect to foreign seizure. The nationalization in one country has no effect on property not within the confiscating country. The court said:

Where the guarantee of an adequate indemnity and its payment is lacking, the expropriation becomes a confiscation, which is a typically political act and cannot, therefore, produce any effect outside the country of confiscation.

*Svit Impresa Nazionale e Bata s.p.a. v. Soc. B.S.F. Stiftung, Cipera e Bata*, 40 *Rivista di Diritto Internazionale* 264 (1957) (Ct. App. Bologna 1956). *BAR COMM.* A company known as Veca was a subsidiary of the Czechoslovakian shoe manufacturing company known as the Svit Nardoni Podnik. This company had formerly been known as Bata, S.A. The Czechoslovakian company had been nationalized. In 1948 the shareholders of the Italian subsidiary of the Czechoslovakian company placed the Italian company in liquidation. Then the representatives of the nationalized Czechoslovakian company claiming by right of the Czechoslovakian state, and also claiming rights in Veca as a stockholder representing 40,000 shares out of the total share capital of the company of 86,500 shares claimed a right to have the assignment of the Italian company's property revoked. The nationalized Czech company claimed that it had never consented to this liquidation and that, as the successor of the original Bata Company and as a substantial shareholder in Veca the Italian company could not be liquidated without the consent of the nationalized Czechoslovakian company. The lower court refused this plea and the higher court at Bologna rejected the appeal. The court stated that the nationalization decree of Czechoslovakia relied upon by Svit Narodni Podnik would have no legal effect upon the rights to property formerly possessed in Italy by that company prior to nationalization and therefore upheld the liquidation of the assets of the Italian company.

*NOTE:* This proceeding was wholly comparable to the laws in New York under which a receiver was appointed for the New York assets of C.A.V. in the *Sabbatino* case. This was to protect the property in the United States for the benefit of creditors of the then nationalized company in Cuba. Later the receivership was dissolved as the court found the old company operating then in New York capable of managing its own assets in New York which, not being in Cuba, had not been affected by the nationalization decree. *Schwartz v. Compania Azucarera Vertientes-Camaguey de Cuba*, 39 *Misc. 2d* 63, 70-71, 240 *N.Y.S.2d* 247, 254-55 (Sup. Ct. 1962).

*Summary as to Italy:* Four cases of Italy cited: two relating to claim of the Iranian Oil Company, being the only ones of the four cases cited which involve the *Sabbatino* question, *i.e.*, transporting of property subjected to a fully executed act of state from one country to another with a request by the former owner that the court refuse to recognize a transfer of title by a confiscatory decree. One was decided on the basis of the act of state, *i.e.*, even if the act complained of was alleged to be one of confiscation, good title was obtained. That same case on appeal was decided on the ground that the act complained of was not contrary to international law as some promise of compensation had been made. The other two cases did not involve any exception to the act of state doctrine, being purely efforts of a nationalized company in one country to secure assets in another country which had belonged to the company before nationalization. Both cases decided conventionally on the basis that confiscatory decrees have no legal effect outside of the territory which promulgates such a decree and executes under it.

*Conclusion as to Italy:* No case cited in Italy indicates any exception to the act of state doctrine.

#### JAPAN

*Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabuski Kaisha*, Dist. Ct., Tokyo, [1953] *Int'l L. Rep.* 305, *aff'd*, High Ct., Tokyo, [1953] *Int'l L. Rep.* 312 (Japan). *DIS. OP.*; *CONG. MEMO*; *BAR COMM.*; *FORDHAM* 628. This is another case involving the seizure by the

Iran Government of the oil concession and properties of the Anglo-Iranian company. A Japanese company had also purchased oil in Iran from the Iranian Government agency and had transported that oil to Japan in a tanker it had supplied for the purpose, the Nissho Maru. Here, as in Aden and in Italy, the Anglo-Iranian Oil Company claimed title to the oil. It asked the court to declare the Iranian seizure "null and void" and insufficient to transfer title and to declare the Anglo-Iranian Oil Company the owner. The lower court before which the case came refused to recognize the title of Anglo-Iranian Oil Company but recognized the validity of the title obtained by the Iranian law and the seizure of the property. In answer to the contention that a law which was contrary to international law was void, the lower court said: "This Court is not convinced that there exists a universally established principle of international law which answers the question in the affirmative."

The Court of Appeals at Tokyo confirmed the lower court's opinion. In so doing it declined to commit itself on the question propounded by the Anglo-Iranian Oil Company. The Court of Appeals of Japan in regard to this same question presented to the lower court said:

And the present Court, which has failed to find any established rules of international law governing the matter, has confined itself to taking the attitude that it is impossible to pass on the validity or invalidity of the said Law and has not concluded positively that the Law is valid. This has had indirectly the same effect as if we recognized the Nationalization Law as valid; and that has resulted in our denying the appellants' ownership of the oil in question. We do not, however, think that these matters are contrary to the public policy of this country.

*Summary as to Japan:* One case cited with reference to the lower court's opinion and to the appellate court's opinion. Both courts upheld the title which was transferred by the seizure in Iran of the Anglo-Iranian Company's property. The title of the Iranian Government, although claimed to have been acquired by a confiscation decree contrary to international law, was recognized.

*Conclusion as to Japan:* The laws of Japan do not recognize an exception to the act of state doctrine.

#### THE NETHERLANDS

P. T. Escomptobank v. N.V. Assurantie Maatschappij de Nederlanden, Ct. App., The Hague, June 6, 1963. GONG. MEMO; BAR COMM. This case does not involve any claim by a confiscating government of title to property within that country's jurisdiction or under its control at the time of a confiscatory decree. The facts indicate a somewhat unusual method of doing business but do not show any exception to the act of state doctrine. The N.V. Assurantie was a long-established insurance company of the Netherlands which for its convenience in doing business within Indonesia had, prior to the commencement of the oppressive acts by Indonesia against Dutch-owned companies, established several wholly-owned subsidiaries in Indonesia. These Indonesian corporations, wholly Dutch-owned, operated within Indonesia in underwriting various types of insurance risks. Not all of the risks were payable in Indonesian rupiahs, and when such obligation was undertaken, the Dutch-owned insurance company would secure a license necessary to increase foreign currency accounts in order that it might always have sufficient currency available to it for meeting all risks not payable in rupiahs. The Indonesian Government took two steps against these subsidiary companies: the appointment of a receiver or "control" over them and later confiscation of all of their assets. At the time of appointment of the receiver or control the several insurance companies had balances in the P.T. Escomptobank at the office in Indonesia and also in that same bank had its foreign currency accounts. Under normal law and procedure a bank account is an asset in the country where due demand on it is to be made. This is true both as to local currency accounts and foreign currency accounts even though the bank in which the foreign currency account may and undoubtedly will have its foreign currency cover accounts either in a branch of its own bank where that foreign currency is the local currency or in some other bank in that foreign country.

So it was with P. T. Escomptobank and the insurance companies.

However, the court found that from their inception these insurance companies in Indonesia had been conducted under a rather unusual type of business operation. By their very charter their operations were conducted by an agent in the Netherlands who had full authority from these companies to operate on their behalf. The P. T. Escomptobank claimed that immediately with the establishment of a "control" over the companies in Indonesia the authority of this agent in the Netherlands was cancelled. The Dutch courts held otherwise on the ground that the laws of Indonesia had no effect upon the business of these Indonesian corporations done in the Netherlands or of the power of the agent who carried on their business there. The P. T. Escomptobank also claimed that the foreign currency accounts must be paid to its "Controller" on his demand in Indonesia. Here the courts determined that the peculiar circumstances of the operation of these Indonesian businesses from the Netherlands were such that the foreign currency accounts were not payable to the "comptroller" in Indonesia but could be collected in the Netherlands. The fact that the business of the Indonesian companies was conducted from the Netherlands by an agent with full authority appears to be a justification for considering that foreign currency assets were not within Indonesia or subject to its exclusive control and the establishment of the "control" of the companies in Indonesia did not cancel the plenary authority of the agent in the Netherlands. When this extraterritorial extension of new Indonesian law was denied, the authority of the agent in the Netherlands continued and he had, of course, the authority to control all assets outside of Indonesia and if his authority had extended to the bank accounts as a general manager (although not specifically stated in the case) the foreign currency accounts were foreign assets. It is readily admitted that the determination of the situs of these foreign currency accounts is unusual unless fixed by agreement covering place of demand and performance and can be justified only on the basis of a long course of dealing between the P. T. Escomptobank and the Indonesian insurance companies under which their foreign business was conducted from the Netherlands. But even if the Dutch courts were in error in holding that the foreign currency accounts were assets payable outside of Indonesia, its decision as to the act of state doctrine was wholly conventional.

Senembah Maatschappij N.V. v. Bank Indonesia, Ct. App., Amsterdam, June 4, 1959, [1959] *Nederlandse Jurisprudentie* 855 (No. 350). CONG. MEMO; BAR COMM.; *FORDHAM* 657. This case has been misunderstood and misinterpreted. It does not involve a confiscation. It does not involve a transfer of title to property. The act of state complained of in this case was the act of the Indonesian Government in placing a receiver known as the "control" over the properties of Senembah (and other Dutch companies) in Indonesia held by Dutch persons and corporations. As this was an act of state which in any event would not be covered by the Sabbatino Amendment since no change of title was involved, it is irrelevant.

The case was decided in the lower court before the confiscation features of the Indonesian oppression of the Dutch became effective. However, the higher courts passed upon the case after the confiscation and considerable reference is made in the case to this fact; the courts holding as part of the ruling that "control" was contrary to international law, and with the dicta that subsequent confiscation was contrary to international law. The facts of the case prove the conclusions expressed.

Senembah, a Dutch corporation, grew tobacco in Indonesia under a concession. Before the oppressive acts by the Indonesian Government against the nationals of the Netherlands began, Senembah had obtained a loan from Bank Indonesia. Although made in Holland the loan was to be paid in Indonesian rupiahs in Djakarta. This loan was collateralized by tobacco warrants held by the bank in Indonesia and by other tobacco warrants held by the Indonesian bank in the Netherlands. At the time the receiver of "control" was made over the Indonesian account, Senembah owed something over 50,000,000 rupiahs. The control demanded the collateral for the loan from the bank and sold it for something more than the original loan. The control then in the name of the company, but, of course, without its consent in any way, borrowed further money from the Bank Indonesia. Senembah, in the Netherlands, considering

that the loan was paid by the sale of its collateral for more than the face amount of its loan, asked to have its collateral in Holland returned to it. The bank refused and Senembah sued the bank to get it back. The court found that the loan had been paid and gave the collateral back to the owner. There was no claim at any time by Indonesia or the Indonesian bank that by any act of Indonesia there was a transfer of title to property in the Netherlands. It was to secure the tobacco warrants pledged in the Netherlands as additional collateral in Indonesia for a loan already paid by sale of collateral, or perhaps as collateral for the new loan which Senembah had not contracted, that the bank claimed this property as collateral. It never claimed title to it. One source of misunderstanding in the case was found in the incorrect statement of the facts in the unofficial publication in the Dutch law journal. They were corrected when the court of appeals decision was reported.

In his testimony before the Committee on Foreign Affairs of the House of Representatives, the Attorney General testified concerning this case as follows:

The Dutch case referred to by Mr. Justice White, *Senembah Maatschappij N. V. v. Republiek Indonesie "Bank Indonesia"* Amsterdam Ct. App. [1959] *Netderlandse Jurisprudentie*, No. 73, is dubious authority for the proposition that Dutch courts refuse to recognize the validity of executed foreign acts of state which violate international law. Contrary to the apparent belief of some, there was no issue in that case concerning title to property in Holland. Senembah, a Dutch company, claimed as its own certain property in the Netherlands.

The Bank Indonesia (a government agency of Indonesia and the defendant in the case), though admitting that the property belonged to the plaintiff, demanded it solely on the ground that under Indonesian law Senembah had a duty to turn that property over to the bank. The Dutch court decided that Indonesian law, contrary to International law, was not effective outside of Indonesia and Dutch courts would not enforce it. To decide otherwise would have supplanted Dutch law. *H.R. 7750 Hearings* 1258.

*Hunzedal, Ltd. v. Smit*, Dist. Ct., Amsterdam, Jan. 3, 1940, [1919-1942] *Ann. Dig. Supp.* 33 (No. 20). *BAR COMM.* This case is explanatory of the general proposition that acts purporting to be "acts of state" performed by a military occupying enemy power have no validity unless in accordance with the Hague Convention. This is the same as United States law, and it is not changed by the Sabbatino Amendment.

A Polish company of Gdynia in Poland made a contract in 1938 with a Dutch shipyard to build a ship. In September of 1939, the Polish company ceded their rights to that contract to a Dutch company and shortly thereafter Poland was occupied by German forces who appointed an "administrator" for the Polish company which had ordered the ship. The facts of the case are not given with great clarity but it is inherent in the opinion of the court that orders must have been given by this "administrator," and his authority to speak in the name of the Polish company was questioned. The court said he had no authority outside of Poland whatever:

In any case such a measure [the appointment], being of a political nature and directed against persons to whom the authorities are not well-disposed, is contrary to Dutch public order and therefore cannot apply in Holland. . . .

*NOTE:* The decision not to recognize any authority of the German-military-appointed receiver, trustee, "protector" or by whatever name he was called was exactly the same legal conclusion to which United States courts came during the war. Many such German officials, trying to speak in the names of corporations in the occupied territory demanded bank accounts and the like in the United States. These claims were usually treated as "adverse claims" for protection of the banks, brokerage houses or corporations owing money to the foreign corporation over which the administrator had been appointed. In no case, however, was the authority of the "Reichs-protector" ultimately recognized.

Hahn Röhren-Walzwerk v. Stokaris (Banska à Hutni-Spalecnost Narodni Podnik, Interveners), Ct. App., Arnhem, March 11, 1952, [1952] Int'l L. Rep. 16. BAR COMM. This was an adverse claim, each party claiming to be the one who held a particular contract with a Dutch corporation known as Stokaris. One claimant was a German limited liability company by the name of Hahn Röhren-Walzwerk. The other was a nationalized enterprise under Czechoslovakian law which, claiming adversely to the other claimant, alleged that the other claimant had not made the contract in question with the Dutch company, but that the contract had been made by three individuals who were then operating in Czechoslovakia together under the name of Albert Hahn Röhren-Walzwerk and were registered under that name in the commercial register of Prague. This particular claimant also alleged that this group (or partnership) had been nationalized and that it was the successor and, therefore, entitled to the benefits of the contract with the Dutch company.

The court dismissed the claim of the nationalized Czechoslovakian company on the ground that as a nationalized company it had no claim to any assets in the Netherlands which had belonged to the Czechoslovakian partnership prior to nationalization. The contract with the Dutch company was performable in the Netherlands. Since this one adverse claimant, the nationalized Czechoslovakian company, had no claim on external assets, this left the only claimant in the action as the German corporation. This decision was, of course, in accord with conventional law in the United States as elsewhere in the world. The case does not show any exception to the act of state doctrine.

*Summary as to the Netherlands:* Four cases cited: one case does not involve an act of state as it was by an occupation authority and is governed by The Hague rules of land warfare. Two cases involve efforts of a nationalized company to secure assets outside of that country and, therefore, are questions of extraterritoriality only. In one case an Indonesian bank sought to obtain property in the Netherlands belonging to a Dutch company whose tobacco concession in Indonesia had been placed under Indonesian "control." The property in the Netherlands had been pledged with that bank as collateral for a loan which the Dutch courts found had been paid in full, by sale in Indonesia of other and different collateral. The Dutch courts rejected the plea that under Indonesian law the Dutch company in the Netherlands was required to turn over this property to the Indonesian bank.

*Conclusion as to the Netherlands:* None of the four cases show any exception to the act of state doctrine.

#### SWITZERLAND

Rosenberg v. Fischer, Fed. Trib., June 3, 1948, [1948] Ann. Dig. 467 (No. 50) (Swit.). CONG. MEMO; BAR COMM. The claim was made in this case for restoration of works of art which had been seized by the German Armies of Occupation in France and later sold to the defendant. This case does not involve an act of state. The German occupation authorities were governed by the rules of the Hague Convention. They could not commit an act of state because the occupation authority was not a government. Furthermore, this was an effort in Switzerland to secure recognition of the validity of the German rules created against the French Jewish population. The court makes the following statement which is completely explicit, indicating that an act of state was not involved and consequently there was no exception to an act of state:

Moreover, the German authorities responsible for these acts of spoliation formally repudiated the rules of international law. In the "statement of principle" drawn up by the "Einsatzstab Rosenberg" as a result of protests by the Vichy Government, one reads, in particular: "There can be no question of applying the Hague Convention, according to which private property must not be seized. The Jew and his property are outside the law because for millenniums he has, for his part, considered the non-Jews to be deprived of all rights." In his report Count

Wolff-Metternich declares that he repeatedly, but vainly, drew attention to the illegality of measures which violated the provisions of both the Hague Convention and the Ordinance concerning the protection of the arts of July 15, 1940.

Vereinigte Carborundum und Electritwerke v. Federal Dep't for Intellectual Property, Fed. Trib., Swit., Sept. 25, 1956, [1956] Int'l L. Rep. 24. BAR COMM. A certain Czech limited liability company, the Vereinigte Carborundum und Electritwerke, was the owner of a certain trademark "Carborundum" which was registered in Switzerland. The Czechoslovakian company was nationalized. Thereafter this nationalized company claimed the right to use the Swiss trademark. Conventionally the Swiss court held that the trademark as registered in Switzerland was a trademark outside of Czechoslovakia and confiscatory laws have only territorial effect. The court said:

It is a generally recognized principle of international law that public law has validity only in the State enacting it [principle of territoriality]. Accordingly, foreign public law cannot be applied or enforced in Switzerland unless Swiss public policy demands it—in particular, because Switzerland undertook by treaty to do so, or because the foreign public law supports private law which is applicable in Switzerland . . . .

German Assets in Switzerland (I.G. Farben) Case, Dist. Ct., Zurich, Aug. 26, 1949, [1949] Ann. Dig. 84 (Swit.) BAR COMM. This was an action by a creditor of I. G. Farben whose agent was to collect the debt due to him by I. G. Farben, in Switzerland. [NOTE: At the insistence of the Allies, Switzerland had agreed to turn over German assets in Switzerland to the Allies at the end of World War II. These the Allies used for payment of reparations in part.] The Swiss court observed that the Allies had taken the German property with no provision for creditors. The Swiss court found that the seizure by the Allies was a confiscation and that the Allied confiscatory legislation had no extraterritorial effect. The court said:

While the mere winding up of the company by the Allies does not itself affect the rights of creditors, the seizure of its assets without acceptance of its obligations has serious consequences for all creditors. These creditors have been expropriated.

*Summary as to Switzerland:* Three cases cited: one case does not involve an act of state. Two cases merely held that a confiscation, in one case by Czechoslovakia and in the other case by the Allies, including the United States, has no extraterritorial effect. Swiss courts will not enforce in Switzerland a foreign confiscatory decree. This is conventional interpretation of the act of state doctrine.

*Conclusion as to Switzerland:* Swiss courts under Swiss law recognize the act of state doctrine.

#### UNITED KINGDOM

Wolff v. Oxholm, 6 M. & S. 92, 105 Eng. Rep. 1177 (K.B. 1817). CONG. MEMO; BAR COMM.; FORDHAM 636.

*In re Fried Krupp, A. G.*, [1917] 2 Ch. 188. BAR COMM.; FORDHAM 637.

*In re Helbert Wagg & Co.*, [1956] Ch. 323, 347-49 (dictum). CONG. MEMO; BAR COMM.; FORDHAM 639.

Three cases are cited, all of which exhibit the same principle of law, which is not an exception to the act of state doctrine. The principle of law underlying each case is this: if anyone assumes the obligation under a contract to pay or perform in a country other than his own and the contract was at the time of its inception legal under the laws of both the country of the inception and the country of the performance, then the obligation remains the same regardless of changes in the laws of the country of which the obligor is a national. Thus, if a contract made elsewhere is payable or

otherwise performable in the United States, performance is governed by the laws of the United States regardless of any change in the laws of the country where the contract was made or where the obligor resides and does business. The only exception to this general statement would be where the parties themselves have specifically agreed in the contract that the laws of a country other than the country of performance shall be the governing law, relating to any alleged failure to perform the contract according to its terms. This statement of general law, with the one exception (created by the parties themselves), is exactly the same principle as that applied in the United States. United States law is fully set forth in the case of *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft*, 15 F. Supp. 927 (S.D.N.Y.), *aff'd per curiam*, 84 F.2d 993 (2d Cir.), *cert. denied*, 299 U.S. 585 (1936). There, various German entities had borrowed money and agreed to repay it in the United States in accordance with the terms of an indenture. By law, Germany exonerated them from making payments in dollars. United States courts held this was not a defense. The obligation remained in the United States. In short, a law absolving the debtors from their obligations is not effective extraterritorially.

The three cases cited are briefly as follows:

*Wolff v. Oxholm*: A British partnership did business with one Oxholm, a Dane who owed 21,000 pounds payable in England. Due to the interposition of a war between England and Denmark the Danish debtor under war regulations of Denmark paid the amount of his debt to the Danish treasury. Later when he came to England he was sued for the whole amount unpaid to the English creditor. The court held that the law in Denmark was not a defense to his obligations in England.

*In re Fried Krupp, A. G.*: At the commencement of World War I, a German ordinance was issued which forbade transmission of funds to Great Britain, Ireland or to the British Colonies and foreign possessions. One Fried Krupp had owed money to J. Wild & Co. of England, the debt being payable in pounds sterling in England. After the war the German company refused to pay interest on the money, claiming it was excused from so doing under the German law. The English court said that the laws of Germany had no effect in England and the debt, not having been paid in accordance with its terms, conventional interest could be recovered.

*In re Helbert Wagg & Co.*: In 1924 a certain German company entered into a loan agreement with Helbert Wagg & Co. of England for 350,000 pounds sterling. Payment of the loan was to be made in London free of German taxes and in every respect, except one, it was a loan made and payable and otherwise to be performed in London. That one exception was that the obligation was to be governed by the laws of Germany. Payment ceased with the German moratorium about 1933 and the default continued until after World War II. In 1956 Wagg made a claim against the German property fund in England on the ground that the company held the defaulted obligation of a German company. The court held that because the agreement for the payment provided that the obligation, although payable in England, should be governed by the laws of Germany and the German law excused the debtor, this was not a proper claim. In short, since there was an agreement that the laws of Germany should have extraterritorial effect the courts decided in accordance with the agreement the parties had made. This case is strictly one of interpretation of the terms of the contract. And in this case, but in this case only because of the terms of the contract, the laws of Germany had extraterritorial effect.

*Summary of Cases of the United Kingdom*: Three cases cited: all of them held that the laws of one country, which are changed, after an obligation has been created in another country by a national of the first country, have no extraterritorial effect unless the parties have agreed otherwise.

*Conclusion as to the United Kingdom*: English cases are no exception to the act of state doctrine.

*NOTE*: All of the courts in *Sabbatino* admitted that England recognized the act of state doctrine.