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International Law, Conflict Law and *Sabbatino*

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INTERNATIONAL LAW, CONFLICT LAW AND SABBATINO

WILLIAM R. GROVE, JR.*

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1. INTRODUCTION

The *Sabbatino* decision¹ appears to be a sound decision in result, but nevertheless it is submitted that it is not beyond reproach. Lewis Henkin has already indicated² that there is a need for the Supreme Court of the United States to clarify the source and scope of its "independent judicial lawmaking power" on matters relating to the foreign relations of the United States.³ Actually one could focus attention on many different facets of the decision, including the following: the classification of the act of state doctrine in the small but growing body of federal common law;⁴ the stature of the judiciary vis-à-vis the executive in decisions concerning foreign relations; the constitutional basis for the Court's judicial lawmaking power in foreign relations; the adoption of the balance of relevant considerations approach in determining if the act of state doctrine should

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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*, 84 Sup. Ct. 923 (1964).

2. Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964).

3. The Court seems to find adequate authority for enacting Act of State in the fact that foreign relations are "intrinsicly federal." But the Constitution does not declare areas or subjects to be "federal." Matters are in the federal domain because the Constitution granted some power to some branch of the national government. Does *Sabbatino* mean that every constitutional grant of power to the Congress, or the President, or the treaty makers, *ipso facto* implies also an independent power in the courts to regulate the subject by common law? May the Court in all such instances decide on its own authority that there shall be regulation, that regulation shall not be left to the states, as well as what the regulation shall be? *Id.* at 818.

4. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964).

be applied; the creation of an exception to the above approach so that in cases of nationalization, expropriation, and confiscation application of the act of state doctrine would be mandatory. Indeed, the opinion touches so many legal areas that Henry J. Steiner of Harvard was prompted to remark, "the *Sabbatino* opinion and dissent could provide text for a course on the foreign relations power and on the significance of customary international law for our national judiciary."⁵

The scope of this article must be somewhat restricted. The *Sabbatino* litigation extended approximately three and one half years and the proliferation of legal commentaries which it inspired has been astounding.⁶ Much of the comment and criticism was intended to be persuasive; moreover, the character of both court decisions⁷ and legal writings⁸ prior to *Sabbatino* were such as to lead one observer to conclude, "It is apparent that the act of state doctrine as a general rule is being eroded by an increasing number of exceptions and refinements, some of them reaching the very core of its traditional scope."⁹ Therefore, even those practitioners and students of law who followed the case in legal literature may have discovered discordant views on the scope, power, and applicability of the act of state doctrine. The rules of law were not clear; indeed rules of the law of the conflict of laws tended to be interspersed in discussions of international law. Confusion may have been anticipated had there been the caveat that the facts of *Sabbatino* place it on the borderline between these two rather amorphous and expanding bodies of law. This border is not well defined; here, concepts tend to blur, overlap, go through transitions, possibly even transpositions. The purpose of this study, then, is to attempt to clarify this border zone and to examine what

5. Steiner, *Responses to Banco Nacional de Cuba v. Sabbatino*, 5 HARV. INT'L L. CLUB J. 209 (1964).

6. To conserve space, the author will not present the myriad of legal commentaries, many of which are conveniently indexed in the Index to Legal Periodicals under "Banco Nacional de Cuba v. Sabbatino" in the Table at Cases and "Expropriation and nationalization" in the Subject and Author Index.

7. Prior decisions of the Court of Appeals of the Second Circuit had enunciated the "Bernstein exception," permitting resort to the forum's public policy in cases in which the executive indicated to the court that relaxation of the act of state doctrine would accord with State Department policy. *Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954). See also *Matter of the Claim of Herbert Brower*, United States Foreign Claims Settlement Commission Decision PO-1634, reported in 58 AM. J. INT'L L. 505 (1964).

8. See e.g., ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON INTERNATIONAL LAW, A RECONSIDERATION OF THE ACT OF STATE DOCTRINE IN UNITED STATES COURTS (1959); Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 AM. J. INT'L L. 305 (1960); Mann, *International Delinquencies Before Municipal Courts*, 70 L.Q. REV. 181 (1954); Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959). But see, Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 16 RUTGERS L. REV. 1 (1961); Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 AM. J. INT'L L. 141 (1960).

9. Bayitch, *Florida and International Legal Developments*, 18 U. MIAMI L. REV. 321, 345 (1963).

rules of law, in the author's opinion, actually play on the *Sabbatino* controversy.

A. Starting Definitions

Confiscation is the taking of private property by the state without payment or compensation to the divested owner.¹⁰ Expropriation is the taking or use of property by the state with adequate compensation, for example, the compulsory purchase of land and the requisitioning¹¹ of property. Nationalization may involve either confiscation or expropriation according to the degree of compensation.¹²

"Before the First World War cases of interference with private property by the state which had international effects were few and far between."¹³ White suggests¹⁴ that Soviet Russia was probably the first state to make use of the term "nationalization" in its municipal law. The term was used in the decree on the nationalization of banking made by the Central Executive Committee of Soviets on December 14, 1917. But on the international level of law, the diplomatic protests made to Soviet Russia after 1917 spoke of "confiscation." However, since the end of the Second World War many states have enacted "nationalization" measures, *e.g.*, England, France, Iran, Egypt, Indonesia and Cuba.

Nationalization, expropriation and confiscation are categorized as "acts of state." "Act of state" designates an executive, administrative, or legislative exercise of sovereign power¹⁵ in which the state has a policy interest *per se* as a state.¹⁶ Foreign judgments, although not necessarily exempt from act of state considerations, are typically concerned with private controversies in which no overriding national interest of the foreign sovereign justifies judicial abstention.

10. See Fawcett, *Some Foreign Effects of Nationalization of Property*, 27 BRIT. YB. INT'L L. 355 (1950); Van Hecke, *Confiscation, Expropriation and the Conflict of Laws*, 4 INT'L L.Q. 345 (1951).

11. "[R]equisition . . . is generally confined to the seizure of property in the public interest for a limited period, usually until the end of some emergency, and in return for compensation." CHESHIRE, *PRIVATE INTERNATIONAL LAW* 141 (6th ed. 1961).

12. Van Hecke, *supra* note 10, at 345. "[N]ationalization . . . is the permanent absorption of property into public ownership in furtherance of some political aim and in return for compensation." CHESHIRE, *op. cit. supra* note 11.

13. Fawcett, *supra* note 10, at 356.

14. WHITE, *NATIONALISATION OF FOREIGN PROPERTY* 2 (1961).

15. See Note, 35 N.Y.U.L. REV. 234 (1960).

16. RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 28a, comment a (Tent. Draft No. 4, 1960); see RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 41, comment c (Proposed Off. Draft 1962). The "act" usually is a "taking" of private property by the state for an alleged "public purpose." The "taking" may assume a variety of forms. See, *e.g.*, *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918) (military requisition); *Bernstein v. Van Heyghen Freres S.A.*, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947) (compulsory sale of stock); *Société Vinicole de Champagne v. Mumm Champagne & Importation Co.*, 10 F. Supp. 289 (S.D.N.Y. 1935) (sequestration); *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E.2d 798 (1938) (foreign exchange control); *Russian Reinsurance Co. v. Stoddard*, 240 N.Y. 149, 147 N.E. 703 (1925) (dissolution of corporation); *cf. Ingenohl v. Olsen & Co.*, 273 U.S. 541 (1927) (custodianship).

Judicial abstention, the refusal of courts to consider a topic appropriate for judicial review, had been the position adopted by American courts with respect to controversies involving foreign acts of state, until *Sabbatino* challenged this position. The judiciary has refused to review and thereby determine the validity of executive, administrative or legislative acts of foreign states. It has not felt free to disregard a nationalization on the ground that it did not comply with the municipal law of the acting state, that it violated the public policy of the forum, or that it violated some principle of international law. This position of the judiciary has been dubbed the "act of state doctrine,"¹⁷ and it appears to have sprung from a maxim in *Underhill v. Hernandez* that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."¹⁸

Property nationalized by the state may: belong to one of its nationals, an individual or corporation, and be situated within its territory; belong to an alien individual or corporation and be so situated; or belong to one of its nationals and be situated abroad. Nationalized property may, for convenience, be classified as local property of a national, local property of an alien, and foreign property of a national. A fourth classification, foreign property of an alien, is not subject to nationalization and will not be discussed in detail. It is a matter of international legislative jurisdiction and it may be noted that neither the situs of the property nor the nationality of the divested owner would be considered sufficient legislative contacts for a foreign state's nationalization decree to reach "foreign property of an alien." The following chart may illustrate further the four measures mentioned above:

<i>Nationality of Divested Owner</i>	<i>Situs of Property Affected</i>	<i>Classification</i>	<i>Municipal or Int'l Level Affected</i>
1. National of Acting State	Within Acting State	Local Property of National	Matter of Municipal Law of Acting State
2. National of Acting State	Without Acting State	Foreign Property of National	Matter of Extra-terri- torial effect under conflict law
3. Alien to Acting State	Within Acting State	Local Property of Alien	Matter of treatment of alien owned property under in- ternational law

17. Observe that where the act of state is subject to review in the courts of the acting state, one relying on the act could be in a better position in an American forum where the act is not reviewable under the act of state doctrine.

18. The classic statement of Chief Justice Fuller is as follows:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. 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. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

4. Alien to Acting State	Without Acting State	Foreign Property of Alien	Matter of allocation of legislative powers between sovereign nations under in- ternational law
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The first measure involves neither conflict law nor international law; it is a matter of internal municipal law of the acting state.¹⁹ The second measure is an action covered by the rules of conflict of laws. With respect to the third and fourth measures, the acting state's decree may conflict with principles of international law.

[I]n international conflicts situations general rules of international law unavoidably enter the picture, mainly in two respects: by allowing the testing of the foreign governmental act against substantive rules of international law, as it happened in the *Sabbatino* case, or, by checking such governmental acts against standards adopted by international law with regard to allocation of legislative powers between sovereign nations. . . . [T]he latter test is in many instances performed simply by relying on domestic conflict rules, apparently under the assumption that a foreign country will have international jurisdiction to legislate in the matter whenever conflict rules of the forum declare the law of such foreign country controlling. This, of course, is but an emergency solution since contacts used by the *lex fori* to identify the controlling foreign legal system are not necessarily the same as those adopted by international law in determining international legislative jurisdiction.²⁰

In examination of the *Sabbatino* case, one must bear in mind the two critical parameters mentioned above:

1. Nationality of the divested owner; and
2. Situs of property at the time of the formal publication or promulgation of the decree of expropriation or nationalization.

B. *Facts and Statement of the Sabbatino Case*

The facts in the *Sabbatino* case are not typical of the litigation in our courts regarding nationalizations. In most of the other cases arising out of nationalizations, the plaintiffs were the former owners of the

19. Where a state nationalizes or confiscates the property of its own nationals, there is no violation of international law. *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 227, 186 N.E. 679, 682 (1933). *Cf. Oetjen v. Central Leather Co.*, 246 U.S. 297, 301 (1918). *But see* the Nurnberg Charter art. 6(c), reprinted in the Nurnberg Trial, 6 F.R.D. 69, 77-78 (1946), which raises the possibility that a state may be held liable for inhumane acts committed on its own people. The principles of the Charter are part of international law. U.N. Gen. Ass. Resolution 95(1), Dec. 11, 1946.

20. Bayitch, *Florida and International Legal Developments*, 18 U. MIAMI L. REV. 321, 345 (1963).

property seeking to recover their property on the ground that the present owner should not be recognized in the United States. In contrast, in *Sabbatino*, the plaintiff in a United States District Court was an agency of the Cuban government seeking the recognition of a Cuban nationalization decree purporting to transfer title to property. The United States Department of State had described the Cuban decree as "manifestly in violation of those principles of international law which have been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary, and confiscatory."²¹ At the time of the nationalization decree, the United States officially recognized the Castro government.

The facts of *Sabbatino* have been frequently stated.²² The S.S. Hornfels, in territorial waters of Cuba, was being loaded with a cargo of sugar, which was the property of a Cuban corporation owned predominantly by United States nationals. Cuba enacted a decree nationalizing property of United States citizens, which included the sugar being loaded. The Cuban government then sold the sugar on the world market through a New York sugar broker. The Cuban corporation claimed that it, not the Cuban Government, was entitled to the proceeds of the sale in the possession of the New York broker. Acting pursuant to a statute authorizing the appointment of a receiver to liquidate the assets of a foreign corporation which has been nationalized, a New York state court ordered the broker to turn over the proceeds to the court-appointed receiver, Peter Sabbatino. Thereupon, an agency of the Cuban Government, Banco Nacional de Cuba, the assignee of the bill of lading for the sugar, brought suit in the United States District Court of the Southern District of New York alleging conversion of the proceeds by the broker and seeking an injunction restraining the receiver from exercising jurisdiction over the proceeds. The broker defended by challenging Cuba's claim of title to the sugar, urging that the decree did not pass valid title to the government of Cuba because the taking was in violation of international law. Finding that the nationalization violated international law because it did not provide for prompt, adequate and effective compensation, the district court granted summary judgment for the defendant. The Court of Appeals for the Second Circuit affirmed, narrowing the depositive grounds. The degree of discrimination against Americans was held to be a violation of international law when it was *combined* with a retaliatory purpose and a failure to provide adequate compensation.²³ The Supreme Court of the United States in an eight-to-one decision reversed, holding that the district court should have recognized the Cuban act of state.

21. State Dept. Note No. 397, July 16, 1960 (to Cuban Ministry of Foreign Relations).

22. See Banco Nacional de Cuba v. Sabbatino, *supra* note 1.

23. For an interesting commentary on discrimination, retaliation and adequacy of compensation see Dawson & Weston, *Banco Nacional de Cuba v. Sabbatino: New Wine in Old Bottles*, 31 U. CHI. L. REV. 63 (1963).

C. Introductory Foundation

The facts of the *Sabbatino* case place it on the borderline of international law and the law of conflict of laws. (In this discussion the term "international law" will mean public international law, and "conflict law" will mean private international law.²⁴) Therefore, care must be exercised to designate whether legal doctrines operating at the international level or at the municipal level are being discussed. But where is the precise boundary between international law and conflict law to be drawn? With respect to nationalizations, it can be said that international law deals with the responsibility of states for the treatment of aliens in connection with rights of property, so that the important factor is the nationality of the owner of the right or rights involved. On the other hand, conflict law deals with the jurisdiction of states and with the sphere of operation of measures of nationalization and confiscation, especially with regard to the granting or withholding of recognition of the extraterritorial effects of such measures. In this connection, the vital factor is the situs of the property at the time of the act of state which "takes" the property.²⁵

The problem of the law applicable on the acts of expropriation, requisition, and confiscation . . . would be a simple one if it were possible to be studied within the sphere of *stricto sensu* Private International Law. Then the generally accepted principle of this law under which the *lex rei sitae* governs every transferring of property would be applied also in expropriation. But the act of expropriation is a manifestation of state power and springs from the State the legal order of which does not regulate the right of expropriation in accordance with the principles of private law. . . . The inquiry, therefore, into the results of these acts in foreign countries eludes the circle of *stricto sensu* Private International Law and belongs to *lato sensu* one which contains the study of the conflict of laws of every kind.²⁶

Nationalizations, expropriations, and confiscations are generally only scrutinized from the viewpoint of international law. But this law alone is not always sufficient for the ascertainment of the private law consequences of these acts. It is generally accepted that international law and

24. In the continental doctrine the law of conflict of laws cannot be equated with private international law. For example, in France the questions of nationality and treatment of aliens are treated as part of private international law. Under this concept, there would appear to be little doubt of the connection between international law and private international law. The *Nottebohm* case exemplifies the question of nationality determined by an international tribunal.

But aside from this, questions of jurisdiction in conflict law lead straight to concepts of international law if questions of immunity or denial of justice arise.

25. WHITE, NATIONALIZATION OF FOREIGN PROPERTY 1 (1961); see Van Hecke, *Confiscation, Expropriation and the Conflict of Laws*, 4 INT'L L.Q. 345 (1951).

26. Massourides, *The Effects of Confiscation, Expropriation and Requisition by a Foreign Authority*, 3 REVUE HELLENIQUE DE DROIT INT'L 62, 63 (1950).

municipal (national) law constitute two different legal levels, despite the contacts existing between them. Therefore, in a concrete case, it is possible for a nationalization which is contrary to the principles of international law to be valid from the standpoint of private law and to produce all its consequences. On the other hand, it can happen that a nationalization which is permitted by international law will not be recognized by other countries because the public policy in their concept of conflict law excludes its execution.

On the international level a state's right to nationalize is limited to the property within its territorial boundaries.²⁷ On the municipal level, a municipal court of another state may "recognize" a foreign nationalization to the extent of granting it extraterritorial effect within its own territory. Such an action on the part of a municipal court would be within the realm of conflict law and not international law. This means that the non-recognition of foreign nationalizations or confiscations by municipal courts with respect to local property, on the ground that such measures have no extraterritorial effect, does not constitute a limitation on the exercise of the sovereignty of the nationalizing state in international law. Since the act of nationalization is a manifestation of state power, it is for international law to set the limits of the exercise of this power.

The role of international law is usually confined to the demarcation of the international limits within which the nationalizing state will move in the exercise of its sovereignty.

Private International Law [conflict law] is the appropriate one to solve all the other problems and especially the problem of selecting the applicable rule among several ones in order to give a solution to the conflict of laws that have connection with the legal relation in dispute.²⁸

Thus, even when municipal courts have passed upon the legality of the foreign act, a decision by such a court that the act was contrary to international law can affect only the rights of the parties in the specific case in relation to the property which is at the material time within the court's jurisdiction. The decision has no effect on the legality or otherwise of the original exercise of the sovereign right of the foreign state. It can neither prejudice nor promote any international claim that may arise out of that act. In the same vein, decisions affording recognition to the effect of foreign decrees on property situated within the territory of the legislating state at the time of the execution of the decree may be

27. For the purpose of territorial jurisdiction, besides actual territory it has been customary to assimilate the following state territory:

- a. The territorial sea;
- b. A ship bearing the national flag of the state wishing to exercise jurisdiction;
- c. Ports.

See STARK, AN INTRODUCTION TO INTERNATIONAL LAW 200 (1963).

28. Massourides, *supra* note 26, at 64.

regarded as being based on the principle of the law of conflict of laws, which is a choice of law principle, that the *lex rei sitae* governs. This principle legitimately may be viewed as a reflection, on the municipal level, of the principle of territorial sovereignty in international law.

It would seem pointless to discuss the relations between international law and conflict law without making quite clear what is meant by these two concepts, at least as far as they relate to the question of principles bearing on nationalizations, expropriations, and confiscations.

II. INTERNATIONAL LAW

International law is concerned primarily with the rights, duties, and interests of sovereign states. Normally, the rules of conduct that it prescribes are rules which states are to observe; as an example, treaties stipulate obligations which signatory states alone agree to perform. "It is rare to find a clause in such instruments ["law making" conventions and treaties] bestowing or imposing an obligation on an individual."²⁹ Therefore, although some modern treaties do bestow rights or impose duties upon individuals, and although the place of the individual in relation to international law is one of the fundamental propositions being questioned today,³⁰ international lawyers and diplomats continue to operate on the assumption that individuals are only incumbents of rights and duties insofar as they are objects, not subjects, of international law.³¹

Consequently, a foreign investor whose property is nationalized by an act of a foreign state must look to his own government for a remedy. He has no standing to sue under international law. Inasmuch as a state has a right to protect its nationals and their interests abroad, it is entitled to intervene diplomatically or to lodge a claim for satisfaction before an international tribunal when one of its nationals has sustained unlawful injury for which another state is responsible. In theory, the injury to the individual is an injury to his government; therefore, the claimant state is deemed to be injured through its subjects and either asserting its own claim for satisfaction, or asserting its right to insure respect for the rules of international law. The state seeks compensation for its own injury, which is measured generally by the injury done to its nationals. At the international level the injured national's only right is to claim through his state as against the state responsible. Actual practice (e.g., of the Department of State of the United States) shows that states regard the sponsoring or espousal of claims of their nationals as entirely within their discretion. Thus, justice in an individual case may be deemed less

29. STARK, *op. cit. supra* note 27, at 55.

30. See Kunz, *The Changing Science of International Law*, 56 AM. J. INT'L L. 488 (1962).

31. See Jessup, *Responsibility of States for Injury to Individuals*, 46 COLUM. L. REV. 903 (1946).

important than strategic diplomatic considerations. The state may decide not to espouse the claim on legal grounds or may delay in pressing the claim for political considerations. It must be noted that prior to the espousal of a national's claim the "local remedies rule" generally must be satisfied.

The exhaustion of local remedies is a recognized rule of international law, prescribing that a state may not take up a claim on behalf of its national and present it to the foreign state for settlement by diplomatic means, or to an international tribunal for judicial determination, unless the national has exhausted the remedies available to him in the foreign state.³² In most cases of nationalization, however, this rule will not come into operation since the injury to the alien is caused by the application of the foreign states municipal law, which is binding on the local courts. These courts are unable to give a remedy for an act which is not wrongful according to the law which they administer.³³

In the nineteenth century, an expropriation of the property of a foreign national would have been regarded as a clear basis for an international claim. At the present time, however, the widening control by states over their national economies and over almost every aspect of private enterprise, and the measures of nationalization of different industries adopted by so many states, makes it difficult to treat as contrary to international law an expropriation of foreign property for a public purpose in accordance with a declared domestic policy, when it is applied without discrimination to the nationals of the expropriating state and to aliens alike. It is generally agreed that to be valid under international law, an expropriation of foreign owned property must: (1) be for a public purpose or in the public interest; (2) not discriminate against aliens as such; and (3) provide for the prompt payment of just, adequate, and effective compensation.³⁴ However, the third requirement for some time has been under attack,³⁵ and the requirements in general are being ques-

32. Local remedies, as a rule, must be exhausted. See 6 MOORE, *INTERNATIONAL LAW* § 987, at 656. See also 5 HACKWORTH, *INTERNATIONAL LAW* § 521 (1943); 2 HYDE, *INTERNATIONAL LAW* 915-22 (1945).

33. "A claimant of a foreign state is not required to exhaust justice in such state when there is no justice to exhaust." Cf. *Cushing v. United States*, 22 Ct. Cl. 1, 40 (1886). See also 6 MOORE, *INTERNATIONAL LAW* § 988, at 677 (1906); Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure?* 31 BRIT. YB. INT'L L. 452 (1954).

34. There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. *Banco Nacional de Cuba v. Sabbatino*, 84 Sup. Ct. 923, 941 (1964).

35. Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states. *Banco Nacional de Cuba v. Sabbatino*, 84 Sup. Ct. 923, 941 (1964).

tioned.³⁶ In *Sabbatino*, the Cuban nationalization decree appeared on its face to be overtly retaliatory,³⁷ and its provision for compensation was largely illusory.³⁸ Thus, the divested American owners naturally challenged the taking as a violation of international law.

The manner in which the divested owners challenged the taking was rather unique. Generally if the situs of the divested alien's property remains within the acting state's territory and exhaustion of local remedies proves to be futile, the injured alien must seek to have his state espouse his claim and press it at diplomatic levels.³⁹ In *Sabbatino*, the United

See Anand, *Role of the "New" Asian-African Countries in the Present International Legal Order*, 56 AM. J. INT'L L. 383 (1962); Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COLUM. L. REV. 1125, 1143-58 (1948); Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863 (1961). See also Domke, *American Protection Against Expropriation in the Light of the Suez Canal Crisis*, 105 U. PA. L. REV. 1033 (1957), where the author expresses uncertainty as to whether compensation is still a requirement of international law.

36. Compare, e.g., Friedman, *EXPROPRIATION IN INTERNATIONAL LAW* 206-11 (1953); Dawson & Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation?* 30 *FORDHAM L. REV.* 727 (1962); Doman, *supra* note 35, at 1127.

37. WHEREAS, the attitude assumed by the Government and the Legislative Power of the United States of North America, of continued aggression, for political purposes, against the basic interests of the . . . Cuban economy, as evidenced by the amendment to the Sugar Act adopted by the Congress of said country . . . [and] WHEREAS, the Chief Executive of the Government of the United States of America . . . has reduced the participation of Cuban sugars in the North American market . . . [and] WHEREAS, this action constitutes a reiteration of the continued conduct of the government of the United States of North America . . . [and] WHEREAS, Cuba must be a luminous and stimulating example for the sister nations of America and all underdeveloped countries of the world to follow in their struggle to free themselves from the brutal claws of Imperialism . . . Now, THEREFORE: In pursuance of the powers vested in us, in accordance with the provisions of Law No. 851, of July 6, 1960, we hereby, RESOLVE: . . . To order the nationalization through compulsory expropriation, and, therefore, the adjudication in fee simple to the Cuban State, of all the property and enterprises located in the national territory . . . owned by the judicial persons who are nationals of the United States of America. . . . *Banco Nacional de Cuba v. Sabbatino*, 84 Sup. Ct. 923, 927 n.7 (1964).

38. The Cuban decree provided for compensation in government bonds with terms of not less than thirty years at a minimum of 2% interest. These bonds would be amortized out of a fund consisting of 25% of the foreign exchange annually received by Cuba from United States sugar sales exceeding 3 million Spanish long tons, at a price not less than 5.75 cents per English pound. It would seem apparent that, given the reduction of the Cuban sugar quota by the United States, the funds from which the compensation would be paid would be nonexistent. Moreover, it has been observed that from 1950 to 1959 the monthly average price for Cuban raw sugar shipments to the United States, even with the benefit of the sugar quota, at no time exceeded 5.50 cents per English pound. In only one year from 1950 to 1959 did Cuban sugar sales to the United States exceed 3 million Spanish long tons. See *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375, 386 n.28 (S.D.N.Y. 1961).

Although the above lip service was given, the decree, in effect, did not provide for any payment. The District Court observed, "Indeed, were the sugar quota for Cuba restored tomorrow, contributions to the compensation fund, based on the ten-year history of sugar purchases from Cuba before the year 1960, would be non-existent." *Id.* at 386.

39. Since a relatively small degree of satisfaction is accorded an alien proprietor after nationalization of his property under the discretionary policy of most states concerning espousal, more and more foreign investors have sought to protect their investments by more definite means. One means is through property protection provisions and expropriation provisions in treaties. Brandon notes:

States was not called upon to espouse, and did not espouse, an international claim; therefore, there was no confrontation of two sovereign states on the international level of law. Instead, since a portion of the nationalized property departed from the territory of the acting state and the proceeds from its sale entered the territory and jurisdiction of the United States, the divested owners sought to recover this property under the laws of the State of New York. This was a matter of municipal law on the municipal level of law. It was when Banco Nacional, a state owned assignee of Cuba's rights, sought recovery for conversion in the United States that the defense of "a violation of international law" was raised.

When property which purportedly has been nationalized by a foreign state enters the United States and some action is before a United States municipal court in respect to it, the relief requested will take the form of either *recognition* of the foreign act of state or *enforcement* of the foreign act of state.⁴⁰ It is important for the purposes of this discussion to distinguish between the two. If the forum finds that the property was wholly and completely subjected to the foreign act of state and if the intended effect of the act was to change title in that foreign state, and the property is in possession and control of a person or someone claiming under him who acquired title in the foreign state, the relief asked for is "recognition," i.e., a confirmation of a result accomplished in another state. But if there was no subjection of the property in the foreign state, or if the property is not in the possession or control of the person who acquired title in the foreign state, then the relief asked for is "enforcement," i.e., completion of the uncompleted act of state, or dispossession of another to vest possession in the hands of the titled claimant under the act of state.⁴¹

The municipal courts of different countries faced with the question of recognition and enforcement have observed the problem in different lights. For example, in England, when a foreign state or one of its instrumentalities asserts before an English forum the public authority con-

"[S]tates may limit this right [to nationalize] by entering into a treaty or international agreement or into a contractual obligation with an alien, whether an individual or corporate person. Nationalization, which is contrary to such undertakings freely entered into, is inherently unlawful and contrary to international law." Brandon, *Legal Deterrents and Incentives to Private Foreign Investments*, 43 *TRANSACT. GROU. SOC'Y* 39 (1959).

Also, private and government insurance are additional means of protecting foreign investment. See WHITE, *op. cit. supra* note 14, at 251-254.

40. A court *recognizes* a right or status governed by foreign law when for any purpose the court treats it as existing according to foreign law in virtue of the rules of the conflict of laws of some legal system. . . . A court *enforces* a right when giving the person who claims it either the means of carrying it into effect, or compensation for interference with it. It is plain that, while a court must recognize every right which it enforces, it need not enforce every right which it recognizes. DICEY, *CONFLICT OF LAWS*, 11 (7th ed. 1958). (Emphasis added.)

41. See Reeves, *The Sabbatino Case: The Supreme Court of the United States Rejects a Proposed New Theory of Sovereign Relations and Restores the Act of State Doctrine*, 32 *FORDHAM L. REV.* 631, 650 (1964).

ferred upon it by its own law, the forum asks: What are the actions which international law commits exclusively to its forum? They are actions based on the *jus imperii* of a state, i.e., a right *qua regis*, a right *jure imperii*, a right peculiar to the supreme sovereign power in a state. The reason for this is that the "exercise" of a state's imperium ends at the state's frontiers.⁴² It is not correct to say that the rights which a state derives from its imperium have no extraterritorial existence, because their existence is recognized within the framework of the appropriate rules of conflict of laws. But their "exercise" is inherently limited to the state's territory. A state's penal and revenue legislation are accordingly limited to a state's territory. Conversely, where a foreign state pursues a right that by its nature could belong equally well to an individual, no question of the imperium of the claim arises and the foreign state's access to the forum is unrestricted. As an illustration: a state whose property is in the defendant's possession can recover it by an action in detinue;⁴³ a state which has a contractual claim against the defendant is at liberty to recover the money due to it;⁴⁴ but a foreign state or its assignee cannot, in view of the *jus imperii* character of the claim, maintain an action in an English court to recover property situated in England, when the foreign state's title to the property is derived from confiscation, expropriation, or requisition.⁴⁵ F. A. Mann explains that "an English Court has no jurisdiction to give effect to a claim, whether made by action or by way of defense, which in substance involves the direct or indirect enforcement of the . . . [*jure imperii*] right of a foreign State."⁴⁶

This may represent the English position with respect to *enforcement*, but in theory suppose municipal courts are called upon to recognize the effects of or enforce official acts of a foreign state. They may be requested to recognize the effects of foreign legislation or administrative measures on title to property which has come within their jurisdiction after nationalization of "local property of an alien," or asked to apply foreign law to property which has at all times been within their jurisdiction, as would be the case with a nationalization of "foreign property of a national." In such cases, are municipal courts bound to take note of the fact that the foreign act violates international law and for that reason refuse it recognition? Morganstern indicates that there are a number of international law grounds on which municipal courts could refuse to recognize the effect of foreign decrees.⁴⁷

42. For the extent of a state's frontiers, see note 27 *supra*.

43. *Union of Soviet Republics v. Belaiew*, 42 T.L.R. 21 (1925).

44. *Haile Selassie v. Cable & Wireless* [1938] Ch. 545, 839.

45. For a different view see WOLFF, *PRIVATE INTERNATIONAL LAW* 527-28 (2d ed. 1950). See also the discussion in CHESHIRE, *PRIVATE INTERNATIONAL LAW* 139 (4th ed. 1952).

46. Mann, *Prerogative Rights of Foreign States and the Conflict of Laws*, 40 *TRANSACTIONAL GROT. SOC'Y* 25, 46 (1955).

47. Morganstern prefaces these grounds on the assumption that according to the rules of conflict of laws, the governing law is the foreign law and that it is enacted by a recognized government.

First, when the foreign state lacks the competence to legislate with binding effect upon certain classes of persons and goods because it is limited by international law, then it would appear that the foreign law could not be regarded as the governing law, irrespective of whether it is regarded as valid by the legislating state or not. At one time, through the doctrine of extraterritoriality, international law limited local law by implying that certain persons, such as diplomats, were not subject to local laws, but today it is accepted that they are merely immune from jurisdiction.⁴⁸

Second, in cases in which the acting foreign state recognizes the supremacy of international law in its municipal legal hierarchy, and in which its own courts are empowered to review its legislative and executive acts with regard to their substance or the competence of the body responsible for them in the light of their conformity with international law, then the municipal courts of other states likewise may refuse to recognize the effects of an act which violates international law. In states where the courts lack power to review acts of state against the yardstick of international law, the acts are valid even if they constitute a violation of international law.

Third, municipal courts may refuse to recognize the effects of foreign acts of state which conflict with international law, but which are regarded as valid in the state where they are consummated, on the ground that they are repugnant to the "public policy" of the forum.

Morganstern⁴⁹ explains these grounds as follows:

All these methods . . . whereby municipal courts may exclude foreign law which is contrary to international law, are those normally employed by them to test the applicability of foreign law in the light of their rules of the conflict of laws . . . [Consequently] [t]here is . . . nothing revolutionary in the suggestion that municipal courts may employ these means to exclude foreign law on the ground that it is contrary to international law.

III. CONFLICT LAW

A. *Relationship to International Law*

It has been suggested that the grounds alleged to deny acts of state as being violations of international law may well coincide with the

48. Certain immunity from the territorial jurisdiction is by international law, and by municipal law, conferred on:

- (a) Foreign states and heads of foreign states;
- (b) Diplomatic representatives, and consuls of foreign states;
- (c) Public ships of foreign states;
- (d) Armed forces of foreign states;
- (e) International institutions.

49. Morganstern, *Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts Which are Contrary to International Law*, 4 INT'L L.Q. 326, 343 (1951).

grounds alleged to prevent application of foreign laws under rules of conflict of laws. A connection between these two fields of law is not infrequently denied, upon the assumption that conflict rules are municipal law and that they are applied by municipal tribunals.⁵⁰ In 1952, Professor Cheshire of Oxford bluntly stated, "There is, of course, no affinity between private and public international law."⁵¹ But his opinion was significantly modified in a later statement:

It would, of course, be a fallacy to regard public and private international law as totally unrelated. Some principles of law, such as the maxim *audi alteram partem* and *ut res magis valeat quam pereat* are common to both; some rules of private international law, as for example the doctrine of the "proper law" of a contract, are adopted by a court in the settlement of a dispute between sovereign states; equally some rules of public international law are applied by a municipal court when seized with a case containing foreign elements.⁵²

It is believed that modern doctrine is about to evolve an international conception of conflict law.⁵³ Dr. Jenks⁵⁴ has noted:

[T]here seems likely to be an increasing number of cases in which conflicts of law will be governed by, and in some cases cannot be governed except by, international rather than national rules. In the light of developments of the last thirty years it is no longer possible to take the view that private international law is "not only municipal law and not international law" but "treats only of matters which are by the existing law of nations, within a State's exclusive sovereignty to legislate upon as it pleases."

B. *General Principles and Exceptions*

Conflict law owes its existence to the fact that in the world there are a number of separate municipal systems of law that differ greatly from each other in the rules by which they regulate legal relationships. Frequently, the courts of one state must take account of some rule of law that obtains in another. Although it is true that a sovereign is supreme within his own territory and can elect to refuse to consider any

50. Lorenzen has summed up the "nationalist position" in relation to the conflict of laws in these words: "The rules of the conflict of laws form a part of the national law [i.e., municipal law] of each state . . . there are as many systems of the conflict of laws as there are independent states." Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, 20 COLUM. L. REV. 247, 269 (1920).

51. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 16 (4th ed. 1952).

52. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 16 (5th ed. 1957).

53. Wortley, *The Interaction of Public and Private International Law Today*, 85 J. DU DROIT INT'L 245 (1954).

54. JENKS, *THE COMMON LAW OF MANKIND* 51 (1958). See also Beckett, *What is Private International Law?*, 7 BRIT. YB. INT'L L. 73, 94 (1926).

law but its own, this policy of indifference seems impractical in today's world and states have found they cannot afford to disregard foreign rules of law merely because they are at variance with their own territorial or internal system of law. Frequently, law suits have foreign elements, i.e., foreign points of contact. When such foreign elements exist it is not always certain that the law of the forum should be applied. The forum looks beyond its own internal law, since the relevant rule of the municipal system to which the case most appropriately belongs may happen to be in conflict with the *lex fori*.⁵⁵ Those rules which determine which municipal law should be applied by the forum, the *lex fori* or some foreign law, are called rules of conflict of laws. Thus, conflict law is that part of the forum's municipal law which in each state determines which system of municipal law shall be applied when the legal problem to be treated has contacts with more than one state.⁵⁶

Conflict law has two functions. First, it prescribes the conditions under which the forum is competent to entertain a suit (questions of jurisdiction). Second, it determines for each class of case the particular municipal system of law by reference to which the rights of the parties must be ascertained (questions of choice of law). Since the function of conflict law is complete when it has chosen the appropriate municipal law, conflict rules do not furnish a direct solution of the dispute; resolution of the dispute is accomplished by the application of the rules of law of the appropriate municipal system.

It has been proposed⁵⁷ as a general principle of conflict law that a right, power, capacity, disability or legal relationship which has been created by the law of a civilized nation applicable according to the forum's rules of conflict of laws is recognized⁵⁸ and, in general, enforced by the forum. There are a number of exceptions to this general principle, including foreign penal laws,⁵⁹ foreign revenue laws,⁶⁰ and foreign laws

55. The classification of law used in this discussion is:

- I. International Law
- II. Municipal Law
 - (a) Internal Law
 - (b) Conflict Law

56. See classification in note 55 *supra*.

57. DICEY, *CONFLICT OF LAWS* 9 (7th ed. 1958).

58. For a description of recognition and enforcement, see note 40 *supra* and text following.

59. Foreign penal laws appear to be universally denied extraterritorial enforcement. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888). See *Huntington v. Attrill*, 146 U.S. 657 (1892). "It is well settled that an English court will not lend its aid to the enforcement, either directly or indirectly, of a foreign penal law." CHESHIRE, *PRIVATE INTERNATIONAL LAW* 138 (6th ed. 1961).

60. Foreign revenue laws are generally denied extraterritorial enforcement. *RESTATEMENT, CONFLICT OF LAWS* § 610, comment c (1934). See *Municipal Council v. Bull*, [1909] 1 K.B. 7, 12 (1908) and more recently, *Government of India v. Taylor*, [1955] A.C. 491 (1954). But see *RESTATEMENT, supra* § 610 (Supp. 1948), where the Institute indicates that the law in this area is changing, causing the *Restatement* to withdraw its earlier view on the matter.

repugnant to the public policy of the forum. Refusal to enforce a foreign penal or revenue law implies no disclaimer of its lawful existence; and on the grounds that national political policy demands the maintenance of harmonious relations with other nations, circumstances may require that its existence be recognized. The exception of "foreign laws repugnant to the public policy of the forum" contemplates public policy in the narrow international sense⁶¹ envisioned by Justice Cardozo in a New York case:

A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . . The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate *some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.*⁶²

For example, while confiscation of property by a foreign government, although nondiscriminatory, violates the Anglo-American municipal policy that there shall be no taking of property without compensation, this policy is not grounds for refusing recognition to a foreign act of state confiscating property within its territory.⁶³

Reason dictates, however, that the more directly the interests of the forum are affected, the more likely the public policy exception will be relied upon. It would seem that courts would be less likely to find a foreign act in violation of public policy when a mere defense is intended or when called upon to recognize the legal consequences resulting from a fully executed act, than when called upon to use their powers affirmatively to enforce and thereby complete an uncompleted act of state.⁶⁴ Never-

61. "The conception of public policy, is, or should be, narrower and more limited in private international law than in internal law." CHESHIRE, *op. cit. supra* note 59, at 155. This is opposed to public policy in its domestic sense which includes the minor policies which generally underlie constitutional provisions, statutes, or judicial acts.

62. *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918) (dictum) (Emphasis added.) See also *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932) (dictum); *Bond v. Hume*, 243 U.S. 15, 21 (1917) (dictum); *Ciampittello v. Campitello*, 134 Conn. 51, 54 A.2d 669 (1947); *Fox v. Postal Tel. Cable Co.*, 138 Wis. 648, 120 N.W. 399 (1909).

63. See *Luther Co. v. James Sagor & Co.*, [1921] 3 K.B. 532, 546, where the court, while recognizing that the confiscation before it would be void in England, concluded that even if a public policy examination could be made, it could not see how "the Courts could treat this particular decree otherwise than as the expression by the . . . government of a civilized country of a policy which is considered to be in the best interests of that country."

64. "No country will enforce an act of state of another country if the act of state is incompatible with its own laws, but it will recognize the validity of the foreign law within that foreign country." Reeves, *supra* note 41, at 645. See also *Luthor Co. v. James Sagor & Co.*, *supra* note 63, 645. See also *Luthor Co. v. James Sagor & Co.*, *supra* note 63, at 545.

theless, the public policy exception is the conflict of law principle which permits denial of enforcement and recognition of the foreign acts of state of nationalization, expropriation or confiscation.

C. *Foreign Property of a National*

As mentioned earlier,⁶⁵ a foreign act of state may purport to affect the "foreign property of a national" or the "local property of an alien." The former action would generally take the form of the foreign government's seeking enforcement in the forum state of its act purporting to affect property outside the territorial jurisdiction of the acting state. Now, foreign acts of state purporting to confiscate property owned by its nationals but whose situs is within the jurisdiction of the forum at the time of enactment may be denied extraterritorial effect if the forum deems such acts repugnant to its public policy. On the other hand, although a state has a basis of legislative jurisdiction over its nationals and their property, even though such persons and property are located outside the territorial limits of the state,⁶⁶ a conflict of jurisdiction arises,⁶⁷ since the state in which an alien is traveling or living also has jurisdiction over his person and property within its territory.⁶⁸

The use of the forum's public policy in connection with extraterritorial confiscations is unnecessary since both international law and conflict law recognize territorial jurisdiction as superior to national jurisdiction.⁶⁹ Therefore, with respect to a foreign act affecting "foreign property of a national," the forum state exercises both primary legislative and judicial in rem jurisdiction over property located at the material time within its territorial jurisdiction. It might be said that the conflict rule of *lex situs* prevails. However, when national policy has dictated, public policy of the forum has been used affirmatively to give extraterritorial effect to foreign decrees that would not otherwise govern.⁷⁰ For example,

65. See text following note 18 *supra*.

66. RESTATEMENT, CONFLICT OF LAWS § 63 (Supp. 1948); DICEY, *op. cit. supra* note 57, at 663; see *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824).

67. RESTATEMENT, CONFLICT OF LAWS § 42, comment g (1934).

68. "Every foreigner who comes into this country, for however limited a time, is, during his residence here within the allegiance of the sovereign . . . and subject to all the laws of the sovereign." *Ex parte Blain*, 12 Ch. D. 522, 526 (1879). See *Darrah v. Watson*, 36 Iowa 116 (1872) (recognition of state judgment service on a transient). See STORY, CONFLICT OF LAWS § 539, at 883 (5th ed. 1857); STRUMBERG, CONFLICT OF LAWS 102 (1963). *But see* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956) where the position has been recently taken that presence of a defendant in a state, with no further connecting link, does not in itself confer jurisdiction upon its courts.

69. Cheng, *The Rationale of Compensation for Expropriation*, 44 TRANSACTIONS GROT. SOC'Y 267, 275 (1959).

70. *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); in this line of cases public policy was used to implement executive policy seeking compensation to American investors who had suffered substantial losses as a result of nationalizations in Soviet Russia.

See also *Netherlands v. Federal Reserve Bank*, 201 F.2d 455 (2d Cir. 1953); *Anderson*

if national policy represented by a treaty or executive agreement conflicts with state law or public policy, the treaty or agreement prevails, notwithstanding local considerations.⁷¹

D. *Local Property of an Alien*

When a foreign act of state purports to affect the "local property of an alien," as by nationalization, the dispossessed alien may seek to obtain a judgment in a municipal court outside the nationalizing state upholding his title to the nationalized property.⁷² The effect of such a judgment may be not only the restitution of the property to the alien but also in some cases the payment of compensation by the nationalizing state. This latter, indirect consequence of the judgment is due to the judgment's discouraging effect on potential purchasers from the nationalizing state, which, in turn, will induce that state to attempt to restore confidence by paying compensation. With respect to restitution, this municipal remedy outside the nationalizing state comes about when subsequent to nationalization the property is transferred to a private party and the property finds its way into the forum's judicial jurisdiction. The divested owner seeks restitution by way of damages in the forum state in an action in rem or in personam. The forum's conflict rule directs the court to the law of the nationalizing state, the *lex rei sitae*.

1. PUBLIC POLICY OF THE FORUM

Normally, following the choice of the appropriate municipal law the forum is free under its conflict law to determine if the foreign act is repugnant to its public policy. In the United States, however, the act of state doctrine proscribes use of the forum's public policy to avoid application of such law. This doctrine has been severely criticized;⁷³ perhaps none

v. N.V. Transandine Handelsmaatschappij, 289 N.Y. 9, 43 N.E. 502 (1942). *But see* Matter of Kahn, 179 Misc. 939, 38 N.Y.S.2d 839 (Surr. Ct. 1942); in this line of cases public policy was used to implement executive policy seeking assistance to an allied government in keeping foreign-based assets out of the hands of a common enemy.

71. *United States v. Pink*, 315 U.S. 203 (1942), criticized in Borchard, *Extraterritorial Confiscations*, 36 AM. J. INT'L L. 275 (1942). See *Zwac v. Kraus Bros. & Co.*, 93 F. Supp. 963 (S.D.N.Y. 1950), 133 F. Supp. 929 (S.D.N.Y. 1955), *aff'd in part*, 237 F.2d 255 (2d Cir. 1956); *Bollack v. Societe Generale*, 263 App. Div. 601, 33 N.Y.S.2d 986 (1942) which limits *Pink* to its facts. It is unlikely that a mere statement of national policy by the Department of State will override the forum's public policy.

72. Seeking remedy in a municipal court within the nationalizing state may prove to be futile. See text accompanying note 33 *supra*.

73. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON INTERNATIONAL LAW, A RECONSIDERATION OF THE ACT OF STATE DOCTRINE IN UNITED STATE COURTS (1959); Fachiri, *Recognition of Foreign Laws by Municipal Courts*, 12 BRIT. YB. INT'L L. 95, 102-06 (1931); Lauterpacht, *Re Helbert Wagg: A Further Comment*, 5 INT'L & COMP. L.Q. 301 (1956); Lauterpacht, *Case and Comment on the Rose Mary*, 1954 C.A.M.B. L.J. 20 (1954); Mann, *International Delinquencies before Municipal Courts*, 70 L.Q. REV. 181 (1954); Mann, *Sacrosanctity of Foreign Act of State*, 59 L.Q. REV. 42, 54 (1943); Wortley, *Expropriation in International Law*, 33 TRANSACT. GROU. SOC'Y 25 (1947); Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959); Note, *Acts of State and the Conflict of Laws*, 35 N.Y.U.L. REV. 234 (1960); Comment, *"Act of State" Doctrine*, 58 MICH. L. REV. 100

has been more scathing than Mr. Justice White's dissent where, after a preface that "No other civilized country has found such a rigid rule necessary for the survival of the executive branch of its government . . .,"⁷⁴ he declared that the act of state doctrine is nothing more than a

blanket presumption of validity applicable to all foreign expropriations . . . [requiring] that all courts . . . approve, validate, and enforce any foreign act expropriating property, at the behest of the foreign state or a private suitor, regardless of whether the act arbitrarily discriminates against aliens on the basis of race, religion, or nationality, and regardless of the position the executive has taken in respect to the Act.⁷⁵

Prior Supreme Court decisions⁷⁶ indicate that the act of state doctrine applies to foreign laws affecting "local property of aliens" within the territory of a government which is recognized by the United States. This doctrine of non-review is a corollary of the principle that ordinarily a state has jurisdiction to prescribe the rules governing title to property within its territorial sovereignty,⁷⁷ a principle reflected in the conflict of laws rule that the *lex loci* is the law governing title to property.⁷⁸ Actually, this conflicts rule in itself would have been enough to have controlled the outcome of most of the act of state cases decided by the Supreme Court, and as will be shown later, was enough to have controlled the outcome of *Sabbatino*.

2. INTERNATIONAL LAW AS PART OF THE FORUM'S MUNICIPAL LAW

In addition to denying application of a foreign law because it is repugnant to the public policy of the forum, will foreign law be denied recognition or enforcement if it is found to be in violation of the *law* of the forum? As mentioned earlier, the internal policy that no property shall be taken without compensation may not be grounds for refusing recognition to a foreign act of state confiscating property within its territory; but what will be the result if the body of international law is part of the municipal law of the forum? Actually, international law is a part of American municipal law, and it is the duty of the courts to apply and enforce it where appropriate.⁷⁹ In theory, while no American

(1959). *Contra*, Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 AM. J. INT'L 141 (1960); Seidl-Hohenveldten, *Extraterritorial Effects of Confiscations and Expropriations*, 49 MICH. L. REV. 851 (1951).

74. *Banco Nacional de Cuba v. Sabbatino*, 84 Sup. Ct. 923, 946 (1964).

75. *Id.* at 960.

76. *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918).

77. *Clarke v. Clarke*, 178 U.S. 186 (1900); *De Vaughn v. Hutchinson*, 165 U.S. 566 (1897).

78. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 30-69 (1959); *RESTATEMENT, CONFLICT OF LAWS* § 254 *a* (Tent. Draft No. 5) (2d ed. 1959).

79. *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also *Rose v. Himely*, 8 U.S. (4 Cranch) 240, 270-71 (1808).

case has been found on this point (outside of the lower court decisions in *Sabbatino*), when a foreign law is in violation of international law the foreign law should not be enforced by United States courts. However, there is a recent English case bearing on this point.

Following the nationalization of its property by the Iranian Government in 1951, the Anglo-Iranian Oil Company brought actions in the courts of Aden, Italy, and Japan asserting its title to cargoes of oil which had been brought within the jurisdiction of these courts. It was successful only in the supreme court of the Colony of Aden in the case which is known by the name of the tanker involved, the *Rose Mary*.⁸⁰ The company's case may be reduced to three propositions: that international law was part of the law of Aden; that the Iranian Nationalization Law constituted a violation of international law, principally because it failed to provide for adequate compensation; and that, being contrary to international law, the fact that this law was valid inside Iran did not suffice to endow it with validity or entitle it to recognition in courts outside Iran. The Aden court held that it was entitled to refuse validity to a foreign law which was contrary to international law in so far as it related to property within the court's jurisdiction, and it found the title to the oil in dispute still to be the property of the company. The company did not fare so well before the courts of Italy and Japan.⁸¹

As a learned writer has shown, the Aden court failed to distinguish two quite separate issues:⁸² first, whether the legislative power of a foreign sovereign to confiscate property within its own jurisdiction without the payment of compensation is open to question in the courts of other countries; second, assuming that the first must be answered in the negative, whether having effectively carried out the act of confiscation, the sovereign is bound by international law to compensate aliens who have been dispossessed of their property.

With respect to the first issue, there are no grounds that a foreign forum may deny the *effectiveness* of legislation passed by the acting state and recognized by the forum state, in so far as it affects property situated within its own territorial domain. Whether a certain act of state is constitutional under the acting state's municipal law is not to be questioned judicially in another country. Its validity cannot be made to turn upon the nationality of the persons affected; even foreigners who choose to submit themselves or their business arrangements to a territorial law must resign themselves to the consequences of a territorial act of sovereignty.

80. *Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary)*, [1953] 1 Weekly L.R. 246 (Sup. Ct. Aden).

81. On facts similar to the *Rose Mary*, two Italian courts, *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co.*, [1955] Int'l L. Rep. 23 (1954), and *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co.*, [1955] Int'l L. Rep. 19 (1953), and a Japanese Tribunal, *Anglo-Iranian Oil Co. v. Indemitsu Kosan Kabushiki*, [1953] Int'l L. Rep. 305, reached the opposite result.

82. O'Connell, *A Critique of the Iranian Oil Litigation*, 4 INT'L & COMP. L.Q. 267 (1955).

Legislative capacity is coincident with power and, short of war, no foreign State can resist an act of power exercised within the territorial limits of another sovereign. Thus, title to the oil passed to the buyer by virtue of the *lex situs*, and there is no principle of conflict law which would justify the divesting of its title by a foreign court.

With respect to the second issue, recognition that an owner has been effectively dispossessed of his property by a confiscating decree does not deny him of a remedy. No reflection is cast upon the right of a sovereign state to dispose of property for the supposed good of the community if a dispossessed owner claims that the state shall make reparation for any breach of contract. The argument that the dispossessed owner acquires a contractual or an equitable right to compensation is, on principle, difficult to resist. At the minimum, the dispossessed owner should be restored the amount by which the state has been unjustly enriched. Since the Anglo-Iranian Oil Co., was a concessionaire, the words of O'Connell may well be appropriate:

A concessionaire may have his rights *ex contractu* abrogated by unilateral action, but that by no means represents the termination of his equitable interest in the works constructed by him. That interest may be said to give rise to a new obligation, of restitutionary or quasi-contractual character, on the part of the State which benefits from the expropriation. In municipal law effect may be denied to this restitutionary principle by virtue of an act of sovereignty; in international law no such act of sovereignty renders a State competent to destroy the equitable interest of a foreign investor. That interest falls within the category of "acquired right."⁸³

E. *Effect of Sabbatino on the Courts' Treatment of Act of State Cases*

Considerable authority exists to the effect that a sovereign is bound by international law to compensate aliens who have been dispossessed of their property,⁸⁴ but the majority of the United States Supreme Court in *Sabbatino* concurred in the view that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens."⁸⁵ In effect, since the substantial consensus of nations on this body of law was lacking, it was determined that the matter was not ripe for adjudication by American municipal courts, rather than that there was no international standard.⁸⁶ A footnote cautions, "This decision in no way

83. *Id.* at 270.

84. See WORTLEY, *EXPROPRIATION IN PUBLIC INTERNATIONAL LAW* 33-36 (1959). See also Mann, *International Delinquencies before Municipal Courts*, 70 L.Q. REV. 181 (1954); but see note 36 *supra*.

85. *Banco Nacional de Cuba v. Sabbatino*, 84 Sup. Ct. 923, 940 (1964).

86. The absence of universal consensus does not preclude the existence of international law, but a doctrine of international law may be sufficiently contested that its application by

intimates that the courts of this country are broadly foreclosed from considering questions of international law.⁸⁷ The Court enumerated several practical difficulties it envisioned would be encountered if foreign expropriations were characterized as invalid under international law and ineffective to pass title,⁸⁸ then concluded:

However offensive to the public of this country or its constituent states an expropriation of this kind may be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application.⁸⁹

Therefore, although international law is part of the municipal law of the United States, the act of state doctrine precludes examination of a foreign act of state in the light of international law much in the same way as it precludes a challenge to the validity of the foreign law on the ordinary conflicts ground of repugnancy to the public policy of the forum.

It must be noted that the United States courts must treat the nationalization by a foreign state of the "foreign property of a national" on a basis entirely different from the nationalization of the "local property of an alien." It may well be asked whether a different treatment is justified. The courts of other countries seem to find it within their power to review fully completed foreign acts of state expropriating property.⁹⁰ American courts have denied recognition or enforcement to many foreign laws, otherwise applicable under the conflicts rules of the forum, when these laws are inconsistent with the public policy of the forum. For example, foreign acts of state purporting to confiscate property of nationals and corporations of the foreign sovereign situated in the United States uniformly have been denied effect in American courts.⁹¹ Foreign penal and revenue laws are customarily refused enforcement.⁹² Foreign judgments are denied conclusive or prima facie effect when the judgment is based on a statute unenforceable in the forum, when the procedures of

a municipal court should be regarded as an expression of municipal rather than international policy. See Jessup, *Diversity and Uniformity in the Law of Nations*, 58 AM. J. INT'L L. 341 (1964).

87. *Banco Nacional de Cuba v. Sabbatino*, *supra* note 85, at 941 n.23.

88. *Banco Nacional de Cuba v. Sabbatino*, *supra* note 85 at 942-44. The Court indicates that the reasons for judicial nonreview via the act of state doctrine are due (1) to an effort to maintain a certain stability and predictability in international transactions, (2) to avoid friction between nations, (3) to encourage settlement of these disputes through diplomatic means, and (4) to avoid interference with the executive control of foreign relations.

89. *Id.* at 944.

90. *Id.* at 946 n.1, where opinions of England, Netherlands, Germany, Japan, Italy and France are cited.

91. *Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F.2d 1000 (D.C. Cir.), *cert. denied*, 342 U.S. 816 (1951); *United States v. Moscow Fire Ins. Co.*, 280 N.Y. 286, 20 N.E.2d 758 (1939), *aff'd*, 309 U.S. 624 (1940); *Vladikavkazsky Ry. v. New York Trust Co.*, 263 N.Y. 369, 189 N.E. 456 (1934).

92. See notes 59 and 60 *supra*.

the foreign court markedly depart from United States' notions of fair procedure, and when enforcement would be repugnant to the public policy of the forum.⁹³ Why then, when these cases demonstrate that American courts have never been bound to pay unlimited deference to foreign acts of state, must the additional element—that the property affected is situated within the acting state—justify an automatic deference to the act, *regardless* of whether the foreign act violates international law?

The "why" of the Supreme Court's restoration of the act of state doctrine appears to lie in the absence of consensus⁹⁴ among nations and in the need to avoid the practical difficulties⁹⁵ which a great trading and capital exporting nation daily encounters. Mr. Justice White argued that the latter "considerations are relative, their strength varies from case to case and they are by no means controlling in all litigation involving the public acts of a foreign government."⁹⁶ However, even in instances when none of these considerations are controlling, a foreign act of state nationalizing the "local property of an alien" within its own territory would lead the forum state under its conflict law to select the *lex situs*—the nationalization decree itself. This principle of *lex rei sitae*, that the *lex loci* is the law governing title to property, is adopted by virtually all nations,⁹⁷ at least with respect to real property.⁹⁸ It would also appear that the act of state doctrine is a corollary of this conflicts rule which rests on the deeply embedded postulate of international law—the territorial supremacy of a sovereign.⁹⁹ However, as it has been criticized, the act of state doctrine is broader; it is not limited to directing courts to

93. *Hilton v. Guyot*, 159 U.S. 113 (1895); *cf.* *The W. Talbot Dodge*, 15 F.2d 459 (S.D.N.Y. 1926); *Venezuelan Meat Export Co. v. United States*, 12 F. Supp. 379 (D. Md. 1935). See generally Reese, *The Status in this Country of Judgements Rendered Abroad*, 50 COLUM. L. REV. 783 (1950).

94. The Court recognized that in the case before it the violation of customary international law was clear under standards upon which virtually all nations did agree, since the nationalization measure discriminated against aliens. But it declined to pronounce an exception to the act of state doctrine for such clear violations, because to do so would lead to exactly the sort of difficulty in close cases that it sought to avoid by its decision.

95. See note 88 *supra*.

96. *Banco Nacional de Cuba v. Sabbatino*, 84 Sup. Ct. 923, 950 (1964).

97. It is at present the universal principle in abundant decisions and recognized by all writers, that the creation, modification, and termination of rights in individual tangible physical things are determined by the law of the place where the thing is physically situated. RABEL, *THE CONFLICT OF LAWS, A COMPARATIVE STUDY* 30 (1958).

98. In the United States of America and in European countries with few exceptions [He mentions the exceptions Italy, Spain, Sweden, Finland, Czechoslovakia and Germany, where succession to immovables is governed by the *lex patriae* of the deceased owner.] . . . the general rule is that the *lex situs* is the governing law for all questions that arise with regard to immovable property. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 554 (5th ed. 1957).

All rights over, or in relation to, an immovable are governed by the law of the country where the immovable is situated. DICEY, *CONFLICT OF LAWS* 512 (7th ed. 1958).

99. See generally KAPLAN & KATZENBACH, *THE POLITICAL FOUNDATION OF INTERNATIONAL LAW* 135-72 (1961).

accept the foreign law "as a rule for their decision,"¹⁰⁰ under the *lex loci* rule, but it precludes a challenge to the validity of foreign law on the conflict law grounds of repugnancy to the public policy of the forum and on the basis of a violation of international law.¹⁰¹

In answer to the removal of public policy considerations from a challenge to the validity of foreign law it would appear that

areas touching the foreign affairs of the nation reflect a need for uniformity of policy in dealing with foreign states, and a concern for the pre-eminence of federal jurisdiction over matters of international significance, lest the provincialism of state courts lead to impolitic judicial decisions offensive to the sensibilities of foreign nations.¹⁰²

The Supreme Court, recognizing the need for uniformity of policy toward foreign nations, concluded "that the scope of the act of state doctrine must be determined according to federal law,"¹⁰³ which would be binding on federal and, in dictum, state courts.¹⁰⁴ It reinstated the act of state doctrine as "federal common law"¹⁰⁵ and the "federal" policy expressed through the holding was determined by the Court itself.¹⁰⁶

In answer to the preclusion of international law considerations at

100. Commenting on the nature of the principle established by *Underhill v. Hernandez*, 168 U.S. 250 (1897), *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) and *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), the *Ricaud* opinion stated that the doctrine

does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918). (Emphasis added.)

101. I suspect that a contention concerning violation of international law . . . is not in substance different from a contention based on violation of the public policy of the forum. I think an examination of the cases we have seen brought in Europe as the result of foreign expropriations . . . will demonstrate that the same points made in support of a contention that international law has been violated are made in support of a contention that the public policy of the forum requires that the law of the situs be disregarded and that a given act be disallowed as the basis for a claim of title . . . [I]t is worth pointing out that the talisman of international law is not necessarily—or even probably—an additional element to overcome our proper reluctance to substitute policy of the forum for the law of the situs as a determinant of litigation in our courts. Lowenfeld, *Comments on Sabbatino*, 5 HARV. INT'L L. CLUB J. 215, 217 (1964).

102. Comment, *The Act of State Doctrine—Its Relation to Private and Public International Law*, 62 COLUM. L. REV. 1278, 1297 n.123 (1962). The Supreme Court cites this comment and various constitutional and statutory provisions in support of their determination. See U.S. CONST., art. I, § 8, cls. 3, 10; art. II, § 2, 3; art. III, § 2; 28 U.S.C. §§ 1251(a)(2), (b)(1), (b)(3), 1332(a)(2), 1333, 1350-51, which reflect a concern for uniformity in United States' dealings with foreign nations, and which indicate a desire to give matters of international significance to the jurisdiction of federal institutions.

103. *Banco Nacional de Cuba v. Sabbatino*, *supra* note 96, at 940.

104. *Ibid.*

105. *Id.* at 939-40. For an up to date appraisal of federal common law and its significance see generally Friendly, *supra* note 4.

106. See note 3 *supra* and accompanying text.

least two arguments may be advanced. It appears that the customary practice of nations is to apply the principle of *lex rei sitae*. This custom appears to be so universally accepted¹⁰⁷ by nations that it would be very natural to consider it as a general principle of international law.¹⁰⁸ If this is accepted, a rule of international law as well as municipal conflict rules would direct municipal courts to apply the *lex rei sitae*, the law of the acting state, and the question of a violation of international standards would be relegated to a determination at the international level. It might be noted in passing that among nations there appears to be greater agreement on the *lex rei sitae* principle than on the international standards applicable to expropriated property. Moreover, there appears to be greater agreement expressed in the decisions of the municipal courts of nations that a forum should accept the validity of a foreign law applicable in a situation subject to its public policy,¹⁰⁹ than agreement that the validity of a foreign law may be questioned in the forum as to its conformity with the principles of international law.¹¹⁰ Secondly, as Professor Philip Jessup has proposed, there are potential dangers when the *Erie* doctrine is extended to legal problems affecting international rela-

107. See notes 97 and 98 *supra*.

108. It is . . . believed that there are certain rules [conflict rules] which are so universally accepted that it would be very natural to consider them as general principles [of international law] It is perfectly possible that certain rules have been adopted nearly universally on the basis of justice and equity and even as a basic principle, and the courts—the national courts in question—have acted in this way without in any way thereby believing that they have carried out an international obligation. Hambro, *The Relations Between International Law and Conflict Law*, 105 RECUEIL DE COURS 47-8 (1962).

Hambro proposes that the conflict principles of *lex rei sitae*, *lex voluntatis* and *locus regit actum* appear to be so universally accepted. The *lex rei sitae* principle is discussed in Hambro, *supra* at 53-54.

109. The following are recent cases where title to property subject to expropriation, completed within the acting state, later was reviewed in a foreign forum: *N.V. Verenigde Deli-Maatschapijen & N.V. Senembah-Maatschappij v. Deutsch-Indonesische Tabek-Handelgesellschaft m.b.h.*, [1959] Int'l L. Rep. 16 (Germany, Bremen Ct. App.) (Indonesian nationalization of tobacco); *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co. (The Miriella)*, [1955] Int'l L. Rep. 23 (Italy, Cir. Ct. of Rome 1954) (Iranian nationalization of oil); *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co.*, [1955] Int'l L. Rep. 19 (Italy, Ct. of Venice 1953) (Iranian nationalization of oil); *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha*, [1953] Int'l L. Rep. 305 (Japan, High Ct. of Tokyo) (Iranian nationalization of oil). *Cf. Princess Paley Olga v. Weisy*, [1929] 1 K.B. 718; *Luther Co. v. James Sagore & Co.*, [1921] 3 K.B. 532; the plaintiffs in the *Princess Paley Olga* and *Luther Co.* cases were Russian nationals, and no violation of international law was alleged.

As to pre-war expropriations:

Suits for the attachment of expropriated property have been brought by dispossessed aliens in the courts of their own or of third States in connection with pre-war expropriations, but with the exception of those decided in French courts, they met with little success. Moreover, the courts based most of their decisions on municipal law, and did not examine the measures of expropriation from the point of view of their compatibility with international law. If the particular municipal court refuses to examine the foreign decree from this point of view, the effectiveness of the remedy will depend on its concept of public policy. WHITE, NATIONALIZATION OF FOREIGN PROPERTY 264 (1961). (Emphasis added.)

110. *Senembah-Maatschappij N.V. v. Bank Indonesia and Twentsche Bank*, [1958] Int'l L. Rep. 38 (Netherlands, Dist. Ct. of Amsterdam); *Anglo-Iranian Oil Co. Ltd. v. Jaffrate*, [1953] 1 Weekly L.R. 246, [1953] Int'l L. Rep. 316 (Sup. Ct. Aden).

tions.¹¹¹ He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations, which would most probably be the effect if courts unsophisticated in international law were to review foreign laws under its principles.¹¹²

IV. *Sabbatino* AND THE APPLICATION OF INTERNATIONAL LAW

A. *The District Court's Exception to the Act of State Doctrine*

The district court held that although it was not free to disregard the nationalization on the grounds (1) that it did not comply with Cuban law, or (2) that the nationalization was repugnant to the public policy of New York or the United States, it was free to examine the nationalization "under international law and refuse recognition to the act if it is in violation of international law." The court acknowledged the existence of the act of state doctrine but believed that the theoretical basis for the doctrine vanished when the sovereign's acts impinge on international law. It therefore deemed that judicial review was appropriate under these circumstances. But to adopt the view that no acts of state should be reviewed except those that violate international law would be to assume that it is possible to tell whether international law has been violated without examination of the facts surrounding the act. It is apparent that if the threshold question (to review or abstain) turns on whether international law has been violated, then the answer of the threshold question decides the case. To decide the threshold question, investigation should be made as to whether: there was a taking; there was a lawful purpose in the taking; the taking was discriminatory; the compensation was inadequate; and the alleged dispossessed owners held good title prior to the taking.

To answer these, legal proof and legal argument is necessary—which in essence amounts to judicial review. That is to say, if there is a determination of the threshold question that there has been a violation of international law, this amounts to review and the case has been decided, since it is very unlikely that the court having found the foreign state to have violated international law thereafter will award it title.

Therefore, the modification to the act of state doctrine promulgated by the district court—that no acts should be reviewed except those that violate international law—in effect is dichotomous with the act of state doctrine and destroys the latter. In consequence, "[t]here would be judi-

111. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939).

112. The Supreme Court concurred in this observation:

When we consider the prospect of the courts characterizing foreign expropriations, however justifiably, as invalid under international law and ineffective to pass title, the wisdom of the precedents is confirmed. *Banco Nacional de Cuba v. Sabbatino*, 84 Sup. Ct. 923, 941 (1964).

cial review in every case where the claimant made an assertion that international law had been violated."¹¹³

B. Decisions Reached on Title by the Lower Courts

Believing that the above exception to the act of state doctrine was applicable, the district court decreed:

Since the Cuban expropriation measure is a patent violation of international law, this court will not enforce it. It follows that C.A.V. [the American owned Cuban corporation] owned the sugar which was held in the present case.¹¹⁴

Thus, in effect the district court held that the Republic of Cuba had never acquired title to the sugar, and apparently that the nationalization decree was invalid¹¹⁵ regardless of the intention of the Cuban government and regardless of the actual execution of the decree by seizure of the sugar.¹¹⁶ The rationale of the court seems to be that the Cuban act of state was invalid *per se* because it was contrary to international law. Consequently, nothing done by Cuba could have the effect of transferring title.

The court of appeals affirmed,¹¹⁷ declaring:

Therefore, we conclude that, since the Cuban decree violated international law, the appellants' title is invalid and the district court was correct in dismissing the complaint.¹¹⁸

113. Lowenfeld, *Comments on Sabbatino*, 5 HARV. INT'L L. CLUB J. 215, 217 (1964).

Such a rule would subject nearly every country in the world that trades with the United States to the risk that its property would be tied up in elaborate litigation in the United States. Note that the property used to obtain jurisdiction need not be the property subject to the alleged taking, for the action brought by the former owner could be a transitory or quasi in rem action as well as an action replevin. And note further, that under the restrictive theory of immunity embodied in the so-called Tate letter, a great many countries that trade with the United States have property potentially available for suit. *Id.* at 218.

114. *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375, 386 (S.D.N.Y. 1961).

115. Reeves suggests that the ability of American courts to declare foreign laws *invalid* when contrary to international law would inevitably impair the sovereignty of the United States.

Reciprocally, all courts of all foreign countries would . . . have . . . not only the power, but in behalf of their own nationals, the obligation, to decide any law of the United States ineffective if they in turn found the United States had violated international law, in a manner to affect their own nationals. REEVES, *supra* note 41, at 661.

116. "Cuba's restraint of the S.S. Hornfels must be regarded for these purposes to have constituted an effective taking of the sugar, vesting in Cuba C.A.V.'s property right in it." *Banco Nacional de Cuba v. Sabbatino*, 84 Sup. Ct. 923, 933 (1964).

REEVES, *supra* note 41, at 648 indicates that there was even judicial confirmation that under the law of Cuba the assets of the sugar company had been vested in the Cuban government.

117. This court relied on two letters (not before the district court) written by State Department officers which it took as evidence that the executive branch had no objection to a judicial testing of the Cuban decree's validity. It relied on the "Bernstein exception" referred to in note 7 *supra*.

118. *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 869 (2d Cir. 1962).

The court, however, indicated that it recognized the argument that the wrong under the standards of international law is not in the taking but in the failure to pay compensation, and that international tribunals have never granted restitution of the property taken. Consequently, with regard to whether a seizure in violation of international law nevertheless may effect a change in title, the court acknowledged the possibility of concluding that the "expropriator possesses good title to the property seized subject to a duty to pay damages for the injury caused."¹¹⁹

However, the court of appeal rejected this argument and conclusion. In doing so it realized that its holding was predicated on a theory of law new to the courts of the United States and that under the ordinary rules of conflict of laws, title to the sugar would be determined by the law of Cuba, namely, the decree of expropriation of August 6, 1960.¹²⁰ But the court reasoned that since invalidation, by municipal courts, of the violating country's title may be the sole deterrent to violations of international law and possibly the only relief open to persons injured by a confiscation, a municipal court should fashion an appropriate remedy. It thereupon proceeded to misapply international law.

C. *The Question of the Applicability of International Law*

As mentioned earlier¹²¹ it is possible for a nationalization which is contrary to the principles of international law to be valid from the standpoint of municipal law. This is due to the existence of two bodies of law operating at different levels. Title is a concept of municipal law. Title to real property is determined pursuant to the municipal law of the place where the property is situated. Title to personal property is acquired according to the laws of the place of acquisition and held pursuant to the law of the place where it is held. The sugar company held title to all its assets in Cuba, under Cuban law, for it could not have held property in Cuba under any other law. Title to property is not held under international law.

The district court cited one case as justifying its determination that the nationalization decree was invalid under international law and not effective to transfer title. Also, the court of appeals quoted one paragraph from the same case.

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.¹²²

119. *Id.* at 868.

120. Resolution No. 1, Aug. 6, 1960, issued pursuant to Law of Nationalization No. 851, July 6, 1960.

121. See text following note 26 *supra*.

122. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

Reeves indicates¹²³ that the very next sentence, if applied to the *Sabbatino* case, directs the court when *not* to apply international law. The following sentence reads:

For this purpose, where there is no treaty and *no controlling executive or legislative act, or judicial decision*, resort must be had to customs and usages of civilized nations [customary international law]¹²⁴

Thus, customary international law is the law of the United States only in the absence of other controlling law. The case which the lower courts¹²⁵ cited for the proposition that a breach of international law voided title acquired under foreign municipal law was not authority for this proposition. On the contrary, it directed the court to seek out the controlling law which, under conflict rules expressed in judicial decisions, is the law of Cuba. Cuba may by its act have become liable for an international wrong, but that wrongful act certainly has no effect to retransfer title and thereby change Cuban law.

Thus, it may be summarized that when tangible property is situated within the acting state at the time the nationalization occurs, the forum has insufficient contacts with the transaction to support application of its own law. *The Paquete Habana* principle that "international law is part of our law" would be useful only if our law were applicable to the transaction. International law did not become applicable to *Sabbatino* via the determination under conflict of laws policy that American municipal law was the controlling law.

Are there any alternative routes by which international law could govern the acts which occurred in Cuba? In addition to its being part of the municipal law of the forum, international law may find application in the forum if it is part of the municipal law of the acting state, if it is a superior law binding on the forum, or if it has become part of the conflicts law of the forum as expressed through the forum's public policy.

In cases where the acting state recognizes the supremacy of international law in its municipal law hierarchy, and in which its own courts are empowered to review its legislative and executive acts, with regard to their substance or the competence of the body responsible for them and in the light of their conformity with international law, then the municipal courts of other states likewise may refuse to recognize the effects of an act which violates international law.¹²⁶ Thus, unless the foreign state

123. REEVES, *supra* note 41, at 675-78.

124. *The Paquete Habana*, *supra* note 122. (Emphasis added.)

125. Mr. Justice White also cites this case. *Banco Nacional de Cuba v. Sabbatino*, *supra* note 116, at 953.

126. See Morgenstern, *supra* note 49, at 343-45.

has accepted a rule of international law as part of its municipal law,¹²⁷ the forum may not incorporate gratuitously what it considers an international legal doctrine into the law of the former.¹²⁸ In *Sabbatino*, the nationalization law, "Law No. 851," enacted by the Cuban Council of Ministers provided that there should be no review by the Cuban courts.¹²⁹ In states where the courts lack power to review acts of state against the yardstick of international law, the acts are legally valid even if they constitute a violation of international law. In addition to this, the American act of state doctrine precludes examination of the validity of an act of a foreign state when attacked on the ground that it violates the municipal law of the acting state.¹³⁰

Is international law applicable as a superior law binding on the forum, *i.e.*, does international law impose an obligation on municipal courts not to recognize or enforce acts violative of international law? No principle of international law requires states other than the state perpetrating the alleged violation to provide judicial or other remedies. The Supreme Court expressed its acknowledgment of this limitation when it avowed that "the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders."¹³¹

It would seem that there is a route by which international law may be the controlling law, and that route is through the availability of principles of international law in the repository of general principles which comprise the public policy of the forum and which are applied as part of the conflicts law of the forum. Mr. Justice White argued that "it is only because of the application of international rules to resolve other issues that the act of state doctrine becomes the determinative issue in this case."¹³² He pointed out that the majority refused an application of international rules governing the validity of expropriating property and yet permitted reference to (1) public international law to determine whether the sugar was being loaded within Cuban territorial waters at the time of the seizure, (2) private international law for the rule that the *lex situs* governed, and (3) to the law merchant common to civilized

127. See, *e.g.*, *In re Fried Krupp Actien-Gesellschaft*, [1917] 2 Ch. 188.

128. *But see* Convention on the International Responsibility of States For Injuries to Aliens, art. 2(2) (Prelim. Draft, Harvard Law School, May 1, 1959), which provides that a state cannot avoid international responsibility by invoking its municipal law.

129. See *Schwartz v. Compania Azucarera—Camaguez de Cuba*, 39 Misc. 2d 63, 70-71, 240 N.Y.S.2d 247, 254-55 (Sup. Ct. 1962), in which a pending action before a Cuban court was dismissed on the ground that all property formerly belonging to the sugar company was, after Law No. 851, the property of the State.

130. See RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 42a (Proposed Off. Draft, 1962).

131. *Banco Nacional de Cuba v. Sabbatino*, 84 Sup. Ct. 923, 937 (1964).

132. *Id.* at 954.

nations to determine whether, at the time, C.A.V. retained title to the sugar, which would then be subject to the nationalization decree, or whether title had already passed to the broker under the contract of sale. As one writer has replied to this seeming inconsistency:

The answer is that these last three categories of law were applied not because they were international law but as part of well-established conflict rules of the forum or as the law applicable to the transaction.¹³³

Thus, the rules of customary international law were not directly applicable to the *Sabbatino* case and the case could have been decided by application of the *lex rei situs*, the governing law under the forum's conflict law. However, under ordinary conflict law, a foreign law may be refused recognition or enforcement if determined repugnant to the public policy of the forum. To close this loophole and to prevent application of customary international law in situations where it might be deemed the controlling law, the Supreme Court carefully worded the scope of the act of state doctrine:

[T]he 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.¹³⁴

The Court provided that the act of state doctrine is to apply "in the absence of a treaty or unambiguous agreement regarding controlling legal principles."¹³⁵ Treaties and executive agreements, in addition to being sources of international law, are also the "Law of the Land"¹³⁶—that is, municipal law. Thus, treaty law would represent a direct application of international law in American municipal courts. The Court apparently wished to reserve decision concerning its handling of treaty violations. It seems that this reservation holds true for contractual obligations between states and aliens as well.¹³⁷

133. Collinson, *Sabbatino: The Treatment of International Law in United States Courts*, 3 COLUM. J. TRANSNAT'L L. 27, 44 (1964).

134. *Banco Nacional de Cuba v. Sabbatino*, *supra* note 131, at 940.

135. *Ibid.*

136. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. CONSR. art. VI, § 2.

See *United States v. Pink*, 315 U.S. 203 (1942) (identifying an executive agreement with a treaty). "A treaty is a 'Law of the Land' under the supremacy clause . . . of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity." *Id.* at 230.

137. See comments of Brandon in note 39 *supra*.

V. AFTERMATH

Legislative response was not long in coming. On June 19, 1964, during Senate hearings on the Foreign Assistance Act of 1964, Senator Fulbright, Chairman of the Senate Foreign Relations Committee, disclosed that a "proposal [for an amendment] which has been submitted to other members of the committee—I first heard of it this morning . . . involves a rather technical legal problem."¹³⁸ After addressing questions to AID Administrator David E. Bell concerning the *Sabbatino* decision, he reported the probability of Senator Hickenlooper's proposing an amendment to the Foreign Assistance Act of 1964. Administrator Bell was requested to see that the State Department prepare a legal position on the proposal.

On June 25, the executive branch released a statement¹³⁹ to the effect that, "The amendment is intended to reverse the recent decision of the Supreme Court in *Banco Nacional de Cuba v. Sabbatino* . . ." and that, "The executive branch strongly opposes inclusion of this amendment in the Foreign Assistance Act."¹⁴⁰ The statement explained that the proposed amendment to section 620(e) of the Foreign Assistance Act, which relates to expropriations and other similar matters, would specify that no court in the United States shall decline on the basis of the act of state doctrine to make a determination on the merits or to apply principles of international law in a case in which an act of a foreign state occurring after January 1, 1959, is alleged to be contrary to international law. The amendment would further provide that no effect shall be given to acts of a foreign sovereign that are found to be in violation of international law. It allows the President to waive these provisions whenever he determines that application of the act of state doctrine is required by the foreign policy interests of the United States, and a suggestion to that effect is filed on behalf of the President with the court.¹⁴¹

The statement revealed *inter alia* that the executive branch considered the amendment *unwise*, in that it would have the effect of forcing the President to decide whether a court ruling on the act of a foreign state was prejudicial to United States foreign policy at a time and in a manner chosen by private parties to a court case and not at a time and

138. S. REP. NO. 1188, 88th Cong., 2d Sess. 449 (1964).

139. Requirement That U.S. Courts Inquire Into Acts of Foreign Sovereigns Unless the President Determines to the Contrary, in S. REP. NO. 1188, *supra* note 138, at 618.

140. *Ibid.*

141. *Ibid.*

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. U.S. CODE CONG. & AD. NEWS 5034 (1964).

in a manner chosen by the President. After indicating why the *Sabbatino* case was not a victory for Fidel Castro, the statement explained that the consequences of the decision would not be a setback to international law: "It was merely an exercise of judicial restraint in a highly complex and volatile area. . . ." ¹⁴² In reminding the legislators that this was a traditional area of judicial restraint the State Department cautioned that "it would be unwise for Congress to foreclose such restraint."

Notwithstanding the objections to such an amendment, on October 1, the Senate committee—urged on by statements of the Bar Association of the City of New York, which had previously filed an amicus curiae brief to the Supreme Court, and statements "of such eminent legal scholars as Professor Myres S. McDougal, of the Yale Law School, supporting this amendment. . . ." ¹⁴³—proposed this amendment at the conference on the disagreeing votes of the two Houses, on the amendments of the Senate to the House bill (H.R. 11380). The "managers" on the part of the House regretted that there had not been an opportunity for thorough study and full hearing on the subject; nevertheless, the conference committee amended the Senate language "to pinpoint its precise effect" and "The House recede[d] with an amendment." ¹⁴⁴

On October 2, 1964, the amendment, ¹⁴⁵ incorporated into section 620(e) of the Foreign Assistance Act of 1964, was adopted by both Houses and on October 7, was approved by the President. The comments made in the House on October 2, very likely express the compromise reached between the House and Senate:

Our adoption of the amendment now requires the State Department, which opposed it, to give the amendment a fair chance to

142. See S. REP. NO. 1188, *supra* note 139, at 619.

143. U.S. CODE CONG. & AD. NEWS 5034 (1964).

144. CONF. R. NO. 1925, in U.S. CODE CONG. & AD. NEWS 5062, 5072 (1964). The House "managers" apparently were successful in limiting the duration of this amendment to January 1, 1966.

145. The following paragraph, as a 1964 amendment to the Foreign Assistance Act of 1961, was added to subsection 620(e) (22 U.S.C.A. § 2370(e)):

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based on (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 acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court, or (3) in any case in which the proceedings are commenced after January 1, 1966. U.S. CODE CONG. & AD. NEWS 4837 (1964).

operate in practice, and puts the burden on them in our hearings next year of showing how the amendment's Presidential waiver provision does not amply meet any problems that may arise in the actual conduct of foreign affairs. . . . [A]s matters turned out [the amendment] was one of the most significant aspects of the bill. Our modification of the act of state rule in the *Sabbatino* decision is very important to the security of our private investments abroad.¹⁴⁶

VI. CONCLUSION

The author realizes that this discussion has been academic and at best represents only a foundation to the great *Sabbatino* debate. As delimited at the outset, its scope has been merely to examine some of the rules of law which play on this controversy. The discussion was intended to be objective and has not attempted to touch upon the significance of the decision or the solution to the enormous number of practical or hypothetical questions by which legal commentators will attempt to test the decision, if indeed the decision survives the legislative attack.

146. 110 CONG. REC. 22849 (1964) (remarks of Mr. Adair).