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Stuart S. Malawer
University of Baltimore School of Law

THE ACT OF STATE DOCTRINE AND THE CITY BANK CASE: A PROPER ROLE FOR THE JUDICIARY IN THE WORLD PUBLIC ORDER.

by

Stuart S. Malawer*

Banco Nacional de Cuba v. Sabbatino (1964)[1] has recently been called "undoubtedly one of the most important International Law cases to be decided by a domestic court this century . . . ."[2] In the line of the "Sabbatino Cases,"[3] the most recent case to be decided subsequent to the Sabbatino Amendment of 1964[4] is *Banco Nacional de Cuba v. The First National City Bank of New York* (1971).[5] In light of prior Congressional legislation, an analysis of the *City Bank* case reveals judicial frustration of the Congressional intent to limit the application of the act of state doctrine and to provide for greater judicial inquiry in cases involving an allegation of invalidity under international law of foreign expropriations. Judicial inquiry into foreign expropriation acts

* Assistant Professor of Law, University of Baltimore School of Law; Member of the Bars of the State of New York and the District of Columbia; J.D. Cornell Law School; M.A., PhD. Cand.

(International Relations) University of Pennsylvania and Certificate Hague Academy of International Law. Studied international law at Princeton University, Fletcher School of Law and Diplomacy, Harvard Law School, Parker School of Foreign and Comparative Law (Columbia University) and Europa Instituut, University of Amsterdam.

[1] 376 U.S. 398 (1964).

[2] Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 10 VA. J. INT'L. 9 (1970). [hereinafter cited as LILLICH]. Lillich describes the problems in the typical case involving expropriation, as a foreign state's taking the property of a United States national located within the territory and transfering it to a third party. The third party subsequently brings the property into the United States. If courts in the United States apply the act of state doctrine, and action to recover the property by the former owner against the third party would be dismissed without considering the validity of the expropriation under international law. *Id.* at 29.

[3] "Sabbatino Cases" refer to the application of the act of state doctrine to matters involving foreign expropriations.

[4] Foreign Assistance Act of 1964, 22 U.S.C. §2370(e) (2) Supp. I, 1965) *as amended*, Foreign Assistance Act of 1965, 22 U.S.C. §2370(e) (2) (Supp. V, 1969).

[5] 270 F. Supp. 1004 (S.D.N.Y. 1967), *rev'd*, 431 F. 2d 394 (2d Cir. 1970), *vacated and remanded*, 91 S. Ct. 58, (1971), *aff'd on rehearing*, 442 F. 2d 530 (2d Cir. 1971), *cert. granted*, 40 U.S.L.W. 3161 (U.S. June 17, 1971) (No. 295).

is necessary in order to create a proper role for the national courts in the development of viable horizontal international legal system, thus promoting the role of law in the world public order.

The Supreme Court in the *Sabbatino* case decided that courts in the United States may not determine whether expropriation acts of foreign states violated international law. The Court applied the act of state doctrine, upholding the application of the Cuban expropriation measures, even though the validity of those acts were questioned under international law. The application of the act of state doctrine precluded the exercise of jurisdiction, thus, precluded the application of the United States' interpretation of the customary international law rules relating to expropriation and compensation.[6] The Court considered the acts of the expropriating government to be immune from judicial inquiry.

Subsequent to the *Sabbatino* cases, by passage of the Sabbatino Amendment, Congress reversed the law as to the application of the act of state doctrine in cases of alleged invalidity under international law of a foreign government's expropriating acts. Proposed by Senator Hickenlooper, the Amendment was enacted as part of the 1964 Foreign Assistance Act. The Amendment stated,

> . . . No court in the United States shall decline on the grounds of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted . . . based upon or traced through a confiscation . . . by an act of that state in violation of the principles of international law, including the principles of compensation . . . . That this subparagraph shall not be applicable . . . in any case with respect to which the President determines that application of the act of state doctrine is required . . . by the foreign policy interests of the United States and a suggestion to this effect is filed . . . [7]

Until the Second Circuit decided the *City Bank* case in 1969, most observers considered the issue was settled by legislative action.[8] The Court in the *City Bank* case restrictively interpreted the Sabbatino Amendment as not applying to cases involving causes of actions relating to expropriated goods marketed outside of the United States. It applied the act of state doctrine on the hearing and rehearing of the case, thus precluding judicial inquiry into the lawfulness under international law of the Cuban expropriation measures.

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[6] Restatement (Second) Foreign Relations Law of the United States §185 (1965). [hereinafter cited as RESTATEMENT].

[7] RESTATEMENT 124.

[8] LILLICH.

In the Stevenson Letter, the Executive suggestion filed with the Supreme Court by the Legal Adviser's Office, the State Department clearly expressed the belief that the foreign policy interests of the United States do not bar judicial inquiry into the validity of the expropriation measures.

> We find the foreign policy interests of the U.S. do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim as a set-off against the Government of Cuba in these circumstances. The Department of State believes that the Act of State Doctrine should not be applied . . . in this or like cases.[9]

The case was remanded to the Second Circuit specifically in order to consider the view of the Executive department. On the rehearing, the Second Circuit held that the amendment introduced by Senator Hickenlooper did not apply. The Second Circuit stated, "Upon reconsideration, we see no reason to change our initial decision on this appeal,"[10] thus determining that the State Department letter made no substantial difference;[11] in the exercise of its discretion, the Court rejected the Executive suggestion. "We decide only that the Judicial Branch will not examine the validity for taking of property . . . even if the complaint alleges that the taking violates customary international law."[12] The court cited the *Sabbatino* case as authority.

The Second Circuit has refused to recognize the intended impact of the Sabbatino Amendment by refusing to give effect to the State Department's suggestion. The suggestion was clearly pursuant to the Congressional legislative intent to foster judicial inquiry when expropriations of foreign governments are alleged in national courts to be contrary to international law. The Sabbatino Amendment clearly reversed the presumptions hampering the foreign policy interests of the United States.[13] Under the Amendment the courts are only denied jurisdiction pursuant to a Presidential determination. Thus, when there is no Presidential determination, the court is required "to make a

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[9] Letter from John R. Stevenson to the clerk of the United States Supreme Court of November 17, 1970, 10 INT'L LEGAL MAT. 89 (1971).

[10] *Id.* at 538.

[11] *Id.* at 541.

[12] *Id.* at 543. The Court quoting from Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 428 (1964). The Court cites as authority for its holding French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E. 2d 704, 295 N.Y.S. 2d 433 (1968). Both *City Bank* and *French* cite as their authority Henkin, *Act of State Today: Recollections in Tranquility*, 6 COL. J. OF TRANS. L. 175 (1967). Henkin admits his article is biased, "And, as doubtless one of the few present who agreed with the Supreme Court decision which Congress has overruled . . . . " *Id.* at 175. A letter of Cecil J. Olmstead entered into the record of the Senate hearing of 1965 argued that the Sabbatino Amendment covered the *City Bank* situation. Hearings on Foreign Assistance Act of 1965 (H.R. 7750). Before the House Comm. on Foreign Affairs, 89th Cong., 1st Sess. 1306 (1964).

[13] S. Rep. No. 1188, Part I, 88th Cong., 2d. Sess. 24 (1964).

determination on the merits giving effects to the principles of international law." There is no room for judicial discretion; Congress created a conclusive presumption of jurisdiction absent a Presidential determination to the contrary. The Second Circuit's exercise of such discretion, contrary to a positive suggestion by the Department of State, was incorrect as a matter of law.[14]

The immediate legal issue presented by the Second Circuit Court's opinion is clear—are the courts of the U.S. precluded from determining the validity of foreign expropriation acts under international law in light of the act of state doctrine? Congress has answered the question in the negative. It should not be necessary for it to speak again. The Sabbatino Amendment creates a two-fold statutory exception to the application of the act of state doctrine to acts of foreign expropriations: one, a reverse "Bernstein exception" and, two, an international law exception. While the Restatement in 1965 gives "no opinion"[15] on the impact of the Sabbatino Amendment on prior case law it concludes that in light of an Executive suggestion "there would appear to be no reason for the court to abstain from ruling on the merits."[16]

A positive Executive suggestion under the Sabbatino Amendment only increases the duty of the courts to inquire into the validity under international law of foreign acts of expropriation.

The traditional view of the role of the judiciary in the field of foreign affairs has been to refrain from involvement, in part, by relying upon the act of state doctrine. This has been stated by Judge Hulbert in 1940.

> However revolting the acts of a sovereign state may be to a free people . . . our courts . . . must . . . leave the solution of political questions of an international character to those upon whom the Constitution devolves that duty (the President).[17]

This view has recently been given effect in a New York state case discussing the racial policies of the Union of South Africa in the operation of its overseas airlines. The court dismissed the case on the basis of the act of state doctrine.[18]

The consistent passage of resolutions by the U.N. condemning the internal racial policies of South Africa evidences the obsolescence of

[14] *Cf.* Note, *Executive Suggestion and Act of State Cases: Implications of the Stevenson Letter in the City Bank Case*, 12 HARV. INT'L. L. J. 557, 560 (1971)

[15] RESTATEMENT 125.

[16] RESTATEMENT 130. When a court in the United States is assured that possible rejection of a foreign act of state will not embarass foreign policy and when that assurance comes from the branch of government responsible for the conduct of foreign relations, there would appear to be no reason for the court to abstain from ruling on the merits. *Id.*

[17] Medvedieff v. Cities Service Oil Co., 35 F. Supp. 999, 1001 (S.D.N.Y., 1940), 1 A.I.L.C., 292, 294 (1971).

[18] South African Airways v. New York State Division of Human Rights, 64 Misc. 2d 707, 315 N.Y.S. 2d 65 (Sup. Ct. 1970).

the historical separability of foreign affairs from domestic affairs. The underlying assumptions of the act of state doctrine are today being questioned. Courts ought not to self-impose jurisdictional limitations, which are not required as international legal obligations, over an area of law that today is more important, in the context of money spent and lives affected, than most domestic matters. As there has been a merging of the academic fields of study of international and comparative law, a realization is needed on the part of the courts that foreign affairs affect the individual and are a powerful factor in every citizen's life and right to property. Such a recognition should not be limited to an awareness that the war-making power is the only area of foreign affairs in need of judicial scrutiny.

The act of state doctrine is not an international legal doctrine. Many foreign legal systems utilize such a doctrine, but it is not required by international law. It is essentially a concept that stems from an historical period in which foreign affairs and domestic affairs were quite distinct. In the nineteenth century only ten percent of the federal budget was devoted to foreign affairs. In this century, there has been a merger of foreign and domestic politics.

The present percentage of the federal budget devoted to military and foreign affairs is many times that spent in the nineteenth century. The application of the act of state doctrine ought to be restricted in order to foster the development of a viable horizontal international legal system that encompasses national jurisprudence.[19] In order to ensure further development of the international legal order pursuant to the mandate of the Statute of the International Court of Justice, Article 38(1)(d), providing for the jurisprudence of national courts to be considered as a subsidiary means of determining rules of international law, courts should not disclaim jurisdiction when a violation of international law is alleged. Also, the act of state doctrine needs to be restrictively interpreted in order to foster the development of international trade and investment between the United States and both developing and developed states, thus, promoting the role of law in the international community.

In the light of the great need for direct U.S. private investment in less developed countries, it makes no sense for the U.S. courts to refuse to review the legality of the expropriation of such investments. This will certainly not be an incentive to increase foreign investment. From a contextual perspective, both legal and policy considerations indicate that the Second Circuit has made an incorrect decision. First, it is

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[19] *See generally*, Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMP. L. Q. 295 (1959).

incorrect specifically in its determination of the law as it relates to foreign expropriations. Second, the Court's general adherence to the act of state doctrine is not politically correct; such an adherence is not beneficial to developing an international community subject to the rule of law. The existence of a viable international legal system depends, in part, on the application by United States courts of international law rules to domestic litigation.

In the context of legislative-judiciary competence in foreign affairs, the judiciary should not frustrate justifiable expectations based upon the clear intention of the Congress as expressed in the Sabbatino Amendment. On appeal to the Supreme Court, counsel for City Bank would do well to question the entire underlying rationale of the act of state doctrine.[20]

To conclude with a recent statement by former Chief Justice Earl Warren,

> There is also a tendency to avoid difficult solutions in the absence of crisis and, when violence occurs, to go no further than freeze the dangerous status quo. This is a prescription for the continuation of the tension.[21]

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[20] The petition for certiorari filed by counsel for the First National City Bank has not questioned the validity of the act of state doctrine in its general application. In addition, they have not emphasized the impact of the Sabbatino Amendment as restricting the court's discretion in denying judicial inquiry. Specifically, the questions presented were:

(1) After U.S. Supreme Court has vacated U.S. court of appeals' judgment and remanded case to court of appeals for reconsideration in light of views expressed by State Department, may court of appeals reinstate its judgment in disregard of those views?

(2) May federal court decline, on basis of act of state doctrine, to permit United States national, as defendant, to offset against claim of foreign government plaintiff its claim for compensation for property confiscated by that foreign government, even though State Department has made finding that United States' foreign policy interests do not require application of doctrine and has expressed view that doctrine should not be applied? 40 U.S.L.W. 3141 (U.S. June 17, 1971) (No. 295).

[21] E. Warren, *World Order*, N. Y. Times, July 23, 1971, at 31, col. 2.