# COMMENT

## THE APPLICABILITY OF THE ACT OF STATE DOCTRINE IN PHILIPPINE COURTS*

### I. INTRODUCTION

Since its judicial formulation in 1674,[1] nearly three hundred years ago, the act of state doctrine has been a constant source of great interest among legal scholars. A great deal of critical analyses and commentaries have evolved not only in England where the doctrine found its first judicial expression, but also in the United States and other countries whose judicial machineries have encountered legal situations which involved the act of state doctrine. Even today, the critics as well as the defenders of the doctrine are still engaged in a legal debate relative to the validity of the doctrine considering that new conditions and institutions have found their way into the framework of the existing international community. In the law schools, in legal forums and conventions, and in the law journals of varying kinds — the constant, and sometimes heated, interchange of opposing views continues. And considering that no common and final solution has been reached by the two diametrically opposed camps, it is safe to assume that the controversy is likely to continue for a considerable number of years.

The widespread interest that the act of state doctrine has presently attracted was not the case during the early stage of the doctrine. It was only after World War II that there has been a great growth of interest in, and re-examination of, the act of state doctrine[2] — the doctrine that "courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[3] Prior to this time there was a relative quiet among legal commentators concerning the doctrine. If ever there were some dissenting voices, they were decidedly negligible and they were not seriously received among legal circles. The doctrine, at the time, was safely established.

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1 Blad v. Bamfield. 3 Swanston 604; Eng. Rep. 992, cited in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398; 84 S. Ct. 923 (1964).

2 Metzger, *The Act of State Doctrine and Foreign Relations*, 23 UNI-PITT. L. REV. 881 (1961-1962).

3 Underhill v. Hernandez, 168 U.S. 250, 252; 18 S. Ct. 83 84; 42 L. Ed. 456 (1897).

From 1674 to the advent of the second world war, a span of more than two hundred years, the doctrine continued to occupy this safe position. But this was not to be a permanent condition of quiet and general acceptance. The revolutionary changes in terms of legal conditions and institutions which have come about in the international community have gradually eroded the hitherto firm and strong fiber of the act of state doctrine.

The tumultuous events of recent years suggest the need of an analysis of a rule which restricts courts to a completely amoral attitude regarding foreign acts of state.[4] While it is true that the doctrine today can still count on the support of many able defenders, nevertheless it is significant to note that there is now a conscious and a sustained move to modify, if not to abandon, the act of state doctrine. In the United States, it has been pointed out that the muddled judicial treatment given to acts of state has long been a source of consternation to attorneys and injustice to litigants. Thus it is quite vigorously asserted that a re-examination of the entire area in the light of relevant legal principles and purposes would seem not only appropriate, but necessary.[5] In England where, under the heading "Act of State", a definite body of doctrine has been evolved as a constitutional background for the treatment of this kind of problem, there is a considerable divergence of views and trends.[6] And in the continental countries, the situation is more or less the same. Their modern position toward the act of state doctrine is not clear. It is currently a subject of comment and criticism, although, admittedly, the exchange of views is not as a widespread and as exhaustive as in the United States.

In our jurisdiction we have not, as yet encountered a factual situation involving the doctrine. Whether or not our Supreme Court will have occasion in the future to pass upon the validity or the ap-

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[4] *Editorial Comment*, 57 YALE L. J. 11 (1947).

[5] Lipper, *Acts of State and the Conflict of Laws*, 35 N. Y. U. L. REV., 258 (1960). It is noteworthy that in 1959, the Committee of International Law of the Bar Association of New York prepared a report urging a reconsideration of the act of state doctrine and the association adopted a resolution urging confinement of that doctrine to cases in which the Department of State thought it desirable that it be applied. More recently, and in the Sabbatino case before the Supreme Court, the association filed amicus briefs urging the court to apply international law, the act of state doctrine to the contrary notwithstanding. The Supreme Court, however, did not follow the recommendations of the association.

[6] Holdsworth, *The History of Acts of State in English Law*, 41 COLUM. L. REV., 1313 (1941).

plicability of the act of state doctrine in Philippine courts is purely a matter of conjecture. However, the fact that we have not been confronted by a case which calls either for the application or abandonment of the doctrine should not be a cause for indifference on our part. We should actively participate in the move to subject the entire area of the act of state doctrine to the searchlight of critical intelligence. For it is a proposition that can not be denied that the doctrine has far-reaching significance, and it involves not a small but a substantial portion of the community of nations.

## II. Statement of the Problem

The applicability of the act of state doctrine in Philippine courts is the main problem that is sought to be discussed in this thesis. As pointed out earlier, no case has been presented before our courts which touches on this intriguing doctrine. This fact necessarily confines the area of the present inquiry into foreign materials, supplemented by Philippine laws bearing on international law. The whole area of the act of state doctrine as developed in English and American jurisprudence will be closely scrutinized, and this, in turn, will be subjected to the test of legal validity as viewed from the standpoint of Philippine law.

The problem may be illustrated in a hypothetical situation where jewelry in Cuba owned by an American citizen was confiscated by the Cuban government, later sold to a French national and then brought into the Philippines where the American owner sues to recover possession of the jewelry as his property. In a situation like this, the vital question that has to be resolved by the forum is whether or not the so-called act of state doctrine will be applied. If it is so applied, the French national would retain the jewelry on the ground that the Cuban confiscation passed title of the Cuban government, the court not judging the validity of the confiscation by the standards of international law. On the other hand, if the act of state doctrine is ignored, the American citizen may be able to recover possession of the jewelry on the ground that the confiscation was illegal, it being violative of international law.

There are other situations which involve the act of state doctrine. Broadly speaking, the doctrine arises in two different types of cases, namely: first, in case of actions for damages, or actions of a similar

kind, purporting to make a private person, whether formerly in the service of the foreign state or not, responsible for acts committed on behalf of, or in cooperation with, a foreign state; secondly, in case of actions instituted against private parties for the restoration, or restitution, of goods or rights, expropriated or confiscated by a foreign government.[7] The subsequent section on the historical background of the act of state doctrine deals with varying situations which exemplify these two types of cases.

## III. THE ACT OF THE STATE DOCTRINE

### *The Doctrine as Stated by Anglo-American Courts*

Numerous attempts have been made to define or explain the act of state doctrine. Since opinions on this matter differ from country to country, it is hardly feasible to give a clear-cut and watertight definition of what the act of state doctrine implies. For the purposes of this thesis, however, the definitions given by English and American tribunals will be heavily relied upon. This predilection is understandable enough if we are to consider the fact that the doctrine is of Anglo-Saxon origin. Some distinction, however, will be drawn between English and American pronouncements, as in spite of the process of action and interaction of one upon the other, the latter have gone further toward a strict interpretation which many consider out of harmony with modern conditions of international life.[8]

In the United States, the most often quoted statement of the act of state doctrine is found in the case of *Underhill v. Hernandez*.[9] Speaking through Chief Justice Fuller, the United States Supreme Court said:

> "Every sovereign 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 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."

The defendant in this case was a general in Venezuela who, at the head of the revolutionary army, entered the city of Bolivar

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[7] Van Panhuys, *In the Borderland—Between the Act of State Doctrine and Questions of Jurisdictional Immunities*, 13 Int'l. & Comp. L. Q. 1211 (1964). The hypothetical illustration given above belongs to the second type of cases.

[8] Zander, *The Act of State Doctrine*, 53 AM. J. INT'L. L., 827 (1959).

[9] 168 U. S. 250; 18 S. Ct. 83; 42 L. Ed. 456 (1897).

on August 13, 1892, and found the waterworks under the charge of an American named Underhill, who asked leave to depart. This was refused until October 18, 1892, presumably because General Hernandez desired Underhill to keep on operating the waterworks for the benefit of his army and the people of the town. Later, the revolutionary government was recognized by the United States. Still later, when both Underhill and Hernandez were in New York, the former brought suit against the latter there for damages on account of his detention and affronts which he had suffered. The United States Supreme Court decided in favor of the defendant because "the courts of one country will not sit in judgment on the acts of another done within its own territory."

The celebrated formulation of the doctrine in this case was reaffirmed in subsequent American cases,[10] the latest, and most controversial, of which is the case of *Banco Nacional de Cuba v. Sabbatino* decided by the United States Supreme Court in 1964.

In England, the leading case is *Luther v. Sagor.*[11] According to Oppenheim, the ruling of the English tribunal in this case stands for the proposition that the "courts of one state do not, as a rule, question the validity or legality of the official acts of another sovereign or the official or officially avowed acts of its agents, at any rate in so far as they purport to have taken effect within the sphere of the latter state's own jurisdiction."[12]

Comparing the English holding in the above entitled case to the American formulation of the act of state doctrine in the celebrated case of *Underhill v. Fernandez,* one can easily discern their similar outlines. Both pronouncements advert to the proposition of non-examination of foreign acts of state without qualification. In 1953, however, a major British decision departed from the strict interpretation of the act of state doctrine. In the case of *Anglo-Iranian Oil*

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[10] See Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918); Hewitt v. Speyer (2d Cir. 1918) 250 F. 367; Banco de Espana v. Federal Reserve Bank, (2d Cir. 1940) 114 F. (2d) 438; United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942); Bernstein v. Van Heyghen Freres, S.A., 163 Fed. 2d 246 (C.C.A. 2, 1947), 332 U.S. 772; Banco Nacional de Cuba v. Sabbatino. 376 U.S. 398; 84 S. Ct. 923 (1964).

[11] 3 K.B. 532 (1921), cited in Peters' *Title to Chattels — "Act of* State" Doctrine, 58 MICH. L. REV. 110 (1959-60).

[12] OPPENHEIM, INTERNATIONAL LAW 267 (8th Ed., Lauterpacht, 1955). It is significant to note the additional qualification introduced for the first time in this edition — that the act must not be contrary to international law.

*Co. v. Jaffrate* (*The Rose Mary*),[13] the oil company, a British corporation, contended that the Iranian nationalization law was invalid to pass title to oil to Iran on the ground that the nationalization was confiscatory and thus a violation of international law. The company sued in a court in Aden to gain possession of oil sold by Iran to a third party, and subsequently brought to Aden. The Supreme Court of Aden held that the Iranian nationalization was confiscatory, that such a confiscation was a violation of international law, and that it was invalid to pass title to third parties because the international law was incorporated into the domestic law of Aden. This ruling was criticized in a subsequent case,[14] but the issue in the latter case was not similar to that of *The Rose Mary*. The result of these two cases is to leave the act of state doctrine unsettled in British law. None of the cases is binding on the House of Lords, and therefore the question remains open.[15]

From a consideration of the judicial pronouncements bearing on the act of state doctrine, one can reasonably describe it as the rule that a court, asked to pronounce itself on the legality of an act performed by a foreign state, even if it is asked to do so in proceedings between private parties, lacks competence thereto, unless the foreign state has given its consent.[16]

*Meaning of the Term "Act of State"*

A precise understanding of the term "act of state" is considerably valuable if we are to have a clearer view of the act of state doctrine.

When is an act said to be an "act of state"? What is the the scope of the terminology? Does it refer only to executive or legislative acts? Or, does it include judicial acts as well?

The answers to these and other related questions are helpful for they may throw some light on the meaning and validity of the present formulation of the doctrine.

An act of state has been said to be any governmental act in which the sovereign's interest *qua* sovereign is involved. "The ex-

[13] 1 W.L.R. 246 (153), cited in Peters, *op. cit., supra,* note 11.
[14] In Re Claim by Helbert Wagg & Co., Ch. 323 (1956), cited in Peters, *op. cit., supra,* note 11 at p. 113.
[15] Peters, *op cit., supra* at p. 114.
[16] Panhuys, *op. cit., supra,* note 7.

pression 'act of state' usually denotes 'an executive or administrative exercise of sovereign power by an independent state or potentate, or by its or his duly authorized agents or officers'. The expression, however, is not a term of art, and it obviously may, and is in fact often intended to, include legislative and judicial acts such as a statute, decree or order, or a judgment of a superior court."[17] The term refers to acts which concern some matter of state, and "the type of matter of state is the matter between states which, whether it be regulated by international law or not, and whether the acts in question are or are not in accord with international law, is not a subject of municipal jurisdiction."[18] It is not a subject of municipal jurisdiction because, though it may give rise to results which fall within the sphere of municipal jurisdiction, it "is essentially an exercise of sovereign power." Acts of state, therefore, fall within the sphere of international rather than municipal law — they must be accepted as ultimate facts by municipal courts, and their legality or illegality can be judged only by the rules of international law.[19]

Pollock defines an act of state as "an act done or adopted by the prince or rulers of a foreign independent state in their political and sovereign capacity, and within the limits of their de facto political sovereignty."[20] The American Restatement of the Foreign Relations Law of the United States,[21] however, defines "acts of state", for the purposes of the act of state doctrine as an act by which a state prescribes or enforces rules attaching legal consequences to conduct, including rules relating to property, status, and other legal interests, determining or giving effect to the interest of the acting state as a state as distinguished from action by that state determining or giving effect to interests of a private nature.

It has been pointed out earlier that the term is often used to include judicial acts.[22] For the purposes of the act of state doctrine however, the term will denote only those acts of an executive, administrative, or legislative nature. Acts of judicial nature will not be considered. This is on account of the fact that rules applicable

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[17] Mann, *The Sacrosanctity of the Foreign Act of State*, 59 L. Q. Rev., 42 (1943).

[18] Moore, *Act of State in English Law* (1906) 1-2, cited in Holdsworth *op. cit., supra*, 41 L. Rev. at p. 1313.

[19] *Ibid.*

[20] POLLOCK, TORTS (14th Edition 1939), 88-9.

[21] 28 (a) at 2 (Tentative Draft No. 4, 1960).

[22] *Supra*, note 17.

to judgments differ from those applied to executive, administrative and legislative acts. It is suggested that one answer as to why judgments do not fall within the ordinary rules governing acts of state stems from the fact that the law of judgments developed long before other act of state cases became important items of litigation in American courts. When the latter gained prominence, the practical considerations applied precluded the possibility of applying rules taken from the law governing judgments.[23]

*Basis of the Act of State Doctrine*

There is no single authoritative and convincing pronouncement regarding the basis of the act of state doctrine. Even the recent decision of the United States Supreme Court in the *Sabbatino* case[24] is not clear or precise on this point. On the other hand, Justice Harlan's opinion in the same case rejects the notion, implied in the *American Banana* case,[25] that the act of state doctrine is compelled by 'the inherent nature of sovereign authority."[26] The opinion settles the issue by saying that "while historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence."[27] That is, the reciprocal respect for the territorial jurisdiction of sovereign states is a desirable policy furthered by the act of state doctrine, but it is not a policy that makes application of the doctrine mandatory. Neither does international law impose a duty to adopt the act of state doctrine. Although the application of the doctrine or its equivalent is frequent in international practice, no authority or decision of an international tribunal exists to suggest that a failure to apply the doctrine is a breach of an international obligation. And, finally, the United States constitution also does not require the act of state doctrine. The court concludes that the act of state doctrine is a device, and it is beneficial because it safeguards the prerogatives of the executive and improves the equality of a state's participation in international society.

The doctrine seems to be one of judicial invention designed to give the executive branch of government maximum flexibility

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[23] Lipper, *op. cit., supra,* note 5, at p. 234.

[24] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398; 84 S. Ct. 923 (1964).

[25] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[26] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398; 84 S. Ct. 923 (1964) at p. 421.

[27] *Id.* at p. 421.

in foreign affairs by precluding the possibility of international friction or disharmony as a result of judicial edict.[28] It is in no respect a part of sovereign immunity. It has been succintly pointed out that the act of state doctrine must not be confused with the doctrine of sovereign immunity. It has long been held that a sovereign can not be sued in the courts of another country without his consent.[29] As a corollary, it has been held that the property of a sovereign is not subject to judicial process in another state,[30] and that a sovereign or his agents cannot be sued in the courts of another state for acts done within the state of the sovereign.[31] None of these situations arises in the application of the true act of state doctrine.[32] If the doctrine is not a part of sovereign immunity, neither does it derive from the inability of the courts to take jurisdiction, for it is settled that a court may, acting as a convenient forum, take jurisdiction over a transitory cause of action arising outside its borders by gaining jurisdiction over the persons or property involved in the legal dispute.

## IV. Importance of the Study

The decision of the United States Supreme Court in the *Sabbatino* case has created a controversy and has excited so much interest. The controversy is so important that it has enlisted the active participation of law professors, legislators, and members of both Bench and Bar alike in the discussion of the issues which are admitted to be crucial for assessing and understanding the role of a domestic court in an international law case.

Addressing the participants in the Seventh Hammarskjold Forum sponsored by The Association of the Bar of the City of New York, Professor Richard A. Falk said that the issue involved in the *Sabbatino* case was "... whether or not a domestic court, located in the United States, could declare invalid the Cuban expropriation by examining on its merits the claim that the expropriation, due to its confiscatory nature, violated international law. The main argument that was advanced to shield the Cuban expropriation from investigation under international law was that the act of state doctrine pre-

28 Lipper, *op. cit., supra,* note 5, at p. 237.
29 2 Hackworth, International Law, 169-176 (1941).
30 *Ibid.*
31 *Id.,* 169, 175.
32 Peters, *op. cit., supra,* note 11, at p. 102.

cluded a domestic court from reviewing on its merits the Cuban expropriation decree, because that decree was the act of a foreign government. The act of state doctrine says, in its simplest form, that courts in the United States will not question the validity of a foreign governmental act. The contention raised by those attacking the expropriation was that there was an international law exception to the act of state doctrine; in other words, that if the foreign governmental act violated international law, a domestic court could examine that argument and, if it found it well grounded, could deny validity to the Cuban expropriation."[33]

Falk advanced four reasons why the controversy is important. *First of all,* it deals directly with the extent to which traditional rules, customary in international law, continue to offer protection to foreign investments, and especially continue to offer protection when foreign investment is encroached upon by an expropriation taking place in one of the capital-importing states; *second,* the *Sabbatino* controversy concerns the extent to which, as a consequence of the act of state doctrine, it is appropriate for a domestic court in one state to uphold the governmental act of another when the act is alleged to violate international law; the *third* reason is that it raises, as no other case perhaps has raised, the scope of permissible and mandatory judicial inquiry in an international law case and the way in which this scope is affected by the peculiar separation of powers doctrine that exists in the United States, to allocate legal authority among the three central branches of the government; and *lastly,* it compels one to reflect on the character of customary international law, and to establish how this process of law-making operates under the conditions of contemporary international society.[34]

It can thus be easily seen that the issues surrounding the *Sabbatino* controversy cut "deep into the potential future effectiveness of all international law and most vitally affect that particular part of international law which is designed to promote and secure an international economy."[35] This statement adverts to the maintenance of

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[33] THE AFTERMATH OF SABBATINO, VII (Tondel, ed. 1965.)

[34] *Ibid.*

[35] Statement of Professor Myres S. McDougal in support of the so-called "*Sabbatino Amendment*" to the United States Foreign Assistance Act of 1961, cited in DEAN ABAD SANTOS' CASES ON INTERNATIONAL LAW. 255 (1966).

an international law which prohibits states from expropriating the property of the nationals of other states without making just and reasonable compensation.

The current controversy that has engaged the ablest of legal minds in the United States should also be a concern of our own students and commentators on international law. There is no cogent reason on our part to ignore it. On the contrary, there are ample reasons which should prompt us to join the dialogue. First of all, the implications emanating from the *Sabbatino* ruling are far-reaching. Secondly, our own constitution expressly "adopts the generally accepted principles of international law as part of the law of the nation."[36] This consideration alone should seriously involve us in the search for satisfactory answers to the challenges posed by the act of state doctrine.

## V. Historical Background

Tracing the origins of the act of state doctrine as presently formulated requires an inquiry not only into American but also English and other foreign cases. This attempt to portray the history of the doctrine is helpful, for such may yield valuable materials which could provide us a broader understanding of the doctrine. Because the act of state doctrine appears to have taken root in England, English cases will be first inquired into, to be followed by American and other foreign precedents.

### *English Precedent*

In 1674, the first case which is said to be the origin of the doctrine was decided in England. This is the case of *Blad v. Bamfield*.[37] Blad, a Dane, in England at the time of filing his bill in equity, prayed an injunction against actions of law against him by various Englishmen because he had seized goods of theirs in Iceland. He admitted the seizures, but justified them by a patent of the King of Denmark, sovereign of Iceland, giving him the exclusive right to trade in that island, a Danish sentence of condemnation of the goods seized, confirmation of that sentence by the Chancellor of Denmark, execution of the sentence, and payment of two thirds of

[36] Const. Art. II, sec. 3.

[37] 3 Swanston 604, cited in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398; 84 S. Ct. 923 (1964).

the value of the goods to the King of Denmark. The English Chancellor gave the complainant a permanent injunction. Says Lord Nottingham:

> "Now, after all this, to send it to a trial at law, where either the court must pretend to judge of the validity of the King's letters patent in Denmark, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd."[38]

While the decision of the English court in this case is decidedly a far cry from the present formulation of the doctrine, nevertheless it is not difficult to imagine the present formulation as having grown or developed from this ancient holding.

In *Wolff v. Oxholm*,[39] the defendant attempted to defend an action for the recovery of a debt on the grounds that he had paid the debt to the Danish government in compliance with a confiscation law of Denmark. The ordinance was passed as a wartime measure, but absolved the debt for all purposes in Denmark. The court, speaking through Justice Ellenborough, held that payment under the Danish Act was no defense. According to the court "the parties are not bound by the quashing of their suit in consequence of a subsequent ordinance not conformable to the usage of nations, and which, therefore, they could not expect, nor are they or we bound to regard." The decision of the court in this case seems to put a premium on international law.

In 1848, another English case was decided along the proposition that acts done by a foreign sovereign in his own territory can not be made the subject of litigation in an English court. In the case of *The Duke of Brunswick v. The King of Hannover*,[40] the acts complained of by the plaintiff were done by the defendant as King of Hannover, and in Hannover. It followed that, even supposing that these acts were contrary to the laws of Hannover, no action lay because "no court in this country can entertain questions to bring sovereign to account for their acts done in their sovereign capacities abroad."[41] The same rule that the Court of Chancery laid down in

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[38] *Ibid.*, p. 607.

[39] 6 M. & S. 92, 105 Eng. Rep. 1177 (1817), cited in Peters, *op. cit., supra*, note 15, at p. 110.

[40] 2 H. L. Cas. 1, 9 Eng. Rep. 993 (H. L. 1848), cited in Holdsworth, *op. cit. supra*, note 6, at p. 1318.

[41] *Id.* at 22, 9 Eng. Rep. at 1000, per Lord Cottenham L. C.

this case had, some years before, been laid down by the Courts of Common Law in the case of *Dobree v. Napier*[42] and was approved by the House of Lords in the case of *Carr v. Fracis Times & Co.*[43] It was held by the Court of Common Pleas in the former case, that if an act has been authorized by a foreign sovereign and was thus a lawful act when it was done, it gives rise to no cause of action in an English court. It is, in such a case, immaterial whether or not the defendant or plaintiff are British subjects, and whether or not the act was lawful or unlawful by English law, or by international law.[44] But it is obvious that the act must have been done within the jurisdiction of the sovereign who gave the authority.[45] In the *Dobree v. Napier* case, the acts done by the defendant under authority of the Queen of Portugal were an offense against the Foreign Enlistment Act of 1819. Speaking through Justice Tindal, the court said:

> "We can not consider the law to be that where the act of the principal is lawful in the country where it is done, and the authorities under which such act is done is complete, binding and unquestionable there, the servant who does the act can be made responsible in the courts of this country for the consequences of such act to the same extent as if it were originally unlawful, merely by reason of a personal disability imposed by the law of this country upon him, for contracting such engagement. Such a construction would effect an unreasonable alteration in the situation and rights of the plaintiff and defendant."[46]

The principle enunciated in the case of *Wolff v. Oxholm*[47] has been followed in *Queen v. Lesley*.[48] The defendant in this case, the Master of a British ship, contracted with the government of Chile to carry some political prisoners from Val Paraiso to England. When the prisoners reached England, they filed an indictment against the

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[42] 2 Bing. N. C. 780, 132 Eng. Rep. 301 (C. P. 1836), cited in Holdsworth, *op. cit., supra,* note 6, at p. 1319.

[43] A.C. 176, (1902), cited in Holdsworth, *op. cit., supra,* note 6, at p. 1319.

[44] The proposition that it is immaterial whether or not the foreign act is violative of international law comes from Carr v. Fracis Times & Co., A. C. 176 (1902), at p. 186, per Lord Lindley. Note that the holding in this case seems to depart radically from the holding in Wolf v. Oxholm, *supra,* note 39.

[45] Barclay v. Russell, 3 Ves. 421, 434-5, 30 Eng. Rep. 1085, 1092 (Ch. 1797), cited in Holdsworth, *op. cit., supra,* note 6, at p. 1319.

[46] 132 Eng. Rep., at 307, cited in Holdsworth, *op. cit., supra,* note 6, at p. 1319.

[47] *Supra,* note 39.

[48] 29 L. J. M. C. 97 (Crown Case Reserved, 1860), cited in Holdsworth, *op. cit., supra,* note 6, at p. 1327.

Master for assault and false imprisoment. It was held that, so long as the ship was in Chilean waters, the authority of the Chilean government afforded a defense to the Master. But that as soon as the ship had left those waters, that authority could not protect him, the rules of English law applied, and he was therefore liable.

The case of *Vavasseur v. Krupp*,[49] an 1878 case, was decided along the same direction taken by the court in the above cited case. In this case, shells which belonged to the government of Japan but had been brought to England, could not be seized by the plaintiff on the ground that they infringed his patent, because they were the property of a foreign sovereign. But the court pointed out that it did not follow that the agents of a foreign sovereign could escape liability if they had offended against English law.

Another English case which followed the holding of *Wolff v. Oxholm*[50] is the case of *In Re Fried Krupp Action-Gesellschaft*.[51] Decided by the Chancery in 1917, this case involved a German law which abrogated the obligation to pay interest to enemies during World War I. The law was held inapplicable to a contract interpreted according to German law partly on the ground that the law was one "which is not conformable to the usage of nations."[52]

Up to this point, it can be observed that the holding in the *Wolff v. Oxholm* case, together with the later cases which had similar holdings, seems to have established a trend toward the proposition that if the foreign act of state is not conformable with international law, English courts can well declare its invalidity or inapplicability in England. This trend, however, was reversed in 1921 by the decision of King's Bench in the case of *Aksionairoye Obschestvo A.M. Luther v. James Sagor*.[53] This was a suit by a Russian company to recover lumber confiscated by the Russian Communist Government. In 1918, the Russian Soviet Federated Socialist Republic passed a decree confiscating sawmills and woodworking establishments and their assets. The plaintiff was a Russian corporation having a sawmill in that country and certain plywood stored in or

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[49] 9 Ch. D. 351 (Ch. 1878), cited in Holdsworth, *op. cit., supra,* note 6, at p. 1327.

[50] *Supra,* note 39.

[51] 2 CH. 188, (1917), cited in Peters, *op. cit., supra,* note 15, at p. 110.

[52] *Id.* at 194.

[53] K. B. 456, revd., (1921); 3 K. B. 532, (1921), cited in Peters, *op. cit., supra,* note 15 at p. 110-111.

near it. In 1920, a representative of the Russian commercial delegation in England made a contract with the defendants selling them certain wood, which was carried out. The plaintiff contended that certain marks showed that the wood was sold and then in the possession of the defendants was the identical plywood formerly stored at its mill and confiscated. The court, speaking through Lord Justice Warrington, said:

> "It is well settled that the validity of the acts of an independent country in relation to property and persons within its jurisdiction can not be questioned in the courts of this country."[54]

The court upheld the Russian confiscatory decree and decided in favor of the defendants.

Eight years later, in 1929, another case was decided similarly to that of *Luther v. Sagor*.[55] In the case of *Princess Paley Olga v. Weisz*,[56] the plaintiff, a Russian national, was suing for property confiscated in Russian by the Soviet government, which had been sold to a third party in question was the plaintiff's palace. The Russian revolutionaries in 1918 had confiscated it and its contents and made it a state museum. Later the Soviet government was recognized by Great Britain. The court held that this confiscation was an act of state, which must be recognized even if contrary to British ideas.

In 1953, a major British decision apparently reverted to the holding in *Wolff v. Oxholm*[57] which puts great importance on international law. The case of *Anglo-Iranian Oil Co. v. Jaffrate* (*The Rose Mary*)[58] arose out of the nationalization of the oil industry by Iran. The oil company, a British corporation, contended that the Iranian nationalization law was invalid to pass title to oil to Iran on the grounds that the nationalization was confiscatory and thus a violation of international law. The company sued in a court in Aden to gain possession of oil sold by Iran to a third party, and subsequently brought to Aden. The Supreme Court of Aden held that the Iranian nationalization was confiscatory, that such a confiscation was a violation of international law, and that it was invalid

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[54] *Ibid.*, p. 548.
[55] *Supra*, note 53.
[56] 1 K.B. 718 (1929), cited in Peters, *op. cit., supra*, note 11, at pp. 111-112.
[57] *Supra*, note 39.
[58] *Supra*, note 13.

to pass title to third parties because the international law was incorporated into the domestic law of Aden.

Three years later, *The Rose Mary* case[59] holding was criticized in the Chancery case of *In Re Claim by Helbert Wagg & Company*[60] involving a liquidated contract debt owed by a German company to a British company. The law governing the contract was German, and the place specified for payment was London. A German law passed in 1933 altered the place of payment of the debt to Berlin, allowed the payment to be made in marks instead of sterling, and forced the German debtor to pay the debt into a German *Konversionkasse*. The amounts paid into the *Konversionkasse* were credited to the accounts of the foreign creditors, but no amounts were shown to have been paid from the *Konversionkasse*. The court assumed that the law was confiscatory. Nevertheless, the defense of payment into the *Konversionkasse* was upheld on the ground that "these courts must recognize the right of every foreign state to protect its economy by measures of foreign exchange control and by altering the value of its currency."[61]

All the cases cited above, beginning with *Blad v. Bamfield* up to the *Helbert Wagg* case, constitute England's literature on the act of state doctrine. It can be seen that even in England, where the doctrine actually originated, the situation is not all too clear. In fact, both *The Rose Mary* and the *Helbert Wagg* cases are not binding on the House of Lords. This means that up to 1956 the act of state doctrine remains unsettled in British law.

*American Precedent*

The case of *Underhill v. Hernandez*,[62] the facts of which have been outlined earlier, is admittedly the leading case. The doctrine as formulated in the United States, however, is much older. As early as 1796, in the case of *Waters v. Collot*,[63] the Attorney-General of the United States had occasion to issue a statement on the subject. This case was action in tort against the former Governor of Guadaloupe for an act done in his official capacity. The particular act

[59] *Ibid.*
[60] *Supra*, note 14.
[61] *Id.* at 351.
[62] 168 U.S. 250; 2 MOORE'S DIGEST OF INTERNATIONAL LAW, 30. This case was decided in 1897.
[63] 2 Dall. 247 (U.S., 1796), cited in King, *Sitting in Judgment on the Acts of Another Government*, 42 AM. J. INT'L. L. 823 (1948).

in question was the seizure and condemnation of plaintiff's vessel. While the defendant was in the United States, he was sued by the plaintiff based on his seizure and condemnation of the vessel. The defendant declined to plead and requested the French Minister at Washington to ask the government of the United States to stop the action. Attorney-General Bradford, commenting on the claim to immunity from suit, said:

> "I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color, of the powers vested in him as Governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere irregularity in the exercise of his powers; and that the extent of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation."[64]

In the same year, but in another case, the Attorney-General remarked: "A person acting under a commission from the sovereign of a foreign nation is not amendable for what he does in pursuance of his commission to any judicial tribunal in the United States."[65]

It has been pointed out that the earliest American judicial opinion in point is one by Justice Marshall[66] in the case of *Hudson v. Guestier*.[67] The question at issue was the validity of a condemnation as prize. The vessel had been captured by the French and taken into Santiago de Cuba, a Spanish port, but remained in French possession there. While there, she was adjudged lawful prize by a French court sitting at Guadaloupe. Marshall said: "The sovereign power possessing jurisdiction over the thing must be presumed by foreign tribunals to have exercised that jurisdiction properly."[68] Since the French authorities held physical possession of the ship, even though she was in the port of another country, the French decree might not be questioned in a foreign court.

In 1841, another case arose which may be compared with the *Waters v. Collot*[69] case. This was the *Mcleod* case[70] regarding which Secretary of State Webster finally agreed with the British authorities

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64 1 Ops. Atty. Gen. 45; 2 MOORE'S DIGEST OF INTERNATIONAL LAW, p. 23.
65 Ops. Atty. Gen. 81; 2 MOORE'S DIGEST OF INTERNATIONAL LAW, p. 24.
66 King, *op. cit. supra*, note 63, at p. 824.
67 4 Cranch 293 ( ).
68 *Ibid.*, at p. 294.
69 *Supra*, note 63.
70 People v. Mcleod, 25 Wend. 438 (N. Y. 1841), cited in Zander, *The Act of State Doctrine*, 53 AM. J. INT'L. L., 828 (1959).

that a British soldier acting in behalf of his government could not be made liable for his participation in activities that resulted in the killing of an American citizen.

The case of *Hatch v. Baez*,[71] decided in 1876, spelled out the act of state doctrine in its modern form. The court, through Justice Gilbert, said:

> "We think that by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory."

Twenty-one years later, the case of *Underhill v. Hernandez*[72] was decided by the United States Supreme Court. This was followed in 1918 by three cases. In *Hewitt v. Speyer*,[73] the doctrine was again enunciated. The plaintiff in this case had a mortgage on the customs receipts of Ecuador. The defendants obtained treasury certificates subject to plaintiff's mortgage. Ecuador paid the defendant out of the customs receipts first, and plaintiff sued to obtain the money paid by the government. Both parties were American citizens. The court, citing the *Underhill* decision, held that there was no cause of action. The plaintiff never had title to the money. Moreover, the act complained of was one taken by a government to preserve its own credit. Said the court: "We take the principle to be incontrovertible ..., that our courts, not only will not adjudicate upon the validity of the acts of a foreign nation performed in its sovereign capacity, but also that persons involved in the performance of such acts can not be subjected to civil liability therefor."

The other two cases decided in 1918 were *Oetjen v. Central Leather Co.*,[74] and *Ricaud v. American Metal Co.*[75] Both cases arose out of requisitions of property in 1913 in Mexico by leaders of a revolutionary Mexican party and army which later became and was recognized as the Mexican government. The first case was an action of replevin for leather. The plaintiff was a receiver of a partnership in Torreon, Mexico, the former owners of the leather, which was seized by General Villa as a military contribution when he captured that city, and sold by him to the defendants, who took it

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[71] 7 Hun. 596, 599 (2nd Dept., 1876), cited in Zander, *op cit.*, *supra* note 70.
[72] *Supra*, note 62.
[73] (2d Cir. 1918) 250 F. 367, 371.
[74] 246 U.S. 297, 302 (1918).
[75] 246 U.S. 304 (1918).

to the United States. Villa was, at the time of the seizure serving under revolutionary General Carranza, who later succeeded in overthrowing the existing government and was recognized by the United States. The court reiterated the doctrine in the *Underhill v. Hernandez* case and declined to go into the validity of General Villa's taking of the leather. In the other case, *Ricaud v. American Metal Company*,[76] the property, lead bullion, was requisitioned from a Mexican corporation in September, 1913, but was alleged by the plaintiff, an American, to have been purchased by him from the Mexican corporation in June, 1913. This bullion had been sold by the Mexican army to Ricaud and another, Barlow, who had brought it to the United States. Again, the court upheld the ruling in the *Underhill v. Hernandez* case by saying that "the act within its own boundaries of one sovereign state can not become the subject of re-examination and modification in the courts of another."

During the Russian revolution, the revolutionary government issued a number of confiscatory decrees. Out of these decrees resulted widespread litigations. The courts uniformly declined investigation of the rights created by the Russian government. In *United States v. Belmont*[77] and *United States v. Pink*,[78] the United States Supreme Court held that the confiscatory decrees issued by the Russian government were valid to pass title to property which was in the United States at the time of the decrees. In the former case, the court stated that "the conduct of foreign relations was committed by the constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power was not subject to judicial inquiry or decision."

The doctrine was again invoked in the case of *Banco de Espana v. Federal Reserve Bank*,[79] a case decided in 1940. During the Spanish Civil War, the Loyalist government confiscated silver in Spain from a Spanish bank by secret decree. The silver was then sold to the United States. After the Franco regime came into power, the bank sued the United States to recover the silver. The Franco regime asked the court to review the legality of the act of confiscation under Spanish law, it being claimed that the confiscation was

[76] *Ibid.*
[77] 301 U. S. 324 (1937).
[78] 315 U. S. 203 (1942).
[79] 114 F. 2d 438 (2d Cir. 1940).

illegal. The court, however, decided against the plaintiff on the basis of the act of state doctrine.

The principle was also applied in two other related cases which arose in 1947 and 1949, respectively. In *Bernstein v. Van Heyghen Freres Societe Anonyme*[80] and *Bernstein v. N.V. Nederlandsche-Amerikaansche*,[81] title to property acquired by Nazi confiscation of property of the Jews was upheld by the court through the application of the act of state doctrine. There is, however, a portion of the decision penned by Judge Learned Hand which is significant. This portion intimated that the act of state doctrine would not be applied if there were a declaration by the executive that the principle should not be applied. According to Judge Learned Hand:

> "The only relevant consideration is how far our executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar; some positive evidence of some positive evidence of such an intent being necessary."[82]

This particular portion of the decision is significant because it creates an exception to the doctrine. Nowhere in the cases previously cited has the court ever declared an exception to the act of state doctrine. This "Bernstein exception", therefore, constitutes a new angle in the development of the doctrine in the United States.

The most recent, and perhaps the most controversial, major American case concerning the act of state doctrine is the case of *Banco Nacional de Cuba v. Sabbatino*.[83] This case will be discussed at length in a subsequent section.

*Other Foreign Precedents*

Some French, German, Italian, and Japanese cases dealing on the act of state doctrine have been recorded in international law journals. In 1953, for instance, an Italian court was called upon to adjudicate title to oil after the Iranian nationalization of the oil industry. In the case of *The Miriella: Anglo-Iranian Oil Co. v. S.U.P.O.R.*,[84] the

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[80] (2d Cir. 1947) 163 F. (2d) 246, Cert. den. 332 U.S. 772 (1947).

[81] (2d Cir. 1949) 173 F. (2d) 71.

[82] Bernstein v. Van Heyghen Freres Societe Anonyme. (2d Cir. 1947), 163 F. (2d) 246 at 251.

[83] 376 U.S. 398; 84 S. Ct. 923 (1964).

[84] Decided by a Venice law court in 1953, reported in 2 INT'L. & COMP. L. Q. 628 (1953). Also reported in 1955 I. L. R. 19. The rest of the materials included in this section have been taken from Peters, *op. cit., supra*, note 11, pp. 114-117.

court held that the Iranian law must be recognized as passing title. It is interesting to note, however, that the court, although it invoked the act of state doctrine, did consider the question of whether or not the decrees were confiscatory. The court decided that they were not, and, therefore, no violation of international law was committed. In the same year, the District Court of Tokyo was confronted by a case with facts similar to those of the above cited case. In the case of *The Anglo-Iranian Oil Co. v. The Idemitsu Kosan Co.*,[85] the Japanese court reached a similar holding to that of the case cited above. The decision was affirmed on appeal to the higher court of Tokyo. The court stated that the nationalization "is not a completely confiscatory law", but it was "subject to payment of compensation." While recognizing the rule of international law against confiscation, the court held that it could not examine the adequacy of the compensation if some compensaton were given.

In 1954, another case involving the Iranian nationalization of the oil industry came up before a three-judge civil court of Rome.[86] The court held that Iran gave a right to compensation, and that nationalization was not contrary to international law. It is interesting to note, however, that the court examined the legality of the Iranian acts according to Iranian law.[87] Furthermore, the court stated that "Italian courts must refuse to apply in Italy such foreign laws as may, even for non-political and non-persecutory motives, decree expropriation of the property of any foreign national without compensation."[88]

In France, the confiscation of a potash company by Catalonia was held to be "contrary to French public order" and thus invalid to pass title to potash subsequently sold to a third party and sent to France.[89] A similar result was reached on substantially the same facts in *Societe Potasas Ibericas v. Nathan Bloch*,[90] the court stating that "French courts may not recognize any divestment of a right of ownership, except with the consent of the owner, without just and

[85] Reported in 1953 I. L. R. 305.
[86] Anglo-Iranian Oil Co. v. S. U. P. O. R. (Italy, Civil Court of Rome, 1954), reported in 1955 I. L. R. 23.
[87] *Id.* at 33, 42.
[88] Id. at 42.
[89] Moulin v. Volatron, (France, Comm. Trib. Marseilles, 1937), 1935-1937 Ann. Dig. 191 (no. 68), affd. on appeal (France, Court of Appeals of Aix, 1939), 1938-1940 Ann. Dig. 24 (no. 10).
[90] France, Court of Cassation (Chambre Civile, 1939), 1938-1940 Ann. Dig. 150 (no. 54).

previous indemnity."[91] A 1954 French decision tends to show that the present French attitude toward confiscations is uncertain. In the case of *De Keller v. Maison de la Pensee Francaise,*[92] an application for sequestration of paintings, confiscated during the Russian revolution and later brought to France for an art show, was made to a French court. The application was denied. The court pointed out that the granting of the sequestration was essentially optional, that the case involved third parties not before the court, and that one party might be the Russian government which could plead sovereign immunity. It is apparent, however, that the court considered the question of the validity of the title acquired through confiscation an open question.

In Germany, it has been held that a Czech confiscation of enemy property is invalid to pass title to a third party. In a case concerning the confiscation of property of Sudeten Germans,[93] both plaintiff and defendant were interned in Czechoslovakia. Both owned sewing machines, and both machineries were confiscated. When they were released, the defendant was given the plaintiff's machine. The plaintiff sued to recover her machine, and the relief requested was granted, on the ground that the confiscatory decree was contrary to international law. In a later case involving a confiscation taking place in the Soviet zone of Germany, a similar result was reached.[94] A German court has even upheld a criminal charge of conversion against the defendant's assertion that title to the goods was not in the former owner, but in the confiscatory government.[95]

## VI. CURRENT CONTROVERSY REGARDING THE DOCTRINE

### *The Sabbatino Decision*

As pointed out earlier, the decision of the United States Supreme Court in the case of *Banco Nacional de Cuba v. Sabbatino*[96] has

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[91] *Id.* at 151.

[92] France, Tribunal Civile de la Seine (Referes, 1954) 82 Journal Du Droit International 119 (1955).

[93] Germany, *Amtsgericht of Dingolfing* (1948), 1948 Ann. Dig. 24 (no. 12).

[94] Expropriation (Soviet Zone of Germany) Case, Germany (American Zone), (Court of Appeal of Nuremberg, 1949), 1949 Ann. Dig. 19 (no. 10).

[95] Czechoslovakia Confiscatory Decree Case, (American Zone), (Court of Appeal of Nuremberg, 1949), 1949 Ann. Dig. 19 (no. 14).

[96] *Supra,* note 80.

caused a wide-ranging debate among legal circles in the United States. To fully appreciate the magnitude of interest provoked by the "Sabbatino controversy", it is necessary to be familiar with the facts as well as the issues of the case.

The action centers about title to a sugar shipment which plaintiff, the financial agent of the Cuban government, asserts by reason of expropriation of the property of Compania Azucarera Vertientes Camaguey, hereinafter referred to as C. A. V., a Cuban corporation, under a nationalization decree. The proceeds of the sale of this sugar shipment were turned over to the possession of the New York State Supreme Court for Kings County which, under section 977-b of the New York Civil Practice Act, appointed a temporary receiver for the assets of C. A. V. located in New York. The receiver has been made a defendant in this action, although leave to sue him was not obtained from the court that appointed him. The remaining defendants are members of a New York partnership, Farr, Whitlock & Co., hereinafter referred to as Farr Whitlock.

The following facts are agreed upon by the parties. In February and July of 1960, Farr Whitlock contracted to purchase sugar from a wholly-owned Cuban corporate subsidiary of C. A. V. The contracts called for the purchase of specified amounts of sugar at specified prices free alongside steamers. The seller was to supply cargo to vessels assigned by Farr Whitlock at a designated Cuban port. Payment was to be made by Farr Whitlock in New York upon presentation of the necessary shipping documents.

Loading of the sugar onto a German vessel assigned by Farr Whitlock commenced on August 6, 1960, a Saturday, continued on August 8 and was completed by one o'clock in the afternoon of August 9. Since there was no wharf at the Cuban port, the sugar was carried on barges to the vessel.

On August 6, 1960, the Cuban President and Prime Minister signed a resolution nationalizing the property of C. A. V. and other named Cuban corporations. Both the resolution and the law pursuant to which it was adopted declared that nationalization of Cuban enterprises in which the United States "physical and corporate persons" held a majority interest was deemed a necessary defensive measure against the aggressive acts of the Congress and President

of the United States reducing the participation of Cuban sugars in the American sugar market.

Farr Whitlock, in order to obtain the necessary consent of the Cuban government to have the loaded vessel depart, on August 11, 1960, entered into contracts with the plaintiff's assignor, a government wholly-owned corporation. The contracts purported to sell to Farr Whitlock the sugar on board the vessel. The contracts contained, in so far as here relevant, the same terms as those in the original agreements between Farr Whitlock and the C. A. V. subsidiary. The vessel departed for Casablanca, Morocco on August 11, 1960.

The sight draft and bills of lading covering the sugar shipment were delivered to Far Whitlock, at its office in New York City, by plaintiff's agent. Farr Whitlock accepted the documents, negotiated the bills of lading to its customer and received the purchase price, in the amount of $175,250.69. Farr Whitlock, did not, however, pay the proceeds to the plaintiff's agent, since it had been advised that a receiver appointed by the New York State Supreme Court for C. A. V. claimed the right to the sales proceeds.

The receiver had been appointed pursuant to a statute authorizing receivership for New York assets of foreign corporations that have been dissolved or the property of which has been nationalized.

The state court which had appointed the receiver enjoined Farr Whitlock from disposing of the sales proceeds and subsequently issued an order, with which Farr Whitlock had complied, directing turnover of the sum to the receiver. The order directed the receiver to deposit the proceeds in the Kings County Trust Company "to be held by it subject to the further order of the court and not to be withdrawn except on such order."

The District Court examined whether it was in a position to investigate the validity of the official act of the Cuban government. The question of its capacity to investigate was resolved by reference to two factors: (1) the nature of the complaint against the expropriation; and (2) the attitude of the Executive Branch in the United States toward a judicial determination. The court said that the act of state doctrine normally requires domestic courts to refrain from questioning the validity of official acts of a foreign government. But does the doctrine prevent a domestic court from examining the claim that the act violates substantive rules of inter-

national law? The District Court answered this question in the negative. In affirming judicial competence, the court strongly emphasized the duty of a domestic court to apply international law whenever it was relevant to litigation, indicating that if the act of state doctrine was allowed to bar such application it would be inconsistent with the discharge of this duty.

Having established this competence to inquire, the decision went on to hold that Cuba's expropriation was illegal under international law for three separate reasons: (1) It was a retaliatory act motivated by the reduction of Cuba's sugar quota rather than being reasonably related to a public purpose: (2) It openly discriminated against American nationals; and (3) It failed to provide compensation that was adequate under international law. The illegality of the taking prevented the passage of title from C. A. V. to the Cuban government. Summary judgment was accordingly granted against Banco Nacional de Cuba.

The decision of the District Court was sustained by the Court of Appeals when the case was elevated to the latter. Upon appeal to the Federal Supreme Court of the United States, however, the decision was reversed. The Supreme Court held that an examination of the foreign act is inappropriate in this case. Relying heavily on precedents, the Supreme Court concluded that "Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the judicial branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement controlling legal principles, even if the complaint alleges that the taking violates customary international law."[97] Before reaching this conclusion, however, the court stated that the relevant rules of customary international law regarding expropriation were not supported by a consensus. It also suggests that the executive is much better able to protect national interests in this area if it can act with a free hand. And finally, the court thinks that it is unwise to question the validity of titles acquired as a result of a purchase of expropriated goods.

[97] Banco Nacional de Cuba v. Sabbatino, 376 U. S. 398 (1964) at p. 428.

The decision, however, was not unanimous. Mr. Justice White dissented from the majority opinion, and he offers many arguments to support his dissent. First of all, he finds that none of the act of state precedents contemplated testing the validity of the act by reference to international law; secondly, Justice White regards the basis of the act of state doctrine to be sound policy reasons rather than "constitutional underpinnings", to borrow the language of the majority opinion; thirdly, he regards the cases refusing to enforce foreign panel and revenue laws and those denying validity to extra-territorial confiscation as relevant here to show that domestic courts do refuse to apply foreign governmental acts in certain circumstances; fourth, Justice White regards the majority as failing to discharge its duty to apply international law to a controversy before it; fifth, he considers that the majority has crippled domestic courts by excluding the review of foreign acts of state under international law; sixth, White refused to regard the stability of international commercial transactions as served by the court's formulation of the act of state doctrine; seventh, according to him, there is no justification in general for using the act of state doctrine to transfer disputes into diplomatic channels; eight, Justice White also rejects the notion that the act of state doctrine must be given the breadth suggested by the majority so as to protect the control of the executive over foreign affairs; and, lastly, he admits that the executive may have good reasons in certain cases for discouraging an adjudication on the merits by a domestic court. But because these reasons may be "more or less present, or absent . . . a blanket presumption of non-review in each case is inappropriate."[98]

*The Sabbatino Controversy*

Various quarters were dismayed by the *Sabbatino* decision. To be sure, there were numerous attacks which came about after the decision. But the decision has its own rank of defenders. It is, perhaps, appropriate to consider the favorable commentaries before touching on the unfavorable ones.

Foremost of the defenders of the *Sabbatino* decision is Professor Richard A. Falk.[99] According to him, the decision does not formulate an absolute act of state doctrine. It enumerates, however,

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[98] *Id.* at p. 468.
[99] See *The Complexity of Sabbatino*, 58 AM. J. INT'L. L., 935-951 (1964).

no less than four occasions on which the doctrine might not apply. First of all, the doctrine would not shield from judicial scrutiny a foreign governmental act alleged to be in violation of a rule contained in an international agreement or treaty binding upon the parties to the dispute. Also, where a consensus exists in support of the standard supplied by the rule of customary international law, the doctrine may not apply. Thirdly, where the case before the court has an unimportant bearing upon the conduct of foreign relations, the doctrine may not also apply. And lastly, the doctrine may not apply where the foreign government whose act is being challenged is no longer in existence. In view of this conception of the act of state doctrine, why does the Supreme Court insist upon the application of the doctrine to the *Sabbatino* facts? Several reasons are outlined in the majority opinion. First, no consensus exists to support the relevant rules of international law. Second, the dispute is deeply embedded in foreign relations. And, third, the government whose act is challenged remained fully in existence at the time of the suit.

Falk believes that the most controversial aspect of the decision involves the determination that no consensus exists to support those rules of international law that condemn a confiscatory and discriminatory taking. On this point, he says: "I would incline to agree with the *Sabbatino* majority that the protection of foreign investment is a subject about which there is such salient conflict that it is not one in which domestic courts are capable of positing authoritative standards . . . If a domestic court were to pass upon the over-all validity of the Cuban expropriation, it could reach one of two unsatisfactory results. Either it could hold the expropriation illegal and render a decision that would be perceived as nothing more than an expression of national interest, or it could find the expropriation legal and gravely compromise the diplomatic posture of the United States. *Sabbatino's* dual concern for judicial independence and for executive-judicial harmony made this an unacceptable dilemma."[100]

It has also been pointed out that failure to apply the doctrine constitutes a manifest disrespect for a foreign state's exercise of the jurisdiction which international law accords it. Furthermore, this

[100] *Ibid.*

will tend to contribute to international tension or even hostilities, as did refusal of courts or other agencies of the injured countries to respect Iran's nationalization of the Anglo-Iranian Oil Company (1953), Egypt's nationalization of the International Suez Canal Company (1956), Indonesia's nationalization of Dutch properties (1958), and Cuba's nationalization of American properties (1960). The fact that refusal to respect foreign acts of state has contributed to international conflict nullifies the argument that acts of state are "mere acts of internal legislation not addressed to foreign powers" and so may safely be ignored by foreign courts.[101]

The critics, on the other hand, have advanced equally cogent arguments against the *Sabbatino decision.* The emphasis by the Supreme Court on general agreement as "to the relevant international laws standards" as the touchstone of justiciability has been labeled as "unfortunate". It is said that this may be taken as reflecting a positivist view that current state practice rather than established principles is determinative of the international law standards themselves.[102]

Professor Jennings of Harvard University criticized that part of the *Sabbatino* decision regarding the matter of consensus among states on the subject of expropriation and compensation. It must be recalled that the majority opinion advanced the view that there is no sufficient consensus among states on the subject. On this point, Jennings says: "How then do we set about assessing the presence or absence of this consensus? It is clearly not just a matter of counting heads . . . There is of course the General Assembly's Declaration on Permanent Sovereignty Over Natural Resources (1803 XVII of 19 December 1962). But let us accept the proposition that treaties are the best evidence of consensus, and that a large number of recent treaties all tending in the same direction must be useful evidence, therefore, of a general consensus. Well, developing countries, particularly in Asia and Africa, it so happens, have made a fair number of treaties since the last war; and pretty well all of them have a provision safeguarding the right to compensation in the event of expropriation. There are something like 50 such treaties

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101 Wright, *Reflections on the Sabbatino Case,* 59 AM. J. INT'L. L. 315 (1965).

102 Stevenson, *The State Department and Sabbatino — "Ev'n Victors Are by Victories Undone",* 58 AM. J. INT'L. L. 708 (1964).

made by some 30 or more developing states. There is one of them that I think might be of special interest. I have the text of a treaty of 1960, which entered into full force in 1961, made between Japan and Castro's Cuba. Article 4 of that treaty reads as follows: 'property of nationals and companies of either party shall not be taken within the territory of the other party except for a public purpose, nor shall it be taken without just compensation . . .' Is it not curious that Castro should thus walk boldly in where the Supreme Court fears to tread?"[103]

Another argument that has been advanced is that review by municipal courts of a taking which is violative of international law would provide the injured party an effective remedy. It has been stated that "the more important advantage over the years would be the judicial confirmation and refinement of the relevant rules of international law. Such confirmation and refinement is of vital importance today to the capital-exporting states. The only effective judicial machinery generally available to this end is the municipal court."[104] Along this line, Professor Myres McDougal of the Yale Law School subscribes to the view that the Supreme Court in the *Sabbatino* case "was extraordinarily timid in not seizing an opportunity to attempt to clarify and reinforce the kind of principles best designed to promote an international economy, the kind of an economy necessary for the maintenance of a free society."[105]

*The Sabbatino Amendment*

Convinced that their arguments were more valid and more compelling, the critics sought reversal of the *Sabbatino* decision through congressional action. The United States Congress conducted hearings, and subsequently approved subsection 620 (e) (2) of the Foreign Assistance Act of 1961 which is now known as "The *Sabbatino* Amendment". The Amendment provides: "Notwithstanding any provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a de-

[103] Remarks delivered before the *Seventh Hammarskjold Forum, New* York, January 11, 1965, published in THE AFTERMATH OF SABBATINO, *supra*, note 33, at pp. 93-94. Professor Jennings appended a list of the developing countries which since the last war have concluded bilateral treaties providing

[104] Coerper, *The Act of State Doctrine in the Light of the Sabbatino Case*, 56 AM. J. INT'L. L., 147 (1962).

[105] *Supra*, note 103.

termination of the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and other standards set out in this subsection: *Provided,* that this paragraph 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 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."[106]

The foregoing amendment clearly enacts an international law exception to the act of state doctrine. It instructs domestic courts of the United States to examine a foreign governmental act when it is alleged in a case before them that the act violates the principles of international law. It is significant to note, however, that the foregoing amendment was not made to apply to any case in which the proceedings were commenced after January 1, 1966.

## VII. The Act of State Doctrine is Applicable in Philippine Courts Provided its Application will not Contravene Established Principles of International Law.

After having made an inquiry into the definition and genesis of the act of state doctrine, and after having reviewed the recent controversy provoked by the *Sabbatino* decision, it is now appropriate to consider the applicability of the doctrine in Philippine courts.

This thesis proposes that the act of state doctrine should be made to apply before our courts provided that its application will not violate established principles of international law. This proposal implies that should an "act of state" case arise before our

[106] Cited in Abad Santos, *op. cit.*, at p. 268.

courts, and it is alleged that the foreign act of state involved is violative of international law, our courts must not accord automatic deference to, or non-review of, the foreign act of state. On the contrary, our courts must examine on its merits the claim that the foreign act of state is violative of international law. If, however, it is not alleged that the foreign act of state is against international law, it is submitted that our courts should apply the act of state doctrine and refuse to sit in judgment on the foreign act of state. In this instance, the application of the doctrine would not do violence to international law. In point of fact, it would even be in conformity with the international law principle of comity among nations.

One of the important reasons to support the present proposal is that in our jurisdiction, international law is a part of our domestic law. Our constitution expressly "adopts the generally accepted principles of international law as part of the law of the nation."[107] This constitutional provision is of great import. It implies that our courts have a duty to apply and enforce international law where appropriate. The automatic deference that a domestic court may accord to a foreign act of state, even if it is alleged that the foreign act is violative of international law, would constitute an abdication of a judicial function which is so clearly implied in the constitutional provision just cited.

The argument that international law precisely requires the foreign acts of state to be treated as sacrosanct is not a convincing one. Even the majority opinion in the *Sabbatino* case admits that international law does not impose a duty to adopt the act of state doctrine. The court observed that although the application of the doctrine or its equivalent is frequent in international practice, no authority or decision of an international tribunal exists to suggest that a failure to apply the doctrine is a breach of an international obligation. As pointed out earlier,[108] the doctrine is one of judicial invention designed to give the executive branch of government maximum flexibility in foreign affairs. It is, according to the *Sabbatino* decision, a beneficial device because it safeguards the prerogatives of the executive and improves the quality of a state's participation in international society.

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[107] Const. Article II, sec. 3.
[108] *Supra*, note 28.

Another reason of equal importance to support the contention is that examination by domestic courts of foreign acts of state which are violative of international law will provide an effective remedy to the injured party. Along this line, a counter-argument has been advanced that domestic courts are not appropriate tribunals for the consideration of these questions. But where may the injured party seek justice? Considering the present condition of the international community, it is extremely difficult for an individual citizen to go directly to an international tribunal. Assuming that he can persuade his own government to espouse his claim and bring an action in the International Court of Justice, still there is no assurance that his claim will be heard unless the foreign government consents to the court's jurisdiction. It is not difficult to see, therefore, that the injured party will ultimately have to rely on domestic courts.

As a concluding reason, it may be stated that consideration by domestic courts of foreign acts of state which are violative of international law will not only serve to uphold the authority, but will also facilitate the development, of international law. This thesis subscribes to the view that "the very international law questions which have been blocked from review by the act of state doctrine, namely, nationalization and state responsibility, are questions which are singularly appropriate for judicial, as opposed to diplomatic, considerations."[109] Domestic courts are the only judicial tribunals which can contribute, in a large measure, to the resolution of these questions, for, as of the present, there is no international tribunal with general compulsory jurisdiction.

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[109] Statement of John R. Stevenson before the *Seventh Hammarskjold Forum*, New York, January 11, 1965, published in *The Aftermath of Sabbatino*, *supra*, note 33, at pp. 74-75.

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