BANCO NACIONAL DE CUBA v. SABBATINO

The Immunity of Foreign Acts of State

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How far does sovereign immunity extend? At the present time, due to the increase in the activities of the state, this question assumes a position of prime importance, for on the answer thereto will depend the extent to which municipal courts are able to protect the rights of private individuals who contract with or are injured by foreign sovereigns.

It is a generally accepted rule of international law that the person of a foreign sovereign, his property in his possession and control and his representatives, at least in their official capacity,[1] are immune from the jurisdiction of the municipal courts of the state where they happen to be at any particular time.[2] As a result of this immunity, the actions of a foreign sovereign cannot be challenged in the courts of another state either directly, by instituting proceedings against the sovereign himself or his representatives, or indirectly, by subjecting his property to suit. It is a much debated question, however, whether this sovereign immunity attaches *to the actions themselves*. Albeit that the actions of a foreign sovereign cannot be challenged in the courts of another state where to do so would involve impleading that sovereign either directly or indirectly, can their validity be challenged in a suit between two private litigants whose rights in some way depend thereon? In other words, in an action between two private litigants, can the courts of one state assume jurisdiction to sit in judgment on the acts of another, this jurisdiction being possible because the foreign state is not directly or indirectly impleaded? This question is presently of topical interest, for in a recent decision in the United States, *Banco Nacional de Cuba v. Sabbatino*,[3] the courts of that country have decided that immunity does not attach to foreign acts of state which are, in their opinion, contrary to international law. This case though arising from a municipal court, and being indeed a variant of the above situation, one of the parties being an arm of the actor government, is of prime international concern, for if it is generally followed in other jurisdictions it will mean that the courts of one country have the power to declare the acts of another to be internationally illegal and beyond its competence.

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[1]See *The Vienna Convention on Diplomatic Relations*, Arts. 29-31, in (1961) 55 A.J.I.L. 1064 *et seq.*

[2]See generally on the subject and extent of sovereign immunity, *inter alia*, Oppenheim, *International Law* (1955), 8th ed., v. 1, p. 264 *et seq.*

[3](1961) 193 F. Supp 375; (1962) 307 F. 2d 845.

It is the submission of this comment that the courts of one nation do not have the power to sit in judgment on the *international legality* of the actions of another sovereign state. This is not a power which is bestowed on the individual members of the international community. There is a lack of capacity which makes the assumption of such a function impossible. Sovereign states, not acknowledging any common superior, are equal before the law and no one of them can arrogate to itself the power to be the judge of the others.

However, this lack of capacity does not mean that one state is bound to recognize or enforce the laws and actions of another. It is a rule of international law too well established to require authority that the laws of one state have no force or effect *ex proprio vigore* beyond its own boundaries and will receive such force and effect in another state as only "its own proper jurisprudence and polity"[4] will allow. If, therefore, it is desired to deny effect to a foreign acquired right or title, the appropriate ground for decision should be the public policy of the forum, and not public international law.

It is the purpose of this comment to examine the *Sabbatino* case in this light, the alternative grounds for decision which did exist and which, it is submitted, were the proper grounds for decision, and generally to consider the nature of the theoretical and practical objections to the assumption by the courts of one nation of the power to adjudicate upon the international legality of the actions of another.

The facts of the *Sabbatino* Case

On August 6th, 1961, the Cuban President and Prime Minister signed a resolution which nationalized all Cuban enterprises in which United States "physical and corporate persons" had a majority interest.[5] One of the enterprises nationalized pursuant to this Cuban decree was Compania Azucarera Vertientes-Camaguey, (hereinafter referred to as "C.A.V."), a corporation organized under the laws of Cuba, but largely American-owned. Prior to nationalization, the New York firm of Farr, Whitlock & Co. had contracted with a wholly-owned subsidiary of C.A.V. to purchase a certain quantity of sugar, the contract stipulating that payment was to be made in New York upon presentation to Farr Whitlock of the shipping documents. While the sugar in question was being loaded into a vessel provided by Farr Whitlock, the nationalization decree was promulgated, and in order to obtain the necessary permission from the Cuban government (the new owner of the sugar) to leave the country, Farr Whitlock entered into another contract with the plaintiff's assignor, a government wholly-owned corporation. This contract purported to sell to Farr Whitlock the sugar already on board the latter's vessel. On completion of the necessary formalities, the vessel sailed for Casablanca, with the result that the sugar, the title to which was here in dispute, was not at the time

[4]Story, *Commentaries on the Conflict of Laws* (1846), 3rd ed., para. 23.

[5](1961) 193 F. Supp. 375, at 376. For the text of the resolution, see *ibid.*, at 382.

of this action and never had been within the jurisdiction of an American court. At all material times the vessel and her cargo were within the confines of Cuban territory.

The shipping documents were delivered to Farr Whitlock in their New York office, but they, upon negotiation of the bills of lading to their customers, declined to pay the purchase price to the National Bank of Cuba.

Subsequent to the nationalization of C.A.V. in Cuba, a receiver had been appointed in New York to take charge of the assets of the dissolved foreign company there situated. The receiver, Sabbatino, made a claim upon the proceeds of the sale of the nationalized sugar and Farr Whitlock, pursuant to a court order paid them over to him, the funds being deposited in a bank "to be held by it subject to the further order of the court and not to be withdrawn except on such order."[6] The present action was then instituted by the National Bank of Cuba against Farr Whitlock and Sabbatino, alleging conversion of the bills of lading and of the proceeds of the sale of the sugar.

The fundamental question to be decided by the court in this action was the ownership of the sugar in question. Which party had a title to transfer to Farr Whitlock: C.A.V. or the Cuban government? It is to be remembered as well that this sugar had been the subject of official action on the part of the Cuban government in Cuba and would thus, according to the traditional acts of state doctrine, fall to be adjudicated according to the legal results of that action in Cuba. The acts of the Cuban government had been taken ostensibly "in the legitimate defense of the national economy, . . . in exercise of our sovereignty and as a measure of internal legislation."[7] In both the District Court and the Court of Appeals, however, it was decided that the act of the Cuban government, nationalizing American-owned property, was violative of public international law and would therefore not receive *recognition* in an American court, with the result that the title of the Cuban government to the sugar in question and hence to the proceeds of the sale thereof was deemed invalid for the purpose of this litigation. Thus the courts of the United States were here arrogating to themselves the power to declare that the acts of the Cuban government were contrary to public international law.

The Distinction between the Recognition and the Enforcement of a Foreign Law or Title and the Alternative Grounds for Decision in the *Sabbatino* Case

In both the District Court and the Court of Appeals, major consideration was given to the question of the *recognition* to be granted in the United States to the Cuban nationalization and hence to the titles flowing therefrom. It is submitted, however, that there were in fact three issues to be considered in the *Sabbatino* case. *First*, it had to be considered whether or not the contract

[6] *Ibid.*, at 377.

[7] *Ibid.*, at 382, n. 14.

for the sale of the sugar in question by the government of Cuba to Farr Whitlock would be *enforced* in an American court, and this irrespective of any consideration of the invalidity of the title of the Cuban government to the sugar. *Secondly*, the courts had to consider whether or not they were at liberty to deny *recognition* to the title of the Cuban government to the sugar and hence to the proceeds of the sale thereof. In other words, if it were decided that the contract between Farr Whitlock and the agency of the Cuban government could be enforced, it would then be necessary to consider whether there was a valid title to enforce. *Thirdly*, and perhaps most important of all, the basis on which a court could refuse to enforce a contract or recognize a title ought to have been considered.

The two functions of the courts in cases such as this, *to enforce* a foreign law or contract and *to recognize* a foreign acquired right or title are quite distinct, but not infrequently, it seems, the basic difference between them is overlooked. Dicey gives the following definitions of these two functions:[8]

> A court recognises a right or status governed by foreign law when for any purpose the court treats it as existing according to foreign law in virtue of the rules of the conflict of laws of some legal system. . .
>
> A court enforces a right when giving the person who claims it either the means of carrying it into effect, or compensation for interference with it. . .

The distinction between these two functions is most important, for it must be remembered that a right or title may well be recognized in a foreign court but yet not enforced there.[9] This distinction and the results flowing therefrom can be well illustrated by the facts and circumstances of the case at hand.

In the *Sabbatino* case, the courts were called upon to consider not only whether they would *recognize* the title of the Cuban government to the sugar in question and to the proceeds of the sale thereof, upon which function both the District Court and the Court of Appeals chose to rest their decisions, but also whether they would *enforce* the contract between Farr Whitlock and the agency of the Cuban government for that sale. The aspect of enforcement was not, however, considered in any detail in either the District Court or the Court of Appeals.

The right of the Cuban government to sue for the recovery of the proceeds of the sale of the sugar in question arose under a Cuban contract, made under Cuban law. This right depended for its realization in the United States upon the enforcement of a foreign law. The Cuban government was here seeking the means of carrying its right to these funds into effect. It was seeking to use the process of the courts of the United States to assist it in making good its claim. Thus, the first question which ought to have been resolved in this case was that of enforcement, and it is submitted that the decision would have been happier had it rested on a refusal to enforce the contract rather than on a refusal to recognize the title of the government. Had the decision been given

[8]Dicey, *Conflict of Laws* (1958), 7th ed., p. 11.

[9]*Ibid.*, at p. 11.

on the grounds of a denial of enforcement, the effects of this decision would have been confined to this transaction alone. Where the courts of one country refuse to enforce a foreign contract, this in no way affects rights which have already been perfected. It does not, for example, have the effect of invalidating, so far as this forum is concerned, all titles deriving from this contract which have been perfected abroad. In the *Sabbatino* case, for example, had the National Bank of Cuba been in possession of those funds, the refusal of an American court to enforce some ancillary contract would not have affected the validity of the title of that government to retain possession thereof.

Where the decision is given on the grounds of the non-recognition of the validity of the title to the *res* in question and of the validity of the foreign act of state from which that title flowed, the results are much more far-reaching. The results of non-recognition are not confined to the particular subject matter of the court action. Where a court in one country refuses to recognize the validity of an act of state in another and of all titles flowing therefrom, this means that whenever a title deriving from such an act falls to be adjudicated in the courts of such a non-recognizing state, it will be denied effect. Thus a *bona fide* purchaser, who acquired his title abroad and brings his *res* to such a non-recognizing state, may well find himself deprived of his property because his title is not recognized in that country. Non-enforcement of a foreign acquired right or title is strictly territorial in effect, whereas the effects of non-recognition of a foreign law and the titles flowing therefrom may well reach all over the globe, with a corresponding deleterious effect on the security of titles deriving from international commercial transactions.

It now falls to be considered on what basis these two functions, to recognize a foreign acquired right or status and to enforce a foreign acquired right or contract are carried out. Both these functions depend on *the public policy of the forum called upon to perform them*, for it is a well settled principle of private international law that the courts of one jurisdiction may decline to recognize and enforce foreign laws and titles deriving therefrom where to do so would be violative of their own public policy.[10] It is not on the basis of public international law or on that of the municipal law of the state where the right was acquired that the courts of one country decline to recognize or enforce foreign acquired rights or titles, but on the basis of the policy of the forum.

The individual members of the international community do not possess the capacity to sit in judgment on the international legality of the acts of one another and hence the policy of the forum can be the only basis of a refusal to grant recognition to or to enforce rights and titles deriving therefrom. It is therefore submitted *first*, that whether the decision in the *Sabbatino* case was made to rest on a refusal to grant recognition to the Cuban act of nationalization

[10]Dicey, *op. cit.*, at p. 12; Cheshire, *Private International Law* (1949), 6th ed., p. 154; Goodrich, *Handbook on the Conflict of Laws* (1949), 3rd ed., p. 21.

or on a refusal to enforce the contract for the sale of the sugar, the basis for this refusal could only validly be the public policy of the United States. *Secondly*, it is submitted that it was the intention of the executive that the exception of public policy should be used in this case to deny effect to the Cuban decree and not public international law.[11] *Thirdly*, the decision of the *Sabbatino* case would, it is submitted, have been happier had it rested on the well tried ground of a refusal to decree enforcement for the Cuban contract rather than on the shifting sand of non-recognition of a foreign act of state. It will be shown below that ample grounds existed for holding that the enforcement of this contract was contrary to the policy of the forum, and it is submitted that it would have been wiser to rest the decision on this narrower ground. Non-recognition of foreign laws and titles flowing therefrom has or can have serious consequences for international trade and it is preferable, where alternative grounds for decision do exist, that they should be utilized rather than rely upon a more dubious ground for decision.[12]

Public Policy and the *Sabbatino* Case

In cases such as the *Sabbatino* affair, the public policy of the forum assumes a position of prime importance, for on it will depend the measures of recognition and enforcement which such foreign acquired rights will receive.

Before a foreign law or contract will be held to be violative of the public policy of the United States, it must do more than violate "local fancy as regards internal affairs."[13] To be contrary to the policy of the forum, such laws or contracts must "violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal."[14] In the United States, the elements which go to make up the policy of the forum are the Constitution, together with whatever statements may be competently made by the executive, the legislature and the judiciary.[15]

In the *Sabbatino* case, apart from the Constitution itself, there were various statements of the executive which ought to have been accorded great weight in assessing the public policy of the forum towards these Cuban decrees. The attitude of the executive towards these Cuban measures of expropriation, while it was initially understanding of the objectives of the Cuban government, finally ended by being distinctly hostile and went so far as to castigate what was being done as illegal at international law.

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[11]*Infra.*

[12]Although the question of certainty of title in international trade transactions did not arise directly here, one of the parties being an arm of the actor government, the above consequences are, it is submitted, inevitable, for if an act is invalid, then it is invalid for all who take title from it.

[13]Goodrich, *op. cit.*, at p. 22.

[14]*Loucks v. Standard Oil Co.* (1918) 224 N.Y. 99, at 111; 120 N.E. 198, at 202.

[15]*United States v. Bank of New York and Trust Co.* (1935) 77 F. 2d. 867, at 874 *et seq.*, *per* Manton, J.

In a note to the Cuban Minister of State, the United States expressed its views on the matter of these nationalizations. In part this note read:[16]

> . . . the Government of the United States understands and is sympathetic to the objectives which the Government of Cuba is presumed to be seeking to attain through this law . . . The Government of the United States recognizes that soundly conceived and executed programmes for rural betterment, including land reform in certain areas, can contribute to a higher standard of living, political stability and social progress. . . . The United States recognizes that under international law a state has the right to take property within its jurisdiction for public purposes in the absence of treaty provisions or other agreements to the contrary; however, this right is coupled with a corresponding obligation on the part of the state that such taking will be accompanied by payment of prompt, adequate and effective compensation. United States citizens have invested in agricultural and other enterprises in Cuba for many years. This investment has been made under several Cuban constitutions all of which contained provisions for due compensation. . .
>
> The wording of the Cuban agrarian law gives serious concern to the Government of the United States with regard to the adequacy of the provision for the compensation to its citizens whose property may be expropriated. . .

In a press release some six months later, the State Department intimated that the United States Ambassador to Cuba had protested to the government of that country concerning certain actions which the United States considered were in violation of the "basic rights of ownership of United States citizens in Cuba —rights provided both under Cuban law and generally accepted international law."[17] The actions involved were seizures of American-owned property without court orders and frequently without any written authorization at all. Despite these actions, however, the government of the United States still expressed the hope that the differences between the two countries would be resolved amicably by negotiations.[18] In fact, the Secretary of State, Mr. Herter, emphasized that the appropriate way to obtain a remedy, if such was not forthcoming from the Cuban government, was to submit the matter to the Department of State and it would, if it felt that the case was meritorious, take up the matter.[19]

It is to be doubted if such statements as these would have had a completely adverse effect on the policy of the forum towards the Cuban measures. However, a further protest to the Cuban government was couched in terms which were sufficiently strong to cause a court at least to stop and consider their effect on public policy. This protest in part stated:[20]

> . . . the Government of the United States considers this law to be manifestly in violation of those principles of international law which have long been accepted by the free countries of the wesr. It is in its essence-discriminatory, arbitrary and confiscatory. . .
>
> I have been instructed by my government to convey to Your Excellency a most solemn and serious protest against this hostile measure. I am further instructed to inform Your Excellency that should this law be employed by the Government of Cuba to seize properties of American nationals, it will be viewed by the Government of the United States as a further evidence and confirmation of a pattern of economic and political aggression against the United States under the guise and pretext of accelerating the social and economic progress of the Cuban people.

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[16](1959) 40 Dept. of State Bull. 958.

[17](1960) 42 Dept. of State Bull. 158.

[18]*Ibid.*, at 237.

[19]*Ibid.*, at 489.

[20](1960) 43 Dept. of State Bull. 171.

The exact effect of this statement on the policy of the forum is open to doubt and will best be considered in relation to the separate headings of the recognition and the enforcement of the foreign title and contract, and in connection with the use to which it might have been put in both the District Court and the Court of Appeals.

The Judgment of the District Court and the Enforcement of the Cuban Contract

Considering first of all the question of the enforcement of the Cuban contract, it cannot be doubted that such statements had an adverse effect on the policy of the forum on which depended the measures of enforcement which this Cuban contract might receive in the United States. Where the executive of a country considers a foreign course of legislation as hostile and as constituting measures of economic and political aggression against its country, such statements must at least render the enforcement of contracts made under such foreign legislation open to the objection of public policy. Such statements as were made by the executive concerning the Cuban measures may not have been conclusive as to the measures of enforcement which the courts of the United States could have decreed for the Cuban contract.[21] They may indeed have left it open to the courts to come to their own conclusions as to the policy of the forum, but in arriving at those conclusions they ought to have accorded great weight to the voice of the executive, which in the realm of foreign relations as these matters are, is the sole voice of the nation, not just of a branch thereof.[22]

It is submitted that the courts in the *Sabbatino* case had the authority to deny enforcement to the Cuban contract on the grounds of the policy of the forum. It may be that if the executive had maintained a steady silence on the subject, the policy of the forum would not have been concerned. However, when the above statements are taken into consideration, it is difficult to see from where Judge Dimock in the District Court drew his conclusion that he was not free on the grounds of public policy to refuse to enforce the nationalization.[23] The enforcement of the contract rights in this case was definitely open to the objection of public policy. Furthermore, the cases relied on by Judge Dimock for this proposition are not in point, for they are concerned with the question of whether or not a court will deny *recognition* to a foreign acquired right or title. Alternatively, they are concerned with the question of whether or not it is open to an American court to hold a member of a foreign

[21]The conclusive effect of executive statements on the policy of the forum regarding the enforcement of foreign laws is so far only established where they are contained in an executive agreement of the Litvinov Assignment type: *United States v. Pink* (1941) 315 U.S. 203; 86 L.Ed. 796. Doubt has been expressed as to the conclusiveness of a mere executive formulation of policy: *Anderson v. Transandine Handelmaatschappij* [1941-42] Annual Digest 10, at 23.

[22]*United States v. Curtiss-Wright Corp.* (1936) 299 U.S. 304, at 320; 81 L.Ed. 255, at 262.

[23]*Banco Nacional de Cuba v. Sabbatino* (1961) 193 F. Supp. 375, at 379.

government personally liable in damages for acts carried out in that foreign country in his official capacity. Such cases have little to do with the question of the enforcement of a foreign acquired right or title.[24]

Quite apart from these considerations, the policy of the United States, both in federal and state decisions, has been held to be contrary to the enforcement of foreign confiscatory laws.[25] It may well be that a distinction has to be drawn here between foreign laws which attempt to confiscate rights which arose in or property situated in the United States and those which confiscate rights arising abroad under a foreign legal system or property situated outside the confines of the United States territory. It may well be that in some of the latter cases the policy of the forum is not applicable,[26] but in that case Judge Dimock would have had to demonstrate this. This he did not do.

The principal importance of the judgment of the District Court lies in its assertion that no United States court had passed upon the question of whether or not it was open to it to deny *recognition* to a foreign act because it itself was violative of international law. This interpretation of the volume of precedent on the subject of acts of state, impliedly overruled in the Court of Appeals, has been the subject of an extensive review elsewhere and need not detain us here.[27] The above-quoted statements of the executive do, however, deserve some treatment in this regard. However, it will be more convenient to consider them in relation to the judgment of the Court of Appeals.[28]

The Judgment of the Court of Appeals and the Recognition of the Cuban Government's Title

The finding of the District Court that the title of the Cuban government to the sugar in question could not be *recognized* in an American court was ap-

[24]The cases relied upon by Judge Dimock for this proposition were: *Underhill v. Hernandez* (1897) 168 U.S. 250; 18 S.Ct. 83; 42 L.Ed. 456; *Oetjen v. Central Leather Co.* (1917) 246 U.S. 297; 38 S.Ct. 309; 62 L.Ed. 726; *Ricaud v. American Metal Co.* (1917) 246 U.S. 304; 38 S.Ct. 312; 62 L.Ed. 733; *Holzer v. Deutshce Reichsbahn-Gesellschaft* (1938) 277 N.Y. 474; 14 N.E. 2d. 798; *Luther v. Sagor* [1921] 3 K.B. 532.

None of these cases was concerned with the enforcement of a contract right. True, *Holzer v. Deutshce etc.* did concern a contract right, but the importance of the judgment of the New York Court of Appeals lies in the fact that it decided that Holzer, because of the operation of German law, had no right to enforce. It was essentially a question, in this case, of whether or not the court would recognize the effect of German law in Germany as being sufficient to nullify a contract right which had arisen under that law.

[25]*e.g. Baglin v. Cusenier* (1910) 221 U.S. 579; 55 L.Ed. 863; *Vladikavkazsky Railway Co. v. New York Trust Co.* (1934) 263 N.Y. 369; 189 N.E. 456; 91 A.L.R. 1426; *Plesch v. Banque Nationale de la République d'Haiti* (1948) 77 N.Y.S. 2d. 41; [1948] Annual Digest 13; *Frenkel v. L'Urbaine Fire Insce Co.* (1929) 251 N.Y. 243; 167 N.E. 430; 65 A.L.R. 1490.

[26]See, for example, the distinction drawn by Judge Manton in *United States v. Bank of New York and Trust Co.* (1935) 77 F.2d 867, at 874 *et seq.*

[27]See Falk, "Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of *Banco Nacional de Cuba v. Sabbatino*" (1961) 16 Rutgers L.Rev. 1, particularly at 28.

[28]*Infra*, note 41.

pealed to the Court of Appeals, where the appellee attacked the validity of the title of the Cuban government on three grounds, *viz.*, the invalidity of the nationalization decree under a) the municipal law of Cuba, b) the public policy of the forum and c) the rules and principles of public international law.

I. The Invalidity under the Law of Cuba.

The first ground of invalidity was not entertained by the Court and to that extent the traditional acts of state doctrine remains unchanged. It is still not open to an American court to declare a foreign act of state invalid under the municipal law of the actor government.[29]

II. Invalidity under the Public Policy of the Forum v. Invalidity under the Rules and Principles of Public International Law.

The pronouncements of the Court of Appeals on the general subject of the acts of state doctrine are particularly interesting, for here the Court acknowledged that it is not normally open to an American court to deny *recognition* to the acts of state of a foreign recognized government, albeit that those actions in some way cause damage to American nationals. Under this traditional doctrine, as interpreted in the United States, foreign acts of state cannot be denied *recognition* either on the grounds of incompatibility with public international law or because of a conflict with the public policy of the forum,[30] and any attempts to challenge the validity thereof have always been confined to diplomatic channels. To the extent, therefore, that the Court of Appeals acknowledged the applicability of the acts of state doctrine to these circumstances, it must be taken to have overruled the statement of Judge Dimock in the District Court that no United States judge had passed upon this subject.[31] The judg-

[29]*Banco Nacional de Cuba v. Sabbatino* (1962) 307 F.2d 845 at 859. Judge Dimock in the District Court had come to the same conclusion: (1961) 193 F. Supp. 375 at 379.

[30]It may be justifiably asked, of course, why, if as far as the international legal order is concerned, each state is free to refuse to recognize the acts of foreign states or foreign acquired titles, (*supra*, p. 359 *et seq.*) have the courts of the United States resolutely refused to make use of the exception of public policy to deny recognition to acts which they did not like? The answer lies in the fact that once recognition is accorded to a foreign government, and hence to its acts and laws, the courts have taken this fiat of recognition as depriving them of whatever power they admittedly possess in the international legal order, to decline recognition to a foreign law or title on the basis of the policy of the forum. The recognition of a foreign government and hence of its acts and laws is deemed to fall within the province of the foreign relations of the United States which, by the terms of the Constitution, are confided to the executive branch of the government. Recognition thereto having been granted, it is not deemed to be within the province of the courts to question "the propriety of what may be done in exercise of this political authority. . ." *Oetjen v. Central Leather Co.* (1917) 246 U.S. 297, at 302; 62 L.Ed. 726, at 732. See also *Ricaud v. American Metal Co.* (1917) 246 U.S. 304; 62 L.Ed. 733. In both these cases, the public policy of the forum was appealed to, but in both the Court declined to make use of it. See also *Kleve v. Basler Lebens-Versicherungs-Gesellschaft* [1943-45] Annual Digest 4; and *Holzer v. Deutsbce Reichsbahn-Gesellschaft*, *supra.*, note 23.

[31]*Banco Nacional de Cuba v. Sabbatino* (1962) 307 F.2d. 845, at 855-857.

ment of the Court of Appeals therefore restores the acts of state doctrine to its traditional place in American jurisprudence.[32]

While under normal circumstances it is not open to an American court to inquire into the validity of and thereby to deny recognition to a foreign act of state, an exception has been developed to this rule. Where the executive of the United States informs the courts that it has no objection to an inquiry by the courts into the validity of the foreign act or legislation from which the title under dispute flows, then it appears such an inquiry may be carried out. This exception rests on the case of *Bernstein v. Nederlandsche Amerikaansche-Stoomvaart Maatschappij*,[33] (hereinafter referred to as "the third *Bernstein* case"). This case involved a question of the validity of Nazi acts of state carried out against a German national who had been forcibly deprived of his property pursuant to the Nazi anti-semitic legislative programme. In previous actions relative to his former property, Bernstein had been denied a remedy because it was not open to the American courts to inquire into the validity of these Nazi acts. Because of the acts of state doctrine, the courts were unable to deny recognition to the title to the property of the present holders thereof from whom *Bernstein* was seeking redress.[34] However, in the third Bernstein case the courts were informed that it was the policy of the executive to relieve the

[32]It is worthy of note that in acknowledging the applicability of the acts of state doctrine to these circumstances, the Court of Appeals quoted as authority, *inter alia*, *Ricaud v. American Metal Co.*, *supra*, note 30. This case is definitely controlling in this situation and it seems inexplicable that Judge Dimock could maintain that this case was not germane to the issue; see 193 F. Supp. 380, note 5. This is not the first time, however, that it has been asserted that the case of *Ricaud v. American Metal Co.* was not germane to situations such as this. It has been maintained, for example, that no question of international law was involved in this case; see *e.g.* Zander, The Acts of State Doctrine" (1959) 53 A.J.I.L. 826, at 843; also Oppenheim, *op. cit.*, p. 268, note 2. Yet in this case, the person who had been deprived of his silver by the forces of General Carranza during the Mexican Revolution, was an American national, *viz.* the American Metal Co. In the Supreme Court, the American Metal Co. sought to show, *inter alia*, that no person's property could be taken, damaged or destroyed or applied to a public purpose without the payment of ample compensation; that to authorize the seizure of private property when needed in the course of military operations, the necessity must be urgent; otherwise the seizure would be void; and that the courts of the United States would always inquire whether or not the governmental agency which performed the act in question had the general power to do so. Considering that the American Metal Co. was a United States national, surely such questions as those bring the case within the confines of international law and so make it pertinent to the *Sabbatino* case? It may well be true that cases such as *Luther v. Sagor*, *supra*, note 24, and *Oetjen v. Central Leather Co.*, *supra*, note 30, did only involve nationals of the nationalizing state. Nevertheless, the *rationes* of those decisions were not narrowly confined to such circumstances; see the comment on these decisions in *In Re Helbert Wagg & Co. Ltd.* [1956] 1 All E.R. 129, at 139. Furthermore, the fact that there may have been alternative grounds for decision in *Ricaud v. American Metal Co.* does not necessarily render the broader statement of law inapplicable or *obiter*; *Membery v. The Great Western Railway Co.* (1889) 14 App. Cas. 179, at 187, per Lord Bramwell.

[33](1954) 210 F.2d 375.

[34]*Bernstein v. Van Heyghen Freres, S.A.* (1947) 163 F.2d. 246; *Bernstein v. Nederlandsche Amerikaansche-Stoomvaart Maatschappij* (1949) 173 F.2d. 71.

courts of any restraints upon the exercise of their jurisdiction when considering the validity of Nazi acts, and on this basis the case was allowed to go to trial.[35]

In the Court of Appeals, it was held that the exception of the third *Bernstein* case was applicable to the circumstances of the *Sabbatino* case, for before the appeal was heard, the executive addressed a communication to the *amici* in the *Sabbatino* case, informing them of the attitude which it adopted towards this and similar actions.[36] In coming to this conclusion, the communications relied on by the Court were two letters, one from the Legal Adviser to the State Department and the other from the Under Secretary of State for Economic Affairs. The first of these letters stated in part:[37]

> The Department of State has not, in the Bahia de Nipe case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalization by Secretary Herter. *Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine.* Since the Sabbatino case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction.[38]

The second communication relied upon by the Court, the letter from the Under Secretary of State for Economic Affairs, in part stated:[39]

> I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts.

The exact effect of these statements is, as the Court noted, somewhat uncertain.[40] However, in the opinion of the Court, they did express the belief on the part of those who were responsible for the conduct of the foreign affairs of the country that the status of the Cuban decrees was a matter for the courts to decide. The Court here attributed to those communications the same force and effect as that of the executive communication in the third *Bernstein* case, *i.e.*, they were held to relieve the courts of the restraints upon the exercise of

[35]This communication took the form of a letter to the attorneys in the third *Bernstein* case from the Acting Legal Adviser to the State Department, Jack B. Tate, and in part stated:

"1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practised by the Germans on the countries or peoples subject to their control.

3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

[36]The Cuban-American Sugar Co. and its wholly-owned subsidiary, the Cuban-American Sugar Mills Co., two companies involved in cases similar to the *Sabbatino* case, were allowed to file briefs as *amici curiae*.

[37]*Banco Nacional de Cuba v. Sabbatino* (1962) 307 F.2d 845, at 858.

[38]Emphasis added by the Court.

[39]*Ibid.*

[40]*Ibid.*

their jurisdiction when passing upon the validity of the Cuban legislation.[41] This interpretation is doubtless correct, but the important question which has to be asked is: upon what basis did the executive intend that the status of these Cuban decrees of nationalization should be determined? The question is fundamentally one as to the meaning of the phrase, "restraint upon the exercise of the courts' jurisdiction" and of the power of the executive of a country to remove such restraints.

The interpretation placed upon these letters was that they removed the restraint under which an American court had been unable to pass upon the validity of a foreign act of state under the rules and principles of international law. These letters, it was contended, empowered an American court to declare that the acts of state of another country, carried out within its own territory, were objectively illegal. It is respectfully submitted that this interpretation is erroneous and that the executive had no intention of empowering the courts to make such a determination. It is submitted *first* that the courts of no nation, under the present form of international organization, at least in time of peace, have the power to adjudicate upon the legal validity of the acts of another and hence whatever meaning could be attached to these executive statements, the intention to allow the courts to carry out such a function could not have been one of them. The power to adjudicate upon the international legality of foreign acts of state is not one which is entrusted to the several states of the international community.[42] But the power which each state does possess is that by which it can deny recognition to a foreign act of state on the grounds of its own public policy and the only reason why the exception of public policy has not heretofore been utilized in the United States is because of the internal constitutional division of power between the executive and the judiciary.[43] The power of each state to refuse, on the grounds of its own policy, to recognize

[41]The decision of the Court of Appeals, relying on an executive communication to enable it to assume the function of inquiring into the validity of a foreign act of state, again impliedly overrules the lower court decision. In the District Court, Judge Dimock, apart from contending that no United States court had passed upon the question of whether or not it was open to it to adjudicate upon the validity of a foreign act of state on the basis of international law, found that because of the *general* state of executive opinion on these Cuban measures, the assumption of this jurisdiction would not cause any embarrassment to the executive, the avoidance of such a conflict between the courts and the executive being, he claimed, one of the reasons for the acts of state doctrine. However the third *Bernstein* case required a *direct* statement from the executive before the courts could assume the function of adjudicating upon the validity of the Nazi acts. This requirement, ignoring as it did the general state of executive opinion towards the Nazi acts and the lengths to which the United States itself had gone to destroy that regime, has not escaped without criticism; see, "Should Judicial Respect be Accorded to Nazi Acts of State" (1947) 47 Columbia L. Rev. 1061; "Act of State Immunity" (1947-48) Yale L.J. 108; Zander, *op. cit.*, at 850; and see the dissenting opinion of Clark, J. in *Bernstein v. Van Heygben Freres S.A.* (1947) 163 F.2d 246, at 253. However, the decision of the Court of Appeals in the *Sabbatino* case would seem to establish that for an American court to inquire into the validity of an act of a recognized government, some *direct* executive permission is necessary.

[42]See further, *infra*, p. 375.

[43]*Supra*, note 30.

foreign acts of state, laws, and rights and titles derived therefrom is inherent in the concept of the territoriality of laws and is itself exemplified by the above-quoted rule of private international law that foreign rights and titles will only be recognized or enforced where to do so is not violative of the policy of the forum.[44] There is no obligation on states prescribed by public international law to recognize or enforce foreign acquired rights or titles and hence there is no breach of international law by a refusal to do so.[45] Therefore, *secondly*, if the executive had any intention in the *Sabbatino* case of permitting the validity of the Cuban acts of state to be determined in an American court, it could only have been on the basis of the *policy of the forum*. This contention, that it was the intention of the executive in the *Sabbatino* case to empower the courts to examine the Cuban laws from the point of view of their compatibility with the policy of the United States, is, it is submitted, supported by the statements made by the executive in the *Bahia de Nipe* case.[46]

The *Bahia de Nipe* Case and the Policy of the Forum

The *Bahia de Nipe* case involved a question of the immunity attaching to a vessel owned by the government of Cuba. On August 17th, 1961, the barratrous captain of the vessel, the *Bahia de Nipe*, a vessel belonging to the Cuban government, diverted the said ship to United States waters and radioed the United States Coast Guard that he and ten members of the crew wished to seek political asylum. The vessel was taken into custody by the Coast Guard, and while it remained in United States waters, five libels were filed in the United States District Court against the Republic of Cuba, its said vessel and her cargo. While the main importance of this case lies in the discussion which it gives to the conclusive effect, on the courts of the United States, of an executive certificate and grant of immunity to the property of a foreign sovereign,[47] the views of the executive on the validity of the Cuban measures, so far as the courts of the United States are concerned, are also of considerable importance here.

Following the executive certificate, immunity was held to attach both to the Cuban vessel and her cargo. Thereupon, an application was made by the United Fruit Company, one of the libelants and the former owner of the cargo, for a stay pending an application to the Supreme Court for a writ of *certiorari*. In opposing this application for a stay, the Solicitor General filed a memorandum setting out at length the views of the executive on the validity of the Cuban measures. The views therein expressed were stated to be those of both

[44]*Supra*, p. 359.

[45]Seidl-Hohenveldern, "Communist Theories on Confiscation and Expropriation. Critical Comments" (1958) 7 A.J. Comp. Law 541, at 556-557; *idem*, "Title to Confiscated Foreign Property and Public International Law" (1962) 56 A.J.I.L. 507, at 508; see, however, Oppenheim, *op. cit.*, at p. 267.

[46]*Rich v. Naviera Vacuba S.A.* (1961) 197 F. Supp. 710; affd. *per curiam* (1961) 295 F.2d 24.

[47]For a full discussion of the prior authorities on this subject, see Lyons, "The Conclusiveness of the 'Suggestion' and Certificate of the American State Department" (1947) 24 B.Y.I.L. 116.

the State Department and the Department of Justice. In part this memorandum read:[48]

> 1. Petitioner, in effect, seeks redress in this proceeding for the expropriation of its property allegedly owned by it in Cuba. But no such redress is available here. It may be assumed that the confiscation is unlawful under international law, *i.e.* so far as relations between the Governments of the United States and Cuba are concerned. But that does not mean that Cuba, as between itself and petitioner, does not have a valid title to the expropriated property so far as our courts are concerned. . .

After having quoted the classical enunciation of the acts of state doctrine by Chief Justice Fuller in *Underhill v. Hernandez*,[49] the memorandum continued:

> This act-of-state doctrine prevents any inquiry by our courts into the acts of the Cuban Government in Cuba which, in this case, may have resulted in the expropriation or confiscation of sugar or other property owned by petitioner in Cuba. And assertion that its property was seized without legal justification and without due process of law in violation of the Fifth Amendment is of no aid to petitioner. . .[50]

It has been cogently pointed out that these views are not those of the Supreme Court,[51] but nevertheless they do give some clarification of the intent of the executive in the *Sabbatino* case.

It is clear from the *Bahia de Nipe* case, that as far as the executive was concerned, the title of the Cuban government to this vessel and her cargo, albeit that it might be invalid in the international forum, was valid for the purpose of litigation in the United States. Indeed, it seems that for some considerable time, the United States, in international disputes of this kind, has held to the view that international law does not render an expropriation of foreign-owned properties illegal or invalid, but rather imposes an obligation on the expropriating state to make prompt, adequate and effective compensation to the former owners.[52] If this interpretation of United States policy is correct, and the executive statements in the *Bahia de Nipe* case would seem to support it, then it would seem to be the American position that at least as regards the municipal forum, a title gained through a foreign expropriation is legal and that the only way in which that legality can be challenged is in the *international forum.*

The Recognition of the Validity of the Cuban Title and the Policy of the Forum

The executive statements on the status of the Cuban decrees in the *Sabbatino* case must, it is submitted, be read in the light of the executive views expressed in the *Bahia de Nipe* case. It will be obvious that there is, in appearance at least, some discrepancy between the views of the executive expressed in the memorandum of the Solicitor General in the *Bahia de Nipe* case, and those expressed

[48]Extracts from the Solicitor General's memorandum are reproduced by Rabinowitz, in his article, "Immunity of State-Owned Ships and Barratry" [1962] Journal of Business Law 89; and by Baade in "The Validity of Foreign Confiscations: An Addendum" (1962) 56 A.J.I.L. 504.

[49](1897) 168 U.S. 250; 42 L.Ed. 457.

[50]*United States v. Pink* (1941) 315 U.S. 203; 86 L.Ed. 796.

[51]Rabinowitz, *op. cit.*, at 93.

[52]Baade, *op. cit.*, at 505.

by the Legal Adviser to the State Department in his communication to the *amici* in the *Sabbatino* case. It is submitted, however, that this discrepancy is resolved if the statements of the executive in the *Sabbatino* case, that whatever effect the Cuban nationalizations would receive in the United States was a matter for the courts to decide, are interpreted to mean that the American courts could examine the Cuban measures *from the point of view of the policy of the United States forum.* Indeed, in view of the statements made in the *Bahia de Nipe* case, considerable doubt may be cast even on this assumption, that the executive was here opening the door to denying recognition to the title of the Cuban government even on the basis of the policy of the forum. The statements made in the *Bahia de Nipe* case detract considerably from the similarity between the communications in the *Sabbatino* case and that in the third *Bernstein* case, on which the assumption of jurisdiction in the *Sabbatino* case rested. Assuming, however, that the *Sabbatino* communications were of the same nature, it is submitted that they were only intended to empower the courts to deny recognition to the title of the Cuban government on the basis of the policy of the forum, not on the basis of public international law. Where the executive, in an all too rare clarification of its stand on these matters, had specifically stated in the *Bahia de Nipe* case that it recognized the legality of the Cuban government's title so far as the domestic forum of the United States was concerned, it is hardly conceivable that a few months later it would have decided to empower the courts to do that which it had previously asserted they could not do. The public policy of the forum was the only basis on which the courts in this case, or indeed in any other case, could have denied recognition to a validly acquired foreign title. Through the fiat of the executive, the courts of the United States recover their power to utilize the exception of public policy to deny recognition to a foreign-acquired title.

Lastly, on the subject of the recognition of foreign titles, it is necessary to consider whether the statements made in the protests to the Cuban government regarding their agrarian laws were of such a nature as to make even the recognition of titles derived therefrom contrary to the policy of the forum, remembering that the denial of recognition has far wider consequences than a mere denial of enforcement of a contract right relevant thereto. Considering the views expressed in the *Bahia de Nipe* case, it is submitted that reasonable doubt exists that the executive protests relevant to the Cuban measures had such an effect on the policy of the forum as to make recognition of the Cuban government's title contrary thereto. This doubt is heightened by the existence of an alternative ground for decision on which the case could have been decided.

The Enforcement of the Cuban Contract and the Policy of the Forum

Just as it was not necessary in the District Court for the Court to deny recognition to the validity of the Cuban government's title in order to defeat the claim of the Cuban National Bank to the proceeds of the sale of the sugar,

so too in the Court of Appeals, resort should have been had first to the expedient of denying *enforcement* to the contract right of the Cuban government. This contention is, it is submitted, considerably strengthened by the views of the executive expressed in the *Bahia de Nipe* case, for it is very easy in the light of those statements to read into the executive communication of the *Sabbatino* case an invitation to deny *enforcement* to such laws and contracts arising under them whenever the opportunity arose, much easier in fact than it is to interpret those statements as an invitation to deny *recognition* to the title of the Cuban government.[53] However, the Court of Appeals declined in this case to make use of the exception of public policy in order to deny enforcement to the Cuban contract. Considering that this would have been a reasonably clear case of a foreign law and contract contrary to the policy of the forum, and in the light of the views of the executive expressed in the *Bahia de Nipe* case, the reasons given by the Court of Appeals for its refusal to apply the exception of public policy are somewhat inadequate. Precedents applying the exception of public policy are not lacking and are too numerous and well known to require restatement here. The Court stated that the right to compensation was a right protected by the Constitution and that confiscation was probably contrary to the policy of the forum. However, the Court was not sure "what the American public would consider to be the proper policy of the United States with respect to expropriation of the property of aliens by foreign sovereigns when the property has its situs within the foreign countries."[54] It was therefore preferable, in the Court's opinion, to give the decision on the "narrower" ground that the title of the Cuban government was invalid under international law.

The import of these statements must be considered. *First*, whenever the property of one's own nationals is seized abroad, in any action relating to the title to that property, it has to be asked whether the policy of the forum is contrary to the enforcement of that seizure and any resultant titles. *Secondly*, it has to be asked how that policy is constituted.

The public policy of the United States consists of something more than the opinions of the American public. It consists of the values to be found in the Constitution, together with those found in the pronouncements of the executive, the legislature and the judiciary, each acting within their respective constitutional spheres.[55] Furthermore, whenever the foreign relations of the United States are involved as they were in the *Sabbatino* case, then apart from

[53]The power of a court to deny *enforcement* to a foreign law or contract deriving therefrom is, of course, quite independent of the power of the executive, unlike the corresponding power to deny recognition to a foreign title or act of state. The only control which the executive can wield over the power of a court to deny enforcement to a foreign contract or law is through the ability of executive to formulate public policy, ou which enforcement depends.

[54]*Banco Nacional de Cuba v. Sabbatino* (1962) 307 F.2d. 845, at 859.

[55]*United States v. Bank of New York and Trust Co.* (1935) 77 F.2d. 867, at 874 *et seq.*, *per* Manton, J.

the Constitution itself, the pronouncements of the executive are those which carry greatest weight, for in the field of foreign affairs, the voice of the executive is the sole voice of the nation.[56] In this case, it could hardly be claimed that the executive viewed the Cuban measures with equanimity.

It is submitted that a strong case could easily have been made supporting the denial of enforcement to the Cuban nationalization and the contract made pursuant thereto on the basis of the policy of the forum. No doubt, attention would have had to be paid to the question of whether or not the policy of the forum was really concerned with actions which took place abroad and were only indirectly delicts to American nationals. The decision of whether the laws in question were contrary to the policy of the forum would no doubt be rendered more complicated by the fact that the national who was injured was Cuban, *i.e.*, the Cuban company, and that lesion to American nationals was only evident once the corporate fiction was cast aside. However, the Court of Appeals found no difficulty in doing this when considering whether or not the Cuban laws were contrary to international law. It is submitted therefore that this consideration would not have stood in its way.

The entire *Sabbatino* decision would, it is submitted, have been happier if it had been based on the concept of non-enforcement of the contract right of the Cuban government rather than on that of non-recognition of the validity of the title of the government, and on the policy of the forum rather than on pretensions of objective international legality.

The International Importance of the *Sabbatino* Decision

Much of the interest of the *Sabbatino* case is admittedly confined to the United States, this case resting, at least in the Court of Appeals, on the peculiar relationship which exists between the executive of that country and the courts. However, the underlying rationale of the decision, that it is open to the courts of one country to adjudicate upon the international legal validity of the acts of another, is of concern to the entire world.

The acts of state doctrine, interpreted here to mean particularly the inability of the courts of one country to judge the acts of another using as the standard, the rules and principles of public international law,[57] has been subjected to

[56] *United States v. Curtiss-Wright Corp.* (1936) 299 U.S. 304, at 320; 81 L.Ed. 255, at 262.

[57] That part of the acts of state doctrine, under which the courts of one country cannot determine the validity of the acts of another according to the constitutional law of that foreign state, was not questioned by either court and so is not directly in dispute. This issue was however raised in argument and some of the authors quoted below, (note 58), have suggested that there is no reason why such a function cannot be assumed. While this part of the acts of state controversy will not be dealt with here, the arguments put forward against the application of public international law will apply, *mutatis mutandis*, to any question of adjudicating upon the constitutionality of foreign acts of state.

much criticism in recent years.[58] This criticism has not been confined to the world of legal theory. In a British case, *Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary)*,[59] a court in Aden similarly applied public international law to deny the validity of a title gained under the Persian nationalization laws, and this irrespective of the fact that the oil, the title to which was in dispute, was in the possession of a third party. Much of this criticism of the traditional acts of state doctrine is motivated by a desire to see law rule in international affairs. But it merits very serious consideration whether the rule of law can be attained through this means, albeit that it is recognized that there is at the present time a distinct "poverty and inadequacy of the international remedies."[60]

It is a well established principle of international law that international law is itself permissive, not restrictive and that restrictions upon the independence of states cannot be presumed.[61] Is there, therefore, a restriction upon the powers of a state such that it cannot undertake to declare the actions of another member of the international community to be illegal? It is submitted that there is and that this restriction is inherent in the present structure of the international community itself. The international community is composed of states which are equal before the law. In international law there is no common superior other than the law itself. The principles contained in the maxims, *par in parem imperium non habet* and *nemo debet esse judex in propria sua causa* are no doubt trite, but they are nonetheless true. In a society composed of sovereign states, all equal before the law and acknowledging allegiance to no common superior, by what right does one of them undertake to castigate the actions of another as illegal? It is submitted that at present, the only way in which the action of one nation can be validly declared illegal is in the international forum, not in the municipal.

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[58]Fachiri, "Recognition of Foreign Laws by Municipal Courts" (1931) 12 B.Y.I.L. 95, at 100; Mann, "Sacrosanctity of Foreign Act of State" (1943) 54 L.Q.Rev. 42, 155; Wortley, "Expropriation in International Law" (1947) 33 Trans. of Grotius Society 30; Morgenstern, "Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts which are Contrary to International Law" (1951) 4 Int'l. L.Q. 326; Lauterpacht H., "Comment on The Rose Mary" [1954] Camb. L.J. 20; Lauterpacht E., "Re Helbert Wagg: A Further Comment" (1956) 5 Int'l. & Comp. L.Q. 301; Hyde, "The Act of State Doctrine and the Rule of Law" (1959) 53 A.J.I.L. 635; Zander, "The Act of State Doctrine" (1959) 53 A.J.I.L. 826; *contra*, Seidl-Hohenveldern, "Extraterritorial Effects of Confiscations and Expropriations" (1950) 13 Mod. L. Rev. 69; Lipstein, "Re Helbert Wagg & Co. Ltd." [1956] Camb.L.J. 138; Reeves, "Act of State Doctrine and the Rule of Law—A Reply" (1960) 54 A.J.I.L. 141.

[59][1953] 1 W.L.R. 246.

[60]See the Recommendations of the Committee on International Law of the Association of the Bar of the City of New York in its report on *A Reconsideration of the Act of State Doctrine in United States Courts*, parts of which are reproduced in Hyde, *op. cit.*, Reeves, *op. cit.*, and in the Restatement of the Foreign Relations Law of the United States, prepared by the American Law Institute, Tentative Draft No. 4, at 28c.

[61]*The Lotus* [1927] P.C.I.J., A. No. 10, 18.

Theoretical considerations apart, there are manifold practical objections to the proposition that the courts of one country can take it upon themselves to designate the acts of another as illegal in a situation where the complainor state is the sole judge. If the logic of the *Sabbatino* case is carried to its ultimate conclusion, then the courts of each state must have the power to declare the principles and rules of international law applicable to a consideration of the acts of the other members of the international community, all these declarations having equally binding force. It will immediately be evident that there is little guarantee that these municipal determinations of international law will agree. Yet if the courts, no matter what their nationality, have the power to declare the rules and principles of international law applicable to a certain situation, all such determinations should be binding—a conclusion of palpable impossibility, particularly in areas such as that of the right to nationalize where the concepts of property relied upon by one half of the world are rejected by the other.[62] Again, even assuming that the rules and principles by which foreign governmental action is to be judged are generally accepted, there is no guarantee that the interpretation and application thereof by various national tribunals to the acts of another government will coincide. This has been graphically demonstrated by several cases which arose out of the Iranian nationalization of their oil industry. Whereas a British court found that the seizure of the oil industry was violative of international law,[63] a Japanese[64] and an Italian[65] court found that it was not. The "parochialism" of these three decisions is further demonstrated by the fact that in the first, the complainor and the judge were both British; in the second the defendants and the judge were both Japanese, and in the third, the defendants and the judge were Italian. Whose interpretation of international law was binding?[66]

When a municipal court is asked to consider the validity of foreign acts of state, it has the choice of recognizing them or of treating them as a nullity, on the basis of the policy of its own forum. But what it cannot do is apply public international law when considering the validity of such foreign actions. Municipal courts, however, are not without a function in the international legal order, even when considering the acts of another sovereign. Municipal determinations of international law are subsidiary sources of international law.[67] They form that evidence of a general custom accepted as law which constitutes the basis of customary international law. When considering the

[62]*Cf.*, for example, the "western" views of the right to nationalize, the right to compensation, etc., with those held in communist countries, in, *e.g.*, Katzarov, *La théorie de la nationalisation* (Neuchâtel, 1960).

[63]*Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary)* [1935] 1 W.L.R. 246.

[64]*Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha* [1953] I.L.R. 305.

[65]*Anglo-Iranian Oil Co. v. S.U.P.O.R.* [1955] I.L.R. 21.

[66]For a full discussion of these and other relevant arguments on this subject, see Reeves, *op. cit.*

[67]See the Statute of the International Court of Justice, Art. 38d.

acts of another government, states in exercising their discretion to recognize them or not as they please, demonstrate effectively their own view as to what a particular rule of international law should be or how it should be interpreted. Municipal determinations of this kind establish an international consensus as to what the standard of action within a certain sphere should be. The immediate result, where recognition is denied to a foreign governmental action on the basis of the policy of the forum, may, no doubt, be the same as that reached in the *Sabbatino* case through this purported use of public international law. But the long term results are considerably different. Whatever the provocation for the *Sabbatino* decision, where the courts making such a determination are erected in the state which is in fact the complainor, the procedure cannot but be described as arbitrary and as contrary to the ordinary precepts of justice. Nor will it suffice to say that justice was violated in the first place by the Cuban action. That is doubtless correct, but the way to remedy a wrong is not to compound it. International law would indeed be a fine discipline if it gave to each of its subjects the right to castigate, unilaterally, the action of another as illegal.[68] On the other hand, where the decision is given on the basis of the policy of the forum, it is overtly parochial. It makes no pretence of being an objective determination according to the rules and principles of international law. It expresses only the opinion of one state as to what the standard of international conduct should be. It contributes to the international consensus on the particular subject, and *this is the most that any municipal determination can do.*

The goal of international law must be the international settlement of interstate disputes. Compulsory international adjudication is the only answer to such problems as arose in the *Sabbatino* case, for it is inherent in the structure of the international community at present, that one state cannot sit in judgment on another. They do not have this power, and the desire to see the establishment of the rule of law should not be allowed to obscure this fact.[69]

[68]Furthermore, these conclusions are in no way affected by the fact that international law forms part of the law of the land and has to be ascertained and applied as often as questions depending on it are presented for decision. (*The Paquete Habana* (1899) 175 U.S. 677; 44 L.Ed. 320). *Cf.*, however, *Banco Nacional de Cuba v. Sabbatino* (1962) 307 F.2d. 845, at 860. There is, it is submitted, a considerable difference between attempting to ascertain the correct rules of international law and to apply them in an action between two private litigants, in no way involving a consideration of the legality of the acts of another government, and attempting to consider the legality of the acts of another state which are themselves one of the sources of the rules of international law.

[69]It would indeed be paradoxical if states individually could declare the acts of the other members of the international community to be illegal. If states do have this power, why, it may be asked, is there such objection, even by the United States itself, to unrestricted compulsory international adjudication of all disputes? Possession of the municipal power to declare a foreign act illegal would surely make acceptance of international adjudication a matter of mere form.