Extraterritorial Expropriations

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I. INTRODUCTION

It is established doctrine in American law that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[1] This rule of deference to foreign governmental acts, now known as the Act of State Doctrine, has its roots and most significant role in the judicial treatment of foreign acts of expropriation. In 1918, the United States Supreme Court first confirmed that the rule applied to the question of the validity of foreign governmental seizures of property[2] and in 1964, in the celebrated case of *Banco Nacional de Cuba v. Sabbatino*,[3] the Court held the doctrine applicable to a taking of property by a recognized foreign government within its territory, even though the taking allegedly violated customary international law.[4]

Since the 1930's, lower federal and state courts have recognized an exception to the Act of State Doctrine which the *Restatement (Second) Foreign Relations Law of the United States* sets forth as follows: "The [Act of State Doctrine] does not prevent examination of the validity of an act of a foreign state with respect to a thing located, or an interest localized, outside of its territory if the act has

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[1]Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

[2]Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

[3]376 U.S. 398 (1964).

[4]*Id.* at 421-23. After the *Sabbatino* decision, Congress enacted the Hickenlooper Amendment as part of the Foreign Assistance Act of 1961. Pub. L. No. 88-633, § 301(d), 78 Stat. 1013 (1964) (codified at 22 U.S.C. § 2370(e)(2) (1964)). The Amendment in its present form provides in pertinent part:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection . . . .

22 U.S.C. § 2370(e)(2) (1976).

The Amendment frees American courts from the Act of State Doctrine only when a taking allegedly violates international law. Thus, the treatment of other takings would still be governed by the *Sabbatino* case.

not been fully executed in accordance with applicable law."[5] This exception to the Act of State Doctrine—known as the extraterritorial exception or territorial limitation—shapes the treatment which American courts accord foreign confiscatory decrees covering property located in the United States at the effective date of the decree and owned by nationals of the expropriating government. Courts routinely find that the Act of State Doctrine is inapplicable in such cases. Hence, they examine—and frequently refuse to recognize—the decrees on the basis of American public policy.[6]

This Article will investigate the extraterritorial exception as it relates to expropriations in light of the cases invoking it and the *Sabbatino* decision. The first part of the Article will analyze the authority and rationale behind the exception. The second part will inquire into the standard which American courts use to determine whether to give effect to an extraterritorial expropriation decree, that is, American public policy.

The first question which arises is, given the basic rule of complete deference to foreign governmental acts and its underlying rationale, is it permissible and logical to treat extraterritorial expropriations differently from territorial takings? When it is urged that an act of expropriation by a foreign government should be applied as the rule of decision in a case in which the res is located outside the territorial limits of the acting state, ordinary conflict of laws principles clearly do not work well. The case is an extraordinary one, involving the public interest as well as other elements not present in an ordinary choice of private law case, such as the public law of the foreign state, the foreign policy of the United States, and the fact that one party to the underlying transaction, although not necessarily a party to the actual case, is a nation-state. The Act of State Doctrine, no matter how it is viewed legalistically, that is, as a rule of international comity or a rule of international law, is an attempt to accommodate these unique factors. At first blush, it would appear that the same extraordinariness is present when the res is located either within or without the territorial limits of the acting state. In other words, it is difficult to accept the notion that a special problem calling for the application of special rules becomes an ordinary problem subject to ordinary rules with a shift in the locus of the subject property.

Little thought had been given to this problem before *Sabbatino*. Two commentators have questioned the general validity of a

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[5]RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 43 (1965) [hereinafter cited as RESTATEMENT OF FOREIGN RELATIONS].

[6]*See, e.g.*, Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

territorial limitation after *Sabbatino*.[7] Although the answer is not entirely clear, this Article will conclude that *Sabbatino* does not preclude but instead supports, in some respects, a general territorial limitation in the case of foreign expropriations.

Having concluded that there has been and will continue to be a territorial limitation on the Act of State Doctrine, this Article will investigate the approach used by United States courts in determining the effect of an extraterritorial expropriation decree. The approach—judging the validity of the decree on the basis of American public policy—has substantial deficiencies. This Article will propose a different method, which is perceived as eliminating those deficiencies.

II. Bases of Jurisdiction

One aspect of the problem may be disposed of immediately by noting that there is indeed a form of territorial limitation on all acts of foreign states. As a general proposition, a state which has validly prescribed a rule of law, such as an expropriation, may enforce that rule only within its own territory.[8] Thus, if a foreign state seizes property with the intention to become the owner of it, to pass muster under international law the seizure must be accomplished within the territory of the acting state or, at any rate, outside the territory of other states. There is no doctrine or rule of law which requires United States courts to pay deference to an act of a foreign state which is unsupported by a recognized basis of jurisdiction to enforce.

The cases under consideration do not involve any violation of the principles of jurisdiction to enforce a rule of law. In the typical extraterritorial expropriation case, the foreign state simply has decreed ownership of property which has a situs in the United

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[7]Henkin, *The Foreign Affairs Power of the Federal Courts*: Sabbatino, 64 Colum. L. Rev. 805 (1964); Comment, *Act of State Doctrine Held Inapplicable to Foreign Seizures When the Property at the Time of the Expropriation is Located Within the United States*—United Bank Ltd. v. Cosmic Int'l, Inc., 9 N.Y.U.J. Int'l L. & Pol. 515 (1976).

[8]Restatement of Foreign Relations, *supra* note 5, § 44 states in part:

> (1) A state may not exercise in the territory of another state the jurisdiction to enforce rules of law that it has under the rule stated in § 32, except to the extent that
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> . . . .
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> (c) the other state otherwise permits its exercise of such jurisdiction.
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> (2) A state that exercises its enforcement jurisdiction when, under the rules stated in Subsection (1), it may not do so, violates the other state's rights under international law.

States. The acting state has jurisdiction to prescribe this rule of law[9] and no illegal enforcement acts have been undertaken.

III. Origin of the Territorial Limitation

Several Supreme Court and New York Court of Appeals decisions serve as the basis for the requirement that in order for the Act of State Doctrine to be triggered with respect to an act of expropriation, the res must have been taken while within the territory of the acting state. The point of departure for examining this requirement is *Underhill v. Hernandez*,[10] in which Underhill, an American citizen, made a claim for damages for illegal detention and assault and battery against Hernandez, a leader of revolutionary forces in Venezuela, which was then in a state of civil war. In an attempt to coerce Underhill to aid the revolutionary effort, Hernandez refused to permit Underhill to leave Bolivar, Venezuela. Hernandez was acting in his capacity as military commander of the faction which subsequently gained power and was recognized by the United States as the legitimate government. The Supreme Court affirmed[11] the lower court judgment for Hernandez, stating: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[12]

In later cases involving expropriations of property, courts have interpreted the words "done within its own territory" to require that the property be *within* the territory of the acting state at the time of the expropriation for deference to be extended to the act of expropriation.[13] The assumed limitation of *Underhill* is derived from *Hatch v. Baez*,[14] an 1876 New York Supreme Court decision, in which the court dismissed the complaint of an American citizen against the former President of the Dominican Republic for "wrongs and injuries" inflicted upon the plaintiff while he was in the Dominican Republic. The court stated:

> We think that, by the universal comity of nations and the established rules of international law, the courts of one country

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[9]The prescriptive jurisdiction of the acting state is founded on the nationality basis. *Id.* § 30 provides in relevant part: "(1) A state has jurisdiction to prescribe a rule of law . . . (b) as to the status of a national or as to an interest of a national, wherever the thing or other subject-matter to which the interest relates is located."

[10]168 U.S. 250 (1897).

[11]*Id.* at 254.

[12]*Id.* at 252.

[13]*See, e.g.*, Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892, 910 (S.D.N.Y. 1968), *modified with respect to damages*, 433 F.2d 686 (2d Cir. 1970).

[14]14 N.Y. Sup. Ct. 596 (1876).

> are bound to abstain from sitting in judgment on the acts of another government done within its own territory. Each State is sovereign throughout its domain. The acts of the defendant for which he is sued were done by him in the exercise of that part of the sovereignty of St. Domingo which belongs to the executive department of that government. To make him amenable to a foreign jurisdiction for such acts, would be a direct assault upon the sovereignty and independence of his country.[15]

In 1918, in *Oetjen v. Central Leather Co.*[16] and *Ricaud v. American Metal Co.*,[17] the United States Supreme Court held the doctrine of *Underhill* applicable to a physical seizure of property within the territory of the acting state regardless of both the nationality of the owner and the allegation that the act violated international law.[18] The Court in *Oetjen* affirmed the view expressed by the lower court in *Underhill*, which had relied on *Hatch*, that the rule of complete deference had its basis in international comity.[19] To sit in judgment of such an act of a foreign state and possibly condemn it would "'imperil the amicable relations between governments and vex the peace of nations.'"[20]

Attempting to determine the applicability of the rule on the basis of its literal formulation is of little utility. Clearly, the acts involved in *Ricaud* and *Oetjen* were carried out within the territory of the acting state. What, however, of the situation in which the only act performed by the state is the issuance of a decree of expropriation? Arguably, if the decree is issued in the territory of the acting state, the act of expropriation is "done within its own territory," regardless of the situs of the property, and the decreeing state is owner of the property. On the other hand, it may be argued on the basis of *Sabbatino*[21] and the *Restatement of Foreign Relations*[22] that when the subject property is located outside the territory of the acting state, no "taking" has occurred because the act has not been "executed in accordance with applicable law,"[23] that is, not "done within its own territory."[24] In some cases, a finding that the acting

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[15]*Id.* at 599.

[16]246 U.S. 297 (1918).

[17]246 U.S. 304 (1918).

[18]Oetjen v. Central Leather Co., 246 U.S. at 303; Ricaud v. American Metal Co., 246 U.S. at 309.

[19]246 U.S. at 303-04.

[20]*Id.* at 304.

[21]*Sabbatino* is discussed at notes 47-66 *infra* and accompanying text.

[22]RESTATEMENT OF FOREIGN RELATIONS, *supra* note 5, § 43.

[23]*Id.*

[24]Only "takings" of property are entitled to deference under the Act of State Doctrine. In *Sabbatino*, the Court concluded that the Cuban expropriation law had

state did not intend its expropriatory decree to encompass property located outside its territory is appropriate. In the typical case under consideration, however, the intention of the acting state to confiscate property located outside of its territory is clearly evidenced in the decree or other pronouncements. Although the inability and failure of the state to take certain enforcement steps may well be a basis for differentiating extraterritorial acts from intraterritorial ones, it would seem that the applicability of the Act of State Doctrine should not turn upon the interpretation of ambiguous expressions in a vacuum.

When, as in *Oetjen* and *Ricaud*, property is located within the territory of the state which expropriates it, no other state can legally perform the act of expropriation without the consent of the territorial state.[25] Although it is generally a valid exercise of prescriptive jurisdiction for, say, the United States to decree expropriation of American-owned property located in Mexico,[26] United States agencies may not, as a general proposition, legally seize the property *in Mexico*. In the latter sense, the jurisdiction of the territorial state to enforce the decree is exclusive.

The formulative cases suggest that to condemn a state's valid exercise of exclusive jurisdiction to enforce a rule of law in effect denies the state's independence. Therefore, such a denial "'imperil[s] the amicable relations between governments and vex[es] the peace of nations.'"[27]

When the subject of the expropriation is located extraterritorially, that is, in the territory of some other state, the jurisdiction of the acting state ceases to be exclusive. In such a case, the state in which the property is located has jurisdiction to prescribe the rule, based on the territorial principle.[28] Sitting in judgment of such an act arguably would not jeopardize the needs of international comity, for

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been "fully executed within the foreign state" and that there had been "an effective taking" of the subject property. 376 U.S. at 414. Whether the act has been executed and whether there has been a "taking" depend upon the "applicable law." *See* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 5, § 43. Certainly, concluding that the law which governs such questions is the law of the acting state is as reasonable as holding American law applicable.

[25]*See* note 8 *supra* and accompanying text.

[26]In such a case, jurisdiction to prescribe is based on nationality. *See* note 9 *supra*

[27]Oetjen v. Central Leather Co., 246 U.S. at 304.

[28]RESTATEMENT OF FOREIGN RELATIONS, *supra* note 5, § 17 provides:

A state has jurisdiction to prescribe a rule of law

(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory and

(b) relating to a thing located, or a status or other interest localized in its territory.

there would be no denial of or interference with an exclusive jurisdiction.

Due to the paucity of early cases, none of which even remotely involved extraterritorial expropriations, one can only speculate how the Supreme Court during the formative era would have approached an act of extraterritorial expropriation in light of the Act of State Doctrine. The Court might have concluded, without more, that the doctrine was a rule of international law[29] which the nation-states, in cases of expropriation, were bound to apply only when the res was located within the territory of the acting state. The Court might even have concluded that if the object of a foreign expropriatory decree were located in the United States, the decree would not be entitled to any consideration because the acting state lacked a base of prescriptive jurisdiction.[30]

IV. Development of the Territorial Limitation in the American Courts

The extraterritorial exception had its genesis in the United States in a series of New York state court cases involving the early nationalization programs of the government of Soviet Russia. For the first time in the judicial history of the United States, the courts were confronted with expropriation decrees which purported to apply to property belonging to nationals of the Soviet Union wherever such property was located.

Before the United States recognized the Soviet Union, the New York courts viewed Soviet edicts and decrees confiscating property of Soviet nationals located in New York as legal nullities;[31] however, the decrees were on occasion given effect in the interest of justice.[32] After the United States had recognized the Soviet government, the decrees of the Soviet Union became law. Nevertheless, until the Supreme Court's 1937 decision in *United States v. Belmont*,[33] the New York courts continued to deny effect to Soviet extraterritorial expropriation decrees on the basis that they were contrary to New

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[29]The New York court adopted this view in Hatch v. Baez, 14 N.Y. Sup. Ct. 596, 599 (1876), which served as the basis for the rule announced by the Supreme Court in *Underhill*.

[30]Although it is clear today that prescriptive jurisdiction based upon nationality is permissible, several cases decided during the earliest part of this century indicated that laws meant to affect property located outside the territory of the state of enactment were legal nullities. *See, e.g.*, Baglin v. Cusenier Co., 221 U.S. 580 (1911).

[31]*See, e.g.*, Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 170 N.E. 479 (1930); Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924).

[32]*See, e.g.*, Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933).

[33]301 U.S. 324 (1937).

York's public policy.[34] Although the courts failed to offer explicit reasoning, they must have viewed the Act of State Doctrine as inapplicable. There is some suggestion that New York's strong public policy would have defeated the argument that considerations of comity should lead to effectuation of the decrees.[35] Even intra-territorial acts, that is, acts confiscating property of Soviet nationals located in the Soviet Union, which seemingly fell within the scope of the *Underhill* doctrine, were evaluated under the public policy of New York. The outcome, however, was the same as if the Act of State Doctrine had been applied: when the subject property was located in the territory of the Soviet Union, public policy dictated giving effect to the decrees.[36]

The New York approach underwent a significant change in 1937, when the Supreme Court decided *United States v. Belmont*.[37] *Belmont* involved a Soviet expropriatory decree covering the property of a Russian corporation, including money on deposit with a New York banker, Belmont. In 1933, the Soviet government had assigned its claim to the money to the United States. The United States sued to recover the assigned bank deposit. The lower court held that a judgment for the United States would for practical purposes give effect to an act of confiscation of property located in New York. Thus, the lower court refused to enforce the decree based on the public policy of New York.[38] The Supreme Court reversed, holding that the President's recognition of the Soviet government, the establishment of diplomatic relations between the two governments, and the assignment, resulted in an international compact between the United States and the Soviet Union which took precedence over New York's public policy.[39]

The opinion included a lengthy recitation of the *Underhill* principle and a discussion of the applicability of that principle to foreign confiscations.[40] Why the Court found it necessary to cite *Underhill*, *Oetjen*, and *Ricaud* is unclear. The majority opinion seems to suggest that the Act of State Doctrine encompasses extraterritorial confiscations. Justice Stone apparently recognized this and, in a concurring opinion, pointed out that the cited cases did not preclude New York from invoking its public policy in relation to confiscatory decrees covering property located in New York and not subject to

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[34]*See, e.g.*, Vladikavazsky Ry. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934).

[35]*Id.* at 378, 189 N.E. at 460.

[36]*See, e.g.*, Dougherty v. Equitable Life Assurance Soc'y, 266 N.Y. 71, 193 N.E. 897 (1934).

[37]301 U.S. 324 (1937).

[38]*Id.* at 327.

[39]*Id.* at 330.

[40]*Id.* at 327-28.

the international compact entered into by the two governments. In other words, the case turned upon the principle that a treaty took precedence over state law and policy.[41]

In 1939, in *Moscow Fire Insurance Co. v. Bank of New York & Trust Co.*,[42] the New York Court of Appeals dealt with an issue similar to that presented in *Belmont*. In a series of decrees beginning in 1918, the Soviet Union had purported to confiscate the property of Russian insurance companies. Moscow Fire Insurance Company was a Russian corporation which had done business in New York since 1899. In 1933, the United States recognized the government of the Soviet Union, which assigned whatever claim it had to the assets of the company to the United States. By virtue of earlier litigation, the Moscow Fire Insurance Company had been liquidated and the surplus assets deposited with the respondent bank.

The issue in *Moscow* was the proper distribution of these surplus assets, which were claimed by the United States on the basis of the assignment. The court first distinguished the situation from that presented in *Belmont*:

> The United States has not invoked the judicial authority of the States in aid of an agreement it has consummated, calculated to give the decrees of the Soviet government force beyond the force given to decrees of other recognized governments. It invokes the aid of the court only to enforce rights of the Soviet government, whatever they might be, which the United States has acquired by assignment . . . .[43]

The court then refused to recognize the decrees, not because recognition would contravene New York's public policy, but because under New York *law*, as applicable under traditional conflict of laws principles, the assets belonged to the directors of the Moscow Fire Insurance Company.[44] New York law was deemed applicable because the property was located in New York and, under traditional conflicts principles, the ownership of property is governed by the law of the situs. The court indicated that the Act of State Doctrine was applicable only when no choice of law issue was presented.[45]

It is submitted, first, that the *Moscow* court's approach was adopted to avoid conflict with that portion of the *Belmont* decision prohibiting the use of state public policy to determine the effect to be given to an expropriatory decree. It is further proposed that the

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[41] *Id.* at 333-37 (Stone, J., concurring).
[42] 280 N.Y. 286, 20 N.E.2d 758 (1939), *aff'd*, 309 U.S. 624 (1940).
[43] *Id.* at 304, 20 N.E.2d at 764.
[44] *Id.* at 314, 20 N.E.2d at 769.
[45] *Id.* at 311, 20 N.E.2d at 768.

Moscow rationale for excepting extraterritorial expropriatory decrees from the orbit of the Act of State Doctrine is of doubtful validity. It may well be that the Act of State Doctrine is triggered only when property which is the subject of an expropriatory decree has been located at some point within the territory of the decreeing state. It is quite another thing to suggest that the law of the decreeing state is applied only when *ordinary* rules of conflict of laws direct its application. In the first place, the traditional choice of law rule was developed in the arena of private transactions which involve minimal public interests, at best.

Second, the traditional rule was developed to facilitate a choice between rules which themselves are designed to govern private transactions, not to determine whether an act of state should be given effect.

Third, the notion that an act of state is not applicable because of the choice of law rule is somewhat absurd when the act is by its very terms applicable. Ordinary choice of law rules work well when a court has before it two or more conflicting rules of law cast in general language which express nothing about their territorial scope. In contrast, an act of expropriation usually applies to specific property in specific places.

Fourth, one cannot assume that there is any applicable law other than the law of the acting state, that is, the decree itself, in a case of extraterritorial expropriation. For example, New York's rules of law dealing with ownership of property cover strictly private transactions and transactions between the state and a private person; the rules are patently inapplicable to the situation at hand.

Fifth, one may argue that New York does have an applicable rule, that is, a judicially fashioned rule. This argument assumes, however, that the New York court has the power to devise and apply such a rule. Certainly the choice of law rule does not give it such a power. The existence of the power depends in part upon whether there is an extraterritorial limitation on the Act of State Doctrine, which obviously begs the question.[46]

In *United States v. Pink*,[47] involving an issue hardly distinguishable from that in *Moscow*, the Court determined that the public policy of the United States favoring judicial recognition of Soviet extraterritorial decrees took precedence over state policy and law.[48]

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[46]It should also be noted that neither the Act of State Doctrine nor ordinary conflicts rules are meant to deal with conflicting exercises of jurisdiction when such exercises are intended to further the public interest. In the typical case, there has been but one exercise of jurisdiction. *Moscow* may be viewed as an atypical case, that is, one involving conflicting exercises of jurisdiction in the public interest.

[47]315 U.S. 203 (1942).

[48]*Id.* at 231-34.

Pink provides additional support for the proposition that the *Underhill* principle is not intended to apply to extraterritorial decrees. Although the Court cited *Oetjen* and *Ricaud*, it did not rely on them.

In summary, two aspects of the formative cases, federal and state, are worthy of mention. Although no Supreme Court decision has explicitly determined the applicability of the Act of State Doctrine vis-a-vis extraterritorial expropriations, the rationale of the doctrine has seemingly presented no bar to judicial evaluation of such acts.

The New York cases are scarcely helpful in this regard. Pre-*Moscow* cases suggest that the New York courts did not view the Act of State Doctrine as precluding the utilization of New York public policy in any case. In that era, the courts had not yet concluded that the scope of the Act of State Doctrine was to be determined by federal law rather than state law. Although the Court in *United States v. Pink* made clear that in regard to the question of the effect of foreign expropriatory decrees, federal policy favoring recognition would take precedence over conflicting state policy,[49] the Court neither confirmed the validity of nor offered a rationale for a general territorial limitation. Nevertheless, the territorial limitation acquired a life of its own and was not questioned until after the Supreme Court's ruling in *Banco Nacional de Cuba v. Sabbatino*.[50]

V. The Impact of *Banco Nacional de Cuba v. Sabbatino* on the Extraterritorial Exception

In 1960, in response to an American reduction of the Cuban sugar quota, Cuba expropriated property belonging to American nationals. The decree became effective when sugar belonging to C.A.V., a Cuban corporation owned principally by American nationals, was aboard a vessel in Cuban territorial waters. In furtherance of its decree, Cuba detained the vessel until the purchaser's agent, Farr, Whitlock and Company, had agreed that the proceeds from the contemplated sale of the sugar would be paid to the Banco Exterior, an agency of the Cuban government, rather than to C.A.V. The agreement between Farr, Whitlock and the Cuban bank recognized Cuban ownership of the sugar. Farr, Whitlock refused to turn over the proceeds of the sale of the sugar to the Banco Nacional, another instrumentality of the Cuban government to which the Banco Exterior had assigned the bill of lading. Banco Nacional sued Sabbatino, the receiver of C.A.V.'s New York assets, for recovery of the proceeds. Sabbatino successfully contended

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[49] *Id.* at 230-31.

[50] 376 U.S. 398 (1964).

in both the District Court[51] and Circuit Court of Appeals[52] that the Cuban decree should not be recognized because it violated international law.

The Supreme Court reversed, holding that the Act of State Doctrine precluded judicial examination of "the validity of a taking of property within its own territory by a foreign sovereign government . . . even if the complaint alleges that the taking violates customary international law."[53]

Although the cases bear a strong resemblance, the Court in *Sabbatino* did not rely solely on *Ricaud*. In *Sabbatino* the Court redefined the rationale underlying the rule of complete deference to acts of foreign states. It did not believe that the Act of State Doctrine was commanded "by the inherent nature of sovereign authority,"[54] as earlier cases had suggested, or by international law.[55] Neither was the rule compelled by the Constitution of the United States.[56] However, the Court stated that

> [t]he act of state doctrine does . . . have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.[57]

Thus, the Court found the real rationale for the rule of complete deference in the separation of powers concept. Because most questions concerning the conduct of foreign relations are political rather than legal, they are proper subjects for executive action rather than judicial decision. Nevertheless, the Court noted that the judiciary would decide certain cases touching on foreign relations.[58] The Court

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[51]193 F. Supp. 375 (S.D.N.Y. 1961).

[52]307 F.2d 845 (2d Cir. 1962).

[53]376 U.S. at 428. In response to *Sabbatino*, Congress enacted the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1976), which provides in essence that the Act of State Doctrine will not bar a judicial determination on the merits when a taking allegedly violates international law. *See* note 4 *supra*.

[54]376 U.S. at 421 (citing Oetjen v. Central Leather Co., 246 U.S. 297 (1917); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Underhill v. Hernandez, 168 U.S. 250 (1897)).

[55]376 U.S. at 421.

[56]*Id.* at 423.

[57]*Id.*

[58]*Id.*

advised consideration of the following factors to determine whether a particular question is appropriate for judicial decision:

(1) The degree of codification or consensus attending the particular area of international law.[59] In *Sabbatino*, the Court noted a lack of codification or consensus in international law concerning the need for compensation for a taking of property.[60]

(2) The impact of judicial decision on American foreign relations. The Court found that the question whether a state may validly expropriate the property of an alien without compensation to be sensitive in view of its direct relationship to the national interests of capital importing nations and those which do not "adhere to a free enterprise system."[61] Because of the sensitivity of the issue, a pronouncement by a United States court that the taking was invalid would likely insult the foreign state and interfere with negotiations pending between the foreign state and the Executive Branch.[62] Furthermore, judicial decisions would be at best piecemeal and thus could not contribute meaningfully to the development of international law.[63] And although a finding of validity would not offend the foreign state, it would likely embarrass the State Department and be detrimental to American interests.[64]

(3) Existence of the acting government. If the acting government is no longer in existence, a judicial decision will not conflict with or embarrass the Executive Branch or insult the foreign government.[65]

The Court also indicated that allowing a court to judge an act of a foreign state might "render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade."[66]

According to several commentators,[67] the *Sabbatino* Court's redefinition of the rationale for complete deference to acts of state has cast doubt on the validity of a general extraterritorial exception: to justify sitting in judgment, courts must now consider the needs of international comity in light of the separation of powers theory rather than the inherent nature of sovereign authority. In other words, the pre-*Sabbatino* rationale for the territorial limitation was that because the acting state did not have exclusive jurisdiction

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[59]*Id.* at 428.
[60]*Id.* at 428-30.
[61]*Id.* at 430.
[62]*Id.* at 432.
[63]*Id.* at 434.
[64]*Id.* at 432.
[65]*Id.* at 428.
[66]*Id.* at 433.
[67]*See, e.g.*, Henkin, *supra* note 7, at 826; Comment, *supra* note 7, at 532-34.

when the object of a foreign expropriatory decree was located in the United States, an American court would not offend international comity by judging the foreign act of state. After *Sabbatino*, however, courts must ask whether sitting in judgment of acts of extraterritorial expropriation "may hinder . . . this country's pursuit of goals both for itself and for the community of nations as a whole . . . ."[68]

The Court in *Sabbatino* did not expressly resolve the issue of the applicability of the Act of State Doctrine to extraterritorial expropriations. Nevertheless, *Sabbatino* may be viewed generally as restricting rather than expanding the ambit of the doctrine. This observation follows from the very refusal of the Court to rest the doctrine on the inherent nature of sovereign authority. In other words, it appears that the Court intended to indicate that there may be cases in which acts clearly done within the territory of the acting state will not escape judicial scrutiny; before *Sabbatino*, this factor alone arguably precluded sitting in judgment by a United States court. The question remains whether the *Sabbatino* Court intended to reject similar restrictions on the doctrine's scope with respect to extraterritorial expropriations.

Sabbatino has prompted several lower federal courts to rationalize the territorial limitation. In *Maltina Corp. v. Cawy Bottling Co.*,[69] the Court of Appeals for the Fifth Circuit provided a lengthy defense of the extraterritorial exception. The court noted that in past cases in which the Act of State Doctrine had been applied to acts of expropriation, the act had "come to complete fruition" in the territory of the acting state.[70] The expropriation was a "fait accompli," so that as a practical matter, it could not have been prevented.[71] On the other hand, the court indicated that when the res is located in the United States at the time of issuance of the decree, the act cannot "come to complete fruition" without the cooperation of the courts of the United States.[72] Furthermore, "there is something the forum state can do to prevent the expropriation, because the property is plainly within the physical control of the forum state."[73] The court then noted that

> [t]his emphasis on the completion of the Act of State squares with the policy considerations articulated in the *Sabbatino* decision. . . . The obvious inability of a foreign state to com-

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[68]376 U.S. at 423.

[69]462 F.2d 1021 (5th Cir. 1972).

[70]*Id.* at 1028. This view was taken earlier in Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968).

[71]462 F.2d at 1028.

[72]*Id.*

[73]*Id.* (citing Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968)).

> plete an expropriation of property beyond its borders reduces the foreign state's expectations of dominion over that property . . . . Consequently, the potential for offense to the foreign state is reduced, there is less danger that judicial disposition of the property will "vex the peace of nations," and there is less need for judicial deference to the foreign affairs competence of the other branches of government.[74]

Particular aspects of the court's argument are unconvincing. First, a foreign expropriation being challenged in a United States court is never a "fait accompli" until the court so declares it, regardless of what the acting state did or where the property happened to be located at any particular time. Although *Ricaud*, *Oetjen*, and *Sabbatino* involved the exercise of various acts of dominion or control over the property by the foreign sovereign, the property nevertheless came under the jurisdiction of the United States courts. In each case, the United States court could have prevented the expropriation by refusing to recognize the decree's intended effect. Furthermore, the court could have enforced its decision that the foreign state had not acquired ownership of the property.

Thus, the *Maltina* court's conclusion that there is a lower potential for insult to the acting state in the extraterritorial expropriation context is unsound to the extent that it rests on the "fait accompli" theory. However, the court's conclusion is plausible when disengaged from the "fait accompli" rationale. In the extraterritorial expropriations setting, the foreign state has prescriptive jurisdiction under the principle of nationality rather than territoriality. It could be argued that when the acting state lacks territorial jurisdiction, its expectations of being recognized as the owner and, consequently, the potential for offense from a judicial refusal to recognize ownership, are reduced substantially.

If one accepts the proposition that in the typical extraterritorial expropriation case, sitting in judgment of the act involved will carry with it less danger of offending the acting state because of that state's limited expectations, the further question remains whether this conclusion alone suffices to support a general territorial limitation upon the Act of State Doctrine. First, it should be noted that, unlike the situation presented in *Sabbatino*, there is no violation of international law when a state expropriates the property of one of its nationals, assuming that no illegal acts of enforcement have occurred. Next, one may question whether the territorial limitation

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[74] 462 F.2d at 1028-29.

is justified under the other factors which the Court in *Sabbatino* used to determine the propriety of judging a foreign act of state.

The Court in *Sabbatino* considered the possibility of interfering with negotiations ensuing or likely to ensue between the United States and the acting state to be a strong reason for refusing to examine the validity of a taking of property within its own territory by a foreign sovereign. In the typical extraterritorial case, however, there will be no negotiations pending between the United States and the acting state with respect to the particular expropriation because the State Department is not likely to take up the claim of a foreign national.

It has been suggested that *Sabbatino* demands judicial consideration of additional factors in determining whether to examine a foreign act of state.[75] To be sure, the Court in *Sabbatino* devoted a good deal of attention to the degree of codification or consensus attending the standard alleged to be appropriate in evaluating the act of state, to wit, the international law of expropriation. The impact of this factor is attenuated in the extraterritorial context because the standard employed by the courts in judging the foreign decree is American public policy rather than international law.[76] Any lack of codification and consensus surrounding American public policy obviously would not engender disagreements between nation-states. The use of American public policy to deny effect does not necessitate a decision that international law—a law to which the acting state is subject and which is formulated by the practices of states, including the acting state—has been violated. To be sure, both the lower courts and the Supreme Court in *Sabbatino* by implication rejected public policy as the standard for judging foreign governmental acts. In evaluating the rejection, however, one must consider the fact that the expropriation was territorial and of alien-owned property. Although the application of American public policy in this context has not been viewed as controversial, this writer considers it inappropriate for reasons which will be discussed later.

In *Sabbatino* the Court also mentioned the availability of another forum as a reason for judicial refusal to examine a foreign act of state. However important that factor may have been in *Sabbatino*, which involved injured Americans who could seek redress through

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[75]The author of a provocative Comment concerning United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868 (2d Cir. 1976), takes the view that *Sabbatino* requires the judiciary to approach extraterritorial expropriations on a "case-by-case balancing-of-relevant-considerations approach." Comment, *supra* note 7, at 535. This approach would demand excessive precision of lower federal courts; both the rule and reasoning of *Sabbatino* were quite general.

[76]*See, e.g.*, Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

the State Department, the typical extraterritorial expropriation case involves, at best, a highly remote possibility that any forum apart from the United States court exists for resolving the issue.

In summary, *Sabbatino* constitutes only a small and easily surmountable obstacle toward recognizing a general territorial limitation on the Act of State Doctrine as it applies to expropriating acts. Even if one agrees with the view advanced by one commentator that *Sabbatino* requires the courts to approach each extraterritorial expropriation on an ad hoc basis,[77] it is highly likely that only a few extreme cases would qualify for application of the Act of State Doctrine. Thus, in the great majority of cases, the courts would be able to proceed just as they always have, that is, by denying enforcement on the basis of American public policy.

VI. Standard for Judging Acts of Extraterritorial Expropriation

The question of the proper standard by which to judge an extraterritorial expropriation decree represents a greater problem and one which is more susceptible to satisfactory solution than the threshold question of the applicability of the Act of State Doctrine. Although sitting in judgment and denying the effect of extraterritorial acts are permissible, the standard used by the courts to examine such acts—American public policy—is unreasonable and should be changed.

A court's conclusion that the Act of State Doctrine is inapplicable to an act of extraterritorial expropriation does not automatically reveal the basis upon which the act should be judged. More specifically, a judicial decision that the doctrine is inapplicable to a particular act does not inevitably call for denial of the act's effect. The problem lies in determining the proper basis upon which to decide whether to give effect to the act.

The present standard for deciding whether to give effect to an extraterritorial expropriation, that is, American public policy, is not the only imaginable standard. For instance, a United States court might conceivably examine the foreign act under the law of the foreign state. When a foreign government has confiscated the property of one of its nationals, it may well be that the state has violated its own law, a law to which it is obviously subject. However, American courts do not inquire into the validity of foreign governmental acts under the law of the acting state. The principal justifications for the refusal are the likelihood of insulting a state by an American court's determining that the state has violated its own

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[77] *See* note 75 *supra*.

law and the likelihood of error in discovering and interpreting foreign public law.[78] Nor do rules of international law provide a basis for denying effect in the typical case under consideration. Nevertheless, international law may play a role when, for example, the acting state has violated rules relating to prescriptive or enforcement jurisdiction. Thus, the situation is one in which the acting state, although it has violated neither international law nor its own law, must pass the test of American public policy.

A. The Public Policy Standard

Public policy was first used to evaluate extraterritorial expropriations in a series of New York cases dealing with the Soviet nationalization program.[79] The series evidences no little antipathy of the New York courts to Soviet decrees, which is not surprising in view of the magnitude and unprecedented nature of the nationalization, the nonrecognition policy assumed initially by the United States government, and the courts' general disdain for institutions so drastically opposed to ideals cherished in the United States. Public policy was a natural choice as the device for judging the Soviet decrees; time-honored, expedient, and devastating, its application involved none of the uncertainty surrounding the international comity standard.

The leading modern case defining public policy in the extraterritorial expropriation setting is *Republic of Iraq v. First National City Bank*,[80] a 1965 Second Circuit decision. In 1958, King Faisal was assassinated and his government overthrown. The successor government issued a decree which purported to confiscate all the property of the former dynasty wherever located. On the basis of the decree, the Republic of Iraq sued to recover King Faisal's account and shares in a Canadian investment trust held in a New York bank. The court applied the extraterritorial exception, refusing to give effect to the decree on the basis that to do so would be contrary to the public policy of the United States against confiscation.[81] The court found the source of the public policy in various provisions of the federal Constitution prohibiting confiscatory action by the United States or a state[82] and noted that "[f]oreigners entrusting their property to custodians in this country are entitled to expect this historic policy to be followed save when the weightiest reasons call for a departure."[83] Finally, the court observed that "the policy of

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[78]Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 415 n.17.

[79]*See* cases discussed at notes 31-36 *supra* and accompanying text.

[80]353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

[81]353 F.2d at 51.

[82]*Id.* (citing U.S. CONST. amends. V, XIV; *id.* art. I, § 9, cl. 2).

[83]353 F.2d at 52.

the United States is that there is no such thing as a 'good' confiscation by legislative or executive decree."[84]

Today, confiscations by foreign governments have become commonplace. The very fact of their multiplicity raises a question about the continued vitality of utilizing public policy as the standard by which to judge extraterritorial acts.

There are, as well, more serious objections to the use of public policy. As it is presently applied, public policy requires that the court inquire whether enforcing a foreign law would be contrary to good morals, deep-seated traditions, and principles of natural justice. It is doubtful that any court applying this test would declare, as did the court in *Republic of Iraq*, that "there is no such thing as a 'good' confiscation . . . ."[85]

In *Sabbatino*, both the district court[86] and court of appeals[87] had refused to evaluate the act on the basis of American public policy, judging it only on the basis of international law. The court of appeals observed that under the generally accepted Cardozo definition of public policy, the taking of property without compensation would likely be contrary to a "fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[88] However, the appellate court believed that the public policy-based concept of just compensation was developed for use in American interstate cases rather than international cases:

> [W]e are aware of the admonition that public policy is an "unruly horse." The concept has proved to be a very difficult one to confine when one seeks to apply it. We are not entirely certain what the American public would consider to be the proper policy of the United States with respect to expropriations of the property of aliens by foreign sovereigns when the property has its situs within the foreign countries. Also, decision of this case based upon the public policy of this forum is undesirable because reliance upon such a basis for decision results in a nationalistic, or municipal, solution of a problem that is clearly international.[89]

The difficulties of applying public policy surface in the extraterritorial context as well. Pinpointing the public attitude is

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[84]*Id.*
[85]*Id.*
[86]193 F. Supp. 375 (S.D.N.Y. 1961).
[87]307 F.2d 845 (2d Cir. 1962).
[88]*Id.* at 859.
[89]*Id.*

troublesome; although the typical extraterritorial case implicates weaker international concerns than those involved in the *Sabbatino*-type case, the element of international interest is nonetheless present. Courts, however, have defined public policy in a way which insures nonrecognition of extraterritorial acts and which has been criticized extensively and rejected in other areas of law.[90] The courts appear to find public policy in the literal words of positive law, that is to say, in the Constitution, but they fail to reflect on the reality that that law does not bind the whole world. Thus, public policy becomes a "substitute for analysis";[91] the true reasons for the decision are masked.

Another objection to the use of public policy is that it evidences little concern on the part of the judiciary for states whose political and economic systems differ from those of the United States. In essence, the courts' failure to take into account the particular needs of developing states amounts to a refusal to acknowledge their legitimacy. Professor Henkin has observed that the

> Act of State [Doctrine] had its origins in attitudes of respect for a nation's mastery in its own land, respect which the United States sought to foster when it was itself a "new nation" wishing to be let alone. *Sabbatino* is evidence that the United States, now a most powerful nation with interests reaching everywhere, may be prepared to accord similar respect to new small nations.[92]

It is suggested that the courts, to conform to this policy of accommodation, should abandon public policy in its present form as a device by which to decide the effect to be given to extraterritorial expropriations.

Another problem with using American public policy to judge acts of extraterritorial expropriation is that of insult to the foreign state. For an American court to announce that a foreign act of state will not be given effect primarily because it violates a law to which the acting state is not subject can scarcely fail to offend the foreign state, although the potential for offense is not sufficiently strong to trigger application of the Act of State Doctrine. The approach ignores completely, it would appear, the reasons for which the state acted.

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[90]*See* Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

[91]*Id.* at 1016.

[92]Henkin, *supra* note 7, at 830.

B. An Alternative to the Public Policy Approach: Judging Extraterritorial Acts by the Factors of Section 6 of the Restatement (Second) of Conflict of Laws

The previous discussion is not intended to suggest that a foreign confiscation of property located here should be given effect automatically. Instead, this author proposes that criticisms could be overcome and the strong judicial tradition of respect in evaluating acts of state preserved by abandoning the present approach in favor of one which would take into account the possibility of according recognition to the foreign act.

Any act of state that becomes relevant in litigation in the United States conceivably involves the interests of the acting state, the United States, affected individuals, the judiciary of the United States, and international legal order. These diverse concerns could be reconciled by using an approach which has gained wide acceptance in the law of choice of law. The question presented in the typical extraterritorial expropriation case is closely analogous to a choice of law question: Should the law of the foreign state be applied? Although it is not an ordinary choice of law question, allowance can be made for its extraordinary nature by the suggested approach, under which a court determines applicable law by investigating the following factors: (1) The needs of the international system, (2) the policies and interests of the states involved, (3) the justified expectations of the parties, (4) the basic policies underlying the particular field of law, (5) uniformity of result, and (6) ease of application.[93] These are the factors incorporated in section 6 of the *Restatement (Second) of Conflict of Laws*[94] and used by many American courts to decide the applicable law in interstate conflict of laws cases. In many areas, the *Restatement* has discarded hard and fast jurisdiction-selecting rules, which were directed to territorially based events, in favor of general

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[93]A similar approach in regard to territorial confiscations has been suggested in Kirgis, *Act of State Exceptions and Choice of Law*, 44 U. Colo. L. Rev. 173 (1972).

[94]Restatement (Second) of Conflict of Laws § 6 (1971) provides:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

approaches which take into account the factors of section 6 to arrive at the applicable law. The scheme of section 6 was aimed at precluding the unjust results which emanated from territorially based rules and reducing the need for artificial escape devices to avoid those rules. The approach, which centers around discovery of the state having the most significant relationship to the underlying issue, has gained much favor with American courts.[95] An analysis of the relevance of the factors of section 6 in the extraterritorial confiscation setting follows.

1. The Needs of the International System.—Although the authors of this approach consider the needs of the interstate and international systems to be of prime importance in determining the applicable law, they observe that is is often difficult to determine those needs on the interstate level.[96] Nevertheless, it is quite clear that the choice of law process on the international level should attempt to maintain harmonious relations between nation-states. Cooperation in the effectuation of respective interests serves in the long run to foster this goal. For example, recognition of the public acts of foreign states, specifically foreign expropriatory decrees, would promote good foreign relations.

Even though the *Sabbatino* Court assigned international comity a minor role in determining the effect to be given acts of state, the Court nevertheless confirmed that "historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine . . . ."[97] Furthermore, when a foreign act of expropriation is intended to affect property in the United States, the potential for offending the acting state is merely reduced, not eliminated entirely.

The possibility always exists that an act of state is in violation of international law. Although the United States, through its courts, may as a general rule give effect to acts in violation of international law with impunity, there is much to be said for a conflicts rule discouraging this approach. Judicial refusal to give effect to acts of state in violation of international law would enhance respect for law and international legal order. Confiscation of property owned by a national of the acting state, however, is not likely to violate international law.

2. The Policies and Interests of States.—A most important factor in the interstate choice of law process is that of the interests of the

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[95]*See, e.g.*, Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979).

[96]Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952). Although the authors' approach applies specifically to choice of law in the private context, the outlined factors may be applied logically in the public context as long as the court acknowledges that the case involves a matter of public law.

[97]376 U.S. at 421.

states involved in having their respective laws applied.[98] The theory underlying this factor is that a state interest—determined by discovering the policy of the state's law and then deciding whether the policy would be advanced by applying the law—should be furthered in the choice of law process.[99]

This factor has a rather false ring when utilized in interstate conflicts cases involving the rights and obligations of private parties. When, however, the state is directly involved, either because it is a party or because its act is being urged as the rule of decision, state interests become more clearly pertinent.[100] For instance, the power of eminent domain, an indispensable foundation of sovereignty, is essential to the vitality of a state. Prima facie, the exercise of the power furthers the acting state's interest in increasing public resources.

On the other hand, the United States may have an interest in preventing the expropriation of property located within its borders or protecting the financial well-being of American nationals. No such interest was identifiable in *Republic of Iraq*. The American bank was a mere stakeholder; no judicial decree could have protected the bank's interest in maintaining its business as depository and trustee.

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[98]B. CURRIE, *Conflict, Crisis and Confusion in New York*, in SELECTED ESSAYS ON THE CONFLICT OF LAW 690 (1963).

[99]The main choice of law theory of the *Restatement (Second)* is that the law of the state having the most significant relationship to the underlying transaction should be applied to issues arising from that transaction. This theory differs in important respects from the governmental interest approach espoused principally by Currie. Under the *Restatement* theory, applicable law is generally determined by considering the factors of section 6, which include the following: "(b) the relevant policies of the forum" and "(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(b), (c) (1971). Under governmental interest analysis, it is necessary to determine whether the policy underlying a rule of law would be furthered by applying it in the particular circumstances of the case. If so, the state in whose law the rule is contained is an interested state. Although the wording of section 6 quoted above is somewhat imprecise, it is this writer's view that 6(b) and (c) incorporate, or at least allow, the policy-interest aspect of governmental interest analysis. *See* Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181 (1977).

For an excellent discussion of the various current choice of law theories and methods and their utilization by American courts, *see* Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407 (1975).

[100]Nevertheless, a clear public interest may be diminished by particular circumstances, such as declaration of the actor; nonparticipation in the proceedings; motives; or events which occur after the taking, for example, a conveyance to private persons.

The United States may have another, albeit indirect, interest in being known as a state into which an alien may bring his property without fear of its injury or loss. Aliens and their property in this country are protected by most of the constitutional safeguards afforded to American citizens.[101] This form of equality tends to insure the aforementioned interest. However, it must be stressed that the United States Constitution is inapplicable to acts of a foreign government.

A United States interest of more than a purely paternalistic nature may surface in the extraterritorial expropriation cases. For example, the United States' interest in exercising its powers of eminent domain and taxation may be injured by giving effect to a foreign decree. The attitude and position of the Executive Department are particularly relevant in identifying such an interest. In *Republic of Iraq*, the United States officially denied any concern in the outcome of the litigation. Although the United States had a direct interest in the exercise of its powers of eminent domain and taxation, neither power would have been jeopardized by giving effect to the Iraqian decree.

These cases, it must be emphasized, do not involve any attempt by the United States to exercise its own jurisdiction. Furthermore, even if it could be said that the United States has an interest in having a large amount of property within its borders so as to increase potential revenues, it is difficult to see how a decision like *Republic of Iraq* insures that the property will remain here. Other United States interests, direct and paternalistic, can be imagined, such as a concern for avoiding the adverse economic effects of a wide-scale confiscation of interest-producing assets.

3. Protection of the Justified Expectations of the Parties.—In *Maltina* the court determined *a priori* that when property is located in the United States at the time of issuance of a confiscatory decree, the acting state has a reduced expectation that its decree will be effectuated.[102] Although the absence of expectation alone would not justify denying effect, it may be used to buttress other factors pointing to denial.

With respect to the expectations of individuals, the court in *Republic of Iraq* noted that the heirs of King Faisal had the right to expect observance of the constitutionally based United States policy against confiscation of assets.[103] Determining any basis for such an expectation is difficult; because the heirs were Iraqi nationals, they

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[101]*See* Republic of Iraq v. First Nat'l City Bank, 353 F.2d at 52.

[102]462 F.2d at 1025. *Maltina* is discussed at notes 69-74 *supra* and accompanying text.

[103]353 F.2d at 51-52.

had at least as much reason to expect application of Iraqi law. Furthermore, it is doubtful that the United States, by permitting aliens to deposit money here, thereby *invites* aliens to make the United States a depository or indicates that deposited assets will be safe from confiscation by the alien's national state.

4. The Basic Policy Underlying the Particular Field of Law.—The general policy of the United States has been to give effect to foreign acts of state. Indeed, *Sabbatino* constitutes some authority for the proposition that a foreign public act is presumed valid and entitled to enforcement.[104] The court's dictum in *Republic of Iraq* that "there is no such thing as a 'good' confiscation"[105] is not only inflammatory and opposed to the basic policy of recognition, but is also inaccurate if one considers valid the many American decisions upholding rather extreme forms of governmental interference with American- and alien-owned property.

5. Uniformity, Predictability, and Certainty of Results.—The approach in its present form fosters only interstate uniformity; federal standards govern the situation in which an act of extraterritorial expropriation is attacked. The approach that "there is no such thing as a 'good' confiscation"[106] also promotes certainty and predictability of result. Although uniformity, predictability, and certainty are worthy goals in every branch of law, they tend to prompt courts to accept hard-and-fast rules without considering the need for justice in particular cases.

6. Ease of Application.—In the choice of law process, a court may have to choose between one rule which is difficult to apply and another which is familiar and therefore simple to apply. This factor of the *Restatement* would favor application of the latter rule. In the present context, giving effect and denying effect to foreign decrees would seem to be equally simple routes to decision.

The choice of law approach which a court adopts should not be greatly burdensome to the judicial process. The public policy approach is certainly simpler than that of the *Restatement*. Nevertheless, in view of the highly complex methods employed by American courts in other areas of the law, the *Restatement* approach cannot be viewed as excessively burdensome. Furthermore, these cases, although important, do not arise frequently.

An advantage of the suggested approach is that it provides an accepted framework for a respectable decision. This hierarchy was devised precisely to alleviate the general problem which had surfaced in the cases under consideration, that is, the use of hard-and-fast *ter-*

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[104]376 U.S. at 437.

[105]353 F.2d at 52.

[106]*Id.*

ritorially oriented rules which resulted in unfair, unprincipled, and unjust decisions. The suggested approach also would seem to appeal to the judiciary because it allows for a healthy amount of judicial subjectivism in the final decision.

VII. Conclusion

During the pre-*Sabbatino* era, the courts might have justified a general territorial limitation upon the Act of State Doctrine as it applies to expropriations on the basis that sitting in judgment of a foreign expropriation covering property in the United States would not offend the needs of international comity, a factor stressed by the Supreme Court in *Ricaud*. The New York State courts viewed the doctrine as inapplicable to extraterritorial acts, denying effect to Soviet decrees under state public policy or on the basis of what the author has concluded was an inappropriate analogy to private conflict of laws rules.

In *Sabbatino*, the Supreme Court redefined the rationale behind the Act of State Doctrine. Although several commentators have questioned the validity of a general territorial limitation after *Sabbatino*, that decision does not preclude such a limitation. Although American courts may scrutinize extraterritorial expropriations, the present standard of evaluation, that is, American public policy, is clearly deficient.

With few exceptions, American courts employing the public policy standard have denied effect to extraterritorial confiscatory decrees of foreign governments. According to American public policy, derived from the United States Constitution, there is no such thing as a good confiscation. Accepting such a general principle is difficult given the great number of reasons which may motivate a foreign state to confiscate property of its nationals and the various public and private interests which arise from case to case. Courts could avoid the drawbacks of the public policy approach by treating extraterritorial expropriation problems as extraordinary choice of law questions. The method of analysis, it is submitted, is furnished by section 6 of the *Restatement (Second) of Conflict of Laws*, which lists the most appropriate factors to be taken into account by the courts in determining the applicable law.