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THE ACT OF STATE DOCTRINE: THE INTERACTION OF DOMESTIC AND INTERNATIONAL FACTORS—SOME OBSERVATIONS AND SUGGESTIONS

*Oscar M. Trelles II**

I. INTRODUCTION

Municipal courts are frequently required to adjudicate the status of rights affected by foreign law when litigation between private parties arises.

> When, by the action of State *E*, *O*, an owner, is expropriated, the legal bond between *O* and the thing claimed by him is severed by the law of State *E*, and, *by that law*, *O* is no longer regarded as having an enforceable claim to the thing expropriated; State *E* thenceforward accords to itself, or to its nominee, the protection of an owner in respect of the thing taken. This may be done either by State *E*'s recognizing itself, or some other person, as the new owner; or merely by State *E*'s withdrawing the protection of its courts from *O*, the owner expropriated, and tacitly allowing a *de facto* possession to remain in possession of the thing seized, as did the Roman praetor in allowing *longi temporis praescriptio*.[1]

According to general principles of conflicts of laws, the *lex rei sitae*[2] at the time of the specific transactions is that which controls. Historically, American courts have customarily refused to question the validity of acts of a foreign nation, even though the parties to the suit frequently challenge their validity. The "act of state" doctrine presupposes that a judicial critique of such action could "imperil the amicable relations between governments and vex the peace of nations."[3] Traditionally the judiciary has been reluctant to interfere

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1. B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW, 1 (1959).

2. *Lex rei sitae*: "The Law of the place of situation of the thing." BLACK'S LAW DICTIONARY 1058 (4th ed. 1968).

3. Oetien v. Central Leather Co., 246 U.S. 297, 304 (1918). In this case plaintiff attempted to replevy hides from an American who traced his title to the insurgent Mexican forces of General Garranza, which had seized hides as an occupational measure. After the Carranza regime was recognized as the government of Mexico, the seizure was upheld as the official act of the duly constituted Mexican government.

with issues of international political significance, issues properly belonging to the executive branch of the government.

Personal rights and immovable property situated in the respective territory of the foreign sovereign are the subjects in which the "act of state" doctrine derives its strongest and most rigid application. Historically, courts had little power to modify the results of an act of a foreign nation. Any decision rendered would be ineffective since sanctions could not be imposed without political support.

Upon analysis of the phenomena of expropriation it is necessary to pose the following queries: To what extent should a domestic court in the United States adjudicate transfers of property that arise from the expropriation decrees of sovereign nations? Furthermore, is an American court, or any other domestic court, obliged to respect the acts of government of a foreign nation if they violate either our public policy or the appropriate substantive norms and principles of international law?

It will be the particular objective of this analysis to develop a series of principles that will establish the basis for a number of propositions concerning the appropriate response of a domestic court when expropriation occurs. This objective must be analyzed in terms of the legal policy of a foreign state. "A domestic court must respond to the distinctive demands of a decentralized legal system when it applies international law."[4] The cold war, nuclear weapons and socialism are some of the more conspicuous factors to be considered in such an analysis.

It is readily apparent that domestic courts have a responsibility to improve the quality of international legal stability when dealing with specific transactions that extend no further than the western bloc. Significant questions arise concerning transactions involving conflicting value standards between opposing social systems in contention for world dominance. Whether a domestic court can strike a balance between international legal order, accepted by the world community, and the national interests of the respective sovereign is questionable. Although the internal legal systems of the many states in the international community have similar basic legal principles, the conditioning factors of diverse political, social, economic, cultural and intellectual structures must be recognized.

The following historical synopsis is not intended to be a comprehensive digest of all previous decisions on the subject, but only

4. Falk, *International Jurisdiction: Horizontal and Vertical Concepts of Legal Order*, 32 TEMP. L.Q. 295 (1959).

of those specific decisions which upon careful review seem to be the most significant and enlightening.

II. ORIGINS OF THE "ACT OF STATE" DOCTRINE

The "act of state" doctrine had its genesis in the immunity *ratione personae*[5] afforded the head of a foreign sovereignty. In *Duke of Brunswick v. King of Hanover*,[6] it was held by Lord Chancellor Cottenham that a "foreign Sovereign coming into this country, cannot be made responsible here for an *act* done in his sovereign character in his own country."[7] This case was influential in extending the principle to include the *act* of a foreign sovereign, eventually culminating in the immunity *ratione materiae*.[8]

With reference to American decisions it appears that the "act of state" doctrine is not a venerable concept of judicial theory. A critical analysis of the decisions frequently cited to support precedential value of the doctrine renders a contrary conclusion.

In Justice Marshall's opinion in *Schooner Exchange v. McFadden*,[9] it is discernible that the doctrine was not determinative in nineteenth century decisions often cited to exemplify its long-standing usage. This is the earliest United States decision cited by the scholars as establishing the "act of state" doctrine. The decision was primarily concerned with the distinct and separate doctrine of a foreign sovereign's *personal immunity from suit*. Here, the United States as plaintiff was attempting to prosecute a claim in the federal courts against a French vessel, a warship of Napolean's navy, located in the territorial waters of the United States. Chief Justice John Marshall dismissed the complaint on the ground that *personal immunity* from suit which would attach to Napolean, if he were present, would also extend to the armed ships of his navy.[10]

An analysis of the reasoning in the case indicates that the immunity of specific individuals from suit is not actually a basis for the modern doctrine. In the opinion, Marshall quotes Vattel and indicates that the decision "rested on the fact that it was impossible to conceive that a foreign sovereign would send his ships, his agents, or go himself into a foreign country without an express or implied

5. *Ratione personae:* "By reason of the person concerned." BLACK'S LAW DICTIONARY 1429 (4th ed. 1968).

6. Brunswick (Duke of) v. Hanover (King of), II H.L. Cas. 1, 9 Eng. Rep. 993 (1848).

7. *Id.* at 15-18 and 998-99 (emphasis added).

8. *Ratione materiae*: "By reason of the matter involved." BLACK'S LAW DICTIONARY 1429 (4th ed. 1968). For an in depth discussion see 36 ST. JOHN'S L. REV. 159, 160 (1961).

9. 11 U.S. (7 Cranch) 116 (1812).

10. Comment, *"Act of State," Immunity*, 57 YALE L.J. 108, 111 (1947).

promise of immunity from judicial control."[11] While the principles of *personal immunity of the sovereign* may be derived from these examples, it would seem that the modern doctrine of "act of state" is not a logical requisite.[12]

A significant aspect of the case, which was rarely cited in many subsequent decisions, is the repeated contention that the implied sovereign's immunity is not a specific right protected to any major degree by authoritative sources, constitutional law, or for that matter, international law. Sovereign immunity was frequently distinguished as a type of privilege which could arbitrarily be granted, depending upon the particular interests of the nations involved. However, on reading many of the modern decisions we see a distinct contrasting situation. These cases not only extend the personal immunity of the sovereign to cover legal claims of private individuals but also seem to assert that public policy may not be used to contravene such immunity.[13]

A further reading of other decisions cited as supporting the "act of state" doctrine discloses that they actually involve immunity concepts and demonstrates the confusion of the courts.[14] In *Underhill v. Hernandez*,[15] the plaintiff was an American citizen suing in an American court for damages received in Venezuela from the so-called Hernandez activities in a local political uprising. Hernandez was acting as a general in the Venezuelan army. The Court held that "the acts of the defendant were acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."[16] The court could have added that a sovereign's right of immunity from personal suit extends to those acting under orders on his behalf by citing the "superior orders concept."[17]

Chief Justice Fuller stated that "[e]very sovereign state is bound to respect the independence of every other sovereign State,

11. *Id.* at 112.

12. *Id.* The personal immunity of the sovereign is not to be discounted, for that doctrine is concerned with the logical conclusion that the immunity would extend to rights, privileges, and property claims which individual private subjects or citizens going into foreign states could well prove were based and vested in them by acts of their respective sovereigns.

13. *See* Dougherty v. Equitable Life Assurance Soc'y, 266 N.Y. 71, 90, 193 N.E. 897, 903 (1934).

14. L'Invincible, 14 U.S. (1 Wheat) 238 (1816). Santisana Trinidad, 20 U.S. (7 Wheat) 283 (1822). Dow v. Johnson, 100 U.S. 158 (1879). United States v. Diekelman, 92 U.S. 520 (1875).

15. 168 U.S. 250 (1897).

16. *Id.* at 254.

17. *Supra* note 10, at 112-113.

and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[18] Again, it may be noted, parenthetically, that in both *Duke of Brunswick* and *Underhill* the defendants were officials or representatives of a foreign sovereign government. This is significant in that both cases presumably could have been disposed of by relying *solely* on the doctrine of sovereign immunity. "Act of state" references did not form any substantial basis of the decisions and were apparently dicta.

Underhill, in substance, does not support the modern doctrine of "act of state."[19] One writer on the subject gives a hypothetical situation to exemplify this statement:

> The *Underhill* holding dismisses plaintiff where *D1* is a sovereign or agent of a sovereign, because American courts have traditionally declined to accept such jurisdiction. Now if *D1* sells the goods to *D2* (private citizen) it does not follow that plaintiff cannot sue *D2* merely because *D1* was beyond jurisdiction of the court. In order to extend *D1*'s immunity to *D2* we must say that *D1* was not only beyond personal suit, but that any rights related to him he may "vest" beyond question in others.[20]

III. Expropriation and the "Act of State" Doctrine

What then is the protection, if any, that is historically afforded the individual owner of property? Can property be expropriated at all? Historically, it may be noted with some certainty that throughout the various developmental periods of mankind the individual property owner was liable to have his property taken from him.[21] A contrary theory was expounded by Blackstone and others that ownership by its very nature and existence implied unlimited dominion, as well as absolute power and complete control. Blackstone asserted the view "that sole and despotic dominion which one man claims and exercises over the external things of the world, [is] in total exclusion of any other individual in the universe."[22]

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18. 168 U.S. at 254.

19. 1 C. Hyde, International Law 734 (2d rev. ed. 1945). 2 J. Moore, International Law Digest 30-32 (1906); 1 L. Oppenheim, International Law 811 (4th ed. 1929). These authors are most often quoted in reference to their critique of *Underhill*.

20. *Supra* note 10, at 113.

21. F.A. Mann, *Outline of a History of Expropriation*, 75 Law Q. Rev. 188, 189 (1959).

22. 2 W. Blackstone, Commentaries*2. The doctrine espoused by Blackstone and others of absolute unlimited ownership was criticized by Rudolph Von Ihering of Germany. This theorist criticized the doctrine as an expression of insatiability or the greediness of the egoism. Mann, *supra* note 21, at 189-90; I. Husick, Law as a Means to an End (1924). Husick contends that expropriation is not something abnormal or inconsistent with the idea of property, but it is a solution to the task of reconciling the interests of society with those of the owner.

Another issue involved in analyzing the historical basis underlying expropriation is the determination of by what right property can be taken by the state. It is difficult to conclude that simply by possessing the right of ownership the monarchy actually enjoyed the right of expropriation. The *dominium directum*, or the residual property, was deemed to be that of the lord in feudal history, so it is reasonable to conclude that he could take what was his. English law during this period viewed property rights as theoretical rather than actual. In reality they were a mere fiction.[23]

English theorists have made two major contributions to the law of expropriation. The first significant theory rationalizes that expropriation involves not merely a legislative or administrative act but a specific type of compulsory contract. This contract is analogous to the common law relationship of vendor-purchaser which binds the parties, subject to compensation, to give up and take the land. The second contribution lies in the wide measure of control over the assessment of property in payment of compensation. This assessment and compensation has traditionally been allowed by the English legislatures to independent bodies.[24]

In the United States these theories were adopted with some modifications. The Supreme Court authoritatively held almost a century ago that the right of expropriation was inherent in and incidental to the power expressly reserved by the federal government, notwithstanding the silence of the Federal Constitution or the absence of the state's consent. In *Kohl v. United States*,[25] an eminant domain case, it was held that "[expropriation] is the offspring of political necessity; and it is inseparable from sovereignty unless denied to it by its fundamental law."[26] It was not until the late nineteenth century that important principles of the "act of state" doctrine and expropriation were outlined.

Mr. Justice Holmes in two opinions expounded certain keen observations on the underlying factors constituting the "act of state" doctrine. In the first of these opinions a Hawaiian was denied the right to sue the Hawaiian government on the grounds that there can be no legal right as against the authority which makes the law on which the rights depend.[27] Therefore, property rights seized by the forum state from one of its citizens and given to another cannot

23. MANN, *supra* note 21, at 191 *interpreting* 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 3 (2d ed. 1898).

24. MANN, *supra* note 21, at 193-200.

25. 91 U.S. 367 (1875).

26. *Id.* at 371-72.

27. Kawananakoa v. Polyblank, 205 U.S. 349 (1907).

be challenged in the forum state. Does it follow from this example that the respective rights of the two parties cannot be questioned in a foreign state?

This issue was decided by Mr. Justice Holmes in *American Banana Co. v. United Fruit Co.*[28] In this decision Justice Holmes, without extensive reasoning or authority, assumed that if rights of two parties could not be questioned in one state, neither could they be questioned by tribunals in another state.[29] In *American Banana Company* it is to be noted that the plaintiff was suing for an alleged tort consisting of the defendant's unwarranted incitement of the Costa Rican government to injure plaintiff in that country. This case presented the "act of state" doctrine with its modern characteristics. No tort could be said to have existed unless decisions of the courts of the Costa Rican government were reviewable in a court of the United States. Justice Holmes illustrated this view succinctly: "the fundamental reason is that it is a contradition in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper."[30]

The determination of the "fundamental reason," referred to above, poses the basic question of whether legal rights and claims vested or divested by one sovereign may be disputed in another sovereign nation. Justice Holmes did not explain why this basic question was answered in the affirmative. In this light Justice Holmes seemed to be unclear in expounding a theoretical legal basis for the "act of state" doctrine, and hinted that it may be subject to exceptions. The major exception suggested was that in some instances private legal rights arising from a foreign sovereign's decision may be disputed by another authority of equal standing if it is necessary to uphold the latter nation's public policy.[31]

Ricaud v. American Metal Co.[32] involved the seizure of property of an American corporation by a representative of a rebellious force later recognized by the United States as the de jure government of Mexico. The Court recognized the revolutionary government retroactively and refused to inquire into the validity of the expropriation even though the property involved was that of an American national. The *Ricaud* case was one of the first decisions in which a

28. 213 U.S. 347 (1909).

29. An analogy could be drawn to the present conflict of law rule which requires the forum court to apply the law of the place where the transaction occurred.

30. 213 U.S. at 358. For an extended discussion see *supra* note 10, at 114.

31. *Supra* note 10, at 114-15.

32. 246 U.S. 304 (1918).

specific application of the "act of state" doctrine was employed.

Until 1920 the "act of state" doctrine was not readily applied by United States courts. In *Salimoff v. Standard Oil Co.*,[33] the court declined to question the rights created by acts of the Russian government within its own territory. Acts of the Spanish Loyalist government were deemed another area in which the modern application and usage of the doctrine were appropriate.[34]

The early decision of *Bradstreet v. Neptune Insurance Co.*[35] is an example, however, of a United States court questioning acts of state when called upon to enforce them. The rejection of the validity of acts of a foreign state in this regard is apparent in matters of prize court seizures which have offended certain minimum standards of justice. The propriety of such a decision is supportable on the basis that the prize proceedings are adjudicated in an international tribunal, but there appears to be an area of conflict if a more technical interpretation of the doctrine is adhered to.

Republic of Mexico v. Hoffman[36] involved the lower court granting immunity as a matter of law to a fishing vessel of the Mexican government to which the plaintiff Hoffman was liable in a damage action. The decision to grant immunity rested on matters of public policy and preference was given to the executive's policies over that of the judiciary. In this regard the court held: "It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."[37] The Supreme Court, upon review of the decision, stressed the fact that the doctrine of sovereign immunity was not an absolute rule of law. Moreover, if the executive had indicated a contrary policy it was the obligation of the court to follow such.[38] Prior to this case the United States courts had indicated that there were standards of justice which must be complied with, otherwise the court would not allow an action to be brought.[39]

In *Bernstein v. Van Heyghen Frères Société Anonyme*[40] a distinct reversal of the continued application of the "act of state" doctrine occurred. Prominent writers prior to this case asserted that

33. 262 N.Y. 220, 186 N.E. 679 (1933).
34. Banco De Espana v. Federal Reserve Bank, 144 F.2d 438 (C.C.A.N.Y. 1940).
35. 3 F. Cas. 1184 (No. 1793) (C.C.C.D. Mass. 1839).
36. 324 U.S. 30 (1945).
37. *Id.* at 35.
38. *Supra* note 10, at 118.
39. De Bremont v. Penniman, 7 F. Cas. 309 (No. 3) (715 C.C.S.D.N.Y. 1873).
40. 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947).

the "act of state" doctrine should not be applied if the act of the other state is contrary to the public policy of the United States.[41]

Bernstein involved a claim by the plaintiff that Nazi officials compelled him to transfer property in Germany to a Nazi designee, and that the defendant, a Belgian corporation, acquired the property with notice of the coercion. The action was removed from the state court and brought in the Federal District Court for the Southern District of New York,[42] but was dismissed on the basis that under the New York conflicts of laws rule, the court had no power to entertain the action. It was held in the Court of Appeals for the Second Circuit, that the validity of the transfer to the trustee was not open to question in the American courts. The basis for this was that plaintiff's claim was reserved for adjudication along with all other claims as part of final settlement with Germany and because the federal government had not acted to relieve its courts of the traditional restraints upon exercise of jurisdiction to question acts of foreign nations done within such nations' own boundaries.

Up to this point the approach taken by the court in the *Bernstein* case was traditional in its upholding the "act of state" doctrine. However, the court received a communication from the Department of State which stated that its policy was "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."[43] The court, upon reconsideration of this communication, granted a rehearing and reversed.[44]

The court felt that there was a conflict between United States public policy and that of the international community. Furthermore, notions of justice and equity must prevail. Judge Learned Hand indicated a substantial addition to the "act of state" doctrine:

41. Foreign courts have applied the public policy exception in various instances. With reference to the Indonesian confiscation of Dutch property, the public policy exception was argued before both Dutch and German courts. The Dutch court applied the exception while the German court denied it. Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 AM. J. INT'L L. 305 (1960). With reference to the Iranian Oil confiscation, the Italian courts have not accepted the public policy exception. Anglo-Iranian Oil Co. v. S.U.P.O.R., 1955 I.L.R. 21 (Court of Venice). A similar result occurred in Japan. Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabuski Kausha, 1953 I.L.R. 305, 312 (High Court of Tokyo). French and Belgian courts have applied the exception to the "act of state" doctrine in varying circumstances. It is evident from these few examples, that on the international scene, non-uniformity is present. Reasons for this result have been offered, including basic political, social and economic differences of the various nations of the international community. Social values of the various competing legal systems of the world undoubtedly have significance in determining the results reached.

42. Unreported.

43. Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375, 376 (2d Cir. 1954).

44. 210 F.2d 375 (2d Cir. 1954).

A United States court might take jurisdiction over cases of foreign acts of state if the Department of State, or more generally, the Executive, had indicated that the court should so act. Thus policy considerations, as determined by the Executive, were deemed to have a significant influence on decisions in this area.[45]

IV. Modern Development of the "Act of State" Doctrine

The most significant decision of a United States court with respect to its influence and effect on the application of the "act of state" doctrine is *Banco Nacional De Cuba v. Sabbatino*.[46] Prior to this decision it was a well established principle that courts would refuse to question the validity of an act of a foreign sovereign having internal effect. The instant case points to the duty of a domestic court to apply international law in relation to justice and equity and to that extent is an important restriction on the application of the "act of state" doctrine.

An analysis of the background of the case reveals the fact that in order to insure an adequate supply of sugar the United States government had issued an order cutting Cuban sugar quota. Preservation of the supply and source of sugar was only one reason, the other was related to diplomatic relations with the new Castro regime. Shortly after this order, Cuba made an announcement in which it criticized the United States for cutting the quota, implying that this was a violation of international law. Cuba then issued expropriation decrees confiscating the property of a substantial number of American-owned firms.[47]

In *Sabbatino*, a New York sugar brokerage firm, Farr-Whitlock, had entered into a contract with a subsidiary of Compania Azucarera Vertientes-Camuguery de Cuba (CAV) to purchase a specific amount of sugar from the latter for a third corporation. Before payment or passage of title ensued, the Cuban government nationalized all of the assets of CAV, which was a Cuban corporation, even though the majority of the stock was owned by American nationals. The Cuban government then insisted that Farr-Whitlock enter into a second contract to purchase the identical sugar from it. Their contract was then assigned to Banco-Nacional, a financial agent of

45. The drafters of the Restatement of Foreign Relations Law of the United States noted that only *Bernstein* had not applied the "act of state" doctrine and then only after the executive had objected. Restatement of Foreign Relations Law of United States 2d, §41, Act of Foreign State: General Rule, Reporters n.5 (1965).

46. 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964).

47. There was some question as to the legality of this action within the nation itself; however, this is not a factor in this analysis.

the Cuban government. That organization retained possession of the necessary bills of lading. Farr-Whitlock subsequently sold the sugar and a New York court held that CAV was the rightful owner.[48] A receiver was appointed by the court to which the proceeds of the sale were awarded, and the receiver was required to manage the assets of CAV.

Banco-Nacional de Cuba then instituted an action in the District Court for the Southern District of New York against the broker and receiver, seeking damages for alleged conversion of bills of lading for sale of the sugar and the proceeds. Banco-Nacional contended that the nationalization of the property involved was an act of state, and the instant court could not refute the validity of the act. The court held that the seizure was a violation of international law and awarded summary judgment for the defendants.[49]

What specifically were the violations of international law relied upon by the court to reach its conclusion? The court proceeded upon the assumption that the courts of this country have an obligation to respect and enforce international law not only by virtue of this country's status and membership in the community of nations, but also because international law is part of the law of the United States.[50] The recognition of foreign decrees is based upon comity, and not upon the full faith and credit clause of the Federal Constitution. Therefore, acts in violation of international law should not be extended any credence when contrary to the settled policy of the forum.

The court held specifically that the nationalization decreed by Cuba was invalid for a number of reasons. First, the decree did not seek to obtain the property for a legitimate public purpose, the real purpose being a retaliation for the cut in the sugar quota.[51] Secondly, the decree violated international law because it discriminated against United States nationals.[52] Finally, it was held that the decree failed to provide adequate compensation for the nationalized

48. Schwartz v. Compania Azucarera Vertientes—Camaguery De Cuba, 28 Misc. 2d 355, 208 N.Y.S.2d 833 (Sup. Ct.), *aff'd*, 12 App. Div. 2d 506, 207 N.Y.S.2d 288 (1960).

49. Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1607, 1615 (1962). It is interesting to note that Judge Dimock held that the courts of this country could not question the validity of the seizure under Cuban law on the basis of the public policy of the forum. This appears to be a modification of the public policy exception referred to earlier in this analysis.

50. U.S. CONST. art. I, §8, cl. 10.

51. 193 F. Supp. at 384.

52. *Id.* at 385. This was based on the fact that there was no basic or wrongful act committed by United States property owners, but simply political opposition.

property pursuant to minimum legal requirements imposed by international law.[53]

As in the *Bernstein* case, there was an executive pronouncement, but in the instant case it consisted of a mere note delivered to the Cuban government declaring the nationalization decree to be a violation of international law. The distinction that must be made is that this was a diplomatic communication and not an executive communication to the judiciary written to affect the result of a specific legal controversy.

The Supreme Court granted certiorari and Justice Harlan delivered the majority opinion. The Court reversed the court of appeals decision, stating that however offensive to the public policy of this country and its constituent states an expropriation of this kind may be, both the national interest and progress towards the goal of establishing rules of law among nations are best served by maintaining intact the "act of state" doctrine in this realm of its application.[54]

What then is the importance of *Sabbatino*? The answer comes in the form of the "Sabbatino Amendment" to the Foreign Assistance Act of 1964. On October 7, 1964, subsequent to the decision of the Supreme Court and before judgment was entered on remand, the President signed the Foreign Assistance Act of 1964 containing the amendment sponsored by Senators Hickenlooper and Sparkman.[55] The amendment provided:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based 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: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that

53. *Id.* at 385.
54. Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 436-37 (1964).
55. J.R. Stevenson, *Judicial Decisions*, 60 AM. J. INT'L L. 107 (1966).

particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court, or (3) in any case in which the proceedings are commenced after January 1, 1966.[56]

The Sabbatino Amendment, as cited, was passed by Congress originally in 1964 after adverse reaction to the Supreme Court's decision, and was due to expire on January 1, 1966; however, it was amended and passed again by Congress in 1965 without any time limitations.[57]

It is quite plain that Congress meant the legislation to apply to confiscations occuring after January 1, 1959, the date on which Castro came to power. There can be no doubt that by its specific language the Amendment applied retroactively to past confiscations and transactions arising therefrom which had occurred between January 1, 1959, and the date of its enactment. The Amendment does not deal with confiscations and transactions in the abstract. It deals with "cases" and the action which courts are to take upon such cases. It consistently uses the word "cases" throughout its text. Nowhere does it distinguish between cases pending at the time of its enactment and cases which were commenced prior thereto.[58]

Since the direction to the court is mandatory, it in essence forces a United States court to accept jurisdiction over such a "case". Retroactive effect is required, and the amendment should not be interpreted in a prospective vein as some have urged.[59]

To a large extent the congressional amendment is simply a reversal of the Supreme Court holding in *Banco Nacional de Cuba v. Sabbatino*. As the Senate Foreign Relations Committee explained:

The effect of the amendment is to achieve a reversal of presumptions. Under the Sabbatino decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy.[60]

56. §301(d)(4) of Public Law 88-633, 78 Stat. 1009, 1013, *as amended*, 22 U.S.C. §2370(e)(2) (Supp. I, 1965).

57. Note, *Act of State Doctrine*, 8 HARV. INT'L L.J. 357, 359 (1967).

58. Stevenson, *supra* note 55, at 109.

59. *Id.*

60. S. REP. No. 1188, 88th Cong., 2d Sess. 24 (1964).

Opposition to the amendment has argued that it should fall on constitutional grounds because Congress lacks constitutional power to enact legislation of this nature. However, it cannot be seriously disputed that the Foreign Assistance Act is a valid exercise of congressional power of the Constitution granting the power to Congress "to regulate commerce with foreign nations, and among the several States."[61] The amendment may also be sustained under Congress' power "to define and punish Offenses against the Law of Nations."[62]

The suggestion has also been made that the amendment impinges on the power of the President over foreign relations and thus violates the doctrine of separation of powers. This is an illusory argument. This amendment did not become law by action of Congress alone. It was part of an act signed into law by the President. While the executive branch opposed the amendment before the Senate committee, the President did not choose to exercise his veto power when it came before him for his signature.

It therefore becomes apparent that the amendment has the effect of embodying the general propositions cited by the lower court in *Sabbatino*. It has withstood attacks on constitutional grounds and has resurrected *Sabbatino* as the leading and most important case in the area.

The complex issues that are now presented involve the propriety of expropriation as measured by standards of international law, the role of the domestic court in this regard, the innumerable policy considerations in view of the present nuclear age and the conditioning factors influencing the basic goals of a modern civilized community of nations. Three of the most striking extra-legal conditions which presented themselves during *Sabbatino* were the *cold war*, *nuclear weapons*, and *socialism*. Fear of war, advanced weaponry, and racial-social philosophies are factors which will continue to influence judicial decision-making.[63]

Whenever considering the part extra-legal factors play in the decision-making process, one must first examine the role of the courts to determine exactly what their function is. The court in this situation has a double burden. Domestic courts are agents of rapidly developing international law, as well as the servants of various sovereign and national interests.[64] They have a duty and a responsibil-

61. U.S. CONST. art. I, §8, cl. 3.

62. U.S. CONST. art. I, §8, cl. 10.

63. Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order*, 16 RUTGERS L. REV. 1, 3 (1961).

64. Schachter, *The Enforcement of International, Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1 (1960).

ity to foster international legal stability in dealing among countries in the same sphere or bloc. The problem arises: if the transaction transcends two spheres or blocs (*i.e.*, Western and Eastern), what then is the duty of the courts with this added dimension? A multitude of new extra-legal conditions and factors stream in to influence the decision-making process.

We see that at the present the cold war and the threat of nuclear confrontation, coupled with the public policy of the forum, help set the stage for the decision-making process. Although there are arguments to the contrary, it would be very difficult to separate the cold war from international law and judicial decisions. Diplomatic channels are constantly being pressured by opposing interests and the effectiveness of this method in resolving disputes is being seriously hindered.

Hand in hand with the cold war stands socialism. It is now a world-wide trend of newly independent nations to foster rapid economic development by acquiring control of the internal capital resources of their respective countries. The very theory behind rapid socialistic development would seem to uphold expropriation, with or without compensation, and this underlying factor must be considered by the court.

The success of this social change depends greatly on the external political repercussions it will cause. The outcome of conflicts in this regard will determine which countries will align themselves with this new government. One way for the countries to voice their approval or disapproval of the newly founded government will be through their own domestic courts—just as we voiced our disapproval of Cuba and its methods in the *Sabbatino* decision.

The socialism factor can lead us to another important condition, which is the increasing competition for influence among the newly developing states.[65] The courts have to be aware of this competition for influence when they are making decisions of international significance.

To argue that the courts could ignore these extra-legal factors would be foolish indeed. This would ignore reality. Ideally, of course, it would be preferable to have the court carry out its judicial duties without assuming a partisan posture and without outside influence. The *Sabbatino* decision is a perfect illustration of a domestic court's response to pressing extra-legal factors. In that case Cuba, a nation which was fostering rapid economic development by

65. Falk, *supra* note 63, at 2.

acquiring control of its internal capital resources and discriminating against the United States and other foreign interests. It was a nation, which, in addition to aligning itself with the eastern block, was fostering communism in the western hemisphere.

The court in *Sabbatino* must have weighed two competing factors. First, treatment of Cuba as an adversary and second, favorable treatment of Cuba so that her friendship might be cultivated. It appears the court was not concerned about rendering a decision that might hurt Cuba's feelings. It seems that the court in its decision was giving Cuba a verbal tongue lashing, warning her that such methods would not be condoned because they were in violation of international law.

In *Sabbatino* the extra-legal factor of economics was ever present. Since much of America's relations with Cuba hinged solely on economic policy, the court necessarily dealt with the importing and exporting of a vital commodity. It would have been legitimate for the Cubans to infer from the *Sabbatino* decision that the sentiments of our judiciary were the same as the sentiments of the executive, *i.e.*, that there could very possibly be in the near future harsh economic sanctions and reprisals against Cuba.

In analyzing the *Bernstein* decision in retrospect, we see that a domestic court initially adhered to the "act of state" doctrine, by not questioning the Nazi powers. The *Bernstein* court granted a rehearing and reversed itself after receiving a communication from the Department of State to the effect that its policy was "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."[66] In *Bernstein* we plainly see how extra-legal factors played an important part in this court's decision. Before the court reversed itself it had looked at the case in a non-partisan posture. But upon receipt of the government communication, it appears that factors such as the war itself, economics, public policy and public pressure were considered, thus playing an important role in the reversal.

In summary then, it appears that extra-legal factors will be ever present and exerting pressure upon the courts when litigation occurs dealing with matters of international significance. This is the case regardless of how earnestly the courts feel that these conditions should be met and dealt with by the executive branch of government.

66. 210 F.2d 375 (2d Cir. 1954).

V. INTERNATIONAL STANDARDS

Since World War II and the establishment of the United Nations, a distinct body of international law has been developed. Although it is an uncontroverted fact that international law is part of the law of the United States,[67] it was not until *Sabbatino* that standards of international law based on justice and equity were applied to defeat the act of a foreign state. It would seem, therefore, that a noticeable trend is being developed, at least in the United States, for applying international law standards towards recognition of desired goals.

Nevertheless, can it be said that this trend developed out of a conscious deliberation of what values must be protected with reference to humans living in a world community? It is entirely possible that this sudden recognition of the abstract notion of human dignity is only an external holding of the courts. Are not the overwhelming pressures of the cold war a major determining factor of how the courts will decide similar issues in the future? There is evidence for this contention in the past, *i.e.*, *Sabbatino*, where the opposing forces of democracy and communism were meeting head on. Possibly the anti-Castro pressures in this country created by the politicians and the public were primarily responsible for the abrupt change in judicial decision making.

There appears to be little dissension on the view that the power balance between the East and West is on precarious ground. Since the Second World War the U.S.S.R. and more recently Red China have gradually encroached upon territory formerly tied with the West. The various nations of the world are beginning to recognize that defensive action is of utmost necessity. The judiciary in the United States is caught between administering international law and giving comity to foreign nations' acts. In the *Sabbatino* decision the former ruled at the expense of the latter. Proponents of this change might assert that this was a necessary result, long overdue. An opposing view would contend that there was no precedent for the decision and no real judicial basis. The latter view, which is deemed the traditional one, may be losing status, not so much with legal theoreticians but with those who decide the law, namely, the courts. A reason for this is that the courts are directly under the view of the public and the executive departments of the government. Pressure groups composed of domestic corporations, representatives of foreign nations, and political factions not only affect the Department

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

of State but also the judiciary, albeit indirectly.

Much of what will happen in the future is based on what has already proceeded in the past. If the cold war continues at its present degree of intensity and the emergence of new nations and governmental systems arise, such as in Africa, there is much to support the theory that the judiciary will be caught in this vast complex and yield to them. The continuing work of the United Nations and the American Law Institute's *Restatement of Foreign Relations Law of United States 2d* are evidence that standards of international law are being increasingly imposed upon the courts of this nation. The doctrines of sovereign immunity and "act of state" no doubt had some real basis. However, the real issue is whether these doctrines are now subservient to international law standards of justice correctly or erroneously applied by domestic courts, whether on the basis of true judicial theory or the innumerable conditioning factors present in the nuclear age.

If one were to proceed from a stare decisis standpoint, a prediction of future holdings would have to be based on the validity of previous decisions. If one weighs *Sabbatino* and the overwhelming conditioning factors of today's world, as opposed to the traditional notions of the "act of state" doctrine, it might very well be contended that the courts in the future will continue the new development of decision making as expounded in *Sabbatino*. This statement has been exemplified by the decision rendered against the Cuban government bank, in *Banco Nacional de Cuba v. Farr*.[68] Here the principles of the *Sabbatino* decision were applied through the Sabbatino Amendment to defeat the Cuban claim. The viability of *Sabbatino* was again demonstrated in *Banco Nacional de Cuba v. First National City Bank*.[69] Even though the decision applied the "act of state" doctrine and refused to reach the merits of the case, based on the failure of the *Bernstein* exception, the dissenting opinion gave due credence to the *Sabbatino* rationale.

Do the holdings of these courts indicate that an international rule of law may eventually be developed that will solve the intricacies of the various problems with reference to expropriations? It would seem to be premature to assert that this is the necessary result. There has been little evidence to justify the belief that a few decisions of a domestic court in an exceedingly complex area, such as the one at issue, will be adopted by the community of nations.

There are conflicting interests and values not only between the

68. 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).
69. 442 F.2d 530 (2d Cir.), *cert. granted*, 404 U.S. 820 (1971).

East and West, but also within the great powers themselves, which will bear heavily when the time comes for the adoption of any international standard. The balance of power is believed to be an ever-changing phenomenon, not a static condition. Thus, it is a near impossible task to predict future developments on an international scale. However, in the United States' judicial system there are less of these complexities to confront. A fortiori the decision-making process in the future will most likely be in agreement with that of *Sabbatino*.

VI. Basic Human Rights and Goals as Interpreted on an International Plane

Before analyzing the "act of state" doctrine from this vantage point, it is necessary to refer to what is considered to be a denial of justice under international law.[70] In this context justice demands that the litigant be given the legal safeguards, both procedural and substantive, guaranteed by international law. Because the world community is developing into a highly intricate system, the necessity of recognizing the basic human rights of each individual in relation thereto is ever growing. Each nation must treat its inhabitants, both nationals and aliens, in an equitable manner, so that disputes may be settled without resort to violence.

Human dignity can be termed the lowest common denominator of all civilized people. It would seem that there is general agreement to the effect that a wider and more equitable distribution of power, wealth, skill, education and health is desired. The concept of human dignity, of course, is not limited to these few values, but is composed of diverse groupings of values interpreted differently depending upon the particular segment of the world community involved. The evaluation process should proceed upon some type of definitive basis. In other words, an international standard of justice to be

70. In regard to an international standard of justice, former Secretary of State Elihu Root prophesied that:

> There is a standard of justice very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens, is that its system of law and administration shall conform to that standard. Although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens. . . .

Address by Elihu Root, *The Basis of Protection of Citizens Residing Abroad*, 4 Proceedings of Am. Soc'y of Int'l L. 16, 20-22 (1910). It is to be noted that there are certain obligations to aliens under international law that are independent of any obligation with respect to human rights generally.

applied throughout the world community of nations should be the most cherished goal.

The American Law Institute has proposed an official draft on the restatement of the law with reference to foreign relations laws of the United States.[71] In § 165, Comment c, six illustrations are given of what is involved in the denial of justice from an international justice standard:

(1) any treatment of an alien that violates international law,
(2) any treatment of an alien that departs from the generally accepted standards of substantive law,
(3) treatment of an alien that departs from the generally accepted standards for the conduct of legal proceedings,
(4) failure to afford an alien an adequate remedy or protection in the administration of justice,
(5) failure to prosecute the perpetrator of a crime causing injury to an alien,
(6) failure to provide an adequate domestic remedy for an injury to an alien for which the state has international responsibility.

The questions arise as to whether this doctrine effectively preserves basic human rights and dignity, whether it is of necessity for peaceful relations among the nations of the world community, and whether it is in agreement with the international standard of justice.

Various theories have been advanced in support of the "act of state" doctrine.[72] Comity among nations has been held to be one of the bases of the doctrine.[73] Respect for the acts of a foreign nation's government within its territory would appear to be a cornerstone of the foundation of international peace and stability. A sovereign nation is presumed to be the authority best informed and most able to deal with the diverse problems of internal government. There has been criticism, however, of the court's application of comity principles.[74] The basic objection revolves around the assertion that the

71. RESTATEMENT OF FOREIGN RELATIONS LAW OF UNITED STATES 2d (1965).

72. The court in *Sabbatino* did not classify the "act of state" doctrine as a rule of private or public international law. Judge Dimock rejected the doctrine because "the act of . . . state violates not what may be our provincial notions of policy but rather the standards imposed by international law." 193 F. Supp. at 381. Based on the views of Dicey, Hackworth, and Oppenheim, Dimock held that the expropriation was a violation of public international law. A. DICEY, CONFLICT OF LAWS 667 Morris ed. 7th ed. 1958); 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 656, 657 (1942); 1 L. OPPENHEIM, INTERNATIONAL LAW 351-54 (8th ed. Lauterpracht 1958). There is considerable opposition and controversy regarding this view, but it appears that most legal scholars of the Western world would agree. A favorable result of the instant case was its ready application of public international law in a domestic court.

73. United States v. Belmont, 301 U.S. 324, 328 (1937).

74. See note 10, *supra*.

courts have not understood their function in examining the public policy of the forum nation before automatically extending the judicial rule to cases involving international relations.[75]

Those expounding the public policy exception to the "act of state" doctrine met with difficulty of application problems because the court in *Sabbatino* held that this was not a valid objection. This decision was ostensibly based upon a violation of international law, but one must question whether this was not in reality the public policy exception. Classic international law theories deserve much weight and merit in this regard. These expositions demand absolute independence and perfect equality of each sovereign nation; furthermore, they argue that abandoning the "act of state" doctrine would violate the principle that no nation has the right to interfere with the domestic affairs of another.[76] In the present state of world affairs this theory would seem to have direct application. Why should a domestic court determine the political, economic and social developments of the new underdeveloped nations of the world community? It could very well be a necessity for the economic growth of a nation that expropriation be made for the benefit of the people. In order to secure a more equitable distribution of such values as wealth, education, and well-being for the nationals of such a country, measures may have to be adopted that are not completely in accord with our own somewhat puritanical notions. It would seem to be an injustice not only to these rising nations, but also to the individual's own human dignity to be dictated to by a foreign nation whose theories concerning particular methods of achieving these ultimate goals may differ.

Uniformity and security in relation to property claims of private citizens is something which most would be in agreement with. The question that arises is whether the abandonment of the "act of state" doctrine would result in non-uniformity and insecurity in this area. It appears that this should be answered in the affirmative. This is the position adhered to by many of the treatises in the

75. Indeed, was this not the theory expounded in *Bernstein* with reference to various acts committed by the Nazis during World War II? There it was contended that comity should not be enforced, that there was an exception to the "act of state" doctrine, namely public policy, and that violation of human dignity had occurred. Undoubtedly, the acts of state involved there were offensive to our public policy, but it would appear that a more important ground for the eventual decision expounded was the violation of human dignity. From a standpoint of justice it could be argued with some authority that discrimination against any people on account of race or religion or nationality is a violation of international law and deserves no recognition.

76. Rapin, *National Sovereignty and National Individualism*, 2 J. LEGAL & POL. SOCIOLOGY 5 (1943).

conflicts of law area.[77] However, the contrary view states that this theory is antiquated and tends toward isolationism, thereby preventing international development and the corresponding growth in the equitable distribution of human values. Arguments centering around public policy are maintainable to some degree, of course, but is this a function of the judicial branch of government? It would seem not in most traditional senses. The executive and the legislature appear to be the more appropriate bodies for public policy recognition where legitimate pressures may be brought to bear directly. Generally, a court is deemed to be an institution which is not static in nature, nevertheless, its hallmarks have traditionally been stability and immunity from daily pressures.

The "act of state" doctrine is used in many instances to prevent judicial embarrassment of the executive in the conduct of foreign relations.[78] Judicial discretion is a necessity in the field of domestic matters, because the Department of State is more informed, better equipped, and possessed of more authority under the Constitution in foreign matters with respect to acts of a foreign state.

The *Restatement* in comment (a) of §41 states that the "act of state" doctrine is not a rule of international law. Refusal to apply it does not give the foreign state, whose acts of state are either questioned or denied effect, a ground for objection under international law. Upon its face this might appear to lessen the importance of the "act of state" doctrine, but this is not the case. The reason for this assertion is that only the Anglo-Saxon nations and a few European nations, recognize the "act of state" doctrine. Therefore, it cannot be deemed a rule which is internationally accepted.

In §43, however, the *Restatement* rejects examination of the validity of an act of a foreign state on the ground that it may have violated the public policy of the United States. This position rejects the *Bernstein* decision and appears correct. Although international law should be vindicated in domestic courts when possible, this does not mean that the standard to be used must be in conformity with notions beneficial only to ourselves. This view would be an injustice to both the international community of nations, and indirectly to the individual nationals of the respective nations.

77. G. CHESIRE, PRIVATE INTERNATIONAL LAW, 138-39 (2d ed. 1938). A. NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW, 32-35 (1943). 3 J. BEALE, CASES ON CONFLICT OF LAWS, 515-17 (1902). Bruch, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L.J. 656 (1918). Goodrich, *Foreign Fact and Local Fancies*, 25 VA. L. REV. 26 (1938). Nutting, *Suggested Limitations of Public Policy Doctrine*, 19 MINN. L. REV. 196 (1935). Carvers, *A Critique of Choice-of-Law Problems*, 47 HARV. L. REV. 173 (1933).

78. See note 10, *supra*.

Recent scholarly debate over the doctrine concentrates on the creation of modifications or exceptions which would lessen the unfortunate results of too strict an application, but at the same time preserve its salutary effect where the particular fact situation of the case demanded it.[79] Three basic positions have been advocated, each consisting of certain advantages specifically relating to application. The first view is deemed to be the older, more traditional approach and postulates that the doctrine should be strictly adhered to.[80] The second approach, taken by the Bar Association of the City of New York, advocates that the doctrine should not be applied unless the Department of State officially requests the court to abstain from examining the legality of the act of state.[81] The third view is taken by the already referred to American Law Institute's *Restatement of the Law of Foreign Relations of the United States 2d*. The essence of this theory is that the doctrine should be consistently applied except when an act is challenged as being contrary to international law.[82] The latter position, namely, the third, may be said to be that of the court in the *Sabbatino* decision. But was there a violation of international law? This question requires an affirmative answer. The court in *Sabbatino* also relied on the second view with reference to the State Department. However, in the first section of this analysis it was stated that the executive communication was indecisive in its recommendation to the court on the former policy position and expected results desired. Which view is preferable? A combination of the second and third views carefully applied would offer advantages hinted at in this analysis. The "act of state" doctrine should be applied in concurrence with distinct executive findings, and only in cases of proven violations of international law should exceptions be made to it.

At this point it is appropriate to briefly discuss when taking is wrongful under international law and what the individual remedies are in respect to this violation. In §185 of the *Restatement*, it is stated that the taking by a state of property of an alien is wrongful under international law if either:

(a) it is not for a public purpose,
(b) there is not reasonable provision for the determination and

79. Note, *Expropriation—Cuban Expropriation Held Invalid Under International Law and Unenforceable by Assignee of Cuba in United States Court*, 110 U. PA. L. REV. 122 (1961).

80. Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 AM. J. INT'L L. 141 (1960).

81. Record of New York City Bar Association, 22K (1959) *cited in* Hyde, *Act of State Doctrine and Rule of Law*, 53 AM. J. INT'L L. 635 (1959).

82. RESTATEMENT OF FOREIGN RELATIONS LAW OF UNITED STATES 2d §41, Comment b.

payment of just compensation, as defined in §187, under the law and practice of the state in effect at the time of taking, or

(c) the property is merely in transit through the territory of the state, or has otherwise been temporarily subjected to its jurisdiction, and is not required by the state because of serious emergency.

In connection with this section it is submitted that §206 of the *Restatement* must be considered. This section provides that a state is not required to consider a claim presented on behalf of an alien injured by conduct wrongful under international law and attributable to the state, if the alien has not exhausted the domestic remedies available by the state.

Questions of human dignity and various social values which seem basic in order to secure the goal of international justice depend on remedies afforded by the judiciary to individual claims. Remedies must be applied equitably in order that the goals of a wide distribution of power, wealth, well-being, rectitude, skill, education and enlightenment can be achieved.

As regards the various remedies available to an individual litigant, basic issues concerning relative rights and liabilities respecting compensation arise. It has been the position of the United States that the duty to pay full value at the time of seizure is obligatory.[83] This position finds some basis in the doctrine of compensation. The duty arises from the confiscation of rights acquired and vested by individuals in their respective properties. Unjust enrichment to the state with a subsequent denial to the individual would result if this duty were not enforceable. Some recent writers have adopted the full measure rule.[84] A contrary view is asserted by the special reporters for the International Law Commission on State Responsibility.[85] Their view essentially states that in cases of mass seizure of the nationalization type, full compensation need not be made. It is submitted that this view is the one to be refined.

Various reasons are given for refusing full compensation in expropriation cases. One reason is that just compensation is the primary obligation, as distinguished from full compensation. In determining the so-called just compensation factor, it is necessary to look at criteria other than the value of the expropriated property. These other criteria are the particular wealth of the country, the needs of

83. Becker, *Just Compensation in Expropriation Cases: Decline and Partial Recovery*, 40 DEP'T STATE BULL. 784 (1959); 1959 A.I.L. Proceedings.

84. Kissam and Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 FORDHAM L. REV. 177, 214 (1959).

85. Garcia-Amador, *Fourth Report on International Responsibilities*, U.N. Doc. No. A/CN4/119 at 63.

the people, and the purposes of the respective governments. The requirement of full compensation could very easily hinder the development of new nations who depend on large scale nationalization, not only to assert recognition as a power in the world community, but also as a detriment to the corresponding benefits of the people. One must recognize, however, that benefits to be derived from just compensation are entirely dependent on what interpretation the seizing nation gives the term "just."[86] International authority in this respect appears rather limited.

Promptness of payment has traditionally been a trouble spot in many expropriation cases. Nations in the past have accepted delayed payment, but certain writers argue to the contrary. They argue that there is a need to make payment in advance of seizure or within a reasonable time thereafter.[87] Realistically speaking, is this is a practicable solution to the problem? In many areas of the world it would seem not, because the seizing nation may not have the necessary funds at hand. Especially in the underdeveloped countries, broad reforms leading to a wide distribution of wealth, education and similar values, should not be delayed due to insufficient prior capital.

VII. ALTERNATIVE REMEDIES

The *Restatement* outlines a basic requirement with respect to individuals' remedies. In § 206 it is stated:

> (1) A state is not required to make reparation on a claim presented on behalf of an alien injured by conduct wrongful under international law and attributable to the state, if the alien has not exhausted the remedies made available by the state. . . .

In § 211 it is stated:

> When a foreign state is responsible for an injury to a national of the United States, the resultant claim for reparation, until and unless espoused by the United States, and except as otherwise provided by law, is subject to the control of the national who has suffered the injury, and he is entitled to any reparation paid to him by the foreign state.

These provisions seem reasonable and consistent with the *Restatement* position on international justice referred to previously.

Gillian White, has made some interesting observations with

86. Note, *Foreign Seizure of Investment: Remedies and Protection*, 12 STAN. L. REV. 606, 609-13 (1960).

87. *Id.*

reference to nationalization and the "Public Utility Principle."[88] The limitations suggested are those of compensation and rule of non-discrimination. The doctrine entitled the Public Utility Principle means that the expropriation of private property by aliens must be in good faith and for public utility purposes. It would appear that the generalizations espoused by White are valid, but without a standard by which to judge them, they lose much of their significance. With reference to pre-war expropriation it appears that suits by aliens were generally unsuccessful in both their own and third states. The reason for this was that international law standards were placed in a subservient position to that of municipal law. Thus, the dispossessed alien generally looks to his national state for aid. Here two obstacles are met especially if the nation adheres to the "act of state" doctrine.

Concerning the available remedies at the international level, with the exception of *Anglo-Iranian Oil Co. v. S.U.P.O.R.*,[89] no such claim has been presented to the International Court of Justice. Perhaps the basic reason for this result is that the jurisdiction of the court is limited.

Prior to the *Sabbatino* decision, "when the property of an individual has been confiscated, his remedies were either to seek redress in the courts of the confiscating country or resort to diplomatic channels."[90] The "act of state" doctrine prevented success in the nation where the alien was a citizen, and results were unjust and inequitable in many instances.[91]

Sabbatino offers the third remedy, that being resort to the courts of the forum, where international law is supposedly applied. The disadvantage of this is that a municipal court's decree has no extra-territorial effect. Therefore, the court's judgment is effective only if the property is within its jurisdiction.

It would seem that the *Sabbatino* decision thus has given only a partial remedy and has resulted in a substantial number of other problems. Specifically, it imposes upon courts the burden of familiarizing themselves with international case law and principles. While the executive gave some indication of its position in *Sabbatino*, what are the courts to do when the executive remains silent? It is submitted that the "act of state" doctrine, although not a cure-all, created less problems from both a theoretical and practi-

88. G. WHITE, NATIONALIZATION OF FOREIGN PROPERTY (1961).

89. 1955 I.L.R. 21 (Court of Venice).

90. Note, *International Law—Foreign Decree May be Examined Under International Law*, 36 ST. JOHNS L. REV. 159, 162 (1961).

91. *Id.* at 162-63.

cal view, and should be applied in subsequent cases.

The goals of human dignity, a wide distribution of wealth, education, well-being and other values undoubtedly depend on remedies afforded the state and individuals. It is necessary, therefore, to suggest realistic alternatives.

The remedy of adjudication in the International Court of Justice has been suggested. This body has failed to be successful because, even though both parties have submitted to the jurisdiction of the court, this does not guarantee that the court will be competent to reach the merits.[92] Various objections to jurisdiction, raised by parties who find themselves at a disadvantage, seriously hinder the decision-making power of the court. It is a suggested alternative that a special court, established by the United Nations to deal exclusively with expropriation, could be developed. Through the use of appropriate sanctions an effective program could be established whereby a mutually acceptable compromise might occur. If the nation is underdeveloped, this factor might be given special consideration.

Arbitration is another suggested alternative which has been adopted in the form of the Permanent Court of Arbitration. This organization was intended as a source of tribunals for particular disputes, but it appears that the states have appointed their own arbitration boards by treaty or convention agreement. Usually, only some form of class suit reaches the tribunal and an individual by himself has little opportunity to be heard. Only world opinion, it would seem, is strong enough to compel submission to arbitration. The exception to this whole area is when the owner's state is in the position to attach the assets of the seizing state.[93] Arbitration at that point could be achieved without much difficulty, but in reality this opportunity is rarely presented to an individual.

The alternative of diplomacy appears to be a serious contender in the fight to achieve the basic goals previously referred to. Diplomacy is dependent upon the conciliatory attitudes of the respective governments. It is submitted, however, that diplomacy is an effective method of achieving compensation. The Department of State in the past and present has been one of the most effective government agencies, undertaking diverse development in the field of foreign relations. Various techniques, *i.e.*, bargaining and negotiation

92. Layton, *The U.S. Reconsiders Compulsory Jurisdiction*, 12 STAN. L. REV. 323 (1960).

93. A. THOMAS AND A.J. THOMAS, NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 352 (1956).

proved to be an effective method when the expropriation in 1938 by Mexico of United States oil created a serious problem. This was solved to a substantial degree by the use of diplomatic channels. Compensation was given to United States citizens despite the fact that Mexico had not consented to the jurisdiction of the Permanent Court of International Justice or that of the existing Claims Commission.[94]

Diplomatic protest is another suggested alternative. This has proven, however, not to be as effective as diplomacy. A state may fail to respond to the protest but at least a presentment of the various legal rights involved has occurred. Future adjudications and conciliation could arise which ultimately may achieve justice and equity while preserving human dignity and various goals.[95]

Physical interventions exemplified in the Mayaguez incident is a possible alternative, but the question of whether this method is likely to preserve international peace remains. A seizing state may cause a substantial threat to this peace, but if this occurs it is suggested that the Security Council of the United Nations take steps to police the trouble spot.[96] It is suggested that a small degree of physical intervention by an agency of the United Nations would be advantageous in underdeveloped nations whose people are entitled to a democratic form of government and a wide distribution of things valued by society. It is to be noted that these nations are entitled to autonomy and any intervention by the United Nations would have to respect this basic goal.

Preventive measures by the use of prospective acts appears to be a rather effective method and alternative. By the use of treaties and conventions a state may prevent, rather than redress a loss to the citizen. A stabilizing force can be established if various nations agree to basic regulatory principles concerning expropriation. The use of various international trade agreements as an alternative has been implemented in South America. The Economic Agreement of Bogota[97] is an example. This document provides that no state shall discriminate against foreign investments because of their foreign nature unless there is fair compensation provided. Methods of implementation seem to present a substantial obstacle to the effectiveness of such agreements.[98]

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94. *Supra* note 86, at 615.

95. *Id.*

96. *Id.* This occurred in 1956 with reference to the United Kingdom and the Suez Canal. However, in this instance, the Security Council requested a withdrawal of the troops present.

97. Pan. Am. Union. L. & T.S. No. 25, I ANNALS ORG. AM. STATES 99 (1949).

98. *Supra* note 86, at 623.

Lastly, individuals and corporations could protect themselves by having their capital exported in the form of dividends and bank accounts in their own nations. This, of course, is dependent upon the nature of the business and whether a large amount of physical assets are necessary to the operation of the business.[99] Direct negotiation and insurance of the particular property are not to be discounted, for they present practical methods in which some degree of protection may be afforded. Governmental plans such as the Marshall plan instituted after World War II are another possibility. However, the only difficulty with government plans of this type is that they are completely dependent upon diplomatic relations which are constantly being influenced by various conditioning factors. Private insurance plans would seem at face value to be a reasonable solution in many fact situations, but this alternative adds little to strengthen the underlying principles of international law with respect to expropriation.

CONCLUSION

It has been the objective of this analysis to trace the diverse lines of the decision-making process and to predict and evaluate possible trends and alternatives to be followed in the future. The complexity of the problem is apparent, and this humble attempt, it is hoped, has given the reader a better insight into the intricacies involved. Based upon the materials presented, it is submitted that the preservation of the "act of state" doctrine with those modifications previously referred to remains the most effective method of attaining the cherished goals of human dignity and a wider distribution of social values. The suggested alternatives of diplomacy and a future international expropriation court may be effective methods for the underdeveloped nations of the world to attain a higher standing in the international community of nations.

99. *Id.* at 627-28.