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International Law—Expropriation—The Act of State Doctrine

The recent case of Banco Nacional de Cuba v. Farr\(^1\) is the decision on remand of the now famous case Banco Nacional de Cuba v. Sabbatino.\(^2\) The litigation arose out of the Cuban expropriation of American properties in 1960. Farr, Whitlock and Company, a New York sugar brokerage firm, had executed a contract to buy sugar from Compania Azucarera Vertientes-Camagüey de Cuba, which was largely owned and controlled by private American capital.\(^3\) Before loading could be completed, Premier Fidel Castro confiscated the properties of twenty-six corporations owned by American interests, including C.A.V.\(^4\) In order to obtain the sugar, Farr, Whitlock had to negotiate another contract with the Cuban Government. Pursuant to this second contract, the sugar was sold in Morocco. Later, Farr, Whitlock refused to deliver either the necessary bills of lading or the proceeds of the sale to the agent of the Cuban government. The Cuban bank then brought suit in a Federal district court against Farr, Whitlock for conversion and against Sabbatino, temporary receiver of C.A.V. for injunctive relief.

The outcome depended upon whether the so-called “act of state doctrine” was to be applied. This doctrine, stated simply, means that the courts of one nation will not sit in judgment on the acts of other nations committed within their own boundaries.\(^5\) Thus if the doctrine were applied, Cuba would succeed because the court could not question the validity of a title obtained by an act of state. If the doctrine were not applied, the court could decide all aspects of the case on its merits, including a determination of the validity of the expropriation in the context of international law.

The district court\(^6\) held that the doctrine was inapplicable be-

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\(^1\) 343 F. Supp. 957 (S.D.N.Y. 1965).
\(^2\) 376 U.S. 398 (1964).
\(^3\) Farr, Whitlock & Co. will hereinafter be referred to as Farr, Whitlock. Compania Azucarera Vertientes-Camagüey de Cuba will be referred to as C.A.V.
\(^4\) 376 U.S. at 401-2 n.3-4. The expropriation decree, Cuban Public Law No. 851, provided a highly illusory method of compensation whereby for thirty years the United States would have to buy more sugar from Cuba at higher prices than any previous period in history. For a full English translation, see 55 Am. J. Int’l L. 822 (1961).
cause the taking was confiscatory and thus a violation of international law.\(^7\) Since the taking was unlawful, title had never parted C.A.V. nor vested in the Cuban Government. The court of appeals affirmed.\(^8\) On appeal to the Supreme Court the case was reversed and remanded in an eight-to-one decision with a vigorous dissent by Mr. Justice White.\(^9\) The act of state doctrine was applied in a broad manner. The mandate to the lower court specified that proceedings were to be entered consistent with the Supreme Court's decision, but leave was given to decide other litigable issues if they should arise.\(^10\)

After the Supreme Court's decree and before disposition of the case on remand, Senators Hickenlooper and Sparkman successfully sponsored an amendment to the Foreign Assistance Act of 1964.\(^11\) The Hickenlooper Amendment precludes American courts from applying the act of state doctrine in cases arising out of foreign expropriations of American property from January 1, 1959 to January 1, 1966. The courts are to decide the cases on their merits, according to principles of international law. But if the President advises the court that such determination would hamper the foreign policy interests of the United States or if the taking in question does not violate international law, the doctrine will be applied and there will be no trial on the merits.

\(^7\) The nationalization was said to be in violation of international law because it was retaliatory, discriminatory, and without adequate compensation. 193 F. Supp. at 384-85.

\(^8\) 307 F.2d 845 (1962).

\(^9\) 376 U.S. 398, 439.

\(^10\) Ibid.

\(^11\) The Foreign Assistance Act of 1964 § 301(d)(4), 78 Stat. 1008, 22 U.S.C. § 2370(e)(2). The amendment reads as follows:

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. \textit{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 (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court or (3) in any case in which the proceedings are commenced after January 1, 1966,
The district court, in *Banco Nacional de Cuba v. Farr*, held that the general mandate from the Supreme Court was inapplicable because of the intervening act of Congress. It applied the amendment retroactively and held that it was bound by the previous decision of the court of appeals that the expropriation violated international law. However, before dismissing the complaint, the court felt that the "Executive Arm" should have sixty days—or longer if necessary—to make a determination whether the act of state doctrine should be applied in the interest of foreign policy.

In order to understand the importance and implications of *Farr* more fully, it is necessary to consider the act of state doctrine as traditionally applied. Probably the original reason for its existence was the principle of absolute sovereignty of nations. In the *Schooner Exch. v. McFadden*, Chief Justice Marshall stated that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute," and any exceptions "to the full and complete power of a nation must be traced up to the consent of the nation itself." It would seem that Chief Justice Fuller, in *Under*...
hill v. Hernandez, had these considerations in mind, when in an often-quoted *dictum*, he stated that "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." Other reasons for its existence are variants of each other and are not mutually exclusive. They are separation of powers and the self-imposed doctrine of judicial restraint known as "political questions." The Supreme Court in *Oetjen v. Central Leather Co.* stated that "foreign relations of our government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of our government, and—is not subject to judicial inquiry or decision." Because of the importance of foreign relations, the courts have felt that the national interest requires the United States "to speak with one voice" in this area. As a result, foreign affairs has been removed from the scope of judicial review and placed in the realm of "political questions." Consequently, the President has a free and unrestrained hand to carry on foreign relations without fear of adverse decisions by the courts.

The actions of the President in the field of foreign affairs have had an important, though indirect, effect upon the traditional act of state doctrine. For example, in *American Banana Co. v. United

*litigant and can only be used by the sovereign or one of its agents who has acted in his official capacity. See Zander, *supra* note 6, at 826, 827; Comment, 35 N.Y.U.L. Rev. 234, 237 n.21 (1960); Comment, 57 Yale L.J. 108, 113 (1947); 75 Harv. L. Rev. 1607 (1962).

*Id.* at 250 (1897).

*Id.* at 252. It is important to note that the case was actually decided on the doctrine of "sovereign immunity," not on the act of state doctrine. The act of state *dictum* by Chief Justice Fuller was not essential to the outcome of the case. This is pointed out in the article by Zander, *supra* note 6, at 837. For other earlier decisions containing the act of state language see Waters v. Collot, 2 U.S. (2 Dall.) 247 (1796); Hatch v. Baez, 7 Hun. 596 (1876); Luther v. Sagor, [1921] 3 K.B. 532.

*Id.* at 297 (1918).


It appears that the United States government had sometimes intervened but solely on the question of sovereign immunity and not on the application
Fruit Co.\textsuperscript{26} and Ricaud v. American Metal Co.\textsuperscript{27} the Court took judicial notice of the State Department's recognition of the foreign governments that had committed the alleged illegal acts. As a result, the act of state doctrine was applied to deny recovery.\textsuperscript{28} Apparently, the courts presumed that a trial on the merits would result in the embarrassment of the President in his conduct of foreign affairs.\textsuperscript{29}

Certain inroads have been made into the act of state doctrine as traditionally applied. One such inroad was the "Bernstein exception."\textsuperscript{30} After a maze of litigation, plaintiff Bernstein, whose vessels had been confiscated by Nazi Germany, was allowed recovery against the defendant Dutch-American corporation, which had purchased the property from Germany. The court of appeals refused to apply the doctrine, relying on a State Department Release\textsuperscript{31} which declared that the President had no objections to the German expropriations cases being fully litigated in American courts. The court held that the case could be tried on its merits and that Bernstein could recover.
The State Department later apparently adopted the Bernstein release as its permanent policy in the famous Tate letter. The Department announced that it would suggest applications of the doctrine of sovereign immunity where the foreign taking was only governmental in nature. If the taking were confiscatory or commercial in nature, the Department would suggest that the doctrine of sovereign immunity not be applied. Presumably, the Bernstein-Tate approach governed prior to Sabbatino. However, the full effect of Bernstein was never known since it was not appealed to the Supreme Court because of an approved settlement.

The next real test of the doctrine came with Sabbatino. The court of appeals had found Bernstein controlling because in Sabbatino, as in Bernstein, the State Department had condemned the expropriations and indicated its willingness to have the cases decided on their merits. The Supreme Court, however, followed the earlier decisions, holding that although the act of state doctrine was not required by the Constitution, it did have "constitutional underpinnings." Thus, it apparently disregarded Bernstein and possibly obscured the significance of the Tate letter. The Court also felt that judicial review by American courts of the acts of other states might "embarrass" the Executive Branch in its conduct of foreign affairs and "would hinder rather than further this coun-

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32 Letter From Jack B. Tate, Acting Legal Advisor of the State Department, to Phillip B. Perlman, Acting Attorney General, in 26 DEP'T STATE BULL. 984 (1952). It is to be noted that the Bernstein Release dealt only with the act of state doctrine, and the Tate letter spoke only in terms of sovereign immunity. However, they were very related in that they were authored by the same person and because their intention was the same, i.e., to give the wronged party his day in court. See Folsom, The Sabbatino Case: Rule of Law or Rule of "No Law"?, 51 A.B.A.J. 725, 728 (1965); 32 U. CINc. L. REV. 112, 114 (1963). For discussion of Tate letter see New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955).


35 43 DEP'T STATE BULL. 171 (1960). The State Department's condemnation of the expropriation said that it was "in its essence discriminatory, confiscatory and arbitrary."

36 307 F.2d 845, 858 (1962).

37 376 U.S. at 423.

38 See Folsom, supra note 32, at 727. The Court stated that it took no position in respect to Bernstein. 376 U.S. at 420. However the preceding commentary infers that Bernstein was overruled.

39 Folsom, supra note 32, at 727.
try's pursuit of goals for itself and for the community of nations as a whole."

Farr presented the first confrontation of the traditional act of state doctrine, as enunciated by Sabbatino, and the Hickenlooper Amendment, and as previously stated the district court found the amendment applicable to all pending cases arising out of the Cuban expropriation, including the remanded Sabbatino case itself. What is more important, it found the amendment to be constitutional, stating that it comes within the congressional power to legislate in the areas of foreign commerce and foreign affairs.

The commerce argument seems to be the most convincing. The court's reasoning was that Congress had the express power, supplemented by the implied power of the "necessary and proper" clause, to enact the Hickenlooper Amendment. This theory has been voiced by some authorities. But the amendment cannot violate the "constitutional underpinnings" of Sabbatino, which are said to be the proper distribution of functions between the political and judiciary branches in regard to foreign affairs. The Farr court had no doubts that Congress could legislate in the field of foreign affairs because Sabbatino and Oetjen had expressly stated that it had the power to do so. However, the question still exists whether Congress can go so far as to realign these "proper functions." The amendment does not convey a new area of jurisdiction upon the courts because they have had jurisdiction from the beginning. They simply have failed to exercise it properly where acts of foreign

376 U.S. at 416-23.
Id. at 423.
243 F. Supp. at 964-71. The outcome of some forty cases will depend upon the final decree in Farr. The court's retroactive application of the amendment is open to question. Senator Hickenlooper stated clearly and unequivocally that the amendment did not apply to Sabbatino. He said "the amendment will lead U.S. courts to a different result from that reached by the majority . . . in Banco National de Cuba v. Sabbatino. It does not change the Court's decision in that case. . . ." 110 Cong. Rec. 19559 (1964). The court wrote this off as a casual statement made in floor debate. However, the statement was made in a series of carefully drawn questions and answers by Senator Hickenlooper himself. There was no debate.
Id. at 38.
376 U.S. at 423.
246 U.S. at 302.
U.S. Const. art. III, § 2 specifically states that the judicial power of federal courts "extends to Controversies . . . between a State, or Citizens thereof, and foreign States, Citizens or Subjects."
states were in question. But if the courts do adjudicate, will their decisions be dictated by the President? Also, has the Congress in passing the amendment, impinged upon the function of the Executive? If the President could be embarrassed in his foreign policy by an adverse decision of the court as stated in *Sabbatino*, could the amendment not embarrass him equally so? It would seem that the amendment, in effect, returns us to the *Bernstein* exception, which apparently was rejected in *Sabbatino*. Does this mean that the amendment must fall also? These questions are open ones that only the Supreme Court can answer. The constitutional question is even more important now than when the *Farr* opinion was rendered because Congress has made the Hickenlooper Amendment permanent law.49

Assuming the amendment to be constitutional, what are its effects upon international law? First, it does not destroy the act of state doctrine. It modifies the doctrine to achieve a "reversal of presumptions."50 No longer will the courts have to presume that a decision on the merits regarding a foreign act of state will embarrass the President in the conduct of his foreign policy. Now the presumption is that such decisions will not embarrass him. Of course, the latter presumption can be rebutted by the President's suggestion that a full determination would hinder the foreign policy interests of the United States.51

Another effect of the amendment should be a discouragement of foreign confiscations.52 At the same time, it should encourage foreign investment.53 The Hickenlooper Amendment does not keep foreign governments from confiscating American property; however, it does prevent confiscating governments from successfully suing otherwise remediless defendants who refuse to pay them what is not rightfully theirs.54

Probably the most important result of *Farr* and its supporting

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50 See 110 Cong. Rec. 19557 (1964).

51 78 Stat. 1008, 22 U.S.C. § 2370(e)(2); See note 11 *supra*.

52 Folsom, *supra* note 32, at 727.


54 Ibid.
Hickenlooper Amendment should be their effect on the growth of international law. The Supreme Court in *Sabbatino* felt that a review of the Cuban expropriation would retard the growth of international law. However, the reverse would seem to be true.

Since international courts have jurisdiction only when the parties are consenting nations, many disputes between foreign states and citizens of the United States would, through application of the act of state doctrine, not be litigable at all. *Farr*, if followed should help to fill this gap in the settlement of transnational disputes. As Mr. Justice White pointed out in his *Sabbatino* dissent, our courts, under the majority ruling, would have to validate automatically, discriminatory and unlawful expropriations. Such acts, if they are also permitted by the law of another nation, would then tend to become a part of accepted international law. Needless to say, if peace and order are to be attained through world law, there can be no place for lawless acts that detract from the stature of international law.

International law has long been declared part of the law of the United States. It would seem, therefore, that our American courts should follow the precedents of the courts of other nations and decide these disputes, even though they may involve acts of foreign states, in the context of international law. *Farr* and the Hickenlooper Amendment should achieve this result.

**Tommy W. Jarrett**

Labor Law—Application of Antitrust Law to Union Activities—Extra-Unit Agreements

In an effort to avoid the concentration of economic power, two national policies have been promulgated that, ironically, result in apparent conflict. The antitrust policy, intended to distribute power...