The Act of State Doctrine - A New Look

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From time to time conditions change in every community. The necessity of to-day becomes useless to-morrow. A new generation has needs its predecessors never imagined. . . . A changed situation may make the taking of particular property necessary to the public good. . . .

Chief Justice Schaefer's own philosophy can be found in a speech given in December 1959. He stated:

For my part, I am quite willing to forget those "generations yet unborn." In fact, I would like to. But I do think that a conscious look ahead is important. The pressure of the facts in the case at hand is always very strong, as any judge can testify who has had to reverse the conviction of an unmistakably guilty defendant in order to vindicate improved standards of criminal procedure.

It is that concern for the future and for the past that tends to prevent *ad hoc* response to the facts, and puts a case where it belongs in the body of the law.123

Illinois thus has cases on the status of dedicated land which have been and are still the law in the state. The Garfield Park "case" would have changed the law if the opinion had not been withdrawn, but the authors can only comment with John Greenleaf Whittier in his poem, *Maud Muller*:

> For of all sad words of tongue and pen,  
> The saddest are these: "It might have been!"

122 Id. at 324, 93 N.E. at 919.

THE ACT OF STATE DOCTRINE--A NEW LOOK

A controversial body of law, namely the so-called Act of State Doctrine, has been subjected to a new examination in a recent New York case1 arising from Cuba's nationalization of American-controlled Cuban enterprises. This New York case has narrowed, if not greatly modified, several past decisions of the Supreme Court2 which contributed to the formation of the Act of State Doctrine. In order to fully understand the significance of this case, it is essential to understand what the doctrine is and how it arose.


The doctrine arose out of a large number of cases, both American and foreign, which dealt mainly with seizures of private property by a sovereign. The American courts answered an issue common to many of these cases by applying language used by the United States Supreme Court in deciding a related case some sixty-five years ago. This language as applied has become known as the Act of State Doctrine.

INTRODUCTION

The situation typically arises when a foreign country takes the private property within the country of either an alien or a national, and then the seizing country sells this property to a third party who is later sued in another country by the former property owner. A hypothetical example will illustrate: X owns property in a foreign country. A new government takes control of that country and nationalizes X's property. Z, an American citizen, buys this property from the foreign government and brings it back to the United States. X, the former owner, attaches the property and institutes suit to regain it. Z alleges by way of defense that X was divested of title by the governmental acts of the foreign country, and that the American courts cannot examine the validity of the acts of a foreign sovereign without offending that country. X replies that the foreign act which purported to divest him of title should not be recognized because of its illegality or because it is repugnant to the public policy of the forum state.

Two closely connected issues arose out of cases similar to the hypothetical example. The first of these issues was whether or not the court can examine the act of a foreign state to see if it was lawful. The second issue arose only if the court decided that it could examine the validity of the foreign act. That issue was whether or not there was any basis on which the court could regard the foreign act as legally insufficient to divest the original owner of title.

The American Courts Up To This Time

The answer of the United States courts to the first issue has precluded the necessity of answering the second. The following words of the Court in Underhill v. Hernandez have been consistently used to answer the first issue:

3 Bernstein v. Van Heyghen Freres Societe Anonyme, supra note 2; Banco De Espana v. Federal Reserve Bank, 114 F.2d 438 (2d Cir. 1940); Ricaud v. American Metal Co., supra note 2; Oetjen v. Centra Leather Co., 246 U.S. 297 (1918).


6 Ibid.
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. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.\(^7\)

In terms of our hypothetical case, this means that once the defendant in the action before the court has demonstrated that his title stems from the action of a sovereign State taking effect on the property within that State, the courts will accept this act as conclusive proof of title. In absence of other factors then, the defendant would retain the property even though it had been extorted from the owner by force and the defendant had knowledge of this extortion.\(^8\)

The language quoted above has become commonly known as the Act of State Doctrine. No attempt will be made here to trace the doctrine back to its basic principles, but it is generally recognized as an offspring of the Doctrine of Sovereign Immunity.\(^9\) By way of background, the origin of the Doctrine of Sovereign Immunity might be examined. This doctrine was originally based on a judicial assumption that a foreign sovereign would not come into a foreign country, nor would the sovereign send his agents or ships, unless he had an express or implied promise of immunity from judicial control.\(^10\) In short, a foreign sovereign is immune from suit in domestic courts only because of a court-granted privilege.\(^11\) A foreign sovereign has no such right according to international law.\(^12\) This origin has not always been remembered, because the courts have gradually begun to regard the immunity as a right; in less than fifty years after Underhill the courts refer to the immunity as a "traditional restraint" on the jurisdiction of the court which can be removed by the executive.\(^13\)

The facts of Underhill v. Hernandez\(^14\) were that Underhill, an Ameri-

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\(^7\) Id. at 252.

\(^8\) This was the situation in Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).


\(^13\) This was the view of the court in Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).

\(^14\) 168 U.S. 250 (1897).
can citizen living in Venezuela, was denied a passport and confined by a
general of the revolutionary army which later became the diplomatically
recognized government of Venezuela. Underhill sued the general in a
United States court to recover damages for his treatment. On appeal, the
Supreme Court reaffirmed that the acts of the general were the acts of
Venezuela and as such were not properly the subject of adjudication in
the courts of this country. This was a proper statement of principles
already decided under the doctrine of sovereign immunity, namely, that
American courts will not render a judgment against a sovereign or his
agents without the sovereign's consent. The court further held that the
courts of this country would not sit in judgment of the governmental
acts of another country done within its own territory. This conclusion
was not necessary to the determination of the case and is therefore
dictum.

The next case which contributed materially to the formation of the
Act of State Doctrine was Oetjen v. Central Leather Co. In this case
the general of a Mexican revolutionary army seized certain hides belong-
ing to a Mexican citizen. The hides eventually came into the hands of
the defendant, an American citizen, and were replevied from him by the
plaintiff, also an American citizen. Plaintiff was the assignee of the orig-
inal Mexican owner. The revolutionary army became the recognized
government of Mexico prior to the final disposition of the case. The
Court held that the principle enunciated in the Underhill case (that the
conduct of one independent government cannot be successfully ques-
tioned in the courts of another government) was as applicable to a case
involving title to property brought within the custody of the court as it
was in cases in which claims for damages were based upon acts done in
a foreign country. The practical effect of the decision was to extend
the privilege of immunity to protect title derived from foreign acts as
well as the foreign acts themselves. There was no re-examination of the
basic issues involved by the Supreme Court in the Oetjen case. The Court
also held that the conduct of foreign relations of our government is com-
mitted by the Constitution to the executive department of our govern-
ment, and whosoever is the sovereign de jure or de facto of a territory
is not a judicial but rather a political question. This language has often
been used as an argument for the application of the Act of State Doctrine,

16 246 U.S. 297 (1918).
17 Recognition de jure gives a foreign regime the status of a legal government in its
relations with the recognizing State. Lipper, supra note 11.
18 Recognition de facto indicates that a State has seen fit to take official cognizance
of the fact that a regime exercising national sovereignty has an existence as a govern-
ment. Lipper, supra note 11.
so it should be examined in its context. The Court was speaking only of giving diplomatic recognition to a foreign government, something generally conceded to be a political function. The Court was not speaking of interpreting effects of acts of that government once recognition had been given, something seemingly a judicial function. International comity and the danger of peril to the amicable relations between nations which might result from a court's examination of foreign acts were the two reasons advanced by the Court for the decision.

Ricaud v. American Metal Co., a companion case of Oetjen, extended the dictum enunciated in Underhill one step further. The facts were substantially the same as the facts in Oetjen, except that in Ricaud the property was originally taken from an American citizen. The Court held that it had no jurisdiction to try and adjudge as to the validity of the title acquired through the seizure and sale as against an American citizen claiming prior ownership. The justification given by the Court was that the issue involved was a political question not properly determinable by the judiciary.

In these three cases, the privilege given a sovereign as a matter of courtesy has been extended first to acts depriving a Mexican national of his property, and then to title acquired by sovereign acts divesting an American citizen of ownership. In light of the fact that foreign acts divesting an alien of property without compensation are a violation of international law, whereas foreign acts divesting a national of property are not, this is an important extension to make without a thorough examination of the basic factual differences between the three cases.

Perhaps the most vivid example of the harsh results which can follow when the courts uncompromisingly apply the Act of State Doctrine is demonstrated by Bernstein v. Van Heyghen Freres Societe Anonyme. In this case, a German Jew was forced by Nazi officials to sign over the

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21 246 U.S. 304 (1918).

22 See House, supra note 9.

23 See Lipper, supra note 11.

24 "[T]he maxim (Act of State Doctrine) could not be brought to bear upon an international delinquency. This could be done only if either the maxim were itself a rule of international law or if, being a rule of municipal law, it would at least serve rather than pervert the true purpose of international law." Mann, International Delinquencies Before Municipal Courts, 70 Law Q. Rev. 181, 197 (1954).

25 163 F.2d 246 (2d Cir. 1947).
title papers to a ship belonging to him to a German official designated by
the Nazi government. The ship was sunk, and Bernstein, now an American
citizen, brought a writ of attachment to recover the insurance proceeds
on the ship. It is significant to note that Bernstein, a United States citizen,
was asking a United States court to examine the validity of acts of a now
defeated government which was no longer recognized by the United
States. Yet the court dismissed Bernstein’s claim on the grounds that the
courts are traditionally restrained from questioning acts of officials of a
foreign nation done within such nation’s own boundaries, and the federal
government had not acted to relieve the courts of this traditional re-
straint. There are two things to note concerning this decision: first, that
the court speaks of a court-granted privilege less than sixty-five years old
as constituting a traditional restraint upon the court; and second, that the
court is granting immunity to acts which our country fought a war to
protest. The practical effects of this case are pointed out by the words of
District Judge Clark in his dissenting opinion:

[T]hey (our allies), as well as our enemies, may be mystified by what must
seem the vagaries of a policy looking to restitution to the Jews in Germany
at the same time that it accepts the acts of Nazi oppression of the Jews as
binding in American courts.26

Judge Clark also pointed out that all previous cases had dealt with situa-
tions where the government had given de jure or de facto recognition to
the foreign State, while here the recognition had been withdrawn.

FOREIGN COURTS

I. England

The following cases illustrate the evolution of the English law on this
point:

The first significant case which dealt with the problem under considera-
tion was Wolff v. Oxholm.27 A debt due a British citizen from a Danish
national was extinguished by an ordinance of Denmark which sequestered
all property of English citizens within Denmark. The British citizen later
sued the Danish national in England, and the Danish law was pleaded as a
defense. The court held that this law of Denmark was not “conformable
to the usage of nations”28 and was therefore void as a defense.

Luther v. Sager29 concerned the confiscation by Russia of certain wood
belonging to a Russian corporation. This wood was sold by Russia to the
defendant, an English firm, which brought it to England. The Russian
corporation brought suit in England to regain the wood. The court, in
dismissing the claim, held that England had recognized Russia, and there-

26 Id. at 254–55.
27 (1917) 6 M. & S. 92, 105 E.R. at 1177.
28 Id. at 106, 105 E.R. at 1182.
29 (1921) 3 K.B. 532.
fore the validity of the Russian decree and the sale to the defendant could not be questioned by an English court. The court did not consider the Wolff case in coming to the decision.

In Anglo-Iranian Oil Co. v. Jaffrate, commonly called the Rose Mary case, the court was concerned with Iranian nationalization. The Iranian government had nationalized all the property of an English company in Persia. Subsequently, the government sold some oil formerly belonging to the English company to an Italian corporation. The English company brought an action of detinue against a tanker of this oil in the Colony of Aden. The Supreme Court of Aden held that the laws which purported to nationalize the property of the English company were ineffectual to divest them of title. The decision can be interpreted as formulating two general principles. The first of these principles is that all legislation that expropriates without compensation is contrary to international law. The second is that such international law is incorporated into the domestic law of Aden, and accordingly such foreign legislation will be recognized as void in the Court of Aden. The court considered the Luther case but decided that the principles enunciated in that case were valid only where the property confiscated belonged to a national of the confiscating state.

In the Re Helbert Wagg & Co. case, a situation involving German confiscation of debts due foreign creditors confronted the court. In denying the claimant relief, the court took the opportunity to criticize the decision of the Rose Mary case by pointing out that the principles enunciated in the Luther case did not distinguish between acts divesting a national of property and acts divesting an alien of title. The basis of the decision was that the German Moratorium Act was not confiscatory and, therefore, could not be denied effect. The court also said that there can be confiscation of alien property which is not violative of international law and which must be recognized by the English courts, but this was dictum.

The state of English law on the subject can be summarized in the following manner:

1. As a general rule, every civilized state must be recognized as having power to legislate in respect of movables situated in that state, and such legislation must be recognized by other states as valid and effectual to alter title to such movables.

30 (1953) 1 Weekly L.R. 246.
32 Accord, Note, 5 INT'L & COMP. L.Q. 301 (1956).
2. There are three exceptions to the above general rule, namely:  
   a) English law will not recognize the validity of foreign legislation 
      intended to discriminate against English nationals in time of war 
      which purports to confiscate wholly or in part movable property 
      situated in the foreign state.  
   b) English courts will not recognize the validity of foreign legislation 
      aimed at confiscating the property of particular individuals or 
      classes of individuals.  
   c) English courts will not enforce the fiscal laws or penal statutes of 
      another State.  

3. The Wolff case illustrates one of the exceptions to the general rule, 
   namely (a).  

4. The Luther case demonstrated the general rule and did not cite Wolff 
   because it recognized it as an exception to the general rule.  

5. The Rose Mary case set up the general rule that confiscation of alien 
   property constituted per se a violation of international law which was 
   sufficient basis for a court to deny legal effect to such confiscation. 
   This in effect was an attempt to establish another exception to the 
   general rule considered above.  

6. The Wagg case agreed with the general rule and exceptions, but dis- 
   agreed with the Rose Mary case insofar as it attempted to set up the 
   broad rule that English courts could not recognize any legislation 
   which confiscates alien property.  

II. Germany  

In an early German case, the defendant in a criminal action pleaded 
confiscatory law of Czechoslovakia as a defense to a conversion charge. 
The court found no evidence of such a Czechoslovakian law, but stated 
that the law as alleged would be of no legal effect because no person can 
be deprived of his property solely on the ground of his nationality. In a 
later case, the German courts had an opportunity to study the problem 
more thoroughly. The facts of this latter case were that a Dutch company 

\[34\] Ibid.  
\[35\] Ibid.  
\[36\] Ibid.  

\[37\] Anglo-Iranian Oil Co., Ltd. v. Jaffrate, (1953) 1 Weekly L.R. 246. Accord, note, 
\[38\] Accord, Note, 5 INT'L & COMP. L.Q. 301 (1956).  
\[39\] Czechoslovak Confiscatory Decree Case, (American Zone) Court of Appeals of 
Nuremberg, Germany; 1949 Annual Digest and Reports of Public International Law 
Cases 25 (Lauterpacht-Case 14).  
\[40\] N.V. Verenigde Deli-Maatshapijen & N.V. Serembah-Maatchappij v. Deutsch-
Indonesische Tabak-Handelgesellschaft m.b.H. The history of this case from the trial 
level to the final decision is analyzed by Domke, Indonesian Nationalization Measures 
had concession rights in certain Indonesian tobacco plantations which were nationalized by the Indonesian government. A harvest from these plantations was sent to Germany, and suit was instituted in the German courts to regain the tobacco. The Dutch company was denied relief on the grounds that it had failed to prove property rights. The German court in its discussion of the problem held that even if the Dutch company had property rights by virtue of their concession rights, they lost them by the nationalization acts, and that the validity of these foreign decrees could not be examined in light of domestic law. Also by way of dictum, the court concluded that the nationalization decrees were not contrary to international law, but that even if such acts were contrary to international law, such illegality would be a basis for a claim to be advanced through the claimant's State Department, and would not be available to the court as a basis for holding the acts void.

III. The Netherlands

In a similar case which also arose out of the Indonesian nationalization, the Dutch courts granted relief on the grounds that the Indonesian acts were so discriminatory as to make them contrary to international law. The court stated that it must deny any validity to the confiscatory acts because of their repulsiveness to the conceptions of morality upheld in The Netherlands.

IV. Italy

In a suit arising out of Persian nationalization of oil belonging to the Anglo-Iranian Oil Company, the Italian courts held that they had a duty, not merely a right, to examine the validity of foreign acts. The conclusion of the court was that they could refuse to apply foreign laws in Italy which were contrary to international law, but that the nationalization under consideration was not contrary to international law.

V. France

The French courts have refused to recognize title to property based on a grant to Spanish authorities which had come into the possession of the latter as a result of expropriation on the ground that French courts may not recognize any divestment of a right of ownership without just and previous indemnity except with the consent of the owner.

41 Senembah Maatschappij N.V. v. Republiek Indonesie Bank Indonesia & De Twentsche Bank N.V., Nederlandse Jurisprudentie 1959, No. 73, 350. This case is analyzed by Domke, supra note 40.


43 Societe Potasas Iberias v. Nathan Bock, Court of Cassation (Chambre Civile 1939), 1938-40 Annual Digest and Reports of Public International Law Cases 150 (Lauter-
THE BANCO NACIONAL CASE

In February and July of 1960, Farr Whitlock and Company, a New York partnership, contracted to purchase Cuban sugar from a Cuban corporation, hereafter called "C.A.V.," the seller to deliver the sugar to vessels designated by Farr Whitlock at a Cuban port. On the day that loading of the sugar was to begin, Cuba passed a decree nationalizing the property of certain named Cuban enterprises which were described as those in which United States "physical and corporate persons" held a majority interest. The nationalization decree purported to be a "defensive measure" against the "aggressive acts" of the the United States, namely, the reduction of the Cuban sugar quota. In order to obtain Cuban consent to allow the now-loaded vessel to depart, Farr Whitlock entered into a contract with a Cuban governmental corporation which purported to sell the sugar to Farr Whitlock at substantially the same terms as those contained in the original contract. The bills of lading covering the shipment were delivered to Farr Whitlock in New York and then negotiated to the customer in return for payment. Before Farr Whitlock could pay the agent of the Cuban governmental agency, the New York State Supreme Court directed, at the instance of C.A.V., that the money be given to a receiver appointed by the court. The Cuban corporation then brought action in the federal court against Farr Whitlock and the receiver for recovery of the money.

In the court's own words, the crucial question was "whether this court can examine the validity of the Cuban act under international law and refuse recognition to the act if it is in violation of international law." This in essence covers the same issues which have been considered so far.

The court's reasoning in determining an answer to this issue assumed the following sequence:

a) The doctrine that courts of this country will not examine the validity of an act of a foreign state insofar as it purports to take effect within its own territory is a court-imposed restraint based on two factors:
   1) Recognition of and respect for the sovereignty of each State within its own territory.
   2) A desire not to embarrass the executive in its conduct of foreign relations.

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45 Id. at 376.
46 Ibid.
47 Ibid.
b) But here the Cuban government has lost its right to respect for their sovereignty if they have violated international law. In addition, the State Department has already delivered a note to the Cuban government declaring the very acts here questioned to be violative of international law, therefore there is no danger of embarrassing the executive.

c) Therefore, if the court finds that the nationalization decree is violative of international law, there is no reason why the court cannot deny effect to this Cuban law, especially since international law is part of our law.

The next issue considered by the court was whether the nationalization decree violated international law. This issue was answered in the affirmative for three reasons: the expropriation was not reasonably related to a public purpose involving the use of such property; the nationalization decree was discriminatory in that it classified American nationals separately; and the nationalization decree did not provide adequate compensation for the taking of property. The decision of the court was that it could deny effect to the Cuban decree, and accordingly the court granted summary judgment to Farr Whitlock and the receiver.

The importance of this case is best determined in the light of past facts. The Act of State Doctrine began under circumstances involving a claim for damages resulting from official acts of a sovereign's agent within the sovereign's territory.49 The Doctrine, itself an extension of the court-granted Sovereign Immunity Doctrine,50 has been extended several times without a thorough examination of the basic principles involved. The previous cases51 which established and expanded the Act of State Doctrine were sufficiently similar to the factual situation in Banco Nacional to have been found controlling if the court wished to so find. This is especially true when one notes that the Doctrine, good or bad, constitutes a growing body of American law, while the reference cited to justify the Banco Nacional decision are generally either foreign cases52 or law text references. If the Doctrine is found on appeal to be controlling in this case, it will be the furthest extension of the Doctrine so far. The facts of this case themselves present a strong argument against application of the doctrine. Here there was a seizure from an American citizen in

50 Accord, Comment, 57 Yale L.J. 108 (1947).
52 Foreign courts are not faced with the Constitutional separation of powers peculiar to the United States.
time of peace. There was a seizure from an American citizen in the Ricaud case also, but that seizure was in time of civil war, and a country is always allowed more latitude in conducting international affairs during wars. Here also there was a direct claim that the seizure was a violation of international law, and in addition the State Department had officially protested that the seizure was violative of international law. These facts have never been combined in one case; their significance, especially the protest by the State Department, will be more easily seen later. But even if the courts find that the Doctrine should be applicable, this case has at least forced a critical re-examination of the basic issues. A further extension of the Doctrine without such an analysis would be a misapplication of the principles of stare decisis.

ARGUMENTS FOR AND AGAINST APPLICATION OF THE ACT OF STATE DOCTRINE

General Principles

In general, States are legally equal as international persons. One of the important consequences of this equality is that the courts of one State do not, as a rule, question the validity or legality of the official acts of another sovereign State or the official acts of its agents, at least insofar as those acts purport to take effect within the latter State's own jurisdiction. Some authorities would add a further qualification to this rule, namely, that immunity of such official acts from court scrutiny is granted only if the acts are not contrary to international law.

63 This is the first case where this exact claim has been raised. "Such cases as Luther v. Sagor... in England, and Underhill v. Hernandez, Oetjen v. Central Leather Co., Ricaud v. American Metal Co., are irrelevant to the issue, as in none of them was any question of international law involved." (Author's footnotes omitted) Zander, The Act of State Doctrine, 53 Am. J. Int'l L. 826, 843 (1959).

64 This fact rebuts one of the arguments in favor of application of the Act of State Doctrine, namely, allowing courts to examine the validity of foreign affairs would embarrass the executive.


67 Whatever may be the rule of International Law as to the duty of States (and their courts to recognize the effects of foreign legislation... there is no such obligation with respect to foreign legislation... which is in itself contrary to International Law," 1 Oppenheim, op. cit. supra note 55, at 267–68.
ing to the principle of territoriality, every State is granted an exclusive right to determine the legal fate of all assets within its borders. A corollary of this principle is that titles to property seized within the country are generally recognized as good titles everywhere. These broad principles are limited however by the rule of international law that a State is bound to respect the property of an alien, and violation of this rule may justify the failure of other States to recognize titles acquired by such violations of international law. In determining whether the property of an alien has been taken in violation of international law, several factors must be considered.

The first factor is that the laws of most States permit wide interference with private property in connection with taxation, measures of public health or police, and the administration of public utilities.

The second factor is that fundamental changes in the political system and economic structure of a State or far reaching social reforms entail interference with private property on a large scale.

The third factor is that seizure of private property for either of the above reasons is not violative of international law if adequate compensation is given. The amount of compensation given for the property is a very important factor in determining whether the taking constitutes a violation of international law. Confiscation is the taking of private property without adequate compensation, and the confiscation of an alien's property is a violation of international law. In spite of the fact that this principle of international law is generally recognized among

58 Seidl-Hohenvelden, supra note 56.

59 Ibid.

60 1 Oppenheim, op. cit. supra note 55, at 352; Lipper, supra note 11; McNair, The Seizures of Property and Enterprises in Indonesia, 6 Nederlands Tijdschrift Voor Internationaal Recht 219 (1959); Comment, 58 Mich. L. Rev. 100 (1959); Hecke, Confiscation, Expropriation, and the Conflict of Laws, 4 Int'l L.Q. 345 (1951); Doman, Postwar Nationalization of Foreign Property in Europe, 48 Colum. L. Rev. 1125 (1948).

61 "Such legislation [which is violative of international law] may properly be treated as a nullity and, with regard to rights of property, as incapable of transferring title to the State concerned either within its territory or outside it." 1 Oppenheim, op. cit. supra note 55, at 268. Also see McNair, supra note 60; Lipper, supra note 11.

62 1 Oppenheim, op. cit. supra note 55, at 352.

63 Ibid.

64 Doman, supra note 60.

65 Hecke, supra note 60.

66 The United States has consistently maintained that there could be no taking of the property of American nationals unless compensation was given. 3 Hackworth, Digest of International Law 652–69 (1942). See also McNair, supra note 60; Lipper, Acts of State and the Conflict of Laws, 35 N.Y.U. L. Rev. 234 (1960); Comment, 58 Mich. L. Rev. 100 (1959); Hecke, supra note 60.
civilized countries, the problem further arises as to what constitutes "adequate" compensation. There are two schools of thought on what is "adequate." One school maintains that adequate compensation can only mean full and prompt payment. 67 This theory is based on an idea of a minimum standard of international law which protects aliens, even if nationals of the confiscating State are receiving inadequate compensation. 68 This is generally accepted as the principle of international law governing today. 69 The other school of thought holds that adequate compensation is only the amount given to the nationals of the confiscating State under the same circumstances. 70 This theory has gained more prominence since World War II, especially among those countries which have nationalized 71 wholly or in part. It should be noted, though, that there are no official documents or reports known to this writer in which a country has expressly said that anything less than full compensation constituted full payment to an injured alien.

That a State need not recognize foreign acts constituting a violation of international law is generally accepted. 72 The question then arises as to whether the courts of one country should recognize such foreign acts to be legally effective as a matter of comity. It would certainly seem that a higher standard of international morality and a greater respect for the sovereign acts of a foreign State would be promoted if the forum courts would reject a foreign law which clearly conflicts with international law. 73 In those States such as the United States where international law is a part of domestic law, 74 it would seem that the courts have a duty to deny effect to foreign acts contrary to international law. 75 The refusal of American courts to consider foreign acts in the light of the law

67 Doman, supra note 60.
68 Ibid.
69 Ibid.
70 Ibid.
71 Nationalization is a general, impersonal taking of the economic structure in full or in part for the nation's benefit, with or without compensation. For a thorough treatment of a country's rights to nationalize and its duties in regard thereto, see Doman, supra note 60, and McNair, supra note 60.
73 Zander, supra note 53.
75 Zander, supra note 53; Lipper, supra note 66.
of nations is not merely a neutral doctrine of abstention. The effect of such a doctrine is to lend the full protection of American courts, police and governmental agencies to transactions which are contrary to the minimum standard of civilized conduct. This is even more evident when one bears in mind that claims submitted through the State Department are not always free from “policy consideration.”

Specific Arguments

Various writers as well as the American courts have advanced many reasons why the Act of State Doctrine should be applied. Other writers have attempted to rebut these arguments favoring application of the Doctrine. A brief summary of the fourteen main arguments on both sides is as follows:

1. Argument Against.—The courts are not adequately equipped to consider problems of international law. They cannot determine the validity, within their own territory, of acts of a foreign nation taking place half a world away.

   Argument For.—The courts are certainly much better qualified to consider international law in these cases than either the executive or legislative branches. Interpretation of the law is a function of the courts specifically granted by the Constitution. In addition, international law is part of the law of the land, and our courts frequently consider international law in determination of other matters.

2. Argument Against.—Examination of foreign acts and a denial by the courts of their legal effects would seem to be a serious breach of international comity which might lead ultimately to war.

   Argument For.—The confiscating State is itself guilty of a breach of international comity if it violates international law. It should not be an insult for one State to examine the acts of another State according to the standards of international law. Such an examination violates no generally accepted international right, and no international tribunal has

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70 Comment, 53 AM. J. INT’L L. 635 (1959); Comment, 57 YALE L.J. 108 (1947).
71 This argument is raised in an article by Zander, supra note 53.
72 U.S. Const. art. III, §§ 1, 2.
73 The Paquete Habana, 175 U.S. 677 (1900); United States v. Smith, 18 U.S. (5 Wheat.) 71 (1820); 1 Oppenheim, op. cit. supra note 55, at 41–42.
ever adopted the rule of sacrosanctity of foreign acts. A court which refuses recognition to acts which are violative of international law does what is expected under principles of international law, and it would seem that the comity of nations would be better served by adherence to international law rather than by the courts ignoring such violations. American courts have assumed jurisdiction over actions in which a foreign sovereign claimed immunity. No war resulted. The American courts have examined foreign judgments to determine allegations that the judgment was obtained by fraud, or that the foreign court lacked jurisdiction, or that the foreign judgment violated the public policy of the United States. These judgments are also acts of state, yet there have been no signs of international tension arising from such judicial examination.

3. Argument Against.—Opening foreign acts to judicial inquiry creates uncertainty and non-uniformity in property transactions, thereby hindering world trade.

Argument For.—Security in property transactions ultimately rests on

84 Ibid.
85 "[N]either principle nor practice countenance a rule which by reference to International Law, obliges—or permits—courts to endow with legal effect . . . acts of foreign States which are in violation of International Law." 1 Oppenheim, op. cit. supra note 55, at 270. See also Mann, International Delinquencies Before Municipal Courts, 70 LAW Q. REV. 181 (1954).
87 The W. Talbot Dodge, 15 F.2d 459 (S.D. N.Y. 1926).
88 Bischoff v. Wethered, 76 U.S. 812 (1869).
93 Societe Potasas Iberias v. Nathan Block, Court of Cassation (Chambre Civile—1939), 1938-40 Annual Digest & Reports of Public International Law Cases 150 (Lauterpacht—Case 54); Moulin v. Volatron, Commercial Tribunal of Marseilles (1937); 1935-37 Annual Digest & Reports of Public International Law Cases 191 (Lauterpacht—Case 68.
94 This objection was raised in a Comment, 53 AM. J. INT'L L. 635 (1959).
acceptance by all nations of a minimum standard of conduct. By measuring rights created by foreign States against international law, the United States courts would lead the way in promoting an international standard of conduct. The fact that such action may occasionally give rise to uncertainty in property transactions seems comparatively unimportant, for such results arise only as part of an attack on a much greater threat to security, namely, the uncertain standard of comity as the basis for international trade. Such decisions might temporarily hinder trade, but they might also very well halt confiscation of alien property. Bar ring the goods so seized from the world market would also remove the aspect of profit as an incentive for such action.

4. Argument Against.—International law is interpreted differently in different countries.

Argument For.—It is true that many areas of international law are open to dispute, but there are also principles which are generally accepted by civilized nations. The claimant in any action would still have the burden of proving that the foreign acts of seizure constituted a violation of international law. It is not argued that the courts must deny effect to any foreign seizure, but rather that the courts should be allowed to deny effect to foreign acts which are in clear violation of international law.

In the event of a failure to prove such a clear-cut violation, the courts would merely deny the claimant relief as they have done in the past. Interpretation of law is traditionally a function of the court. If the courts cannot interpret international law according to a generally accepted understanding of the principles involved, then the State Department certainly cannot be expected to do so in determining whether there is a basis for a claim to be submitted through diplomatic channels.

5. Argument Against.—Opening foreign acts to judicial inquiry might lead to unfavorable treatment of American property abroad.

Argument For.—In the context of a case such as Banco Nacional De Cuba or Ricaud, this argument in effect states that the United States courts should recognize foreign acts which confiscated property of an American citizen for fear that a failure to so recognize would lead to

95 Comment, 57 Yale L.J. 108 (1947).
96 Ibid.
98 I Oppenheim, op. cit. supra note 55, at 1-35.
99 "By a consistent use of the principles of private international law, a proper deference to the clearly expressed policies of the Executive, and by an intelligent use of judicial discretion, it should be possible to recognize and give effect to all such foreign acts of state which do not conflict with the fundamental concepts of justice and morality prevailing in the international community." Zander, supra note 53, at 852.
100 U.S. Const. art. III, §§ 1, 2.
other such acts. In cases where there is a violation of international law, it is very possible that American property abroad has already been unfavorably treated.

6. Argument Against.—Allowing the court this right of inquiry into such acts is not an effective remedy to the problem because the part of the property in litigation which can be returned to the injured party is usually only a small part of the total property confiscated. Therefore it would be wiser to require that the claimant submit his entire claim through diplomatic channels.

Argument For.—This objection misses the entire point. The issue involved is whether the courts can determine the rights of parties properly before the court as to property within the jurisdiction of the court. The issue is not whether the court can correct the total wrong. The function of the court is to adjudicate rights, not to solve all the evils in the world, and in these cases there are rights before the court to be adjudicated. Nor does the fact that a claimant is granted a judgment for part of his confiscated property bar him from instituting a claim through diplomatic channels for the remaining property or compensation for that property.

7. Argument Against.—Judicial review of foreign acts might force double payment. A buyer might have to pay the former owner as well as the selling country.

Argument For.—An extension of this objection would bar the courts from assuming jurisdiction in any case involving stolen property. Surely those raising this objection would not argue that a person buying stolen property should be allowed to retain that property as against the owner on the basis of this double payment argument. A buyer of goods is in a better position to protect himself than one whose property is arbitrarily seized.

8. Argument Against.—Allowing the courts power to examine and even disregard foreign acts would grant the courts control over part of foreign relations previously an exclusive prerogative of the State Department, namely, the duty of protecting the interest of the United States and its citizens abroad. Allowing the courts such power is an arrogation of the executive power.

Argument For.—The separation of powers contained in the Constitution is not an insulation of powers.\textsuperscript{101} There are principles of distribution, but there are also overlappings and a significant interdependence.\textsuperscript{102} The courts cannot be barred from their Constitutional duty of determining individual rights merely because they incidentally accomplish a result


\textsuperscript{102} Ibid.
usually intrusted to the executive. In view of the interdependence among the branches of our government, it would not seem to be an arrogation of executive power to bring court decisions into harmony with national policy. A good illustration of this point would be the Bernstein case. Here it could scarcely be called an arrogation of executive power to deny effect to acts which this country had protested by going to war. Looking at the objection conversely, the refusal of the courts to grant to claimant relief would throw the burden of determining whether he has a valid claim on the State Department, a burden which the State Department is ill equipped to bear. This burden of making determinations in each individual case could readily lead to embarrassing situations if foreign delegates should construe particular decisions as a personal diplomatic affront. In effect, the executive would then be determining title to property, a function of the judiciary.

9. Argument Against.—Even if the confiscation of private property is violative of international law, this violation is the basis for a claim to be submitted through the State Department and does not make such an act void.

Argument For.—This objection begs the question in that the very issue in dispute is whether the court can dispose of this claim by disregarding the foreign acts, or whether the State Department must handle the claim. This objection also fails to take into account that a violation of international law may be both the basis for a diplomatic claim and a court's excuse for denying the violative act any legal effect, and the two may not be mutually exclusive.

10. Argument Against.—The review of a foreign governmental act is tantamount to giving a judgment for damages against the foreign government.

Argument For.—This may in effect be true, but the immunity of a sovereign is not an absolute right. There is no principle of international law prohibiting such an examination.

11. Argument Against.—There is a dispute as to what standard of compensation is adequate, and therefore there is no sure method of determining whether there has been a violation of international law.

Argument For.—The principle of a minimum international standard of equitable compensation is the prevailing rule of international law today. The concept of prompt, full compensation has been challenged

103 Accord, Comment, 57 Yale L. J. 108 (1947).
104 Lipper, supra note 66.
105 Accord, Comment, 58 Michigan L. Rev. 100 (1959); Lipper, supra note 66.
106 1 Oppenheimer, op. cit. supra note 55, at 267.
107 Doman, supra note 60; Comment, 109 U. Pa. L. Rev. 245 (1960).
mainly in regard to nationalizations. Where there is no full nationalization, the pragmatic considerations which have undermined the full and prompt compensation rule do not apply.\textsuperscript{108}

12. \textit{Argument Against}.—Review of such foreign acts is a "political question" over which the courts cannot assume jurisdiction.

\textit{Argument For}.—A political question is one which is committed to either the legislature or executive for final determination.\textsuperscript{109} It has also been explained as one that, according to the required or habitual distribution of sovereignty, is properly determinable by the executive or legislative branches of the government.\textsuperscript{110} There is a distinction, however, between a political question and a judicial question which is concerned only incidentally with a political issue.\textsuperscript{111} The granting of official recognition to the new government of a foreign country has always been considered a function of the executive, and therefore "recognition" is considered a "political question."\textsuperscript{112} Sovereign immunity is usually an incident of official recognition\textsuperscript{113} and is closely connected with it, yet it is granted by the courts, and the courts have assumed jurisdiction in cases despite a plea of such immunity.\textsuperscript{114} The courts have also held that the scope and effect of the law of any foreign nation is a judicial question.\textsuperscript{115} It would seem that the courts should be free to consider and pronounce an opinion upon the exercise of sovereign power by a foreign government if the consideration of those acts of a foreign government constitutes only a preliminary to the decision of a question of private rights which in itself is subject to the competency of the court.\textsuperscript{116}

\textsuperscript{108} The entire question of the duty of compensation is treated in 109 U. Pa. L. Rev. 245 (1960).


\textsuperscript{111} Lipper, \textit{supra} note 66.

\textsuperscript{112} Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Lipper, \textit{supra} note 66.

\textsuperscript{113} However, the immunity has been given even when there was no recognition [Salimoff v. Standard Oil, 262 N.Y. 220, 186 N.E. 679 (1933)] and when the foreign government has ceased to exist [Banco De Espana v. Federal Reserve Bank, 114 F.2d 438 (2d Cir. 1940); Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947)].


\textsuperscript{115} Anderson v. N.S. Transandine Handemaatschappij, 289 N.Y. 9, 43 N.E.2d 502 (1942).

\textsuperscript{116} Mann, \textit{The Sacrosanctity of the Foreign Act of State}, 59 Law Q. Rev. 42, 155 (1943).
13. Argument Against.—Such judicial review might embarrass the executive.

Argument For.—This objection would not be valid where the executive had already condemned the acts sought to be judicially reviewed such as in the Bernstein case (where the acts had been condemned by actions of the executive) and the Banco Nacional case (where the acts had been condemned by diplomatic protest). The courts cannot make policy, and a judgment does not bind the nation to any position in foreign affairs.\(^{117}\) It would therefore seem difficult to understand how a court judgment could interfere with foreign relations enough to embarrass the executive. The executive branch, through the suggestion procedure, has adequate means of so informing the court when it deems it in the best interest of the United States that the court refuse to hear the case on the merits.\(^{118}\) The executive might also conclude a treaty validating the title acquired or granting the foreign country compensation if the occasion were important enough.\(^{119}\) Fear of embarrassment of the executive does not seem to be a very attractive basis upon which to build a rule of law, and use of this as any criteria would lead to great uncertainty in decisions.

14. Argument Against.—The United States has invoked the Act of State Doctrine as an answer to protests by foreign countries that the United States had seized alien property.

Argument For.—Admitting arguendo that there were seizures, the position of the United States would seem to be logical in light of the facts. Until now the United States has extended the protection of the Act of State Doctrine to other foreign countries. It would be inconsistent for a country to deny itself the same protection which it extends to other countries.

CONCLUSION

The Act of State Doctrine developed as an answer to a specific factual problem. Under the facts of the Underhill case, perhaps it was a just solution to the problem presented. As all other principles of law though, it cannot be extended rigidly to new factual situations without an examination of the basic issues presented. When the reasons for application of that principle of law no longer result in a just solution, the doctrine should no longer be applied. The following quotations will best sum up the correct attitude which should be adopted in regard to the use of the Act of State Doctrine as a rule of law.


\(^{118}\) Lipper, *supra* note 66.

\(^{119}\) Accord, Comment, 58 Mich. L. Rev. 100 (1959).