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George R. Harper

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ACT OF STATE DOCTRINE—LIMITATIONS ON SABBATINO: NON-APPLICABILITY OF THE HICKENLOOPER AMENDMENT

The sole stockholder of a Cuban corporation fled to the United States after confiscation of his company by the Castro Government, and thereafter became assignee of the corporation president's power of attorney. Later he brought an action against a Florida corporation to recover a sum owed the Cuban corporation for tobacco sold to the Florida corporation prior to Castro's takeover in Cuba. The United States District Court for the Middle District of Florida entered summary judgment dismissing the complaint, on the grounds that to assume jurisdiction would be a violation of the Act of State Doctrine as recently defined by the Supreme Court of the United States. On appeal to the United States Court of Appeals for the Fifth Circuit, *held*, reversed: Where the Cuban government did not specifically prohibit the manner in which the plaintiff corporation attempted to collect the sum owed to it, the Act of State Doctrine was no bar to the suit. *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir. 1968).

The resurging importance of the Act of State Doctrine in the field of international law is due in no small part to the Castro takeover in Cuba.¹ Not since the Nazi confiscations in Germany during the late nineteen thirties and early nineteen forties has this principle played such a prominent part in international law and conflicts of law litigation.²

1. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Calderone v. Naviera Vacuba S/A*, 325 F.2d 76 (2d Cir. 1963); *Pons v. Republic of Cuba*, 294 F.2d 925 (D.C. Cir. 1961); *Banco Nacional de Cuba v. First National City Bank of New York*, 270 F. Supp. 1004 (S.D.N.Y. 1967); *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966); *Blanco v. Pan American Life Ins. Co.*, 221 F. Supp. 219 (S.D. Fla. 1963); *Mann v. Compania Petrolera Trans-Cuba, S.A.*, 32 Misc. 2d 790, 223 N.Y.S.2d 900 (1962).

2. All over the world, political and social upheavals preceding, and caused by, the two world wars have created legal problems connected with confiscations (expropriations without adequate compensation) or other expropriations of private property by foreign governments.

A. EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* § 48 (1962).

Calling the Act of State Doctrine a principle of international law is, of course, technically incorrect. "[T]his doctrine is a conflict of laws rule applied by American courts; it is not a rule of international law." Bayitch, *Florida and International Legal Developments 1962-1963*, 18 U. MIAMI L. REV. 321, 345 (1963). The view is also expressed in the 1962 Proposed Official Draft of the Restatement of the Foreign Relations Law of the United States that the Act of State Doctrine is a rule of Conflict of Laws.

The proper use of the term, however, is not at issue and will not be discussed here. Throughout this paper the writer will refer to the Act of State Doctrine in the same manner as did Judge Tuttle in his opinion. The following passage is quite ample for purposes of this casenote:

[D]ecisions affording recognition to the effect of foreign decrees on property situated within the territory of the legislating state at the time of the execution of the decree may be regarded as being based on the principle of the law of conflict of laws

This principle legitimately may be viewed as a reflection, on the municipal level, of the principle of territorial sovereignty in international law.

Comment, *International Law, Conflict Law and Sabbatino*, 19 U. MIAMI L. REV. 216, 223-24 (1964).

The most important recent case dealing with the Act of State Doctrine is *Banco Nacional de Cuba v. Sabbatino*,³ a controversial decision which generated considerable comment both in and out of print.⁴ *Sabbatino* defines the Act of State Doctrine as follows:

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 . . . another done within its own territory.⁵

This tenet is traditionally applied in cases where the legality of acts of foreign states have occasion to be questioned in American courts of law.

The comprehensiveness of the above rule of law is beginning to be offset by various exceptions, however, imposed both judicially⁶ and legislatively.⁷ The primary importance of the case noted herein, *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*,⁸ is that it sets a practical limit on the universal application of the *Sabbatino* rule.

The Act of State Doctrine is one of the oldest principles in our system of Anglo-American jurisprudence.⁹ The Supreme Court noted in *Sabbatino* that the Doctrine can be traced back to the case of *Blad v. Blamfield*,¹⁰ decided in 1674. It was first enunciated in its modern

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

4. Collinson, *Sabbatino: The Treatment of International Law in United States Courts*, 3 COLUM. J. OF TRANSNAT'L L. 27 (1964); Falk, *The Complexity of Sabbatino*, 58 AM. J. INT'L L. 935 (1964); Kline, *An Examination of the Competence of National Courts to Prescribe and Apply International Law—the Sabbatino Case Revisited*, 1 U. SAN FRANCISCO L. REV. 49 (1966); Reeves, *The Sabbatino Case and the Sabbatino Amendment: Comedy—or Tragedy—of Errors*, 20 VAND. L. REV. 429 (1966); Sisul, *Nationalization: A Changing Concept in International Law*, 6 ILL. CONTINUING LEGAL EDUC. 109 (1968).

5. 376 U.S. at 416.

6. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966); *Banco Nacional de Cuba v. First Nat'l City Bank*, 270 F. Supp. 1004 (S.D.N.Y. 1967); *F. Palicio y Compania v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966).

7. Foreign Assistance Act § 301(d)4, 22 U.S.C. § 2370(e)2 (1964), popularly known as the Hickenlooper Amendment or the Sabbatino Amendment.

8. 392 F.2d 706 (5th Cir. 1968).

9. Ehrenzweig is of the opinion that the Doctrine can be traced to Bartolus' TRACTATUS REPRAESSALIUM, written in 1354. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 48, n.19 (1962).

It has also been said that:

The original common law meaning of "act of state" or "matter of state" referred to acts of the forum sovereign pursued beyond the territorial bounds of England. Such acts were immune to review by domestic English courts. Thus the common law usage of the "act of state" doctrine concerned acts of a state which would not be reviewed by the courts of the same state.

Kline, *supra* note 4, at 101.

10. 3 Swans. 604, 36 Eng. Rep. 992 (1674). With due respect to the Supreme Court, this should probably be *Blad's Case*, 3 Swans. 603, 36 Eng. Rep. 991 (1674). *Blad v. Blamfield* concerned the issue of whether a perpetual injunction to stay an alien's suit at law could be granted by an English court. *Blad's Case* concerned the question whether the confiscation of an Englishman's property in Denmark should be given effect in England. It was said:

[F]or whatever was law in *Denmark*, would be law in *England* in this case, and

form in the case of *Underhill v. Hernandez*,¹¹ and reaffirmed in three other cases decided within the next two decades.¹² These four cases are frequently cited as the basis for the Act of State Doctrine as it is defined in the United States. Its present form is virtually unchanged from that in which it was first delineated in *Underhill*.

After the period from 1897 to 1918, very few cases dealing with the Act of State Doctrine were decided in this country until the periods immediately before and after World War II.¹³ Thereafter, it was practically laid to rest until Castro's revolution in 1959 brought about another flurry of international claims. A comprehensive determination by the Supreme Court as to rights and liabilities arising out of the Cuban situation was inevitable;¹⁴ thus the great importance of *Banco Nacional de Cuba v. Sabbatino*.¹⁵

In re-establishing the Doctrine as it was first laid down in *Underhill v. Hernandez* over seventy years ago, the Supreme Court said:

None of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from *Underhill*. . . . On the contrary in two of these cases . . . the doctrine as announced in *Underhill* was reaffirmed in unequivocal terms.¹⁶

The English courts have not paralleled ours in the development of the Act of State Doctrine. At first it seemed they would do so; *Underhill* and *Oetjen v. Central Leather Co.*¹⁷ were both mentioned approvingly in an important English case.¹⁸ The recent decision of *Anglo-Iranian Oil*

would be allowed as a very good justification in the action: but if the wrong were done without colour of authority, it was fit to be questioned 3 Swans. at 604, 36 Eng. Rep. at 992 (emphasis by the court).

11. 168 U.S. 250 (1897).

12. *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918).

13. Most of the early cases dealt with Communist confiscations in Russia. See, e.g., *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N.Y. 286, 20 N.E.2d 758 (1939); *Vladikavkazsky Ry. v. New York Trust Co.*, 263 N.Y. 369, 189 N.E. 456 (1934); *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933).

For later cases see *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Zwack v. Kraus Bros. & Co.*, 93 F. Supp. 963 (S.D.N.Y. 1950); *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.*, 28 F. Supp. 279 (S.D.N.Y. 1939); *The Navemar*, 18 F. Supp. 153 (E.D.N.Y. 1937).

14. The Supreme Court noted in *Sabbatino* that no fewer than thirty-five cases were awaiting the outcome of the decision.

15. 376 U.S. 398 (1964).

16. 376 U.S. 398, 416. Compare *Griffin v. McCoach*, 313 U.S. 498, 506 (1941):

It is "rudimentary" that a state "will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the municipal law, or in other words, violate the public policy of the State where the enforcement of the foreign contract is sought."

17. 246 U.S. 297 (1918).

18. *Arksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva A. M. Luther v. James Sagor & Co.*, 3 K.B. 532 (1921).

An interesting case is *Wright v. Mutt*, 1 H. Bl. 136, 126 Eng. Rep. 83 (1788), concerning litigation arising as a result of a law enacted by the Georgia Legislature shortly after the

Co. v. Jaffrate,¹⁹ however, demonstrates that the English courts have given their Act of State Doctrine an interpretation and reorientation which is not found in the United States. The difference is that although the English courts may not sit in judgment on the acts of a foreign government done within the borders of its own country, a particular act is not an "act of state" if it violates English law, of which international law is a part.²⁰ They are not bound to apply foreign law to property which has at all times been within their jurisdiction. This interpretation is different from that of "act of state" in the American courts.²¹ Had *Sabbatino* been decided in England there is a good probability that it would have had an entirely different outcome.²²

Courts in other countries seem to have adhered more closely to the English rather than the American interpretation of the Act of State Doctrine.²³ A desire on the part of American judges and legislators to bring the interpretation of our Act of State Doctrine more into line with that of other countries brought about further developments in the *Sabbatino* series.²⁴ These developments in turn laid the basis for the decision in *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*

The most important of these "backlash" developments is the so-called Hickenlooper Amendment,²⁵ which was added to the Foreign

Declaration of Independence, which declared a confiscation of the properties of the Tory governor. Since the case arose after the Revolution, the English court upheld the law as being one of an independent country and as such entitled to respect.

19. 1 W.L.R. 246 (1953).

20. *Id.*; Snyder, *Banco Nacional de Cuba v. Sabbatino: The Supreme Court Speaks*, 16 SYRACUSE L. REV. 15 (1964).

21. *But see* *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), which was the final outcome of *Sabbatino* and in which the previous result was overturned due to the application of the recently-passed Hickenlooper Amendment. It was held that the expropriation by the Cuban government violated international law and that the Hickenlooper Amendment was constitutional.

22. The Russian nationalization decrees have been held not to affect assets of Russian corporations in England. *In re Russian Bank For Foreign Trade*, [1933] Ch. 745, held that where a debt owing by a nationalized corporation is "locally situated" or "primarily recoverable" in England, it is not affected by Soviet nationalization decrees. To the same effect is *Sedgwick Collins & Co. v. Rossia Ins. Co.*, 1 K.B. 1 (1926), which held that the position of creditors of a Russian corporation as against the property of such corporation located in England, such as debts owing to it from Russian debtors, is not altered by the nationalization decrees of the Russian government.

23. A Comment in 3 Am. J. Comp. L. 87 (1954), by Otto C. Sommerich, discusses 49 SJZ [1953, No. 18] 281 *et seq.* (Superior Court of the Canton of Zurich, Switzerland). In that case the court held that confiscatory measures of another government, though recognized, might be repudiated as contrary to the public policy of Switzerland; and that foreign measures, even if enacted by law, cannot be recognized by Swiss courts if vested rights are violated thereby. The thesis that foreign confiscatory legislation has no extraterritorial effect is thus upheld. Other cases, to the same effect, are discussed in the same comment.

24. The constant shifting back and forth between the terms "*Sabbatino* decision" and "Act of State Doctrine" throughout this paper is not inadvertent. This writer believes the use of the terms to be interchangeable. The *Sabbatino* decision was the complete American Act of State Doctrine, prior to the enactment of the Hickenlooper Amendment.

25. Foreign Assistance Act § 301(d)4, 22 U.S.C. § 2370(e)2 (1964), *as amended* 79 Stat. 658 (1965).

Assistance Act of 1964²⁶ because of congressional dissatisfaction with the result in *Sabbatino*. The draftsmen of the Amendment made no secret of the fact that their purpose was to overrule that portion of *Sabbatino* which prohibited a court from taking jurisdiction over a case because of the Act of State Doctrine.²⁷ There were, however, three instances where the Hickenlooper Amendment would not apply, and one of these was that it had no effect when the case did not involve a violation of international law. In deciding *Tabacalera*, Judge Tuttle's first problem was to determine whether the case fell within this exception.

The plaintiff in *Tabacalera* was a Cuban citizen suing on the debt of Tabacalera Severiano Jorge, S.A., a confiscated Cuban corporation. Confiscation without compensation by a state *from its own nationals* is no violation of international law.²⁸ The Hickenlooper Amendment therefore did not apply to *Tabacalera*, and *Sabbatino* was still good precedent. Had the Cuban government by law or decree prohibited the plaintiff from bringing suit, the Act of State Doctrine would have eliminated jurisdiction in the District Court.

This is one of the turning points on which Judge Tuttle based his decision. The actual law by which the Cuban government purported to confiscate Tabacalera was carefully analyzed and incorporated, word for word, into the opinion.²⁹ Although couched in very broad terms, the Cuban law did not actually cancel the power of attorney which had been granted to the president of the corporation prior to confiscation,³⁰ nor did it prohibit the assignment of that power after confiscation. As stated in the opinion:

[T]hrough inadvertence, mistake or purposeful handling of this account, the Cuban government did not actually, by any of its official acts, interfere with the right of Tabacalera . . . to collect this account in the manner in which the company sought to pursue the remedy in the United States courts. . . . We see no reason to create a further power of confiscation in the inventor than the government gave him.³¹

26. 22 U.S.C. § 2151 *et seq.* (1964), as amended 79 Stat. 653 (1965), 80 Stat. 796 (1966).

27. This, incidentally, radically changed the trend of prior decisions. The effect of *Sabbatino* was to overrule a number of cases which had previously been decided. *See, e.g.,* Gonzalez v. Industrial Bank (of Cuba), 12 N.Y.2d 33, 234 N.Y.S.2d 210, 186 N.E.2d 410 (1962); Stephen v. Zivnostenska Banka, Nat'l Corp., 15 App. Div. 2d 111, 222 N.Y.S.2d 128 (1961); American Jewish Congress v. Carter, 19 Misc. 2d 205, 190 N.Y.S.2d 218 (Sup. Ct. 1959).

28. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Pons v. Republic of Cuba, 294 F.2d 925 (D.C. Cir. 1961).

The case of *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (1966) held that: [C]onfiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law.

29. 392 F.2d at 710, discussing Cuban Ministry of Labor Resolution No. 20260 (Sept. 15, 1960).

30. A copy of the document which granted the power of attorney had been attached to the plaintiff's affidavit. *See* 392 F.2d at 707-8.

31. 392 F.2d at 714.

Thus the plaintiff had an outstanding, unconditional power of attorney which had never been cancelled.³² Nothing actually prohibited him, as assignee, from bringing suit in Florida for collection of an account due the corporation.

Still another problem had to be overcome, however, before the defendant could be made to pay the money owed to the plaintiff Jorge as assignee of the plaintiff Tabacalera. The court found that the plaintiffs had the power to collect. However, could they do so in the face of the Act of State Doctrine, which prohibited the Court from interfering with an act done by a foreign state *within its own borders*? The situs of the *res*, which in this case was an intangible chose in action, became of vital importance; for if the situs was considered to be within the borders of Cuba, as it was in *Sabbatino*, the court of appeals would have no jurisdiction.³³

In the past, the situs of an intangible has been held to be in different places for different purposes.³⁴ The law on this point, at least in Florida, seems to be that intangible property accompanies the person of the owner.³⁵ Judge Tuttle held in *Tabacalera* that:

In attempting to fashion a rule fixing the situs of an indebtedness for the very limited purpose of deciding whether it is "property *within [Cuba's] own territory*," we find no compelling requirement that we accept the fiction that the situs is irrevocably at the domicile of the creditor, a fiction sometimes used for commercial purposes. For the purpose of our inquiry we find this debt was not property in Cuba.³⁶

32. Judge Tuttle states that the reason for this was that the intervenor probably did not know anything about it. 392 F.2d at 714. Be that as it may, the plaintiff did have the power to collect.

33. 392 F.2d at 713:

The really important point of difference between the facts of this case and that of *Sabbatino* is that the subject of the confiscation in the latter case was a ship's cargo of sugar which was present in the territorial waters of Cuba—tangible personal property—whereas in the case before us the subject of the alleged "taking" by the government of Cuba is a credit owed to the Cuban corporation . . . by an American creditor domiciled in Tampa, Florida.

For cases where the Doctrine has been applied *see* *Compania Ron Bacardi, S.A. v. Bank of Nova Scotia*, 193 F. Supp. 814 (S.D.N.Y. 1961); *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N.Y. 286, 20 N.E.2d 758 (1939); *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (1966); *Mann v. Compania Petrolera Trans-Cuba, S.A.*, 32 Misc. 2d 790, 223 N.Y.S.2d 900 (Sup. Ct. 1962).

In *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), the Republic of Iraq sought to recover a bank account and stock held in New York by the late King Faisal II. A successful coup in Iraq had resulted in the confiscation of all the king's property. The Court said:

Under the traditional application of the act of state doctrine, the principle of judicial refusal of examination applies only to a taking by a foreign sovereign of property within its own territory

34. 392 F.2d at 714-15. *See also* *Curry v. McCanless*, 307 U.S. 357 (1938); *Farmer's Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930); *Chicago Rock Island & Pac. Ry. v. Sturm*, 174 U.S. 710 (1899).

35. *Beverly Beach Properties, Inc. v. Nelson*, 68 So.2d 604 (Fla. 1953).

36. 392 F.2d at 716.

That the situs of the debt was held to be here in the United States could very easily have been anticipated, due to the lack of any contrary precedents upon which the Court could rely. It has long been the policy of the courts to decide the situs of intangible property on the basis of their concept of justice, rather than on any hard and fast rule of law.³⁷

Nor is the fact that the Court found the outstanding power of attorney to be valid very surprising; this, too, is a matter which was decided at the judge's discretion and by his innate sense of justice.

The greatest importance of *Tabacalera* is that it sets a tentative limit to the *Sabbatino* decision, even without the use of the Hickenlooper Amendment. The purpose of the Amendment is to protect American citizens from confiscations of their property by hostile foreign governments;³⁸ it makes no mention of foreign creditors who seek relief, in American courts, from confiscatory decrees imposed by their own governments. The practical effect of *Tabacalera* is to fill a gap which *Sabbatino* had opened but which the Hickenlooper Amendment had not completely closed.

If for no other reason than that it prevents unjust enrichment, this writer believes the *Tabacalera* decision to be a sound one. A contrary result would not seem to further the concept of justice as it should exist in American courts. Permitting a debtor to refuse to pay a bona fide foreign creditor who is here in the United States, and yet at the same time discouraging him from sending that same debt to the foreign country on the grounds that it is against public policy to trade with unfriendly nations, is a philosophy which should not be sanctioned by any court of law.

GEORGE R. HARPER

UNINSURED MOTORIST COVERAGE—SETOFF OF AMOUNTS PAYABLE UNDER MEDICAL PAYMENTS COVERAGE

The plaintiff-insured was involved in a collision with a negligently operated uninsured vehicle. The defendant-insurer had issued to the plaintiff a policy which included both medical payment and uninsured motorist endorsements, but specifically excepted from payment under the latter coverage amounts paid or payable under the former. The plaintiff sought a declaratory judgment to determine whether the setoff provision con-

37. Needless to say, the problems inherent in determining the location of intangibles will, in many cases, enable the forum to reach virtually any result of its choosing.

A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS §§ 48, 172 (1962). See also § 242 of the same work.

38. The legislative history of the Hickenlooper Amendment leaves no doubt that it intends for international law to require compensation for confiscated American property. See S. REP. No. 170, 89th Cong., 1st Sess. 19; 110 CONG. REC. 18936-37, 18946 (1964); 110 CONG. REC. APP. A5157 (1964).