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Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law

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SABBATINO RESURRECTED: THE ACT OF STATE DOCTRINE IN THE REVISED RESTATEMENT OF U.S. FOREIGN RELATIONS LAW

*By Malvina Halberstam**

I. INTRODUCTION

Among the more controversial provisions of the *Restatement of the Foreign Relations Law of the United States (Revised),*[1] are the sections dealing with the act of state doctrine in Tentative Draft No. 4.[2] Section 428 provides: "Subject to §429, courts in the United States will refrain from examining the validity of an act of a foreign state taken in its sovereign capacity within the state's own territory." This provision, of course, is based on the Supreme Court decision in *Sabbatino.*[3] The Court there stated, "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government"[4] even if it is alleged that the taking is contrary to international law.

The Court's decision in *Sabbatino* met with overwhelming[5]—though not

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[1] The *Restatement of the Foreign Relations Law of the United States* was adopted by the American Law Institute in 1962 and finally promulgated with revisions in 1965. Work on the *Restatement (Revised)* began in the late 1970s. Thus far, five tentative drafts have been completed and presented to the members of the Institute. The revised *Restatement* as a whole is scheduled to be considered at the May 1985 meeting of the Institute.

[2] RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §§428 and 429 (Tentative Draft No. 4, 1983) [hereinafter cited as Tentative Draft No. 4]. This draft was considered by the members of the Institute at its 60th Annual Meeting, held in Washington, D.C., May 17–20, 1983. The greater part of the morning of May 19, at which Tentative Draft No. 4 was discussed, was devoted to discussion of these provisions. Other provisions that were subjected to considerable discussion and criticism at previous meetings include Jurisdiction (Tentative Draft No. 2 §§401 and *ff.*, 1981) and Economic Injury to Nationals of Other States and Remedies for Such Injuries (Tentative Draft No. 3 §§712, 713, 1982).

[3] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[4] *Id.* at 428.

[5] *See, e.g.,* R. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT: SIX PROCEDURAL STUDIES (1965); McDougal, *Comments,* 58 ASIL PROC. 48 (1964); Jennings, *Comments,* in

universal[6]—criticism from academicians and practitioners alike and was very quickly overruled by Congress in an amendment to the Foreign Assistance Act.[7] This amendment, known as the Hickenlooper Amendment, provides, in pertinent part:

> [N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right [to property] is asserted by any party . . . based upon . . . an act of that state in violation of the principles of international law. . . .[8]

Louis Henkin, the Chief Reporter for the *Restatement (Revised)*, stated at a meeting of the Foreign Lawyers Association in 1967, at which he described himself as "one of the few present who agreed with the Supreme Court decision":[9]

THE AFTERMATH OF SABBATINO 87 (Tondel ed. 1965); Mann, *The Legal Consequences of Sabbatino*, 51 VA. L. REV. 604 (1965); Kline, *An Examination of the Competence of National Courts to Prescribe and Apply International Law: The Sabbatino Case Revisited*, 1 U.S.F.L. REV. 49 (1966); Laylin, *Holding Invalid Acts Contrary to International Law—A Force toward Compliance*, 58 ASIL PROC., *supra*, at 33.

[6] *See, e.g.*, Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964); Henkin, *Comments*, in *Act of State: Sabbatino in the Courts and in Congress*, 3 COLUM. J. TRANSNAT'L L. 99, 107 (1964); Cardozo, *Congress versus Sabbatino: Constitutional Considerations*, 4 *id.* at 297 (1966); Metzger, *Act of State Redefined: The Sabbatino Case*, 1964 SUP. CT. REV. 23.

[7] The Hickenlooper Amendment was first adopted in 1964 as a rider to the Foreign Assistance Act of 1964, Pub. L. No. 88-663, §301(d)(4), 78 Stat. 1013 (1964). As originally adopted, it read:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that 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.

For Senator Hickenlooper's statement on the purpose of the amendment, see 110 CONG. REC. 19,546, 23,674–82 and App. 5757 (1964).

[8] Section 620(e)(2) of the Foreign Assistance Act of 1965, Pub. L. No. 89-171, §301(d)(2), 79 Stat. 653, 659, *as amended*, 22 U.S.C. §2370(e)(2) (1982). The bracketed words "to property" were not in the amendment as enacted in 1964. *See* Foreign Assistance Act of 1964, §301(d)(4), *quoted supra* note 7. *See also* S. REP. NO. 1188, 88th Cong., 1st Sess., pt. I, at 24 (1964).

[9] Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 175 (1967).

> No case in recent years attracted as much attention, produced as much writing or aroused as much controversy among international lawyers in the United States as did *Banco Nacional de Cuba v. Sabbatino.* The flood of writing subsided and the controversy became largely moot after Congress *substantially "repealed"* the decision of the Supreme Court by enacting the "Second Hickenlooper Amendment."[10]

Andreas Lowenfeld, the associate reporter for the revised *Restatement* who drafted sections 428 and 429, had similarly interpreted the Hickenlooper Amendment as reversing the ruling of the Court in *Sabbatino.* He wrote:

> In the *Sabbatino* case the Executive Branch had argued and the Supreme Court had held, that United States courts should not review the official acts of foreign governments affecting property within the foreign state. . . . The majority of the organized Bar had argued, and the Congress has now agreed, that the courts of the United States *should review the official acts of foreign governments if these acts affect property beneficially owned by United States citizens* and are alleged to be in violation of the principles of international law.[11]

Nevertheless, section 428 of the revised *Restatement* reasserts the act of state doctrine as set forth in *Sabbatino.*

Section 429, to which section 428 is "subject," provides: "[T]he act of state doctrine will not be applied to claims to *specific property located in the United States* based on the assertion that a foreign state confiscated the property in violation of international law."[12] This exception to the act of state doctrine, intended to take account of the Hickenlooper Amendment, is a very narrow construction of that amendment. The Hickenlooper Amendment is not limited by its terms to specific property located in the United States. It directs the courts "to make a determination on the merits giving effect to the principles of international law" in "a case in which *a claim of title or other right to property is asserted by any party.*"[13] While some lower courts have limited the Hickenlooper Amendment to property located in the United States,[14] and there is legislative history to support

[10] *Id.* (emphasis added) (footnotes omitted).

[11] Lowenfeld, *The Sabbatino Amendment—International Law Meets Civil Procedure,* 59 AJIL 899 (1965) (emphasis added) (footnote omitted).

[12] Tentative Draft No. 4 §429 (emphasis added).

[13] 22 U.S.C. §2370(e)(2), *supra* note 8 (emphasis added). The amendment as originally adopted did not even include the words "to property," which were added in the 1965 version. *See supra* notes 7 and 8. Although the amendment as currently in effect includes the words "to property," it makes no reference to "specific" property, or to its being "located" in the United States. The property involved in the *Sabbatino* case itself was not in the United States when the action was brought and, indeed, had never been in the United States; only the bills of lading were here. Thus, unless the words "specific property located in the United States" in §429 are interpreted to include not only the actual tangible property that was confiscated, but documents for property, such as bills of lading, as well, the *Restatement* provision would require application of the act of state doctrine to the facts in *Sabbatino,* the very case the Hickenlooper Amendment was designed to reverse.

[14] *See, e.g.,* Banco Nacional de Cuba v. First Nat'l City Bank, 431 F.2d 394 (2d Cir. 1970), *vacated and remanded,* 400 U.S. 1019, 442 F.2d 530 (2d Cir. 1971), *rev'd,* 406 U.S. 759 (1972); French v. Banco Nacional de Cuba, 23 N.Y.2d 46 (1968); Johansen v. Confederation

the narrow construction adopted by the *Restatement,* there is also legislative history to the contrary.[15]

The broad reassertion of the act of state doctrine in section 428 and the narrow exception provided in section 429 do not reflect that "Congress

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Life Ass'n, 312 F.Supp. 1056 (S.D.N.Y. 1970). For a discussion of the Second Circuit decision, summarizing the legislative history and criticizing the opinion, see Note, 11 VA. J. INT'L L. 406 (1971); Lillich, *International Law,* in *Annual Survey of New York Law,* 22 SYRACUSE L. REV. 263, 269–80 (1970–71). *See also* Note, *A New Approach to the Act of State Doctrine: Turning Exceptions into the Rule,* 8 CORNELL INT'L L.J. 273 (1975). The *French* decision is discussed and criticized in Note, 11 HARV. INT'L L.J. 212 (1970); Note, *Sabbatino Comes Full Circle: A Reconsideration in Light of Recent Decisions,* 4 N.Y.U. J. INT'L L. & POL. 260 (1971). *But see* Comment, *Sabbatino Property: A French Twist,* 57 GEO. L.J. 1299 (1969).

It should be noted, however, that while the Second Circuit construes the exception created by the Hickenlooper Amendment narrowly, it does not give the act of state doctrine the broad application provided by §428. In Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), the court declined to apply the act of state doctrine, stating:

> Act of state analysis depends upon a careful case-by-case analysis of the extent to which the separation of powers concerns on which the doctrine is based are implicated by the action before the court. . . . Here, adjudication of the legality of Nigeria's and Central Bank's challenged conduct does not threaten to embarrass the executive branch in its conduct of United States foreign relations, and hence does not seriously implicate the relevant policy considerations. . . . We are not being asked, as the Court was in *Sabbatino,* to judge a foreign government's conduct under ambiguous principles of international law. These are not cases where the challenged governmental conduct is public rather than commercial in nature, . . . or where its purpose was to serve an integral governmental function. . . . Finally, the executive branch has not stated its views in these cases regarding either the propriety of applying the act of state doctrine . . . or the validity of the very governmental act *sub judice.* . . .

Id. at 316 n.38 (citations omitted). *See also* Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984); Allied Bank Int'l v. Banco Credito Agricola de Cartago, 566 F.Supp. 1440 (S.D.N.Y. 1983); Razoulzadeh v. Associated Press, 574 F.Supp. 854 (S.D.N.Y. 1983).

[15] In response to a question by Congressman Fraser, Cecil J. Olmstead, one of the main proponents of the amendment, stated:

> [I]f there was a violation of a contract between a U.S. investor and a foreign state and no proceeds or goods or commodity from the enterprise came into the United States, there would never be an opportunity for this amendment to work. There would have to be other ways of seeking redress in that situation. Of course this amendment will only operate when some proceeds of the illegal expropriation turn up in the United States.

The Foreign Assistance Act of 1961: Hearings on H.R. 7750 Before the House Comm. on Foreign Affairs, 89th Cong., 1st Sess. 608 (1965) [hereinafter cited as *House Hearings*]. In a written statement submitted to amplify his interpretation of the Hickenlooper Amendment, Olmstead made clear that his view that the amendment would not apply if the property or proceeds thereof could not be found in the United States was based not on an interpretation of the Hickenlooper Amendment itself but on his belief that the doctrine of *sovereign immunity,* as then in effect, would bar the court from exercising jurisdiction. *See House Hearings, supra,* at 1306. Mr. Olmstead's statement and insertions for the record are reprinted in *The Foreign Assistance Program: Hearings Before the Senate Comm. on Foreign Relations,* 89th Cong., 1st Sess. 731–34, 744–46 (1965) [hereinafter cited as *Senate Hearings*]. In a letter to the author, dated Feb. 23, 1984, commenting on an earlier draft of this article, Olmstead stated, "[A]s to the

substantially 'repealed' the decision of the Supreme Court by enacting the 'Second Hickenlooper Amendment,' " as Professor Henkin stated soon after the Hickenlooper Amendment was enacted.[16] Furthermore, in the intervening years, there has been more criticism of the act of state doctrine; the State Department, which had initially urged the rule adopted in *Sabbatino* and opposed the Hickenlooper Amendment, has since then advised the Supreme Court that it would not be opposed to the Court's overruling *Sabbatino;*[17] and four Justices of the Supreme Court have either rejected *Sabbatino* or expressed approval of the "*Bernstein*" exception to the act of state doctrine.[18]

Moreover, even the *Sabbatino* Court did not purport to lay down an all-encompassing rule. There is language in the opinion that application of the act of state doctrine would depend on such factors as the extent of

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discussion in connection with the hearings on the so-called Hickenlooper Amendment, there was never any intention that the exception be limited to the specific property taken in violation of international law."

Questioning another witness before the committee, Congressman Fraser said:

> This gets to the second question, which to my mind is a much more important one. You have assumed throughout the discussion that the only time the *Sabbatino* amendment would have an effect is where a party in this country has acquired some kind of attachment, rights, some kind of jurisdiction in rem that attaches to the property that flows from or is related to the actual taking back in the other country.
>
> I don't read the amendment that way. . . . I read it to mean that if a private party in the United States can acquire jurisdiction in rem against the government of whose acts it complains, then they can go to court seeking to enforce their rights with respect to other property that was confiscated but which has no relationship to property that was attached in order to acquire jurisdiction.
>
> In other words, I don't read this amendment as saying they only can proceed where they actually get their hands on the property that flows from the property confiscated.

House Hearings, supra, at 1029. Congressman Fascell, on the other hand, stated, "It [the amendment] was never intended to apply to any property that doesn't come here." *Id.* at 1027. *See also* the colloquy between Congressman Fraser and Professor Stanley Metzger in *id.* at 1030. Even Senator Hickenlooper's position on this point is not without ambiguity. *Compare* 110 CONG. REC. 19,557 (1964) *with id.* at 18,936. For a discussion of the legislative history, see R. LILLICH, *supra* note 5, at 97–113; Lillich, *supra* note 14, at 269–80; *Sabbatino Comes Full Circle, supra* note 14, at 267–69; Note, 11 HARV. INT'L L.J., *supra* note 14, at 218–24; Note, 11 VA. J. INT'L L., *supra* note 14, at 408–16; *Sabbatino Property, supra* note 14, at 1299–1307; Reeves, *The Sabbatino Case and the Sabbatino Amendment: Comedy—or Tragedy—of Errors,* 20 VAND. L. REV. 429 (1966–67).

A substitute amendment, submitted by the State Department, and explicitly limited to cases in which "title [is] asserted to property (or to the proceeds thereof) located in the United States," was not adopted. *See Senate Hearings, supra,* at 728–29. However, the substitute amendment also required an affirmative determination by the Executive that application of the act of state doctrine would "not be consistent with the foreign policy interests of the United States"; moreover, it was received too late for consideration. *See id.* at 728. Thus, Congress's failure to adopt the administration's proposal is not necessarily indicative of a congressional intent to make the amendment applicable to situations in which the property was not in the United States.

[16] *See supra* quote at note 10.

[17] *See infra* note 44 and accompanying text.

[18] *See infra* notes 104–108 and accompanying text.

codification or consensus regarding the international law in the area and the importance of the issue to United States foreign relations. Thus, the Court stated:

> [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . . It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.[19]

The Court concluded by saying that "rather than laying down or reaffirming an inflexible and all-encompassing rule," it was deciding only that United States courts would not consider the validity of a taking of property by a foreign government "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles."[20]

Considering the separation of powers rationale and the above-quoted qualification of the act of state doctrine, the U.S. Court of Appeals for the Sixth Circuit has held that the act of state doctrine does not apply where the foreign government's act is contrary to a treaty provision;[21] and the Second Circuit has refused to apply the act of state doctrine when adjudication of the legality of the conduct did "not threaten to embarrass the executive branch in its conduct of United States foreign relations," the court was not being asked "to judge a foreign government's conduct under ambiguous principles of international law," the challenged governmental conduct was "commercial in nature" and the executive branch had not "stated its views . . . regarding . . . the propriety of applying the act of state doctrine."[22] The revised *Restatement* contains no such limitations; it does what the Supreme Court refused to do: it lays down "an inflexible and all-encompassing rule."

It is the position of this writer that given the qualifying language in *Sabbatino,* the suggestion by the State Department that *Sabbatino* be overruled and the statement by four Justices currently on the Supreme Court that they would limit or reverse *Sabbatino,* proposed sections 428 and 429 do not properly restate the United States law on the subject.[23]

[19] *Sabbatino,* 376 U.S. at 428. [20] *Id.*

[21] Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984).

[22] Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d at 316 n.38, quoted more fully *supra* in note 14.

[23] Professor Henkin has suggested that the arguments in this paper would more appropriately be directed at the act of state doctrine than at the revised *Restatement* provisions, given the Supreme Court's decision in *Sabbatino.* That, of course, raises the question as to whether the *Restatement* should foreshadow changes in the law or merely state what courts have held in the past. Professor Herbert Wechsler, the eminent director of the Institute for over 20 years, has made it clear that in his view the *Restatement* should be more than a formulation of what the courts have held and has vehemently opposed attempts to limit it to merely stating the established law. *See* Wechsler, *The Course of the Restatements,* 55 A.B.A.J. 147

II. THE ACT OF STATE DOCTRINE

Meaning

The act of state doctrine is not a doctrine of judicial self-restraint or abstention, comparable to the political question doctrine.[24] The language of the Court in *Sabbatino* and of section 428 of the *Restatement* is somewhat misleading in that respect. The Supreme Court in *Sabbatino* stated, "we decide only that the Judicial Branch *will not examine the validity* of a taking of property within its own territory by a foreign sovereign government."[25] The *Restatement* similarly states that U.S. courts "*will refrain from examining the validity* of an act of a foreign state."[26] However, the Court in *Sabbatino* did not dismiss the case, as it does when the case involves a political question. Instead, the Court proceeded to enforce the Cuban decree, notwithstanding that its discriminatory and confiscatory character violated international law and, if enacted by the United States, would be a violation of the due process and taking without just compensation clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[27]

(1969); Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute,* 13 ST. LOUIS U.L.J. 185 (1968); Wechsler, *On Freedom and Restraint in the Restatements,* 43 A.L.I. ANNUAL REPORT 5–9 (1966). He said, "[I]f we ask ourselves what courts will do in fact within an area, can we divorce our answers wholly from our view of *what they ought to do,* given the factors that appropriately influence their judgments, under the prevailing view of the judicial function?" 55 A.B.A.J. at 149 (emphasis added). He suggested as "a working formula" that "we [the Institute] should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs." *Id.* at 150, adding that he meant "the courts of last resort." *Id.* at 149. In a letter to the author, Professor Wechsler observed:

> Institute practice has always viewed the U.S. Supreme Court as a special case . . . and has felt obliged to state Supreme Court doctrine and decisions as they stand, reserving a critique for Comment or Reporters' Notes. Whatever may be thought about the special case, I did not undertake to deal with it in anything I wrote.

I would suggest that even where there is a Supreme Court case in point, if the decision is not recent and has been substantially eroded by the refusal of a majority of the Court to reaffirm the principle in subsequent cases, the black-letter rule should not reassert the principle without qualification. Even viewing the Supreme Court as "a special case," the act of state provisions in §§428 and 429 are unnecessarily rigid, given the limiting language in *Sabbatino* and subsequent Supreme Court decisions, as noted in the introduction and discussed more fully below, and as a number of Institute members pointed out during the discussion of these sections. *See* 60 A.L.I. PROC. 426–27 (Richard B. Lillich), 428 (Fred. L. Morrison), 428–29 (Monroe Leigh), 434–36 (Cecil J. Olmstead), 440–43 (Mark B. Feldman), 447 (Sigmund Timberg), 449–50 (Peter B. Trooboff) (1983). Urging the inclusion of an exception for human rights violations, Frederick A. Ballard stated: "I think you are hesitating because of the policy of The American Law Institute to just state what the law is. But I would remind you that the Institute has frequently, as our Director has put it, caught the movement of the law. . . ." *Id.* at 437. *See also* notes 89 and 117 *infra.*

[24] *See* Baker v. Carr, 369 U.S. 186, 211–12 (1962).

[25] 376 U.S. at 428 (emphasis added).

[26] Tentative Draft No. 4 §428 (emphasis added).

[27] While the U.S. Constitution does not prohibit the taking of private property for a public purpose (*see* Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321 (1984)), it prohibits the

Thus, the effect of the Supreme Court decision in *Sabbatino* and of the *Restatement* provisions is to require U.S. courts to enforce a foreign act of state, even if that act is contrary to international law and to the United States Constitution.[28] "[N]ot only are the courts powerless to question acts of state proscribed by international law but they are likewise powerless to refuse to adjudicate the claim founded upon a foreign law; *they must render judgment and thereby validate the lawless act.*"[29]

As a report on the act of state doctrine by the Committee on International Law of the Association of the Bar of the City of New York emphasized several years prior to the *Sabbatino* decision:

> A refusal of courts to consider foreign acts of State in the light of the law of nations is not, it should be remembered, merely a neutral doctrine of abstention. On the contrary the effect of such a doctrine is to lend the full protection of the United States courts, police and governmental agencies to commercial or property transactions which are contrary to the minimum standards of civilized conduct. . . .[30]

In a statement to the House Foreign Affairs Committee in support of the Hickenlooper Amendment, Myres McDougal, commenting on *Sabbatino,* stated:

> The policies applied by the Court, relating to the appropriate allocation of competences among the different branches of our Government, are, in fact, those which underlie the "political questions" doctrine, but the Court did not apply the test for "political questions" which it had so recently announced in *Baker v. Carr* . . . , and it did not find the issue nonjusticiable, as application of the "political questions" doctrine would have required.

Government from doing so without just compensation. The Fifth Amendment provides, "nor shall private property be taken for public use without just compensation." The Court in *Sabbatino* noted that "the possibility of payment" under the system provided for by the Cuban decree "may well be deemed illusory." 376 U.S. at 402.

Clearly, the U.S. Constitution has no application to the conduct of a foreign government outside the United States. It is not clear, however, that the Constitution should have no application when a U.S. court is asked to enforce a foreign state act in the United States, in Justice White's words, "to validate the lawless act." *See infra* text accompanying note 29. It is at least arguable that constitutional limitations should apply in these circumstances. *See infra* notes 71–74 and accompanying text.

[28] In this respect, the act of state doctrine goes further than the full faith and credit clause, which has been held not to require one state to enforce the judgment of another state that violates the Constitution. *See, e.g.,* Thomson v. Whitman, 85 U.S. (18 Wall.) 457 (1873); William v. North Carolina II, 325 U.S. 226 (1945). *Cf.* Judge Dimock's opinion in Banco Nacional de Cuba v. Sabbatino, 193 F.Supp. 375, 381 (S.D.N.Y. 1961) ("Even if we were to suppose a requirement of international law that a state afford full faith and credit to the acts of another state, such a requirement clearly would not extend to an act of state which was in violation of international law").

[29] 376 U.S. at 439 (White, J., dissenting) (emphasis added).

[30] Committee on International Law, Association of the Bar of the City of New York, A Reconsideration of the Act of State Doctrine in United States Courts 8 (1959). This suggested resolution was adopted with some minor textual changes at the Annual Meeting of the association on May 12, 1959, 1959 Y.B. A.B. CITY N.Y. 276.

> The doctrine of automatic, blanket abstention announced by the Court is clearly a new, and bizarre creation.[31]

Rationale

What is the justification for this bizarre doctrine that requires a United States court to direct a United States citizen to turn over property in the United States to a foreign state, pursuant to an act of that state that violates international law and deprives him of his property precisely because he is a citizen of the United States?[32] Although the Court in *Sabbatino* cited a number of prior decisions as precedent, its holding was clearly not mandated by those decisions. The cases cited by the Court have been discussed extensively[33] and it is not necessary to repeat the discussion here, other than to note that none of these cases required United States courts to act affirmatively to implement a foreign decree that violated international law and would violate the United States Constitution if enacted by the United States.

The Court gave two reasons for a decision it acknowledged was required neither by international law nor by the Constitution:[34] (1) a judicial determination of the validity of a foreign act of state under international law might embarrass the Executive in its conduct of foreign affairs;[35] and (2) since the content of the applicable international law in this area was unsettled, it should not be determined by municipal courts.[36]

Possible Interference in the Executive's Conduct of Foreign Affairs. The argument that a judicial determination of the question would interfere with the Executive's conduct of foreign affairs was also the rationale for the Supreme Court's decision some years earlier, in *Republic of Mexico v. Hofffman,*[37] that courts are bound by the Executive's determination to grant or deny a foreign state's claim of sovereign immunity. In an editorial in the *American Journal of International Law,* Philip Jessup criticized that decision as an abdication of the judicial function.[38] He said, "It is the

[31] *House Hearings, supra* note 15, at 1037 (citation omitted).

[32] Castro's action, nationalizing the property of U.S. citizens in retaliation for the lowering of Cuba's sugar quota by the United States, is by no means an isolated instance of a foreign state's confiscation of a U.S. citizen's property as retaliation against the United States. Muammar Qaddafi, when nationalizing oil holdings of U.S. citizens in Libya, said, "We proclaim loudly that this United States needs to be given a big blow in the Arab area in its cold, insolent face." 13 ILM 767, 770 (1974). For a discussion of the Libyan nationalization, see generally *id.* at 767–82. *See also* testimony of Henry Schuller at the hearings on the "International Rule of Law Act," *infra* note 62, at 55–61, 88–104.

[33] *See, e.g.,* Justice White's dissent in *Sabbatino,* 376 U.S. at 439 *passim;* Reeves, *The Act of State—Foreign Decisions Cited in The Sabbatino Case: A Rebuttal and Memorandum of Law,* 33 FORDHAM L. REV. 599, 618–70 (1964–65); Olmstead, submission in *House Hearings, supra* note 15, at 593–96, and *Senate Hearings, supra* note 15, at 746–49; Olmstead, testimony in *House Hearings, supra* note 15, at 598–600, 1320–24; Henkin, *id.* at 1076–78; Katzenbach, *id.* at 1257–59.

[34] 376 U.S. at 423–24, 427.

[35] *Id.* at 431–33.

[36] *Id.* at 428–30, 434–35.

[37] 324 U.S. 30 (1945).

[38] Jessup, *Has the Supreme Court Abdicated One of its Functions?,* 40 AJIL 168 (1946).

normal process of international affairs to insist that a question of this character must be submitted to the courts and that the diplomatic channel should be utilized only where the courts fail to do justice."[39] The Foreign Sovereign Immunities Act of 1976[40] removed the determination of claims of sovereign immunity from the Executive and vested it in the courts under a restrictive theory of immunity, as set forth in the Act. Numerous cases have been decided by the courts under the Act, without any indication that these decisions have interfered with the Executive's conduct of foreign affairs.[41]

Furthermore, the State Department no longer takes the position it took in *Sabbatino*, that a judicial determination of the legality of a foreign act of state under international law would interfere with the Executive's conduct of foreign affairs. It has, in fact, stated that a refusal to consider the legality of foreign acts may be detrimental to the Executive's conduct of foreign affairs. Thus, in *Banco Nacional de Cuba v. First National City Bank*, the Legal Adviser submitted a letter to the Court stating that judicial determination of the legality of the foreign act of state would not interfere in the Executive's conduct of foreign affairs.[42] In *Alfred Dunhill v. Republic of Cuba*,[43] the Legal Adviser wrote a letter to the Solicitor General, included in the Government's brief, inviting the Court to overrule *Sabbatino*. He stated:

> [A]t least on a case-by-case basis, the trend in Executive Branch pronouncements has been that foreign relations considerations do not require application of the act of state doctrine to bar adjudications under international law.
>
> . . . .
>
> In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts

[39] *Id.* at 169. *Compare* R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER, at xii (1964): "[D]omestic courts must struggle to become their own masters in international law cases. The executive must not be allowed, and must certainly not be invited, to control the outcome of judicial proceedings by alleging the precedence of foreign policy considerations."

[40] The Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891, 28 U.S.C. §§1330, 1332, 1391, 1441, 1602–1611 (1976).

[41] *See, e.g.*, Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); Pfizer Inc. v. Government of India, 434 U.S. 308 (1978); S & S Mach. Co. v. Masinexportimport, 706 F.2d 411 (2d Cir. 1983); United States v. County of Arlington, Va., 702 F.2d 485 (4th Cir. 1983).

[42] *See* letter of John R. Stevenson to the Honorable E. Robert Seaver, Clerk of the Court, United States Supreme Court, Nov. 17, 1970, printed as an appendix to Banco Nacional de Cuba v. First Nat'l City Bank, 442 F.2d 530 (2d Cir. 1971).

[43] 425 U.S. 682 (1976).

> under international law, *we would not anticipate embarrassment to the conduct of the foreign policy of the United States.*[44]

The present Legal Adviser, Davis R. Robinson, quoted this language in a letter written for submission to the Court of Appeals for the Sixth Circuit in *Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethiopia.*[45] Furthermore, in testimony before a subcommittee of the Senate Judiciary Committee, he took a position directly contrary to the Supreme Court's position in *Sabbatino* that a judicial determination of the validity of a foreign act of state under international law might embarrass the Executive in its conduct of foreign affairs. Robinson stated that the "refusal to pass on questions of foreign governmental conduct may actually frustrate important foreign policy objectives."[46]

Adjudication of International Law Questions by U.S. Courts. The other reason given by the Supreme Court for its decision in *Sabbatino* was that United States courts should not decide questions of international law, at least if the relevant international law was controversial.[47] It was this aspect of *Sabbatino* that evoked the sharpest criticism.[48] The proposition that international law is part of U.S. law and must be applied by U.S. courts has its origin in the earliest decisions of the Supreme Court. As the Court stated in the oft-quoted language of *Hilton v. Guyot,* "International law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation . . . , duly submitted to their determination."[49] Nor has application of international law by U.S. courts been limited to those rules of international law that are undisputed. In *The Paquete Habana,*[50] the landmark decision generally cited for the proposition that international law is part of U.S. law, three Justices dissented because they disagreed with the majority's interpretation of the

[44] Letter from Monroe Leigh, the Legal Adviser, Department of State, printed as Appendix 1 to the plurality opinion of the Supreme Court in Alfred Dunhill of London, Inc. v. Republic of Cuba, *id.* at 706, 709, 710–11 (emphasis added).

[45] *See* Contemporary Practice, 77 AJIL 142–43 (1983); Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984).

[46] *See* testimony of Davis R. Robinson in the hearings on the "International Rule of Law Act," *infra* note 62, at 8. He cited the court decisions involving the Libyan nationalization as an example. *Id.*

[47] 376 U.S. at 427–33.

[48] *See* articles cited *supra* note 5; *see also* Olmstead, *House Hearings, supra* note 15, at 576–620, 1305–06, and *Senate Hearings, supra* note 15, at 731–34; Jennings, *House Hearings, supra* note 15, at 586–89, and *Senate Hearings, supra* note 15, at 739–43; Dean, *House Hearings, supra* note 15, at 584–86, and *Senate Hearings, supra* note 15, at 738–39; Stevenson, *House Hearings, supra* note 15, at 581–84, and *Senate Hearings, supra* note 15, at 734–39.

[49] Hilton v. Guyot, 159 U.S. 113, 163 (1895), *quoted in* The Paquete Habana, 175 U.S. 677, 700 (1900). *See also* The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815), in which Chief Justice Marshall stated that "the Court is bound by the law of nations, which is a part of the law of the land."

[50] 175 U.S. 677 (1900).

applicable international law.[51] They did not suggest, however, that international law should not be applied because it was unclear.[52]

Municipal courts in the United States and other countries constantly interpret and apply international law.[53] Since there are few international tribunals and their jurisdiction is very limited, municipal courts play a major role in the interpretation and development of international law.[54] Indeed, this *Restatement* provides in another section that in determining whether a rule has been accepted as international law, "substantial weight is to be accorded [to] judgments of municipal courts."[55]

A rule that would preclude municipal courts from deciding whether acts of other states invoked in litigation before these courts comply with international law would be inimical to the development of international law in two respects: first, it would eliminate a major source for the interpretation, application and development of international law; and second, it would help those states that choose to violate international law to do so. Few states have systems of government under which their own courts would invalidate governmental acts on the ground that they violate international law and there is rarely an international tribunal to which the question could be taken. If municipal courts of third countries enforce acts of foreign states regardless of whether they violate international law, there is, in most instances, no court in which the legality of the states' act can be challenged. As Judge Jennings put it:

> The prime importance of the domestic jurisdiction in international law cases . . . is that it provides the only considerable area of compulsory judicial determination of public international law issues. The sovereign state of course enjoys immunity from jurisdiction, except insofar as it chooses to waive it, in the international sphere, and to an important extent also in domestic courts. But public international law issues increasingly arise in ordinary civil cases between individuals or corporations in which the state is not in any sense a defendant. In this kind of case the International Court has no jurisdiction at all. The domestic court does commonly have jurisdiction; and its exercise of it is backed by the sanction of the state machinery of enforcement. So quite clearly, we have here a

[51] *Id.* at 715–21 (dissenting opinion of Fuller, C.J., in which Harlan, J., and McKenna, J., concurred).

[52] *Id. passim.*

[53] *See, e.g.*, cases cited *supra* note 49; Mosler, *L'Application du droit international public par les tribunaux nationaux*, 91 RECUEIL DES COURS 619 (1957 I); Barbuit's Case, Cases Talb. 280 (1735) ("The law of nations . . . in its fullest extent was and formed part of the law of England . . ."); *see also* Triquet and others v. Bath, 97 Eng. Rep. 936 (K.B. 1764); West Rand Central Gold Mining Co. v. The King, [1905] 2 K.B. 391; The Rapid, 12 U.S. (8 Cranch) 153, 162 (1814); Memorandum, *Senate Hearings, supra* note 15, at 746–49.

[54] *See generally* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW, CASES AND MATERIALS 116–67 (1980); W. BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS 77–91 (3d ed. 1971). *See also* R. FALK, *supra* note 39; McDougal, *Senate Hearings, supra* note 15, at 751–76; Memorandum, *Senate Hearings, supra* note 15, at 746–49.

[55] Tentative Draft No. 1 §103(a) (1980).

> facet of jurisdiction which is of prime importance to international law and international lawyers.[56]

In the editorial criticizing judicial deference to executive determinations of immunity, already referred to, Judge Jessup said:

> Pending the needed fundamental changes in the international legal system which can be made only by multipartite convention, there is more need today than there ever has been before for the coöperation of national courts in contributing to the development of international law. . . . It would be a distinct disservice to the rule of law if it should eventuate that questions of international law should always have to be determined solely by international courts. . . .[57]

He noted, "Chief Justice Marshall pointed out in 1815, that 'the decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.' "[58]

Urging extension of the Hickenlooper Amendment, Professor McDougal stated:

> I am writing to urge that last year's amendment . . . or some equivalent be made permanent legislation, thus reestablishing the application of appropriate international law as the long-term policy for all American courts.
>
> . . . .
>
> . . . [I]n a world without centralized legislative, executive and judicial institutions most of the decisions about the development and application of international law must continue to be made, as during the past several hundred years, by the officials of particular nation-states. Any suggestion that our courts are not competent to continue to participate in the development and application of an international law, whether related to economic affairs or to other affairs, is fundamentally inimical to our own long-term national interests and the comparable interests which we share with other states.[59]

A report by the Committee on International Law of the Association of the Bar of the City of New York, issued several years prior to the Supreme Court decision in *Sabbatino,* states:

> It is the thesis of this report that the role of the act of state doctrine should be more narrowly circumscribed in the United States courts than is presently the case. The courts should not be foreclosed by the rule of judicial abstention from determining the validity under international law of foreign acts of state where the foreign sovereign or his agent is not before the court (or, though before the court, is not entitled to sovereign immunity) and a determination of the validity under international law of the foreign state's act is essential

[56] Jennings, *The Sabbatino Controversy, Senate Hearings, supra* note 15, at 739–40, and *House Hearings, supra* note 15, at 586–87. Jennings has since been appointed to the International Court of Justice.

[57] Jessup, *supra* note 38, at 171–72.

[58] *Id.* at 170.

[59] *Senate Hearings, supra* note 15, at 751–52.

> to the determination of the rights of the parties. However clear the respect of the United States courts should be for the official acts of a foreign state, *their concern for the necessity of maintaining minimum standards of international conduct by the enforcement of international law should be paramount.*[60]

The resolution adopted by the committee urged the Department of State to issue a declaration that state and federal courts should "inquire into the validity under international law of acts of foreign states" when relevant to the determination of controversies before them, unless the Department of State notifies the court that doing so would prejudice the conduct of the foreign relations of the United States.[61]

Testifying on a bill to eliminate the act of state doctrine,[62] Davis R. Robinson, the Legal Adviser, said, "When the courts refuse to decide

[60] Committee on International Law, *supra* note 30, at 4 (emphasis added).

[61] The resolution read:

> Whereas it is important both for the redress of individual wrongs and for the realization of the rule of law in international affairs, that United States courts be encouraged to exercise the judicial function of inquiry into the validity under international law of the acts of foreign States when such inquiry is necessary to determine the rights of litigants and will not prejudice the conduct of the foreign relations of the United States;
>
> NOW THEREFORE, BE IT RESOLVED, that The Association of the Bar of the City of New York is of the view that the *United States Department of State should make a public declaration* to the effect that (1) it is the policy of the United States Government that United States courts consider themselves free from any restraint based on deference to the executive branch of Government and the conduct of this country's foreign relations which prevents judicial inquiry into the validity under international law of the acts of foreign States whenever such inquiry is necessary for the determination of controversies within the jurisdiction of such a court and will neither violate recognized principles of sovereign immunity, to the extent such principles may be applicable, nor prejudice the conduct of the foreign relations of the United States; and (2) if the Department of State, after such notice as the court deems reasonable, does not indicate otherwise in a particular case, the absence of such prejudice shall be presumed.

Id. at 15–16 (emphasis added). The signatories to the report and suggested resolution included John R. Stevenson, subsequently Legal Adviser, Richard N. Gardner, Philip C. Jessup, subsequently a judge on the International Court of Justice, Professor Willis L. M. Reese, and Stephen M. Schwebel, currently a judge on the International Court of Justice. Monroe Leigh, who subsequently served as Legal Adviser, and Richard R. Baxter, who subsequently was appointed to the International Court of Justice, also expressed their opposition to the proposition that municipal courts should not decide questions of international law, as did other academicians and practitioners. *See, e.g.*, Griffin, testimony on the "International Rule of Law Act," *infra* note 62, at 62–75; Jennings, *The Sabbatino Controversy, House Hearings, supra* note 15, at 586–91, and *Senate Hearings, supra* note 15, at 739–44; Lillich, testimony on the "International Rule of Law Act," *infra* note 62, at 124–29; Olmstead, *House Hearings, supra* note 15, at 576, and *Senate Hearings, supra* note 15, at 731; Schuller, testimony on the "International Rule of Law Act," *infra* note 62, at 55–61, 88–104; Committee on International Law, *supra* note 30; Wallace, testimony on the "International Rule of Law Act," *infra* note 62, at 22–30. *But see* Cardozo, *supra* note 6; Henkin, *House Hearings, supra* note 15, at 1060–74; Henkin (both references), *supra* note 6; Rabinowitz, testimony on the "International Rule of Law Act," *infra* note 62, at 104–17.

[62] S. 1434. Designated the "International Rule of Law Act," the bill was introduced by Senators Mathias and Domenici in 1980 and reintroduced in 1982. It provides: "No court

issues of international law properly presented to them, they forego the opportunity to apply international law where it provides an appropriate basis for decision. They also fail to do justice to the parties before them."[63] The roster of those who have argued that U.S. courts have an obligation to determine whether foreign acts of state comply with the requirements of international law includes the present and two former U.S. judges on the International Court of Justice and the present and two recent Legal Advisers.[64]

Even Richard Falk, who argues that concepts of sovereignty and respect for divergent social philosophies of government make it inappropriate for one state to apply its view of international law to the acts of another state,[65] does not advocate that U.S. courts enforce foreign acts of state uncritically. Falk would preclude municipal courts from considering the validity of an act of state under international law only if, in his words, "the subject matter of disputes illustrates a legitimate diversity of values on the part of two national societies."[66] Where, however, the foreign act violates a generally accepted principle of international law, "then domestic courts fulfill their role by refusing to further the policy of the foreign legal system."[67] Although he criticized the district court's opinion in *Sabbatino,* he agreed that its conclusion that the Cuban decree was invalid was correct insofar as it was based on the ground that the decree was discriminatory. He stated:

> The decree was discriminatory, as it expropriated only the property of American nationals. Here, respectable international authority supports the conclusion of invalidity drawn by Judge Dimock. In fact, if the discriminatory facts were used to classify the case in the first instance, then the expropriation no longer falls within the domain of legitimate diversity. This means that objections to substantive review disappear, and an American domestic court would be entitled to refuse the plaintiff recovery. That is, discriminatory economic legislation violates universal standards.[68]

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in the United States shall decline on the grounds of the federal act of state doctrine to make a determination on the merits in any case in which the act of state is contrary to international law." *The International Rule of Law Act: Hearings on S. 1434 Before the Subcomm. on Criminal Law of the Senate Judiciary Comm.,* 97th Cong., 1st Sess. (1981). Although extensive hearings were held before the Senate Judiciary Committee, no action has yet been taken.

[63] Testimony of Davis R. Robinson on the "International Rule of Law Act," *supra* note 62, at 8.

[64] Judges Jessup, Baxter and Schwebel and Legal Advisers Stevenson, Leigh and Robinson. *See supra* note 61. Sir Robert Jennings, the British judge on the International Court, has also argued that municipal courts have an obligation to decide questions of international law. *See supra* text accompanying note 56. Justice Powell has stated, "Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law." First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 774 (1972).

[65] Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino,* 16 RUTGERS L. REV. 1, 2 (1961).

[66] *Id.* at 8.

[67] *Id.*

[68] *Id.* at 38.

Moreover, he declared that "it is generally agreed and appears to be good policy to allow a domestic court to refuse to enforce foreign confiscatory legislation."[69] As an illustration of another situation in which it was appropriate for a municipal court to determine whether the foreign state's act violated international law, he cited the *Bernstein* case, not on the ground that the Executive had advised the court that such a determination would not interfere in the conduct of foreign affairs, but because the act of state involved was racially discriminatory.[70] What Falk is advocating, then, is not that the judiciary be denied the power to determine the validity of acts of state under international law, but that it not apply *international law as interpreted by the West* to issues on which the Soviet Union or the Third World takes a different position. Thus, even Falk does not urge the absolute bar to municipal courts' consideration of the validity of acts of state under international law that proposed section 428 of the revised *Restatement* adopts.

Application of the Due Process and Taking without Just Compensation Clauses. Where the judgment of a U.S. court enforces a foreign confiscatory decree, application of the act of state doctrine may also raise questions under the due process and "taking without just compensation" clauses of the Fifth and Fourteenth Amendments. There are two analytically distinct lines of argument. First, in *Shelley v. Kraemer,*[71] the Court held that state court enforcement of private action constitutes state action. The judiciary is a coordinate branch of the Government and its action, as that of the legislature, constitutes state action. Thus, a judgment giving effect to a private racially restrictive covenant violates the constitutional proscription on discrimination by the state. The Court stated, inter alia:

> That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.
>
> . . . .
>
> We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. . . .
>
> These are not cases . . . in which the States have merely abstained from action. . . .[72]

Clearly, if Congress enacted a law nationalizing private property without providing compensation, it would violate the due process and "taking without just compensation" clauses of the Fifth and Fourteenth Amendments.[73] Applying the reasoning of *Shelley v. Kraemer,* it is arguable that when the federal courts enforce a foreign decree, such enforcement

[69] *Id.*

[70] *Id.* at 21–23, 31.

[71] 334 U.S. 1 (1948).

[72] *Id.* at 14, 19.

[73] *See, e.g.,* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897); Thompson v. Consolidated Gas Corp., 300 U.S. 55 (1937) (invalidating an uncompensated taking); Berman v. Parker, 348 U.S. 26 (1954); Kirby Forest Indus. v. United States, 104 S.Ct. 2187 (1984).

renders it governmental action, and if that decree nationalizes property without just compensation, it constitutes "state" action by the U.S. Government in violation of the Constitution.[74]

Second, and quite apart from whether U.S. court enforcement of a foreign confiscatory decree is considered "state" action, it is arguable that since the purpose of the act of state doctrine is to further the foreign policy interests of the United States, its application in situations where an individual is compelled to relinquish his private property towards that end, without compensation, violates the "taking without just compensation" clause, particularly where the lawful owner succeeds in obtaining possession of the illegally confiscated property (or other property belonging to the government that has illegally confiscated his property) and he is compelled by a judgment of a U.S. court to return it. It is generally accepted that, in the conduct of foreign affairs, the President may settle or even relinquish claims of U.S. citizens against foreign countries,[75] the French Spoliation Claims being a famous example of such action.[76] And, as Professor Henkin has stated, "No one has successfully argued in the Supreme Court that in purporting to dispose of private claims . . . the United States deprived the original claimants of property . . . or appropriated their claims for a public purpose and was obligated to pay them just compensation for any loss."[77] Nevertheless, it is by no means settled that the Government's relinquishment of private claims to further national interests, without providing compensation, does not violate the due process and "taking without just compensation" clauses of the Fifth Amendment.

In *Dames & Moore v. Regan*,[78] the Court, sustaining the President's action, stated, "Though we conclude that the President has settled

[74] While *Shelley v. Kraemer* involved racial discrimination and the equal protection clause, and may therefore be *sui generis*, its rationale would apply equally in this context. Moreover, the fear that a broad reading of *Shelley* would obliterate the distinction between private and governmental action and would, for example, bar the enforcement of state trespass laws against persons excluded from private property on racial grounds (*see* G. GUNTHER, CONSTITUTIONAL LAW, CASES AND MATERIALS 1002–07 (10th ed. 1980)) has no application in this context.

[75] *See* Dames & Moore v. Regan, 453 U.S. 654, 675–88 (1981); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 262–63 (1972); Shanghai Power Co. v. United States, 4 Cl. Ct. 237 (1983). However, the Supreme Court was careful to limit its holding narrowly even on this point. It said:

> We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

453 U.S. at 688.

[76] The United States relinquished the claims of U.S. citizens against France in exchange for France's forgiveness of a breach of a treaty obligation by the United States. For a discussion of the case, see L. HENKIN, *supra* note 75, at 263.

[77] *Id.* (footnotes omitted).

[78] 453 U.S. 654 (1981).

petitioner's claims against Iran, we do not suggest that the settlement has terminated petitioner's possible taking claim against the United States."[79] Justice Powell, concurring in part and dissenting in part, went further. He said, "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts."[80] While the act of state doctrine does not involve the Government's relinquishing or settling private claims, it does deprive the claimant of a remedy in U.S. courts in order to further foreign policy goals; in cases where the owner of the confiscated property succeeds in regaining the property (or compensation for it), as was the case in *Sabbatino,* and the court forces him to return it to the foreign state, it is a "taking" in the most literal sense of that word. Moreover, the agreement involved in *Dames & Moore* also deprived claimants of their remedy in U.S. courts, rather than settling or relinquishing their claims. Indeed, under the agreement involved in that case, the claimants were provided with an alternate forum in which to pursue their claims. In most instances in which the act of state doctrine is applied to deprive claimants of a remedy (and sometimes the property itself), no alternate forum is available.

III. Implementing Another State's Illegal Act

Professor Henkin has argued in defense of *Sabbatino,* "[I]nternational law does not tell the United States how to react to Cuban acts that violate international law. The United States is free to condone, acquiesce in, implement, or even applaud them."[81] While I hesitate to disagree with Henkin, I would suggest that international law does not—and certainly should not—permit one state to implement another state's laws that violate international law; that a state's use of its courts and its police to enforce another state's decree that violates international law is itself a violation of international law.

It is a general principle of law, recognized in most legal systems, that one who aids and abets another in violating the law is himself guilty of a violation.[82] Article 27 of the International Law Commission's draft articles on state responsibility provides: "Aid or assistance by a State to another State, if . . . rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful

[79] *Id.* at 688–89 n.14.

[80] *Id.* at 691 (footnote omitted).

[81] Henkin, *supra* note 9, at 181.

[82] This principle is codified in the criminal law of many states. *See, e.g.,* Colombia Criminal Code (1967), Arts. 196–202; French Criminal Code (1960), Arts. 97, 99, 103–107; German Criminal Code (1961), §§47–49a; Greek Penal Code (1973), Arts. 45–49; Italian Penal Code (1978), Arts. 110–119; Criminal Code of Kenya (1967), §§20–22; Korean Penal Code (1960), Arts. 25, 28, 30–34; Criminal Code of the People's Republic of China (1982), Arts. 19–20, 22–26; Criminal Code of the RSFSR (1972), Arts. 15, 17–19; Turkish Penal Code (1965), Arts. 64–67. *See* American Series of Foreign Penal Codes (1960–).

act. . . ."[83] As Professor Mann argued, "[I]f a State commits an international wrong and the court of another State, the forum, refuses recognition to that wrong, the latter does what international law expects it to do and what it must do *in order not to become an accessory to the delinquency.*"[84]

In the United States, judicial enforcement of a private act renders the conduct "state action," and if discriminatory, a violation of the Constitution. Thus, as noted above, the U.S. Supreme Court held that when a state's court enforces a private discriminatory contract, the state is itself guilty of discrimination.[85] Similarly, the Court has stated that by admitting illegally obtained evidence, the courts would be participating in the illegality.[86]

Even Henkin apparently would not extend his argument that a state "is free to condone, acquiesce in, implement, or even applaud"[87] another state's law to violations of the international law of human rights. The Reporters' Notes to section 428 state that "[a] claim arising out of an alleged violation of human rights—for instance a claim by the victim of torture or genocide—would . . . probably not be defeated by the act of state defense since the accepted international law of human rights contem-

[83] Draft articles on state responsibility, Art. 27, [1978] 2 Y.B. INT'L L. COMM'N, pt. 2, at 78, 99, UN Doc. A/CN.4/SER.A/1978/Add.1/pt.2. Indeed, it is arguable that even under the revised *Restatement* a state is not free to implement an illegal act of another state. Section 711, State Responsibility for Injury to Nationals of Other States, provides:

> A state is responsible to another state for injury to a national of the latter state resulting from an official act or omission that violates
>
> (a) an internationally recognized human right;
> (b) any other personal right or interest of individuals of foreign nationality that is protected by international law; or
> (c) rights to property or other economic interests of persons, natural or juridical, of foreign nationality that are protected by international law, as provided in §712.

Tentative Draft No. 3 (1982).

[84] Mann, *International Delinquencies before Municipal Courts,* 70 LAW Q. REV. 181, 198 (1954) (emphasis added). *Cf.* Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine,* 23 VA. J. INT'L L. 191, 220–32 (1982–83) (arguing that foreign state officials who engage in terrorist acts in violation of international law are not entitled to immunity from prosecution in the United States). He states:

> If, for example, a foreign government or official violated international law and one of our courts recognized a claim to immunity, the court's decision would have the undesirable effect of supporting illegality. The judiciary's commitment to law would be compromised and its decision to tolerate illegality would be functionally the same as though the court had been an accomplice of the offending government.

Id. at 227.

[85] Shelley v. Kraemer, 334 U.S. 1 (1948). *See supra* text accompanying notes 71–74.

[86] *See, e.g.,* McNabb v. United States, 318 U.S. 332, 345 (1943) ("a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without *making the courts themselves accomplices in willful disobedience of law*") (emphasis added); Terry v. Ohio, 392 U.S. 1, 12–13 (1968) ("The rule also serves another vital function—the imperative of judicial integrity") (citing Elkins v. United States, 364 U.S. 206, 222 (1960)).

[87] *See supra* text at note 81.

plates external scrutiny of such acts."[88] While the reporters are to be commended for at least including a caveat on human rights, this caveat is problematic in several respects. First, it is only a sentence in the Reporters' Notes, not a qualification of the black-letter rule.[89] Second, even this sentence in the Reporters' Notes does not categorically reject application of the act of state doctrine to human rights violations. It states only that a claim arising out of such violations would "*probably* not be defeated by the act of state defense."[90] Third, it gives as the reason for the distinction between human rights and other rules of international law that international law "contemplates external scrutiny of such acts."[91] Clearly, international law also contemplates external scrutiny of other acts that violate international law.[92] Indeed, it is only relatively recently that the proposition that the protection of individual rights is a legitimate subject of international law has gained acceptance.[93] International scrutiny of a state's confiscation of property belonging to aliens is far older.[94]

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[88] Tentative Draft No. 4 §428 Reporters' Note 4.

[89] Several members of the Institute urged qualification of the black-letter rule to indicate that the act of state doctrine does not apply to human rights violations. *See, e.g.*, comments by Sigmund Timberg, 60 A.L.I. PROC. 423 (1983), and Richard B. Lillich, *id.* at 426–27. *See generally id.* at 423–30, 437–39, 447–48. Finally, Bennett Boskey suggested as a compromise that the sentence concerning human rights quoted above (*see* text at note 88 *supra*) be moved from the Reporters' Notes to the Comment and Professor Henkin agreed to do so. *Id.* at 452–55.

[90] Tentative Draft No. 4 §428 Reporters' Note 4 (emphasis added). While the court in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), did not rule on the applicability of the act of state doctrine since the defense had not been raised below, it nevertheless noted "in passing" its doubt as to "whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state." *Id.* at 889. Given the tenor of the opinion and the extensive discussion of human rights under international law, it is probable that had the court believed it to be so, it would have also "noted in passing" that the act of state doctrine does not apply to human rights violations.

[91] Tentative Draft No. 4 §428 Reporters' Note 4.

[92] *E.g.*, treaty violations, *see* Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 28 UST 1977, TIAS No. 8532 (1977); treatment of aliens, *see* authorities cited *infra* note 94.

[93] *Compare* 1 L. OPPENHEIM, INTERNATIONAL LAW (1912), "States only and exclusively are subjects of the Law of Nations" *with* Lauterpacht's edition of 1 OPPENHEIM (1955), that one can "no longer countenance the view that, as a matter of positive law, States are the only subjects of International Law. . . . [T]here must be an increasing disposition to treat individuals, within a limited sphere, as subjects of International Law," *quoted in* L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1, 6 (1973). *See also* Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 19 (1982). "[A] State's own citizens were almost completely at its mercy, and international law had little to say about mistreatment of persons by their own government."

[94] *See, e.g.*, West Rand Central Gold Mining Co. v. The Kings, [1905] 2 K.B. 391; Chorzów Factory case, 1928 PCIJ, ser. A, No. 17, 1 WORLD CT. REP. 646; 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655–65 (1942); U.S. Dep't of State, 19 Press Releases 50, 136, 139, 165 (1938) (United States-Mexico discussions on expropriations); *see generally* 2 M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 900–29, 1385–1413 (1937). *See also* Comment,

IV. THE HOUSE OF LORDS DECISION IN *BUTTES GAS AND OIL CO. v. HAMMER*

Much has been written about the extent to which decisions in other states are consistent with or inconsistent with the position taken by the U.S. Supreme Court in *Sabbatino.*[95] I will not engage in an analysis of the foreign cases here, other than to note that in none of those cases has a court of one state required a citizen of that state to turn over property in his possession to the government of another state, pursuant to an act of the latter state that deprived him of that property as retaliation against his government in violation of international law. I do, however, wish to discuss the decision of the House of Lords in *Buttes Gas & Oil Co. v. Hammer,*[96] since it is cited in the Reporters' Notes to the *Restatement* as a basis for the proposition that the House of Lords decided "to adopt the American view of the act of state doctrine."[97] This, I believe, is not entirely correct.

While the *Buttes* opinion does rely on act of state and cites the Supreme Court decision in *Sabbatino,* the case differs from *Sabbatino* and section 428 of the *Restatement* in two significant respects. First, the act in question was not a discriminatory confiscation of property of a British citizen, intended as an act of retaliation against his Government. It was an agreement between Iran and two emirates, "adjacent independent sovereign states in the Arabian Gulf, whose foreign relations were controlled by the United Kingdom government under treaty,"[98] entered into with the approval of Great Britain, settling a dispute among them over territorial sea rights off their respective coasts. United States courts have long deferred to the Executive in matters involving disputed claims of sovereignty over territory, quite apart from the act of state doctrine. In *Williams v. Suffolk Insurance Co.,*[99] for example, decided in 1839, the Supreme Court held that the plaintiff was entitled to insurance compensation for its ship seized by Argentina off the Falkland Islands, even though the Government

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The Act of State Doctrine—Its Relation to Private and Public International Law, 62 COLUM. L. REV. 1278, 1297–1302 (1962). For international arbitration awards regarding international scrutiny of confiscation of alien property, see, e.g., Marguerite de Joly de Sabla (U.S. v. Pan.), American and Panamanian General Claims Arbitration 432, 447, 6 R. Int'l Arb. Awards 358, 366 (1933) ("acts of a government in depriving an alien of his property without compensation impose international responsibility"); *accord* Norwegian Shipowners' Claims (Nor. v. U.S.), Hague Ct. Rep. 2d (Scott) 36, 69, 1 R. Int'l Arb. Awards 307, 334 (Perm. Ct. Arb. 1922).

[95] For the position that other states do not have a similar rule, see Justice White's dissent in *Sabbatino,* 376 U.S. at 439–41, 446; the testimony of Cecil Olmstead in the hearings on the Hickenlooper Amendment, *Senate Hearings, supra* note 15, at 743–44, 746–49, and *House Hearings, supra* note 15, at 590–91, 593–96. For the position that other states do have a similar rule, see Reeves, *supra* note 15, at 541–63; Reeves, *supra* note 33.

[96] [1981] 3 All E.R. 616, [1981] 3 W.L.R. 787. For a discussion of the act of state doctrine in England, criticizing its extension in *Buttes,* see Jones, *Act of Foreign State in English Law: The Ghost Goes East,* 22 VA. J. INT'L L. 433 (1982).

[97] Tentative Draft No. 4 §428 Reporters' Note 11.

[98] *Buttes,* [1981] 3 All E.R. at 616.

[99] 38 U.S. (13 Pet.) 415 (1839).

of Argentina had warned that it would seize ships entering without prior authorization. The Court based its ruling on the ground that the Executive had recognized British, not Argentinian, claims to sovereignty over the Falkland Islands. More recently, the Court of Appeals for the Fifth Circuit, dismissing an action for conversion arising out of the same controversy as *Buttes*, stated: "The issue of sovereignty over disputed territory is a political question reserved to the executive branch."[100]

Second, the House of Lords characterized the act of state doctrine as one of "judicial restraint or abstention,"[101] and dismissed not only Occidental's counterclaim, which challenged the validity of the foreign act of state, but also Buttes's initial action for slander, which denied that the act violated international law. Lord Wilberforce stated, "To allow Buttes to proceed but to deny Occidental the opportunity to justify, would seem unjust. . . ."[102] Thus, although the Court did not adjudicate the validity of the act of another sovereign, it also did not permit a party to rely upon the validity of the act to secure relief from the Court.[103] In *Sabbatino,* by contrast, the Court enforced the illegal Cuban action. For *Buttes* to reach the same result as *Sabbatino,* the House of Lords would have had to render judgment for Buttes in the slander action. This the House of Lords expressly refused to do.

V. THE POSITION OF THE SUPREME COURT SINCE *SABBATINO*

While the Supreme Court has not overruled *Sabbatino,* four of the Justices currently on the Court have either explicitly rejected it or adopted the *Bernstein* exception.[104] Justice White, of course, rejected the Court's position in *Sabbatino* in his dissenting opinion in that case.[105] Justice Powell, concurring in *First National City Bank,* stated, "I believe that the broad holding of *Sabbatino* was not compelled by the principles, as expressed

[100] Occidental of Umm al Qaywayn v. A Certain Cargo, 577 F.2d 1196, 1204 (5th Cir. 1978), *cert. denied,* 442 U.S. 928 (1979). A letter from the Legal Adviser, included in the Government's amicus curiae brief, stated, in part:

> It is our view that it would be contrary to the foreign relations interests of the United States if our domestic courts were to adjudicate boundary controversies between third countries and in particular that controversy involved here.
>
> . . . .
>
> *We do not believe that this judicial self-restraint should turn on . . . the so-called Act of State doctrine.* . . . It rather follows from the general notion that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties.

577 F.2d at 1204 n.13. For a discussion of that case, see Insley & Woolridge, *The Buttes Case: The Final Chapter in the Litigation,* 32 INT'L & COMP. L.Q. 62 (1983).

[101] [1981] 3 All E.R. at 630. A British commentator stated that "Lord Wilberforce was invoking and applying a notion of non-justiciability akin to the U.S. political question doctrine." Jones, *supra* note 96, at 466. *Compare Occidental of Umm al Qaywayn,* 577 F.2d 1196 (5th Cir. 1978).

[102] [1981] 3 All E.R. at 633.

[103] *Id.*

[104] Chief Justice Burger and Justices White, Rehnquist and Powell.

[105] 376 U.S. at 439–72.

therein, which underlie the act of state doctrine. . . . Had I been a member of the *Sabbatino* Court, I probably would have joined the dissenting opinion of MR. JUSTICE WHITE."[106] Echoing the argument of Judge Jessup that judicial deference to the Executive constitutes an abdication of the judicial function, Justice Powell said:

> I do not agree, however, that balancing the functions of the judiciary and those of the political branches compels the judiciary to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law. Such a result would be an abdication of the judiciary's responsibility to persons who seek to resolve their grievances by the judicial process.
>
> Nor do I think the doctrine of separation of powers dictates such an abdication. . . . Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law.[107]

Justice Rehnquist, in an opinion joined in by Chief Justice Burger and Justice White, delivered the judgment of the Court. He wrote:

> We conclude that where the Executive Branch . . . expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called *Bernstein* exception to the act of state doctrine.[108]

Thus, the rule proposed in sections 428 and 429 of the *Restatement* ignores the expressly stated position of four Justices now on the Supreme Court. As Justice Rehnquist stated in another context, "While not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue."[109]

VI. CONCLUSION

In sum, given the storm of protest that *Sabbatino* evoked from the academic community and the practicing bar,[110] the swift reversal of its specific holding by Congress in the Hickenlooper Amendment,[111] the suggestion in the Government's brief in *Dunhill* that *Sabbatino* be overruled,[112] the explicit rejection of *Sabbatino* by four of the Justices now sitting on the Supreme Court[113] and the testimony by the present Legal Adviser that the refusal to pass on foreign governmental conduct may actually frustrate important foreign policy objectives,[114] I think sections 428 and 429 of the *Restatement* do not accurately reflect the law as it is

[106] First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 774 (1972).
[107] *Id.* at 774–75.
[108] *Id.* at 768.
[109] Texas v. Brown, 103 S.Ct. 1535, 1540 (1983).
[110] *See supra* notes 5 and 48 and accompanying text.
[111] *See supra* notes 7 and 8.
[112] *See supra* note 44 and accompanying text.
[113] *See supra* text at notes 104–108.
[114] *See supra* quote at note 46.

evolving on this subject.[115] For the reasons stated above, I believe it would not be inappropriate for the *Restatement* to adopt a position (similar to that urged by the Association of the Bar of the City of New York[116]) that when a judicial decision of the issue is not inconsistent with the political question doctrine, a court should not decline to determine the validity under international law of an act of state invoked by one of the parties in litigation before it,[117] at least if the Executive gives no indication that such a determination would be detrimental to the conduct of foreign affairs.[118] The application of the political question doctrine to those cases to which it is applicable under the criteria set forth in *Baker v. Carr,*[119] together with a provision that would preclude or render highly unlikely judicial consideration of the foreign acts' compliance with international law when the Executive advises the court that its determination of that question would be harmful to U.S. foreign relations, should suffice to safeguard the primacy of the Executive in the conduct of foreign affairs.

[115] Following statements by several members of the Institute, urging greater flexibility, Professor Henkin agreed to insert the word "generally" or "ordinarily" in §428 and to modify the comments somewhat. Even as modified, the proposed provision would not take sufficient cognizance of the caveats in *Sabbatino* and of the subsequent developments. As Mark Feldman stated:

> [S]ince the *Sabbatino* decision . . . there has not been any decision of the Supreme Court . . . and there has not been any position by the United States Congress or by the Executive Branch supportive of the act of state doctrine in the expropriation context. . . . [I]n every case the Court has put together a majority against the application of the act of state doctrine.

60 A.L.I. PROC. 440–41 (1983). For a discussion of the role of the *Restatement,* see *supra* note 23.

[116] For the text of the proposed resolution, see *supra* note 61.

[117] Whether U.S. antitrust laws or foreign laws should apply to conduct abroad that has an effect on trade in the United States involves complex and controversial questions of law and policy beyond the scope of this article. For the approach suggested by the *Restatement,* see Tentative Draft No. 2 §§403, 415. *See also* Tentative Draft No. 3 §419. For a summary of the U.S. cases on point, see §415 Reporters' Note 2. It should be noted, however, that a rejection of the act of state doctrine would not necessarily deprive those who engage in conduct abroad that is either permitted or required by the foreign law but a violation of U.S. law of the protection of the foreign law, which is now sometimes invoked under the act of state doctrine. The act of state doctrine as applied in *Sabbatino* and as set forth in §428 requires U.S. courts to enforce the foreign act in those cases to which it applies *without considering its validity under international law.* Rejection of this doctrine would permit the courts to consider the validity of the foreign act under international law. But if the foreign act does not violate international law, it would still be applied to those cases to which it is otherwise applicable. Since both the U.S. laws that prohibit restraint of trade and the laws of other countries that permit or in some instances require conduct that results in limiting competition are valid under international law, adoption of the approach suggested by the New York City Bar Association (*see supra* notes 60–61 and accompanying text) or by the Mathias bill (*see supra* note 62) would not preclude application of the foreign law.

[118] Whether the courts should be foreclosed from making such a determination by an executive decision that a judicial determination would be detrimental to U.S. foreign relations raises complex questions concerning the appropriate role of the courts in our constitutional system. Judge Jessup and Justice Powell have taken the position that even in those circumstances, automatic deference by the courts to the Executive is an abdication of the judicial function. *See supra* notes 38 and 107 and accompanying text.

[119] 369 U.S. 186 (1962). *See also* Occidental of Umm al Qaywayn v. A Certain Cargo, 577 F.2d 1196 (5th Cir. 1978), *cert. denied,* 442 U.S. 928 (1979).