ments in favor of adopting the United Nations' terminology will seem impelling to many because it permits a fresh start unencumbered by such political overtones as have come to be associated with the words "peaceful co-existence" in recent years, and because it permits precise correlation between the work of the Association and the diplomats of the United Nations who seem, in spite of their criticism, to have drawn upon the Association in the past for ideas.

JOHN N. HAZARD

THE SABBATINO CASE—THREE STEPS FORWARD AND TWO STEPS BACK

The July 6, 1962, decision of the United States Court of Appeals for the Second Circuit in *Banco Nacional de Cuba* v. *Sabbatino*[1] reached the correct result in holding the Cuban Government's title to sugar, which it had expropriated while in Cuba, was invalid because the expropriation decree violated international law. However, from the standpoint of expanding the rôle of our courts in ascertaining and administering international law "as often as questions of right depending upon it are duly presented for their determination" (*Paquete Habana,* 175 U. S. 677, 700), the court's opinion was disappointing. The court took three steps forward by (1) its willingness to review the international law validity of the Cuban expropriation decree; (2) its holding that the decree was in violation of international law, and (3) its further holding that this violation of international law invalidated the expropriating government's title.

Unfortunately, these steps forward were accompanied by two, in the writer's opinion, unnecessary steps backward: (1) The court expressly limited its willingness to review the international validity of a foreign government's acts to a case "where the State Department has expressed a lack of concern as to the outcome of the litigation" and "where an agency of the expropriating country instead of some third party is the litigant relying upon the expropriation for its title." (2) It cast doubt on the established principle of international law that a taking of an alien's property without provision for adequate compensation is, in and of itself, a violation of international law, without regard to whether or not the taking is also discriminatory or retaliatory in nature.

Act of State Doctrine

The doctrine, asserted by the Cuban Government in defense of its title, that acts of a foreign sovereign with respect to persons or property within such sovereign's territory may not be reviewed in the courts of the United States, should not apply where such acts are alleged to violate international law. The act of state doctrine is not a rule of public international law, but rather a doctrine that, if applied to acts violating international law,

a new committee to examine and report on two topics: (1) the legal aspects of the emergence of new states into independence, and (2) the content of the legal rule of non-intervention in the internal affairs of other states.

[1] Reported in 56 A.J.I.L. 1085 (1962).

would undermine its authority and afford such acts the full protection of our courts and police forces.

Judicial reluctance to interfere with the Executive Branch's prerogatives in the field of foreign policy under our Constitutional separation of powers does not require, and the court's decision explicitly recognizes that it does not require, total judicial abstention in all cases from the review of foreign sovereign acts of state. Neither does it require, as the court's opinion seemed to imply, a specific State Department waiver of the doctrine in each individual case.

Where the act of state is alleged to violate international law and not just the municipal law of the acting state or United States public policy, adequate notice to the State Department and appropriate consideration of any affirmative State Department request for judicial abstention are all that respect for the Executive Branch would seem to require. With the act of state doctrine so restricted, the general presumption would be in favor of, rather than against, the courts' discharging their fundamental responsibility of deciding cases, including cases involving international law. Moreover, the State Department would be spared the embarrassment of affirmatively authorizing review of a foreign sovereign's acts in a specific case. Any complaint by the foreign sovereign that United States courts have misapplied international law could be met by the United States State Department agreeing to submit the question of "denial of justice" to an appropriate international tribunal (or, in the case of another country which has accepted the International Court's compulsory jurisdiction, by merely refraining from invoking the Connally or "self-judging" reservation to the United States' acceptance).

The actual State Department letters involved in the *Sabbatino* case indicate a State Department position much closer to that urged here than that suggested by the court's apparent interpretation of those letters as constituting an affirmative expression of "lack of concern as to the outcome of the litigation." The extracts from these letters quoted in the opinion read as follows:

> The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalization by Secretary Herter. *Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine.* Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction. [Emphasis added]
>
> . . . . . .
>
> I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts.

The court called specific attention to the fact that it was by-passing the act of state doctrine in a case involving the foreign state itself rather than

a third party, and hence the problem of preserving the security of titles to property subject to international trade was not presented. It is to be hoped that this specific reference was in no sense intended as an indication that the result might be different if a third-party purchaser for value were before the court. For however important the security of individual commercial transactions may be, of far greater concern is the maintenance of those minimum standards of civilized conduct on which the general security of all such transactions ultimately rests.

Uncompensated Taking as Violation of International Law

The court concluded that the expropriation decree of the Cuban Government provided an "illusory compensation" in worthless Cuban bonds. However, after a review of the relevant authorities relating to the question of whether a failure to provide adequate compensation is a violation of international law, the court "declined at this time to attempt a resolution of that difficult question," resting its holding instead on the fact that, in addition to failing to provide adequate compensation, the Cuban decree also involved a retaliatory purpose and discrimination against United States nationals.

By reviewing the relevant authorities in its opinion and, in effect, concluding (despite the fact that all of the decisions of international tribunals and most of the writers cited upheld the principle of adequate compensation, as do the United States Government and the draft *Restatement of the Foreign Relations Law of the United States*) that the question was a difficult one, the court tends to suggest the uncertainty of international law in an area of fundamental importance to private international investment abroad.

Moreover, the court's references to the views of "some writers . . . that the payment of adequate compensation is not required by international law," and to the fact that "it is commonplace in many parts of the world for a country not to pay for what it takes," may be subject to misconstruction. They might be taken to indicate the importance which United States courts, in ascertaining international law, would attribute to the views of a minority of writers (some of whom at least, are not disinterested) and to the mere practice (as distinguished from the custom) of states, a practice which, though frequently protested, has only rarely, because of the inadequacies of international remedies, been tested in court.

While it is understandable that a United States court would be reluctant to decide a question which confiscating governments have so frequently in recent years avoided submitting to international tribunals, it is regrettable that the court did not either go into the question fully and reach a definite conclusion or rest on its decision that a determination of this question was unnecessary, without at the same time casting doubt on the international law principle involved.

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