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Article 10

# International Law: Effect Given by the United States Courts to Expropriation Decrees of Foreign Governments when in Violation of International Law

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If the borrower is unable or unwilling to undertake a 2% "origination" charge, or a 1% prepayment penalty, the amount of financing procurable may be similarly reduced. Thus, the first question is whether the inherent "definiteness" of the statement of contingency is materially improved, simply by a recitation of the amount to be borrowed. In short, will it not be necessary to reach the good faith question "to determine the meaning of the ambiguous phrase" even though it fixes the basic loan amount, if, like *Kovarik,* it omits other essential details?

Regardless of the force of these considerations, it will be readily conceded that where circumstances permit, the safe legal course is to spell out each of the criteria of acceptability of financing. But is this solution generally possible or practical? In most instances, the details of financing are inherently ambiguous and tentative when the conditional contract is executed, because neither the buyer, seller, nor prospective third party lender has any definite idea as to what the ultimate financing terms will (or can) be. This is the precise reason for inserting a subject to financing clause. To the extent that detail is specifically stated it ordinarily amounts to no more than a general stipulation of the bounds of "reasonable diligence," or "reasonable acceptability," or "good faith" effort toward determining a future fact.

Thus the court is faced with the dilemma of either strictly interpreting such contracts (and therefore often holding them void, as did the principal case), or allowing the buyer a broad discretion in his selection of terms, and running the risk that such discretion may, in certain cases, be almost unlimited. From the decision of the principal case, it would not appear that any broadly-applicable choice has been made between the alternatives. The dilemma remains largely unresolved. It would now appear that only a total absence of specification of detail, either in the contract or in the surrounding circumstances, produces no contract.

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**International Law: Effect Given by the United States Courts to Expropriation Decrees of Foreign Governments when in Violation of International Law**—One of the defendants contracted to buy sugar from a subsidiary of an American-owned Cuban corporation, the latter to supply the cargo on vessels in Cuba, payment in New York on delivery. On the same day the sugar was to be loaded on board, a decree was issued by the Cuban government, nationalizing a number of Cuban corporations, including the vendor's parent corporation, it being among those corporations designated by the decree as being controlled by physical or corporate persons of the United States. The decree was based on defensive measures against alleged aggressive acts of the United States' government which reduced the Cuban sugar quota

in the American market. (Under the decree, the former owners were to be compensated in Cuban bonds of not more than thirty years duration, paying 2% per annum, with interest payable from a fund set up of 25% of the foreign exchange received through United States' purchases of sugar exceeding three million tons per year, at a rate not less than 5.75 cents per pound. The determination of the value of the seized property was left to the Cuban government). Upon being notified of the decree, the defendant contracted with the plaintiff, agent of the Cuban government, to buy the sugar from the new owners. The sugar was then loaded and delivered in New York, where the defendants sold it. The receipts of the sale were immediately thereafter frozen by the receiver of the defunct corporation, the other defendant. Plaintiff, as agent for the Cuban government, sues for the proceeds of the sale in a conversion action. The lower court denied plaintiff relief, holding that the decree violated International law.[1] Plaintiff then appealed and the Court of Appeals for the Second Circuit affirmed. *Banco Nacional de Cuba v. Sabbatino.*[2]

The Act of State doctrine is a widely accepted domestic rule of law, originating from the doctrine of sovereign immunity, and based on a desire to promote comity among nations. It declares that the courts of the forum state cannot question the validity of acts of other states, whether done according to the law of that state or not, when done by that other state in regulation, within that state, of the conditions on which personal and real property may be transmitted, of the status and capacity of persons located therein, and of the validity of all contracts made therein.[3] The doctrine has been frequently applied by courts of the United States when deciding issues based on foreign law. It is usually used to determine the property rights of individuals and states arising under foreign decrees purporting to act on property located within the jurisdiction of the forum state, and most often results in the enforcement of such decrees. However, the doctrine is not a rule of International law; instead, it is regarded as a rule of conflicts of law, and, therefore, when applied by a court, the result is not an adjudication on an International law basis. As a result of this distinction, the court had a choice in the instant case: it could have adjudicated the controversy on the most frequently applied basis of Act of State or it could have resorted to a decision based on International law. The court chose the latter alternative, terming the adjudication on such basis a "narrow

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[1] 195 F. Supp. 375 (S.D.N.Y. 1961).

[2] 307 F. 2d 845 (2nd Cir. 1962).

[3] 30 Am. Jur. *International law*, §30, at 456. See also Hudson v. Guestier, 8 U.S. (4 Cranch) 293 (1808); Underhill v. Hernandez, 168 U.S. 250 (1897); Ricaud v. American Metal Co., 246 U.S. 304 (1897); Oetjen v. Central Leather Co., 246 U.S. 297 (1917).

exception" to the doctrine,[4] consideration being given, at the same time, to announcements of the State Department regarding the Cuban seizures.

The turning point of the resultant decision was the finding that the decree was retaliatory in that it was an act done in response to the United States' cutting of the Cuban sugar quota, and thus violative of International law. Examination of the decree leaves little doubt as to this contention.[5] But while writers have almost unanimously upheld the theory that an act of retaliation violates international law, case decisions have been conspicuously absent on the subject. Nevertheless, considering the bases of International law, its sources and origins,[6] such a conclusion cannot be regarded as a judicial non-sequitor, and an examination of these sources draws the obvious conclusion that retaliation is invalid under the law of nations. For instance, in the charter of the Court of International Justice, the sources of International law are stated to be, among others, general principles of domestic law applied internationally, and the dissertations of eminent writers on the subject. Regarding the general principles, most civilized societies have no internal laws sanctioning personal retaliation measures taken by an injured party against a tort-feasor who causes him damage. Rather, the general principles of domestic law forbid this type of redress. The reasoning supporting this attitude applying with equal persuasiveness to retaliation among nations. And, furthermore, eminent writers on International law have stated that an act of retaliation violates the law of nations.[7]

Similarly correct, although on a less concrete basis of reasoning, was the court's ruling that the discriminatory aspects of the decree resulted in a violation of the law of nations. Where, as here, it is apparent from the face of the decree[8] that it is discriminatory, against a particular group of aliens, writers have indicated that such an act is violative

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[4] *Supra* note 2, p. 859.

[5] Exec. Power Resolution No. 1, issued in accordance with the provisions of Law No. 851, of July 6, 1960. The decree read, in part, as follows: "Whereas, in the face of such developments . . . being fully conscious of their great historical responsibility and in the legitimate defense of the national economy, (we) are duty bound to adopt the measures deemed necessary to counteract the harm done by the aggression inflicted on our nation."

[6] WHEATON, ELEMENTS OF INTERNATIONAL LAW, 20-21 (1936); 1 HYDE, INTERNATIONAL LAW 10-11 (1937).

[7] RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES, §205 (1962) and American Branch of the International Law Association, Proceedings and Committee Reports, 68 (1957-58).

[8] Executive Power Resolution No. 1, issued in accordance with the provisions of Law No. 851, of July 6, 1960, reading in part, as follows: ". . . to order the nationalization through compulsory expropriation . . . to the Cuban state of all the property and enterprises located in the national territory, and the rights and interests resulting from the exploitation of such property . . . owned by judicial persons who are nationals of the United States of North America, or operators of enterprises in which nationals of said country have a predominating interest."

of International law.[9] It must be pointed out, however, that there are contrary reasons for upholding an apparently discriminatory decree. Such may include the fact that the economy of the expropriating state may be so completely held by the nationals of one particular country (usually in one particular industry upon which the entire economy of the expropriating state is based) that an act of nationalization may give the outward appearance of being discriminatory against a particular group of aliens while, in reality, the decree is aimed only at the particular industry which is taken. Such may frequently be the case in the economies of nations such as Cuba, commonly referred to as the "capital-importing" nations. Such states are characterized by a domination of ownership of the factors or production in the hands of aliens who have brought the capital to the country for investment purposes. This is in contrast to the "capital-exporting" countries, namely, those wherein the aliens owning the productive facilities reside. That Cuba was such a "capital-importing" country and that the Cuban economy was, basically, a sugar economy whose ups and downs were based on the economic vagaries of the sugar market. The latter, in turn, being controlled by American holders, fairly states the general condition in that country at the time of the decree. Thus, in the absence of other evidence of discrimination, a decree expropriating American owned property might be justified, at least insofar as the question of discrimination is concerned. Furthermore, unlike in cases of retaliation, where diplomatic relations cannot be advantageously utilized to promote the interest of citizens of the foreign state (whose citizens' property is being taken), where decrees are discriminatory only, such channels of redress could conceivably be used, as such means are now used when decrees do not discriminate. Yet, in any case, where the discrimination is based on retaliation, as it is here, there is good reason, notwithstanding the arguments of the "capital-importing" states, to hold that the decree violates International law.

Not finding it necessary to decide whether the failure of the decree to provide adequate compensation violated International law, the court avoided taking a stand on this controversial issue. The controversy amounts to this: on the one hand, the "capital-importing" states declare adamantly that, when the purpose of expropriation is for the improvement of social welfare or for economic reform, there is no duty to compensate fully, their position being backed by much authority;[10] yet,

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[9] RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES, §170 and Ill. 2 (1962); Standard Oil Tankers Case, 22 AM. J. INT'L L. 404, 419-20 (1928); 19 DEPT. OF STATE BULL. 408 (1948); Netherlands note to Indonesia, Dec. 18, 1959, 54 AM. J. INT'L L. 484, 485-7 (1960); Rolin, 6 NETHERLANDS INT'L L. REV. 260, 269 (1959); Solin, *In Proceedings of the American Branch of the International Law Association* 1959-60, at p. 31.

[10] FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW, 206 (1953); Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 AM.

on the other hand, the "capital-exporting" nations demand the payment of "just" compensation, which is usually meant to be compensation at 100% of value, they too, being backed by much authority.[11] Had the court decided the point either way, the verdict would have been the same, since the decree was found to violate International law on its discriminatory and retaliatory aspects. As a result, the question of adequacy of compensation remains without adjudication in the American courts.

As a basis for deciding the question on an International law basis, rather than on the more conventional Act of State doctrine, the court was led by a directive from the State Department as to the official government position on the decrees. This directive consisted of somewhat uncertain statements[12] issued from various sources in the State Department to the litigants in this and another case,[13] which stated that the question of the effect of the decrees was for the courts to decide, giving what might be interpreted as a "green light" to the courts to disregard the Act of State doctrine. These apparent pronouncements of the Executive branch have been previously used, but in somewhat different circumstances as a means of guiding the courts. In *Pink v. United States*,[14] the act of the President in recognizing the Soviet Union as part of an executive agreement to assign to the United States all claims of the Soviet government to assets held by Russian corporations before nationalization that were situated in the United States resulted in a loss of such assets to the stockholders of the corporations, whose rights were otherwise secured and recognized in New York.[15] Thus, in this way, the Executive acted to change the course of previous adjudications through the recognition of a foreign regime. More recently, and bearing directly upon this case due to the directive to the courts involved, was the policy of the State Department showing interest in foreign decrees of expropriation. The first such indication of this policy arose shortly after World War II, concerning the acts of the then defunct Nazi regime. In the first case,[16] the dispossessed plaintiff was denied recovery on the

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J. INT'L L. 801, 803-4 (1960); Williams, *International Law and the Property of Aliens*, BRIT. YB. INT'L L. (1928); BRIERLY, LAW OF NATIONS, 178 (1936).

[11] RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES, §190, comment a, (1962); Anderson, *Title to Confiscated Foreign Property*, 20 AM. J. INT'L L. 528-9 (1926); Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 AM. J. INT'L L. 305 (1960).

[12] State Dept. Bull. April 13, 1961; Statement of the Legal Advisor to the *Amici*, Oct. 18, 1961; Statement of the Undersecretary for Economic Affairs, Nov. 14, 1961.

[13] Kane v. Nat. Institute of Agrarian Reform, (no. 61 L. 730) Fla. Cir. Ct. (1961).

[14] 315 U.S. 552 (1942). See also Belmont v. United States, 301 U.S. 324 (1937).

[15] Pink v. United States, 284 N.Y. 555, 32 N.E. 552 (1941).

[16] Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F. 2d 246 (1947), *cert. denied*, 332 U.S. 772 (1947).

basis of the Act of State doctrine. But in the second case,[17] on appeal, this was reversed due to an intervening State Department announcement that declared that the validity of the decrees was for the courts to determine,[18] thus reversing the previous adjudications. But viewing the *Pink, Belmont* and *Bernstein* cases in the light of this case, it is seen that, on one hand, the *Bernstein* cases involved the acts of a defunct regime whose lack of existence could no longer justify the use of the Act of State doctrine (as there would be no interference with the comity of nations on which the doctrine is based); while, on the other hand, the *Pink* and *Belmont* cases dealt with an executive agreement, authorizing constitutionally to the President in his power to grant recognition, thus exercisable at a higher level of authority than the Act of State doctrine, which itself, is of judicial origin and within the court's general discretion to apply. Thus, it appears that while the acts of the Executive were justified in the *Pink* and *Belmont* cases on a constitutional basis and in the *Bernstein* cases on a lack of comity basis, it could not be held so justifiable in this case where the government whose decree was in question was presently in control of its territory and had diplomatic ties with the United States, it being seemingly possible that without such pronouncements the court would have applied the Act of State doctrine and decided the case differently. This leads to the conclusion that such executive pronouncements could be viewed as a possible breach of the separation of powers through the influence of the Executive on the course of adjudications in the courts.

As a first impression, the case definitely sets a precedent in the use of State Department pronouncements as a direction-steering device for courts of law regarding the acts of presently existing governments. Although this device probably will not result in the discarding of the Act of State doctrine due to the doctrine's long established use, it suggests that there may be exceptions where the Act of State doctrine would not be applied. This could result, due to the method whereby such announcements are made, in a hesitancy of attorneys for the various litigants concerning the validity of their causes of action, due to potential variances in verdicts in time due to intervening State Department pronouncements. Should the point ever be brought up on appeal, the Supreme Court might very well reverse and call for a new trial to be

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[17] Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F. 2d 375 (1954).

[18] State Dept. Press Release 296, Apr. 27, 1949, stating in part, as follows:
"This letter repeats the Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on peoples subject to their controls; . . . it is this Government's policy to undo the forced transfers and restitute identifiable property to victims of Nazi persecution wrongfully deprived . . . the policy of the executive . . . is to relieve American courts from any restraints upon the exercise of their jurisdiction to pass upon the validity of acts of Nazi officials."

decided, without reference to the announcements of the State Department. Also, it may result in the deciding of decrees' validity on an International law basis in disputes between former owners of seized property and bona fide purchasers, thus, in effect, spelling out an eventual discarding of the other theories of enforcing or denying enforcement to foreign decrees of expropriation. This will, therefore, cause greater consideration of International law in the Municipal courts than has been given up to now.

SHERIN SCHAPIRO

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**Libel and Slander: Defamation by Television Broadcast Is Actionable Per Se**—As a result of a presentation on a television program known as "The Untouchables," plaintiff, a retired prison guard, brought an action against defendant television companies alleging that they had defamed him by presenting a sequence showing that a prison guard accepted a bribe while attending a prisoner during a railway transfer from a federal prison in Atlanta to Alcatraz. Plaintiff alleged in the Superior Court of Georgia that such production clearly indicated that such Federal officer aided and abetted the Federal prisoner, in this case one Alphonse Capone, in his attempt to unlawfully escape from confinement. Defendants demurrers were overruled and on appeal the Court of Appeals of Georgia affirmed and held that such television presentation was actionable per se as "defamacast" and that plaintiff could maintain the action either by showing that he was the guard specifically referred to or as a member of a two-man group. *American Broadcasting-Paramount Theatres, Inc. v. Simpson.*[1]

The Court of Appeals of Georgia in this decision squarely faced the problem of determining whether defamation by television is to be categorized for purposes of litigation as libel or slander. The court determined that television defamation as such is not easily classified within the age-old torts of libel or slander, and furthermore, that the medium of television has outmoded the principles which form the basis for the distinction between the two actions. Therefore, this court took upon itself the task of establishing a new cause of action uniquely designed to cover situations involving defamation by means of mass media communications. The court has termed this as "defamacast." The rationale which justifies this departure, at least in terms of nomenclature, from the established forms of libel and slander is that modern law must be able to keep pace with modern technological growth. The law of television and radio defamation is quite obviously only as old as the mediums themselves are, and therefore the body of decision law is sparse. The basic distinction between libel and slander has been the

[1] 126 S.E. 2d 873 (Ga. 1962).