INTERNATIONAL LAW: HICKENLOOPER AMENDMENT HELD APPLICABLE TO PROPERTY CONFISCATED BY A FOREIGN NATION ONLY IF PROPERTY MARKETED IN THE UNITED STATES

In *Banco Nacional de Cuba v. First National City Bank*[1] the Court of Appeals for the Second Circuit held that the Hickenlooper Amendment[2] requires a federal court to exercise jurisdiction over a suit only when the claim involves identifiable expropriated property which the confiscating nation attempts to market in the United States. *First National City* is the most recent in a series of suits arising out of the nationalization of American property in Cuba by the Castro government.[3] First National City Bank made a fifteen-million dollar loan, secured by collateral held in New York, to a corporate agency of the Cuban Government in 1958. After accession to control by the Castro government on January 1, 1959, the loan was renewed, and Banco Nacional succeeded to the obligations of the original borrower. After repayment of one-third of the loan and the return of an equal portion of the collateral, the Cuban Government nationalized eleven First National City offices in Cuba in September, 1960. First National City retaliated by selling the collateral securing the ten-million dollar balance on the loan for an amount considerably greater than the principal due plus interest;[4] the excess was to be applied as a setoff against the loss occasioned by the confiscation of the property. Banco Nacional sued to recover the excess from the sales,[5] and First National City counterclaimed for the same amount on the grounds that Cuba's confiscation constituted a violation of international law. The district court held that the defendant was entitled to a setoff for any amount due and owing to it from the

1. 431 F.2d 394 (2d Cir. 1970), *vacated*, 39 U.S.L.W. 3321 (U.S. Jan. 26, 1971).

2. Foreign Assistance Act of 1965 § 301(d)(2), 22 U.S.C. § 2370(e)(2) (Supp. V, 1970), *amending* Foreign Assistance Act of 1964 § 301(d)(4), 22 U.S.C. § 2370(e)(2) (1964).

3. *See* Cuban Power Resolution no. 2, *reproduced in* Banco Nacional de Cuba v. First National City Bank, 270 F. Supp. 1004, 1009-10 n.6 (S.D.N.Y. 1967).

4. The district court set the excess at $1,810,880. 270 F. Supp. at 1006. There is some dispute as to the amount in the court of appeals. 431 F.2d at 395.

5. A second cause of action for recovery of Banco Nacional's deposits with First National was dismissed on First National City's motion for summary judgment and is not at issue here. 270 F. Supp. at 1011.

Cuban Government as a result of the confiscation of First National City's Cuban properties. The court of appeals reversed, ordering summary judgment for Banco Nacional.[6]

The act of state doctrine precludes courts of one nation from passing upon the validity of the actions of foreign states performed within their own territories in their sovereign capacity.[7] Although not a rigid requirement of either international or Constitutional law,[8] the Supreme Court has found its vitality to depend upon the necessity of maintaining the proper distribution of control over foreign affairs between the judicial and political branches of government.[9] In *Banco Nacional de Cuba v. Sabbatino,*[10] where this doctrine was applied to Cuban property expropriations, the Court held that

> [t]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[11]

That suit arose when an American commodity broker contracted with the Cuban subsidiary of an American-owned producer for the purchase of a shipload of sugar. The Castro government expropriated the cargo, and the broker entered into identical contracts to purchase the same sugar from an agent of the Cuban Government. The broker obtained the bills of lading without making payment, whereupon claim was made for the funds on behalf of the American-owned producer. Banco Nacional's subsequent suit against the broker for conversion was dismissed by both the district[12] and circuit courts.[13] The Supreme Court reversed the decision, holding that the act of state doctrine precludes any challenge to the Cuban expropriation, thus

6. The excess proceeds were not remitted to the Cuban bank but rather became a blocked Cuban asset according to the terms of the Trading with the Enemy Act, 50 U.S.C. App. § 5 (1964).

7. *See generally* H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 387-90 (1933).

8. "[T]he act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1963). The doctrine, as noted by the Court in *Sabbatino,* stems from seventeenth century English precedent, Blad v. Bamfield, 36 Eng. Rep. 992 (Ch. 1674) and emerged early in American jurisprudence. *See, e.g.,* Hudson v. Guestier, 8 U.S. (4 Cranch) 293 (1808); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

9. 376 U.S. at 427-28.

10. 376 U.S. 398 (1964).

11. *Id.* at 428.

12. 193 F. Supp. 375 (S.D.N.Y. 1961).

13. 307 F.2d 845 (2d Cir. 1962).

nullifying as a defense the alleged illegality of the Cuban action. There was an immediate and most audible reaction from those who witnessed the Court close judicial channels of redress to innocent victims of Castro's international indiscretion.

Within a month, Senator Hickenlooper offered an amendment to the pending foreign aid bill[14] designed to reverse the *Sabbatino* decision; a rewritten version was enacted as part of the Foreign Assistance Act of 1964,[15] and a slight but crucial modification was made thereto in the following year.[16] The Amendment directed that no United States court should decline on the basis of the act of state doctrine to hear a case in which a property claim is based upon a confiscation by a foreign state in violation of international law.[17] The Congress, smarting from a decision which it viewed as an open invitation to thievery by future Castros, thus hoped to assure the individual victim his "day in court." In Senator Hickenlooper's words

> [t]he Amendment is designed to discourage uncompensated expropriation of foreign investment by preserving the right of the original owners to attack any taking in violation of international law if the property involved comes before a U.S. Court. . . . [T]he knowledge that this market will be denied to stolen property should discourage seizure of that investment.[18]

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14. S. REP. No. 1188, 88th Cong., 2d Sess. 37 (1964).

15. 22 U.S.C. § 2370(e)(2) (1964).

16. Foreign Assistance Act of 1965, § 301(d)(2), *codified at* 22 U.S.C. § 2370(e)(2) (Supp. V, 1970). See note 17 *infra.*

17. The Amendment in its present form provides:

> 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 *to property* 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 . . . . Foreign Assistance Act of 1965 § 301(d)(2), *codified at* 22 U.S.C. § 2370(e)(2) (Supp. V, 1970) (emphasis added).

The broader version of the 1964 Amendment covered cases where a "claim of title or other right" was asserted. 22 U.S.C. § 2370(e)(2) (1964). The words "to property" were added in 1965. The addition made explicit what was obviously the original intent of its sponsors; both Congressman Adair, 110 CONG. REC. 23680 (1964), and Senator Hickenlooper, 110 CONG. REC. 24076-77 (1964), had expressly voiced their desire to limit the act to expropriated property later marketed in the United States. The extensive hearings in 1965 made this abundantly clear. *See Hearings on H.R. 7750 Before the House Committee on Foreign Affairs*, 89th Cong., 1st Sess. 578 *et seq.* (1965) and *Hearings Before the Senate Committee on Foreign Relations on the Foreign Assistance Program*, 89th Cong., 1st Sess. 728 *et seq.* (1965).

18. 110 CONG. REC. 19557 (1964).

The legislatively-intended reversal of *Sabbatino* followed shortly after the Amendment's enactment. On rehearing the case, now *Banco Nacional de Cuba v. Farr*,[19] the district court, after allowing sixty days for the Executive to intervene, held the Hickenlooper Amendment constitutional under the Commerce Clause and exercised its newly-established jurisdictional "reversal of presumptions"[20] by dismissing the Cuban claim for the proceeds of the expropriated sugar.[21] This apparent intention to limit the Amendment's coverage to property which had been seized and which later appeared on the American market was discussed in *French v. Banco Nacional de Cuba*.[22] The claimant brought suit on Cuban-issued certificates of tax exemption for which he was prevented by Cuban regulation from receiving currency other than Cuban pesos. In dismissing the complaint, the court held that the intended scope of the Amendment was limited to "specific and identifiable and 'traceable' property."[23]

Relying heavily upon the legislative history of the Amendment,[24] the Second Circuit Court of Appeals in *First National City* held that the lower court significantly expanded the allowable scope of federal court jurisdiction over expropriated property claims by overreading the vague terminology delineating the type of claim covered.[25] Since the property at issue was not and had never been "confiscated property," the Second Circuit reasoned that the case was not within the intended bounds of the Hickenlooper Amendment. The court found further support for its narrow interpretation in the legislative policy underlying two other bills prompted by the Cuban expropriations. Through an amendment to Subchapter V of the International Claims Settlement Act of 1949,[26] Congress provided that the Foreign Claims Settlement Commission should ascertain the amount and validity of claims against Cuba resulting from nationalization. Thus the proper determination of First National

19. 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

20. 1964 U.S. CODE CONG. & AD. NEWS 3852.

21. Banco Nacional de Cuba v. Farr, 272 F. Supp. 836, 838 (S.D.N.Y. 1965).

22. 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968).

23. *Id.* at 61, 242 N.E.2d at 714, 295 N.Y.S.2d at 447.

24. 431 F.2d at 399-402. In support of its interpretation, the court cited the views of the Amendment's House sponsor, Congressman Adair, 110 CONG. REC. 23680 (1964); of Professor Olmstead, *Hearings on H.R. 7750 Before the House Committee on Foreign Affairs*, 89th Cong., 1st Sess. 578 (1965); and of then Attorney General Katzenbach, *id.* at 1235-37.

25. 431 F.2d at 402.

26. 22 U.S.C. §§ 1643-1643k (Supp. V, 1970).

City's claim, according to the court, lay with the Commission and not the federal courts. The court of appeals also noted that, pursuant to the Trading with the Enemy Act,[27] the President had blocked all Cuban assets within the United States.[28] First National City would bypass this system of claims settlement[29] if allowed to retain the excess proceeds rather than submit them to the settlement fund for distribution to all claimants.

Banco Nacional de Cuba v. First National City Bank, by refusing to sanction an expansion of the Hickenlooper Amendment to provide a "self-held seizure remedy" for those few American claimants with access to assets of a foreign nation at the time of nationalization of American property,[30] restores validity to an important international doctrine. Coupled with the results in the *French* case,[31] where a contractual right was held not to be "property" covered by the Amendment, it has been suggested that the act of state doctrine will be restored by confining the scope of the Amendment by judicial interpretation of its ambivalent wording.[32] The *First National City* decision by reversing the district court avoided the very delicate question of whether the Hickenlooper Amendment did, in effect, create a *new federal remedy* for private investors to recover damages for confiscated property when all aspects of the transaction took place in a foreign state and should therefore be governed by that state's law.[33] The decision thus relieves somewhat the pressures exerted by the legislatively-mandated intrusion of the judicial branch on the delicately balanced international situation in which the President must operate. The Amendment attempted to avoid the pitfalls of judicial incursion in this area by allowing the President to intervene in those suits vital to the conduct of foreign affairs. However, this safeguard is illusory; rarely will the President intervene to deprive an

27. 50 U.S.C. App. § 5 (1964). The court noted as well, however, that there is no present provision for vested blocked assets in the United States for the satisfaction of claims. *See* 431 F.2d at 403, n.16.

28. Embargo on All Trade with Cuba, Proc. No. 3447 (Feb. 3, 1962), 3 C.F.R. §§ 157-58 (1959-63 Comp.). *See* 31 C.F.R. § 515 *et seq.* (1970).

29. A total of 8,404 claims have been submitted totalling $3,339,000,000. Sutton, *American Claims Against Cuba,* 3 INT. LAW. 741, 742 (1969).

30. 431 F.2d at 402.

31. 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968). See note 17 *supra* and accompanying text.

32. Note, *Act of State,* 11 HARV. INT. L.J. 212, 227 (1970).

33. *See* Henkin, *Act of State Today: Recollections in Tranquility,* 6 COLUM. J. TRANSNAT'L L. 175, 184-85 (1967).

American investor of the potential recovery of his property. Moreover, to intervene in only selected cases prompts charges of discrimination against the United States and, of course, invites retaliation of the same nature.[34] Finally, the decision illustrates the lack of foresight demonstrated by Congress in its haste to chastise the Castro government by offering piecemeal redress in the courts at the expense of concentrated efforts by the Executive. The Amendment itself rests on the erroneous assumption by Congress that other national courts have generally voided the act of state doctrine when necessary.[35] Furthermore, as the *First National City* decision establishes, the Amendment reaches only property which the expropriator attempts to market in the United States; it in no way prohibits such trade but rather threatens only a potential lawsuit if the property is identified. The latter problem is especially vexing when it is noted that most property recently nationalized has been either non-identifiable raw material or non-marketable property.[36] The confiscating nation is forewarned only that it need seek non-American markets for resale; the investor's "day in court" is thus denied him by the very effect of the Amendment, providing, as it does, a remedy only as to a very limited class of property, itself excluded by the imposition of the Cuban trade embargo by Presidential proclamation in 1962.[37] Conceivably, the foresightedness of decisions such as those rendered in *French* and *First National City* will guide the Congress to more practical solutions to protect American investment abroad.

34. *See generally* Mazaroff, *An Evaluation of the Sabbatino Amendment as a Legislative Guardian of American Investment Abroad*, 37 GEO. WASH. L. REV. 788 (1969).

35. [N]ot one case of all those cited is authority for the proposition that any independent nation in the world has ever eliminated from its jurisprudence the principle of law embraced in the act of state doctrine, permitted its courts to ignore it, or made any exception to it. Reeves, *The Sabbatino Case and the Sabbatino Amendment: Comedy—or Tragedy—of Errors*, 20 VAND. L. REV. 429, 487 (1967).

36. For recent discussions of ramifications of the problem, *see generally* Benham, *In Latin America: Growing Threats to U.S. Companies*, U.S. NEWS, July 14, 1969, at 68-70; Clear, *Report from Lima*, FORTUNE, Mar., 1969 at 55-56; BUSINESS WEEK, Nov. 22, 1969, at 80-82; NATIONAL REVIEW, Sept. 9, 1969, at 891-92; U.S. NEWS, Nov. 3, 1969, at 55-56.

37. See note 28 *supra*.