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## The Territorial Exception to the Act of State Doctrine: Application to French Nationalization

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# The Territorial Exception to the Act of State Doctrine: Application to French Nationalization

Carolyn B. Levine

## **Abstract**

This Note reaches the contrary conclusion that the French nationalization of American subsidiaries fits within the territorial exception to the act of state doctrine.

# THE TERRITORIAL EXCEPTION TO THE ACT OF STATE DOCTRINE: APPLICATION TO FRENCH NATIONALIZATION

## INTRODUCTION

The Socialist government of President Francois Mitterrand of France recently implemented a government takeover of a significant segment of French banking and industry. On February 11, 1982, a bill<sup>1</sup> was signed into law nationalizing five major industrial groups,<sup>2</sup> thirty-nine banks<sup>3</sup> and two financial holding companies.<sup>4</sup> The effect of the legislation was to increase government participation in the economy to sixteen percent.<sup>5</sup> This increase was greater than in any other West European nation,<sup>6</sup> resulting in expansion of the public sector by 900,000 employees.<sup>7</sup>

The nationalizations form the core of the Socialists' plan for France,<sup>8</sup> a policy which envisions revitalization of the economy.<sup>9</sup>

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1. Law of Nationalization, No. 82-155, 1982 Journal Officiel de la République Française [J.O.] 566 (to be codified in 1982 Recueil Dalloz-Sirey, *Législation*) [hereinafter cited as Nationalization Bill].

2. *Id.* art. 1. The five industrial groups are Compagnie de Saint Gobain, Rhône-Poulenc S.A., Pechiney-Ugine-Kuhlmann, Compagnie Générale d'Électricité, and Thomson-Brandt. *Id.*

3. *Id.* art. 12. Among the banks nationalized is the reknowned Banque Rothschild. *Id.*

4. *Id.* art. 29. The financial holding companies are Compagnie financière de Suez et de l'Indochine and Compagnie financière de Paris et des Pays-Bas. *Id.*

5. See National Assembly Debate on Nationalization, 1981 J.O. 5169, 5171 (statement of M. Pierre-Bernard Cousté) (the parliamentary debate took place on Dec. 18, 1981).

6. *Id.*

7. The Nationalizations, Documents from France, No. 82/35, at 10 (available at the Press and Information Service of the French Embassy, New York). Prior to the 1982 nationalizations, the public sector comprised six percent (or 1.1 million persons) of France's salaried workforce. As a result of the nationalizations, approximately two million employees are distributed among 3,500 companies which are controlled directly or indirectly by the state. *Id.*

8. President Mitterrand was elected on May 10, 1981. In a televised interview in December 1981, Mitterrand elaborated on the rationale for the Socialists' program:

There are several fundamental reasons for our choosing to nationalize a certain number of firms. There is . . . a kind of choice that I would call, in the proper sense of the term, a political choice, the choice of a certain kind of society. It seems to us that once a certain amount of capital has been accumulated and concentrated in key sectors of the economy . . . then it's indispensable for the state to have the control and — if need be — ownership of these sectors.

Mitterrand Says Nationalizations Necessary to Wage Coherent Fight Through Credit and Industry Against Unemployment and for Industrial Restructuring, Statements from France,

## Significant government spending and expansion of state owner-

No. 81/103, at 1 (available at the Press and Information Service of the French Embassy, New York) [hereinafter cited as Television Interview].

Although clothed in the politics of Western Europe, the discussion among senators in the National Assembly before adoption of the legislation, reveals the truly socialist underpinnings of the program:

[T]he nationalizations are a first step towards a true emancipation of the workers, a first step towards control over working conditions by the workers themselves, a first step towards a general reorientation of the economy by the collectivity. In the absence of all of this, there is no true democracy.

. . . [E]xtension of the public sector well underscores the will of the collectivity to take its destiny into its own hands and to escape domination by a few private interests which have dominated this nation for too long . . . .

. . . Private industrial capital has proven itself, in effect, incapable of bringing about a rejuvenation and development of our apparatus of production . . . . Banking capital, obsessed by short term profit and careful to avoid the simplest risk, prospers in parasitic fashion, without attention to real needs . . . .

National Assembly Debate on Nationalization, 1981 J.O. 5169, 5172 (statement of M. Philippe Bassinet) (author's translation).

9. President Mitterrand stated: "[W]e inherited a rate of inflation of 14% when we were elected last May [1981], and we have pumped some 35 to 36 billion francs [about seven billion dollars] into the French economy in the framework of our program to stimulate the economy . . ." Television Interview, *supra* note 8, at 4.

Prior to its enactment, the nationalization bill was reviewed by the Conseil Constitutionnel, the supreme legal tribunal in France. Judgment of Jan. 16, 1982, Con. Const., Fr., 1982 J.O. 299 (to be reported in 1982 Recueil Dalloz-Sirey, *Jurisprudence*). As a matter of French constitutional law, the government had to show that the proposed nationalization was a clear public necessity. Constitution de la République Française, Déclaration des Droits de l'Homme et du Citoyen, art. 17. The Declaration states: "Property being an inviolable and sacred right, no one may be deprived thereof except where a public necessity, lawfully established, clearly so requires, and on condition of a just and prior indemnity." *Id.* The Conseil Constitutionnel accepted the Socialists' position that the nationalizations were necessary to bring about economic change and growth. Judgment of Jan. 16, 1982, 1982 J.O. at 300-01. The Conseil Constitutionnel does not appear to have been impressed by the concerns of the opposition that President Mitterrand's motives may have been ideological or political. For a discussion of the legislation by the National Assembly, see *supra* note 8. Indeed, as some commentators point out, in 1972 when the Socialists first suggested the nationalizations, the present day economic crisis was unknown. Borde & Eggleston, *The French Nationalizations*, 68 A.B.A. J. 422, 425 (1982).

The constitutional criteria set out in the Declaration include a requirement of compensation for expropriated property. The inadequacy of compensation was the additional basis for rejection of the initial nationalization proposal in January 1982, by the Conseil Constitutionnel. Judgment of Jan. 16, 1982, 1982 J.O. at 302-03. The compensation scheme adopted will give shareholders of nationalized companies the equivalent of 6.67 billion dollars worth of 15 year government bonds in exchange for their shares. Nationalization Bill, *supra* note 1, arts. 2-5. The Conseil Constitutionnel rejected the government's initial formula for compensation which was based partly on historical share price and partly on assets and profits of the corporations nationalized. Judgment of Jan. 16, 1982, 1982 J.O. at 304. Instead, the government has worked out a compensation scheme to be based on the average monthly share price between October 1, 1980 and March 31, 1981, plus 14% for inflation. Also, a dividend will

ship<sup>10</sup> are being used to extricate the economy from its present slump.<sup>11</sup>

Among the nationalized industrial groups and banking institutions are parent corporations to United States subsidiaries.<sup>12</sup> The public statements of French government officials<sup>13</sup> indicate that the legislation<sup>14</sup> is intended to reach these subsidiaries. Each enterprise in its entirety would thereby be government-owned, enabling the government to proceed with its plan to strengthen the economy.<sup>15</sup>

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be paid for 1981 at a rate 14% higher than the 1980 dividend. Nationalization Bill, *supra* note 1, arts. 2-5. The Conseil Constitutionnel's finding that the proposed compensation was adequate would not prevent a United States court from reconsidering the same issue and perhaps drawing a different conclusion.

10. See generally National Assembly Debate on Nationalization, *supra* note 5.

11. Television Interview, *supra* note 8, at 4-5. The President further remarked that investment in the private sector has been at a standstill since 1976. *Id.* at 6.

12. Some of the French parent corporations having American subsidiaries intended to fall within the nationalization are: Compagnie de Saint Gobain/Certain-teeed Corp., Moody's INDUSTRIAL MANUAL 2944 (1981); Pechiney-Ugine-Kuhlmann/Pechiney Ugine Kuhlmann Development Inc., Ugine Kuhlmann of America, Inc., Instel Corp., Howmet Aluminum Corp., Pechiney Ugine Kuhlmann Corp., Howmet Turbine Components Corp., Moody's INTERNATIONAL MANUAL 925 (1981); Compagnie financière de Suez et de l'Indochine/Suez American Corp., *id.* at 903 (1981); Compagnie financière de Paris et de Pays-Bas/Warburg-Parisbas Inc. *id.*

13. See *infra* note 16.

14. The legislation itself is silent on the fate of foreign subsidiaries. See Nationalization Bill, *supra* note 1.

15. See *supra* notes 8-9. The issue of extraterritorial application of laws is one which recurs in international affairs. See, e.g., *infra* notes 59-110 and accompanying text. The cases discussed *infra* notes 59-110 consider the effect in the United States of nationalization laws by Iraq, Cuba and Pakistan. The recent attempt by the Reagan Administration to use trade sanctions to bar the sale of parts manufactured abroad by foreign subsidiaries of United States businesses to the Soviet Union for its Trans-Siberian oil pipeline is an example of the United States attempting to extend the reach of its laws abroad. See *U.S. to Penalize Those Who Aid Siberia Pipeline*, N.Y. Times, Aug. 26, 1982, at A1, col. 5. These sanctions were imposed pursuant to the Export Administration Act of 1979, 50 U.S.C. app. §§ 240-2420 (1976 & Supp. III 1979).

In the context of nationalization, the issue may persist as nations trying to control rampant inflation in fragile economies or groping for political leverage, nationalize key banks and industry. See comments of President Mitterrand, Television Interview, *supra* note 8, which indicate that improved management of the economy is the rationale for the French nationalization.

Nationalization also may be used as a way for nations, particularly those in the developing world, to centralize the management of their foreign debt. In September 1982, Mexico nationalized certain banks for precisely this reason. *Mexico Seizing Banks To Curtail Flight of Capital*, N.Y. Times, Sept. 2, 1982, at A1, col. 2. For an illustration of the use of nationalization for political leverage, see discussion of Libyan nationalization of United States oil interests, discussed *infra* notes 37-40 and accompanying text. Nationalization has been a common phenomenon throughout this century. For an overview, see E. BAKLANOFF, EXPRO-

Resistance to French nationalization of American subsidiaries has been a subject of concern to French government officials<sup>16</sup> although it has not yet been the subject of litigation in United States courts.<sup>17</sup> If challenged in United States courts, France would be likely to take the position that the act of state doctrine<sup>18</sup> bars United States judicial review of French government acts.<sup>19</sup> This Note reaches the contrary conclusion that the French nationalization of

PROPRIATION OF U.S. INVESTMENTS IN CUBA, MEXICO, AND CHILE (1975) and M. GORDON, THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY (1976).

As the international sphere and its economy become characterized increasingly by interdependence, national boundaries tend to become less distinct. See D. BLAKE & R. WALTERS, THE POLITICS OF GLOBAL ECONOMIC RELATIONS (1976), wherein the authors state: "The multinational corporation is probably the most visible vehicle for the internationalization of the world economic system." *Id.* at 76. United States law, however, continues to recognize those boundaries which is reflected in the distaste of United States courts for the application of foreign law on United States soil. See *infra* Part II for discussion of the territorial exception to the act of state doctrine whereby courts of the United States may refuse to give extraterritorial effect to foreign laws.

16. This is reflected in press reports. An aide to Prime Minister Pierre Mauroy is quoted as saying: "Foreign lawsuits trying to establish ownership of the subsidiaries are the most serious threat we face." *Takeovers By France Resisted*, N.Y. Times, Oct. 19, 1981, at D1, col. 1. The aide said the French government would litigate the issue, and "only the lawyers will win." *Id.* Discussing the views of French legal experts, an editorial stated: "A challenge by stockholders and governments to the control of foreign subsidiaries will strike at the heart of the nationalization law." *Bus. Wk.*, Dec. 21, 1981, at 66. Jean Rey, a former Common Market Commission president expressed the opinion that "nationalization of foreign subsidiaries could damage the economic interests of the countries they are in . . . because the French Government may starve the operations abroad of investment capital in its drive to lower unemployment at home." *Takeovers by France Resisted, supra*, at D1, col. 1.

17. It would probably be preferable from the French government's point of view to negotiate private settlements with the United States subsidiaries. For example, France's takeover of the French subsidiary of Honeywell Inc., a United States corporation, was arranged by private agreement whereby Honeywell's holdings in CII-Honeywell-Bull Computer Company of France will be reduced from 47% to 19.99%. Agreement Reached in CII-Honeywell-Bull Takeover, *News & Comments from France*, No. 82/17, at 4 (Apr. 22, 1982) (available at the Press and Information Service of The French Embassy, New York).

18. The act of state doctrine is discussed fully *infra* Part I.

19. An advisor to Prime Minister Pierre Mauroy is reported to have taken the position that France is "nationalizing the stock in French companies—which hold stock in other foreign companies — rather than seizing the tangible assets of the expropriated companies." *Bus. Wk.*, Dec. 21, 1981, at 66. See also Borde & Eggleston, *The French Nationalizations*, 68 A.B.A.J. 422 (1982). The authors write:

It is claimed that by nationalizing the parent company of foreign subsidiaries, the problems raised by the extraterritoriality principle could be avoided on the theory that the assets located in the foreign countries remain the property of the same legal entity, the only change being the ownership of that entity. This rationale was proposed by the Hungarian government during its nationalizations after World War II, but courts throughout the world held that this was only a "subterfuge" and that the nationalizations could still be subject to their scrutiny.

*Id.* at 427. For an example of a case to which the authors refer, see *Zwack v. Kraus Bros.*, 27 F.2d 255 (2d Cir. 1956), discussed *infra* note 70.

American subsidiaries fits within the territorial exception<sup>20</sup> to the act of state doctrine. The nationalization is therefore an appropriate subject for review by courts of the United States, which should find the legislation invalid as to American subsidiaries.<sup>21</sup>

### I. DEVELOPMENT OF THE ACT OF STATE DOCTRINE AND ITS RELEVANCE TO FRENCH NATIONALIZATION OF AMERICAN SUBSIDIARIES

The act of state doctrine was first articulated by the United States Supreme Court in 1897 in *Underhill v. Hernandez*:<sup>22</sup>

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will

20. See discussion *infra* Part II.

21. The question of obtaining jurisdiction to sue the government of France is beyond the scope of this Note. The relevant law is the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1604-1607 (1976). While foreign governments enjoy a presumption of immunity in United States courts, the Act provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . .

. . . .

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States . . . .

*Id.* § 1605(a).

Additionally, the Act does not provide immunity in the case of an express waiver by the foreign sovereign or where the foreign sovereign engages in "commercial activity" having "direct effects" in the United States. *Id.* For a discussion of the direct effect clause see Note, *The Nikkei Case: Toward a More Uniform Application of the Direct Effect Clause of the Foreign Sovereign Immunities Act*, 4 *FORDHAM INT'L L.J.* 109 (1980-81).

The Act provides for a remedy by allowing attachment of property in anticipation of judgment:

The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution . . . if . . . .

. . . .

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law. . . .

28 U.S.C. § 1610. These portions of the Act have been interpreted to create an exception to foreign sovereign immunity in cases where property is expropriated in violation of international law. See Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 *FORDHAM L. REV.* 155, 197 (1981). See also Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 *FORDHAM L. REV.* 543 (1977).

22. 168 U.S. 250 (1897).

not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>23</sup>

Subsequently many courts have invoked the doctrine.<sup>24</sup> More recently, the Supreme Court reaffirmed the doctrine in the leading case of *Banco Nacional de Cuba v. Sabbatino*.<sup>25</sup> The Court held that judicial review of the expropriation of sugar by Cuba was barred,<sup>26</sup> even though the taking violated international law by its political, retaliatory and discriminatory nature.<sup>27</sup> The Court outlined several rationales for the doctrine.<sup>28</sup> It emphasized that neither the inherent nature of sovereignty<sup>29</sup> nor international law<sup>30</sup>

23. *Id.* at 252.

24. See *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Shapleigh v. Mier*, 299 U.S. 468 (1937); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

25. 376 U.S. 398 (1964).

26. *Id.* at 407.

27. The circumstances giving rise to the suit in *Sabbatino* involved Farr, Whitlock and Co., a commodities broker, which contracted in 1960 to purchase Cuban sugar from *Compania Azucarera Vertientes-Camaguey de Cuba (C.A.V.)*, a Cuban corporation whose stock was owned principally by Americans. *Id.* at 401. In response to a United States reduction of the Cuban sugar import quota by President Eisenhower, Cuba nationalized property in which Americans had an interest. *Id.* The State Department characterized the Cuban nationalization law as "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory." *Id.* at 402-03 (quoting State Dep't. Note No. 397, July 16, 1960).

In order to obtain the consent of the Cuban government for the ship carrying the sugar to leave Cuba, the broker entered a series of contracts with a Cuban bank which assigned the bills of lading to Banco Nacional, an instrumentality of the Cuban government and petitioner in the suit. *Id.* at 405. Farr, Whitlock accepted the bills of lading from petitioner, received payment from its customer, but refused to hand over the proceeds to petitioner. *Id.* at 405-06. *Sabbatino* became the receiver for C.A.V. *Id.* at 406. Suit followed for conversion of the bills of lading and to recover payment for the sugar from Farr, Whitlock. *Id.*

28. See *infra* notes 31-34 and accompanying text.

29. 376 U.S. at 421.

If a transaction takes place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely declines to adjudicate or make applicable its own law to parties or property before it.

*Id.* This portion of the Court's reasoning is questionable. One reason a United States court declines such cases is that, as between nations, jurisdiction over cases is largely territorial, a question of having the parties and the subject matter before the court. To allow United States courts to decide legal issues arising in another country would certainly be to disregard the independence, right to self-determination, and sovereignty of that country.

30. *Id.* The Court noted that other countries do not follow the doctrine with any consistency. *Id.*

compels its application. Although the United States Constitution does not demand it, the act of state doctrine does rest on " 'constitutional' underpinnings . . . [which arise] out of the basic relationships between branches of government in a system of separation of powers."<sup>31</sup> The Court recognized that the adjudication of certain matters by the judiciary may hinder foreign affairs, the conduct of which is left to the Executive branch by the Constitution.<sup>32</sup> To allow courts of the United States to sit in judgment on the acts of other nations might " 'imperil the amicable relations between governments and vex the peace of nations.' "<sup>33</sup> This rationale is rooted in considerations of international comity. Often more can be achieved through diplomatic negotiation than through the combativeness of litigation.<sup>34</sup>

31. *Id.* at 423.

32. *Id.* The Court noted that the act of state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Id.*

33. *Id.* at 418 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918)).

34. *See* 376 U.S. at 431. Soon after the Supreme Court's decision in *Sabbatino*, the Hickenlooper Amendment to the Foreign Assistance Act of 1964 was passed by Congress. 22 U.S.C. § 2370(e)(2) (1964). The amendment provides:

[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 including a foreign state . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law . . . .

*Id.*

The legislative history of the Hickenlooper Amendment and its treatment by courts soon after its passage indicate that the amendment was intended to be a legislative reversal of *Sabbatino*. The Senate Report covering the amendment as proposed stated: "The amendment is intended to reverse in part the recent decision of the Supreme Court in *Banco Nacional de Cuba v. Sabbatino* . . ." S. REP. No. 1188, 88th Cong., 2d Sess. 2, reprinted in 1964 U.S. Code Cong. & Ad. News, 3829, 3852. Senator Hickenlooper himself said: "Basically, the amendment is designed to assure that the private litigant is granted his day in court." 110 CONG. REC. 19,547 (daily ed. Aug. 14, 1964). *See* *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 963 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968). There, considering *Sabbatino* on remand from the Supreme Court, Judge van Pelt Bryan held the Hickenlooper Amendment to apply. The court wrote that the broad purpose of the amendment was to discourage illegal confiscations and to prevent the United States from becoming a "thieves market." 243 F. Supp. at 966. It may be of interest to note that the constitutionality of an act of Congress expressly intending to overrule a decision of the Supreme Court has not been litigated in this connection. Such an intent would appear to be an affront to the doctrine of separation of powers.

Although the Supreme Court has not had the occasion to consider the Hickenlooper Amendment, the lower federal courts have interpreted it on a case by case basis. Generally it has been construed strictly and courts have imposed a two-fold requirement: a claim of title

In the post-*Sabbatino* era, the federal courts have invoked the act of state doctrine when reviewing Arab and Cuban nationalization.<sup>35</sup> A theme common to all of these cases, including *Sabbatino*, is an act of expropriation which is in essence political, and often

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must be shown to property taken by the nationalizing state in violation of international law and the property must find its way back through commercial channels into the United States. See, e.g., *infra* note 37. This second requirement makes the amendment inapplicable to the present case since the property in question is located in the United States.

While it may appear that the Hickenlooper Amendment weakens *Sabbatino*, nonetheless *Sabbatino* was reaffirmed in *Alfred Dunhill, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). *Dunhill* gave continued vitality to the act of state doctrine more than ten years after the *Sabbatino* decision. The Court gave tacit approval to *Sabbatino* while holding, on distinguishable facts, that a government acting in a purely commercial capacity may not cloak itself in the protection of the act of state doctrine. *Id.* at 689-90. Counsel were specifically requested by the Court to address the question whether *Sabbatino* should be reconsidered. *Id.* at n.5. The Court, however, refused to disturb the *Sabbatino* holding. *Id.* at 690.

*Dunhill* involved competing claims by former owners of Cuban cigar companies and Cuban intervenors (a term of art referring to government-appointed managers of the business after nationalization) for the purchase of post-intervention cigar shipments to *Dunhill* and other American importers. *Id.* at 685. The importers sought to set-off pre-intervention payments which should have gone to the former owners, but were mistakenly made to intervenors. *Id.* at 688. The Court found nothing in the record (i.e. no statute, decree, order or resolution of the Cuban government itself) constituting an act of state with respect to the intervenor's obligation to repay the money mistakenly paid to them and allowed the set-off. *Id.* at 690. The case is thus factually distinguishable from *Sabbatino* and the present case where governments acted in their sovereign capacity. Relying on *Sabbatino*, the *Dunhill* Court said: "The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations." *Id.* at 697. But the Court continued, "we are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts . . ." *Id.* at 697-98. For further discussion of *Dunhill*, see Note, *Alfred Dunhill of London, Inc. v. Republic of Cuba: The Act of State Doctrine-Altering the Sovereign's New Cloak*, 7 CAL. W. INT'L L.J. 662 (1977). See also *F. Palicio y Compania v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966); *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967), discussed *infra* note 42.

35. See *infra* notes 37-43 and accompanying text. Additionally, in the antitrust field the act of state doctrine has often been at issue, beginning with the Supreme Court's decision in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). There, the Court found that the doctrine barred adjudication of the legality of the Costa Rican seizure of plaintiff's banana plantation which, allegedly, was induced by the anti-competitive activity of the defendant. *Id.* at 359. Courts have found *American Banana* to state an overly restrictive view of antitrust law, and jurisdiction under the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976), now requires a showing of anti-competitive effects in the United States. *Industrial Inv. Dev. v. Mitsui & Co.*, 594 F.2d 48, 53 (5th Cir. 1979). See also *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927). For a discussion of jurisdiction in international antitrust law, see Comment, *Defining Jurisdictional Limits in International Antitrust: Should the EEC Adopt the Timberlane Approach?*, 5 FORDHAM INT'L L.J. 469 (1981-82). See also B. HAWK, UNITED STATES, COMMON MARKET, AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (1979).

discriminatory and retaliatory.<sup>36</sup> It is in such cases that the act of state doctrine assumes its relevance.

The cases arising from the Libyan oil nationalization of 1973<sup>37</sup> present a clear example of a situation envisioned by the *Sabbatino*

In recent cases, application of the act of state doctrine in the antitrust area has depended on the degree of government participation in the alleged conspiracy. It has been necessary to show the government's intimate involvement, in which case the rationales underlying *Sabbatino* attach and the court declines adjudication. Thus, in *International Ass'n of Machinists (I.A.M.) v. OPEC*, 649 F.2d 1354 (9th Cir. 1981), I.A.M. sought injunctive relief against the price setting policies of OPEC which it alleged were damaging to United States industry. *Id.* at 1355. The court denied the injunction stating:

The possibility of insult to the OPEC states and of interference with the efforts of the political branches to seek favorable relations with them is apparent from the very nature of this action . . . [T]he granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources.

*Id.* at 1361. Thus, echoing *Sabbatino*, the court found that the government was the perpetrator of the price-fixing conspiracy alleged and declined review. *Id.* *Accord* *General Aircraft Corp. v. Air Am., Inc.*, 482 F. Supp. 3 (D.D.C. 1979); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

Where insufficient government participation was shown, the doctrine did not apply and courts have been willing to provide a remedy where appropriate. For example, in *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), plaintiffs alleged that defendants violated the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976), by infiltrating plaintiff's Indonesian corporate partner in a proposed logging concession and causing denial by the Indonesian government of a required logging license. 594 F.2d at 51. The court found the act of state doctrine inapplicable. To determine whether there had been an antitrust violation by defendant, it was not necessary to examine the validity of Indonesia's failure to issue the license. *Id.* at 53. The court said: "The government of Indonesia is not a named co-conspirator here. Its right to withhold a cutting license is not questioned. This is the major factor distinguishing this case from right to ownership cases such as *American Banana* and *Sabbatino*." *Id.* *Accord* *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976).

36. See *infra* notes 37-43 and accompanying text.

37. See, e.g., *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). There, Nelson Bunker Hunt, an independent owner of an oil concession in Libya, brought suit against several major oil producers (Mobil, Exxon, Shell, Texaco, Standard Oil, British Petroleum, Gulf Oil, Occidental Petroleum and Grace Petroleum) alleging violation of antitrust laws and breach of contract. *Id.* at 70. Hunt claimed that defendants conspired to preserve the competitiveness of Persian Gulf oil over Libyan oil by preventing him from reaching a settlement with Libya regarding its participation in Hunt's oil interest. *Id.* at 76. He claimed this led ultimately to nationalization of his concession. *Id.* The court declined to examine the nationalization, relying on the act of state doctrine which it called "a judicial articulation of the separation of powers doctrine." *Id.* at 77.

The United States government called the expropriation a " 'political reprisal against the United States Government and coercion against the economic interests of certain other United States nationals in Libya.' " *Id.* at 73 (footnote omitted) (quoting A. ROVINE, *DICTIONARY OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 335 (1973)). The court stated that the "action taken here is obviously only an isolated act in a continuing and broadening confronta-

court to which the act of state doctrine should apply.<sup>38</sup> Colonel Qadhafi's comments<sup>39</sup> on the occasion of Libya's expropriation of United States interests in Libyan oil illustrate the political, retaliatory and discriminatory nature of his act: "We proclaim loudly that this United States needs to be given a big hard blow in the Arab area on its cold, insolent face."<sup>40</sup>

Similarly, the courts refused to examine the validity of Castro's nationalizations which were steeped in political controversy.<sup>41</sup> In one case, Cuban plaintiffs sought to recover a debt incurred by American importers for cigars shipped after the takeover.<sup>42</sup> The court held that the act of state doctrine bars review of a Cuban takeover of an American-owned cigar enterprise. It also has been held that the refusal by a Cuban bank to abide by a government proclamation requiring the bank to convert pesos into dollars constituted an act of state.<sup>43</sup>

tion between the East and West in an oil crisis which has [far-reaching] implications and complications." *Id.* at 78. *See also* *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980) (contract obligations for concession arrangements repudiated by Libya did not constitute property for the purposes of the Hickenlooper Amendment and thus the act of state doctrine was a bar to judicial review); *Hunt v. Coastal State Gas Producing Co.*, 583 S.W.2d 322 (Tex.) (arising from the same Libyan takeover of Hunt's interests), *cert. denied*, 444 U.S. 992 (1979).

38. Libya's expropriation, like that by Cuba, took place in an atmosphere of intense political turmoil. Both cases present the potential for judicial interference in the handling of foreign affairs. As noted earlier, this should be avoided by the courts. *See supra* notes 29-34 and accompanying text.

39. Colonel Muammar al-Qadhafi seized power in 1969 leading a junta which instituted socialist policies in Libya. *THE WORLD ALMANAC AND BOOK OF FACTS* 557 (1982).

40. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). For a discussion of international arbitration awards in the Libyan nationalization cases, see von Mehren & Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476 (1981).

41. *See infra* note 51 and accompanying text.

42. *F. Palicio y Compania v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967). In *Palicio*, after the government takeover, interventors took up the manufacture of cigars in plants formerly run by Americans. 256 F. Supp. at 483. The cigars were sent to United States importers who had been customers of the former owners and refused to pay the Cuban interventors. *Id.* at 484. The court said: "these obligations accrued by reason of sales completed after plaintiffs had been intervened. No debts were in existence at the time of the intervention. In short, the take-overs were fully executed under Cuban law before the trade acceptances and other obligations involved in this dispute arose." *Id.* at 489. Relying on the rationales set forth in *Sabbatino*, the court declined to examine the validity of the takeovers and held that the interventors had the right to sue on the debt owed. *Id.* at 489-90.

43. *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 295 N.Y.S.2d 433, 242 N.E.2d 704 (1968). In *French*, plaintiff's assignor invested in a Cuban farm in 1957, at a time when Cuba permitted foreign investors to convert the proceeds from their enterprises into dollars and

The rationales for the act of state doctrine as set forth in *Sabbatino*<sup>44</sup> assume their greatest significance and are most clearly understood in the context of the Cuban and Arab cases. Such nationalizations go to the heart of the political relationship between the United States and the taking state,<sup>45</sup> as well as the conduct of foreign affairs which has been left to the Executive.<sup>46</sup> It is not appropriate for the courts to interfere in this political relationship by an adjudication on the merits of the nationalization.<sup>47</sup> In such instances, diplomacy is the proper method of resolution and may be, in fact, more effective.<sup>48</sup>

French nationalization does not fit the pattern set by *Sabbatino* and followed by other Cuban cases and the Libyan oil

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exempt such proceeds from Cuba's tax on the exportation of money. *Id.* at 50, 295 N.Y.S.2d at 438, 242 N.E.2d at 707. When plaintiff sought to redeem his investment certificates for dollars, he was refused pursuant to a Cuban government decision promulgated in 1959 to suspend such conversion in order to stop the flow of foreign currency from Cuba. *Id.* at 51, 295 N.Y.S.2d at 439, 242 N.E.2d at 708. The court held, "there is no question that the actions complained of were aimed at protecting Cuba's scarce 'foreign exchange resources.'" *Id.* at 64, 295 N.Y.S.2d at 450, 242 N.E.2d at 716. Since control of national currency is "an essential government function," such action constituted an act of state. *Id.* at 63, 295 N.Y.S.2d at 449, 242 N.E.2d at 715. See also *Present v. United States Life Ins. Co.*, 96 N.J.Super. 285, 232 A.2d 863 (1967), *aff'd*, 51 N.J. 407, 241 A.2d 237 (1968).

44. See *supra* notes 29-34 and accompanying text.

45. See *supra* notes 32-33 and accompanying text.

46. See *supra* note 33 and accompanying text.

47. See *supra* note 34 and accompanying text.

48. *Id.* For other cases considering the act of state doctrine, see *Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp 412 (S.D.N.Y. 1980), *rev'd sub nom. Banco Para el Comercio Exterior de Cuba v. First Nat'l City Bank*, 658 F.2d 913 (2d Cir. 1981), *cert. granted*, 51 U.S.L.W. 3297 (U.S. Oct. 19, 1982) (No. 81-984), which relies on the case of *Banco Nacional de Cuba v. First Nat'l City Bank*, 270 F. Supp. 1004 (S.D.N.Y. 1967), *rev'd*, 431 F.2d 394 (2d Cir. 1970), *vacated and remanded for reconsideration*, 400 U.S. 1019, *rev'd on remand*, 442 F.2d 530 (2d Cir. 1971), *rev'd and remanded*, 406 U.S. 759, *reh'g denied*, 409 U.S. 897 (1972), *aff'd on remand*, 478 F.2d 191 (2d Cir. 1973). See also *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980) (non-performance of a vacation package contract due to refusal of government to give entry to plaintiff does not constitute act of state since the doctrine does not preclude judicial resolution of all commercial consequences stemming from public acts); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D.C. Del. 1978) (trade policies of the Polish government with respect to the sale of golfcars in the United States do not constitute acts of state so as to bar antitrust and antidumping claims of American manufacturers); *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977) (act of state doctrine precludes inquiry into reason for denial of import license to United States manufacturer by Brazilian government); *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18 (S.D.N.Y. 1976) (act of state precludes suit by alleged descendant of original owner of artwork expropriated by the Soviet government and subsequently sold); *United Mexican States v. Ashley*, 556 S.W.2d 784 (Tex. 1977) (Hickenlooper amendment inapplicable and act of state doctrine bars suit by plaintiff seeking to attach Mexican-owned artifacts located in United States on the ground that plaintiff's ranches in Mexico had been expropriated by the Mexican government).

nationalization cases.<sup>49</sup> For example, Cuba's nationalization of the sugar industry was prompted by the United States criticism of Castro's policies and was in retaliation for a cutback in United States imports.<sup>50</sup> The legislation expressly addressed only United States interests and ignored other foreign sugar manufacturers.<sup>51</sup> Thus, the legislation had its genesis in the political relationship between Cuba and the United States. Similarly, Libya's confiscation of oil interests was politically motivated—a way for Libya to defy the United States.<sup>52</sup> Furthermore, it was discriminatory in that the properties of other foreigners in Libya were left undisturbed.<sup>53</sup>

French nationalization, by contrast, is not closely tied to the political relationship between France and the United States. The French nationalization forms part of the Socialist agenda for France, a plan to restructure French economic life,<sup>54</sup> with little consideration given to the impact it might have on international relations.<sup>55</sup> In contrast to the United States antagonistic relationship

49. See *supra* notes 37-43 and accompanying text.

50. On July 7, 1960, President Eisenhower reduced Cuba's sugar quota. *Sabbatino*, 376 U.S. at 401.

51. The Cuban decree provided that:

WHEREAS, the attitude assumed by the government and the Legislative Power of the United States of North America, which constitutes an aggression, for political purposes, against the basic interests of the Cuban economy . . . the Revolutionary Government [is forced] to adopt, without hesitation, all and whatever measures it may deem appropriate or desirable for the due defense of the national sovereignty and protection of our economic development process . . . .

. . . Full authority is hereby conferred upon the President and the Prime Minister of the Republic . . . to nationalize, through forced expropriations, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest . . . .

Act of July 7, 1960, No. 851, 58 *Caceta Oficial* 16367, 16367 (Cuba) (*quoted in Sabbatino*, 376 U.S. at 401-02 n.3).

The *Sabbatino* court wrote that the United States Department of State found the Cuban law "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory." *Id.* at 402-03 (citing State Dept. Note No. 397, July 16, 1960).

52. See *supra* text accompanying note 40.

53. See *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

54. See *supra* notes 8-11 and accompanying text. This is not to ignore the fact that Cuban and French nationalization share in common an attempt at internal economic restructuring. However, Cuban nationalization had a political motivation, an element noticeably lacking from the French takeover.

55. The focus of French concern has been private challenges to the legislation, see *infra* note 16, rather than the reaction of the United States government itself.

with Cuba or Libya, France and the United States are members of the "western bloc" and have enjoyed a relatively stable political relationship through the years.<sup>56</sup> The nationalization plan has not been undertaken for any retaliatory purpose, nor does it discriminate against American interests—all foreign interests are subject to the same takeover.<sup>57</sup> Thus, French nationalization does not resemble in any way the political nationalization schemes undertaken by Cuba's Castro or Libya's Qadhafi. The act of state doctrine as formulated in *Sabbatino* and followed in subsequent cases does not bar judicial review of French nationalization in light of the distinctions outlined above between French nationalization and Cuban or Libyan nationalization. Furthermore, French nationalization of American subsidiaries falls within the territorial exception to the act of state doctrine, an exception which has been developed by the federal courts<sup>58</sup> in the years since *Sabbatino*.

## II. THE TERRITORIAL EXCEPTION TO THE ACT OF STATE DOCTRINE

The federal courts have recognized a limitation to the act of state doctrine which makes it applicable only to confiscation of property located in the taking state.<sup>59</sup> The territorial exception to the doctrine allows courts to refuse to give extraterritorial effect to confiscatory decrees aimed at property located within the United States.<sup>60</sup> The justification for the exception is found in the express language of *Underhill v. Hernandez*:<sup>61</sup> "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."<sup>62</sup>

Property targeted for nationalization located in the United States renders superfluous the rationales<sup>63</sup> underlying *Sabbatino*. An examination by a United States court of the validity of the

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56. See, by contrast, discussion of the relationship between the United States and Cuba, *supra* notes 50-51 and accompanying text.

57. See Nationalization Bill, *supra* note 1.

58. See cases discussed *infra* notes 59-111 and accompanying text.

59. See *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

60. *Id.*

61. 168 U.S. 250 (1897), discussed *supra* in text accompanying notes 22 and 23.

62. *Id.* at 252 (emphasis added).

63. See *supra* notes 29-34 and accompanying text.

attempted confiscation of such property poses no threat to amicable relations<sup>64</sup> between the United States and the would-be nationalizing state. The court would not be determining rights to property located in a foreign nation.<sup>65</sup> Such adjudication does not offend the sovereignty<sup>66</sup> of the taking state since that state is not in a position to compel disposition of the property.<sup>67</sup> Furthermore, diplomatic negotiation plays no role under these circumstances. The property is already located in the United States and the Executive need not negotiate for its return.<sup>68</sup>

In a variety of situations the federal courts have applied the territorial exception to property found to be located in the United States. *Republic of Iraq v. First National City Bank*<sup>69</sup> was the first circuit court case<sup>70</sup> in the post-*Sabbatino* era to articulate the territorial exception. The controversy centered around a New York bank

64. See *supra* note 33 and accompanying text.

65. See *supra* note 62 and accompanying text.

66. See *supra* note 29 and accompanying text.

67. See cases discussed *infra* notes 85-111 and accompanying text.

68. See *supra* text accompanying note 34.

69. 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

70. Traditionally, courts have recognized that foreign acts of confiscation are presumed to violate the public policy of the United States forum and should not be given extraterritorial effect. See *Ingenohl v. Olsen & Co.*, 273 U.S. 541 (1927); *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90 (1918); *Baglin v. Cusenier Co.*, 221 U.S. 580 (1911); *Zwack v. Kraus Bros.*, 237 F.2d 255 (2d Cir. 1956); *Plesch v. Banque Nationale de la République d'Haiti*, 273 A.D. 224, 77 N.Y.S.2d 43, *aff'd*, 298 N.Y. 573, 81 N.E.2d 106 (1948); *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N.Y. 369, 189 N.E. 456 (1934).

In *Zwack*, plaintiff's Hungarian liqueur exporting firm was nationalized and suit was brought against its exclusive American distributing agent for an accounting of profits made as a result of the continued sale of the liqueur by the defendant and for trademark infringement. 237 F.2d at 257-58. The court held:

It is clear that the Hungarian government could not directly seize the assets which have a situs in the state of the forum. To allow it to do so indirectly through confiscation of firm ownership would be to give its decree extraterritorial effect and thereby emasculate the public policy of the forum against confiscation. This we decline to do.

*Id.* at 259.

As early as 1939, the reluctance of the courts to give effect to foreign nationalization decrees in the United States was apparent. In *Moscow Fire Ins. Co. v. Bank of New York*, 280 N.Y. 286, 20 N.E.2d 758 (1939), *aff'd per curiam sub nom.* *United States v. Moscow Fire Ins. Co.*, 309 U.S. 624 (1940), discussed *infra* note 134, the court declined to give effect to Soviet nationalization of property claimed by the United States government. The property was "what remain[ed] of the capital which this State required the insurance company to deposit here. . . . It is the property which at all times has been within the State of New York . . . . At no time could the insurance company or the Russian government have transferred it to Russia." *Id.* at 308, 20 N.E.2d at 766. The court concluded "[i]n the strongest sense its situs was in this State, and the control of this State complete." *Id.*

account issued to King Faisal II of Iraq. The Republic of Iraq attempted to seize money and shares of stock held by First National City Bank on behalf of King Faisal, who was assassinated in 1958 during an Iraqi revolution.<sup>71</sup> The attempted seizure was pursuant to a government decree that "all property [of the dynasty] . . . whether moveable or immoveable . . . should be confiscated."<sup>72</sup> The court held that a New York bank account, although issued to the King, was located in New York rather than Iraq.<sup>73</sup> The court held that only a United States court could require the bank to turn over the assets to Iraq.<sup>74</sup> Therefore the property in issue could not be considered to be in Iraq.<sup>75</sup>

The principal task of the Second Circuit in *Republic of Iraq* was to define the application of the act of state doctrine to foreign confiscatory decrees addressed to property located in the United States.<sup>76</sup> The development of the territorial exception by the court was couched in the framework of the rationales<sup>77</sup> underlying the act of state doctrine, especially the concept that a foreign act of

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United States v. Pink, 315 U.S. 203 (1942), presented facts identical to those of *Moscow Fire*. The Court, however, reached a contrary result while not overruling its earlier decision. *Id.* at 216. In fact, Justice White, in his dissenting opinion in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), cited *Moscow Fire* to support his argument that "foreign confiscatory decrees purporting to divest nationals and corporations of the foreign sovereign of property located in the United States uniformly have been denied effect in our courts, including this Court . . ." 376 U.S. at 447.

*United States v. Pink* involved a claim by the United States acquired under the Litvinov Assignment of 1933. Under the agreement the Soviet government assigned its claims against American nationals to the United States in exchange for the United States' diplomatic recognition of the Soviet government. 315 U.S. at 211-12. The Court found that *Moscow Fire* was not res judicata since the respondent had not been a party to that suit. *Id.* at 216.

The Court in *Pink* allowed the confiscation of the assets of a New York insurance company under the Soviet nationalization decree of 1918, relying on the constitutional power of the Executive branch to conduct foreign affairs. *Id.* at 229. The Court viewed the Litvinov Assignment and diplomatic recognition of the Soviet government as an aspect of this foreign affairs power, *id.*, and as part of a broad attempt by the United States to remove any source of friction between the United States and the Soviet Union. *Id.* at 225. *Pink* is distinguishable from *Zwack* in that *Zwack* did not involve a comparable political arrangement. For a case in accord with *Zwack*, see *D'Angelo v. Petroleos Mexicanos*, 422 F. Supp. 1280 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

71. 353 F.2d at 49.

72. *Id.*

73. *Id.* at 51.

74. *Id.*

75. *Id.*

76. *Id.* at 50.

77. *Id.*

state is within the sphere of foreign affairs.<sup>78</sup> Similarly, the decision to give effect to foreign confiscatory decrees which relate to property located in the United States is tied to foreign affairs<sup>79</sup> with a consequent need for uniformity among the states. "It would be baffling if a foreign act of state intended to affect property in the United States were ignored on one side of the Hudson but respected on the other . . . ."<sup>80</sup>

The court in *Republic of Iraq* stated that the primary consideration for a court exercising its discretion to give extraterritorial effect to a foreign confiscatory decree is whether the decree is consistent with the law and policy of the United States.<sup>81</sup> The court concluded that the Iraqi ordinance was inconsistent with United States law and policy,<sup>82</sup> particularly in view of general constitutional guarantees of due process embodied in the fifth and fourteenth amendments to the Constitution as well as the prohibition against bills of attainder.<sup>83</sup> These principles recognize a constitutional repugnance for governmental confiscation of private property.<sup>84</sup>

The focus of the territorial exception shifted in *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*<sup>85</sup> There suit was brought after the Cuban revolution by a Cuban seller against a Florida buyer to collect the purchase price of a contract for the sale of tobacco which predated the revolution.<sup>86</sup> The court found that the act of state doctrine did not bar the collection of the debt, which was found to have its situs in Florida, and applied the territorial exception.<sup>87</sup>

The court distinguished *Tabacalera* from *Sabbatino* in one particularly significant respect. In *Sabbatino*, the res that was the subject of the suit was tangible personal property present in Cuban territorial waters at the time of the nationalization, whereas in *Tabacalera* the res was a credit owed by a Florida corporation on

78. See *supra* notes 32-34 and accompanying text.

79. 353 F.2d at 50.

80. *Id.*

81. *Id.* at 51.

82. *Id.*

83. *Id.* at 52. See *supra* note 9.

84. 353 F.2d at 52.

85. 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968).

86. *Id.* at 711.

87. *Id.* at 716.

tobacco delivered and accepted. Moreover, the funds which Standard would have used to satisfy that debt were located in Florida. Compulsion to pay the debt could have been accomplished only by a United States court.<sup>88</sup> The court justified its application of the territorial exception by relying on the fact that "the government of Cuba was not physically in a position to perform a *fait accompli* in the nature of the acquisition by the Cuban government or its inventor of the money owed to Tabacalera by Standard Cigar Company."<sup>89</sup> The Fifth Circuit in *Tabacalera* reiterated the position taken by the Second Circuit in *Republic of Iraq*<sup>90</sup> and considered whether the political relationship between the United States and Cuba required the court to give effect to the Cuban confiscatory decree.<sup>91</sup> The issue of international relations, however, was found to be of secondary importance.<sup>92</sup>

Subsequent cases<sup>93</sup> have followed this analysis and have placed primary emphasis upon the notion that the foreign taking state is not in a position to perform a *fait accompli* over property located in the United States. Considerations of foreign policy and notions of

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88. *Id.* at 712-13. The court called this the "really important difference" between the two cases. *Id.* at 713. A second distinction between the cases was that although the Cuban tobacco industry was nationalized in 1960 and Tabacalera was intervened by the government, *id.* at 709, the power of attorney held by Severiano Jorge, the sole stockholder of Tabacalera, was not revoked by the government. The power of attorney included the authority to collect debts owed to the corporation. *Id.* at 713-14. The court noted that by contrast in *Sabbatino*, the government had undertaken a "direct and open confiscation" of the property of the sugar corporation. *Id.* at 712. In *Tabacalera* "there was no confiscation of the kind exercised by Cuba as to the sugar in *Sabbatino*." *Id.* at 714. Furthermore, the court found that even had the Cuban government taken over Tabacalera, as the government's unlimited power under the nationalization program would have allowed, the takeover would not require the United States court to recognize the confiscation since the property was in the United States. *Id.* The court said:

The underlying thought expressed in all of the cases touching on the Act of State Doctrine is a common-sense one. It is that when a foreign government performs an act of state which is an accomplished fact, that is when it has the parties and the *res* before it and acts in such a manner as to change the relationship between the parties touching the *res*, it would be an affront to such foreign government for courts of the United States to hold that such act was a nullity. Furthermore, it is plain that the decisions took into consideration the realization that in most situations there was nothing the United States courts could do about it in any event.

*Id.* at 715.

89. *Id.*

90. 353 F.2d 47 (2d. Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

91. 392 F.2d at 715.

92. *Id.*

93. See *infra* notes 95-111 and accompanying text.

due process have become secondary in the analysis.<sup>94</sup> In *United Bank Ltd. v. Cosmic International, Inc.*,<sup>95</sup> a debt owed by a United States corporate defendant for goods supplied by a Pakistani plaintiff was held to have its situs in the United States.<sup>96</sup> The dispute arose after nationalization of a Pakistani jute mill by the revolutionary government of Bangladesh.<sup>97</sup> The Second Circuit rejected the arguments of the post-nationalization Bangladesh mill owners who asserted that the act of state doctrine precluded an examination of the validity of the taking.<sup>98</sup>

The court, holding the situs of the debt to be in the United States, explained that the power to enforce a debt depends on jurisdiction over the debtor and borrowed from the reasoning of the Fifth Circuit in *Tabacalera*: "Where an act of state has not 'come to complete fruition within the dominion of . . . [a foreign] government, . . . no *fait accompli* has occurred which would otherwise effectively prevent an American court from reviewing the act's validity."<sup>99</sup> The court noted that the absence of such accomplished fact eliminates the danger of the judiciary offending the foreign state's sovereignty or interfering with executive function.<sup>100</sup>

The Fifth Circuit again upheld the territorial exception to the act of state doctrine in *Maltina Corp. v. Cawy Bottling Co.*<sup>101</sup> The court found that trademark registration of goods manufactured outside the United States constitutes property located in the United States for the purposes of the exception.<sup>102</sup> The court held that Cuba's dissolution of a Cuban corporation did not bar the use of the corporation's trademarks in the United States.<sup>103</sup> Such trademarks are considered to have a local identity apart from the foreign manufacturer.<sup>104</sup>

94. *Id.*

95. 542 F.2d 868 (2d Cir. 1976).

96. *Id.* at 877.

97. *Id.* at 870 n.2 (where the court noted that effective March, 1971, India had issued a Proclamation of Independence declaring that East Pakistan became the sovereign state of Bangladesh after a revolution).

98. *Id.* at 877.

99. *Id.* at 874.

100. *Id.* at 875 (citing *Sabbatino*, 376 U.S. 398, 427 (1964), and *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1028-29 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972)). *Maltina* is discussed *infra* notes 101-110 and accompanying text.

101. 462 F.2d 1021 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972).

102. *Id.* at 1027.

103. *Id.*

104. *Id.* at 1026. *Accord* *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892 (S.D.N.Y. 1968), *modified*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971).

Citing the earlier territorial exception cases,<sup>105</sup> the *Maltina* court stated: "the federal courts are to take a pragmatic view of what constitutes an extraterritorial action by a foreign state."<sup>106</sup> To deny effect to the Cuban confiscation would have the desirable consequence of preventing Cuba from controlling the "disposition of valuable assets"<sup>107</sup> in the United States. Furthermore, deprivation of the trademarks without compensation by Cuba would violate notions of due process.<sup>108</sup> Although the court recognized the potential foreign affairs implications of the attempted extraterritorial expropriation, the court emphasized that since the trademarks were within the jurisdiction of the United States, Cuba was not in a position to accomplish the expropriation.<sup>109</sup> Thus, the court's decision did not touch on the propriety of Cuba's acts as to property in *Cuba*, and could not thereby offend Cuba's sovereignty.<sup>110</sup>

In summary, three recurrent themes are woven throughout the cases formulating a territorial exception to the act of state doctrine. These themes justify the exception. First, and perhaps most significant, when property is located in the United States rather than within the territory of the taking state, the foreign state is not in a position to perform a *fait accompli* over the property. Thus, refusal by a United States court to give effect to confiscation under these circumstances is justified because it does not call into question any disposition of property by the foreign state within its domain. Second, it is within the discretion of the United States courts to consider the political relationship between the sovereign parties in

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105. *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *F. Palicio y Compania v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967).

106. 462 F.2d at 1027.

107. *Id.*

108. *Id.*

109. *Id.* at 1028. It is noteworthy that the *Maltina* court interpreted *Sabbatino* as a suit by Banco Nacional to recover money located in the United States. *Id.* The court, however, said that *Sabbatino* should not be interpreted as removing the territorial restriction to the act of state doctrine because the "expropriation of sugar constituting the Act of State" came to fruition within the dominion of the Cuban government. *Id.* This is in contrast to the interpretation of *Sabbatino* by the court in *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968), discussed *supra* note 85 and accompanying text. There the court said "in the *Sabbatino* case the *res* that was subject to confiscation by the Cuban government was physical property present in Cuba . . ." *Id.* at 714.

110. 462 F.2d at 1029.

determining whether to give effect to foreign confiscatory decrees. Finally, courts are unwilling to enforce foreign confiscatory decrees in light of constitutional repugnance for deprivation of property embodied in the United States Constitution.<sup>111</sup>

### III. APPLICATION OF THE TERRITORIAL EXCEPTION TO FRENCH NATIONALIZATION OF AMERICAN SUBSIDIARIES

The territorial exception to the act of state doctrine is a well-established principle of law, applied consistently by the federal courts to a variety of cases.<sup>112</sup> The recent attempt by the Government of France to nationalize American subsidiaries along with their French parent corporations presents an opportunity to apply the rationales behind the exception.

111. For cases wherein the territorial exception was rejected on facts distinguishable from those of the present case, see *F. Palicio y Compania v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967), discussed *supra* note 42, and *Tran Qui Than v. Blumenthal*, 469 F. Supp. 1203 (N.D. Cal. 1979), *aff'd in part, remanded in part on other grounds, sub nom. Tran Qui Than v. Regan*, 658 F.2d 1296 (9th Cir. 1981), *appeal docketed*, 50 U.S.L.W. 3984 (U.S. June 15, 1982) (No. 81-2219).

In *Palicio*, the territorial exception did not bar application of the act of state doctrine because none of the property confiscated was within the United States at the time of the confiscation. 256 F. Supp. at 487. The nationalization was fully executed before the dispute arose as to whether the debt for the sale of cigars was owed to the Cuban interventors or the former owners, and the court declined to review the validity of the taking. *Id.* at 489.

*Tran Qui Than* reaffirmed the territorial exception, although finding it inapplicable to the facts. 469 F. Supp. at 1209-10. It is the most recent pronouncement to date of the territorial exception as developed in the Second and Fifth Circuits. In that case, plaintiff was a shareholder in a South Vietnamese bank and claimed an interest in funds owed by the United States government to the bank on army contracts. *Id.* at 1204-05. After the fall of Saigon in 1975, Vietnamese funds in the United States were blocked under the Foreign Assets Control of the Treasury Department and the Trading with the Enemy Act. *Id.* at 1205. Plaintiff argued for unblocking the funds, contending that failure to do so conflicted with the territorial exception to the act of state doctrine. *Id.* at 1209-10. The court agreed that United States courts may decline to give effect to confiscatory decrees. *Id.* In this case, however, Viet-Nam was not a party to the action and the validity of Vietnamese confiscation was not in question: "What Tran seeks to do here is to convert a shield against the enforcement of claims derived from foreign expropriation into a sword to frustrate the marshalling by the Executive Branch of assets to which a foreign government may lay claim in the future." *Id.* at 1210. In the territorial exception cases, the courts were determining disputed rights to property as between the original owner and a government purporting to confiscate that property. By contrast, in *Tran Qui Than*, "no such issue arises, for the Court does not decide who will be entitled to the funds." *Id.*

112. See *supra* notes 59-110 and accompanying text.

The basis of the territorial exception is territorial jurisdiction.<sup>113</sup> The United States has jurisdiction over property which is located in the United States<sup>114</sup> and has the authority and power to act<sup>115</sup> against that property. By contrast, the foreign state is in no position to compel disposition of such property.<sup>116</sup>

As a threshold matter in all the territorial exception cases it must be established that there is property located in the United States over which United States courts may exert their power. In the case of French nationalization, there are several indicia that the American subsidiaries are property located in the United States subject to the jurisdiction of its courts. First, the way in which the law locates shares of stock which are embodied in share certificates, is analyzed. Then, the location of a corporation is examined from the point of view of jurisdiction and choice of law.

This analysis requires an understanding of the difference between physical goods, like tables and chairs, and a corporation. It is perhaps simple to see that tables and chairs in a New York office building are property located in the United States. If France purported to nationalize all property belonging to French businesses anywhere in the world, a court could find that under the territorial

113. *Id.*

114. The Supreme Court recognized in *Hanson v. Denckla*, 357 U.S. 235 (1958), that restrictions on jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Id.* at 251. The jurisdiction of the United States, as a separate sovereign, is restrained by territorial boundaries as well. See Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470 (1981).

115. One commentator has written:

The word "jurisdiction" has too many meanings. Because of that it is a prime source of confusion and ambiguity in the law . . . .

One sense in which the word is used, commonly spoken of as relating to "judicial jurisdiction," has to do with whether a court has power to act against the particular person . . . against whom, or the thing against which, the court is asked to act . . . . Judicial jurisdiction . . . normally depends on the validity of service of process . . . .

R. LEFLAR, *AMERICAN CONFLICTS LAW* § 3, (1968). For more recent comments on the nature of jurisdiction and conflicts of law see Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960 (1981) and Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080 (1981).

116. This is, of course, different from the case where both the United States and the foreign state have jurisdiction. For a discussion of this problem see Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982).

exception, chairs located in New York were beyond the reach of the French nationalization decree.<sup>117</sup> By contrast, a corporation is more complex and more difficult to locate—it is a creation of the law.<sup>118</sup> Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*<sup>119</sup> defined a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”<sup>120</sup>

The situs of a share of stock, represented by a share certificate, is in the state that incorporates the issuer.<sup>121</sup> This would support a finding that American subsidiaries are located in the United States for purposes of the territorial exception. This principle was first enunciated in 1899 by the Supreme Court in *Jellenik v. Huron Copper Mining Co.*<sup>122</sup> The Court, attempting to determine stock ownership, considered whether the stock in question was personal property within the district where the suit was brought.<sup>123</sup> The Court wrote: “As the habitation or domicile of the Company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the Company

117. Such a case would be analogous to the territorial exception cases discussed *supra* notes 49-110 and accompanying text.

118. See *infra* notes 119-20 and accompanying text.

119. 17 U.S. (4 Wheat.) 518, 629 (1819).

120. *Id.* at 636. For other definitions of a corporation, see 1 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 4 (rev. perm. ed. 1974).

121. *U.S. Indus., Inc. v. Gregg*, 540 F.2d 142 (3d Cir.), *cert. denied*, 433 U.S. 908 (1976). In *Gregg*, the court stated: “courts have accepted the view of Justice Holmes that the ‘foundation of jurisdiction is physical power.’ . . . The state of a corporation’s domicile may constitutionally provide, as Delaware has done, that the situs of its capital stock is in its home state.” *Id.* at 149 (quoting *McDonald v. Mabee*, 243 U.S. 90, 91 (1917)). The *Gregg* court referred to Delaware law which provides: “For all purposes of title, action, attachment, garnishment and jurisdiction . . . the situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . shall be regarded as in this State.” DEL. CODE ANN. tit. 8, § 169 (1975).

The New York courts have applied this rule. See *Oliner v. Canadian Pac. Ry. Co.*, 34 A.D.2d 310, 311 N.Y.S. 2d 429, *aff’d*, 27 N.Y.2d 988, 318 N.Y.S.2d 745, 267 N.E.2d 480 (1970); *In re Nielsen*, 48 Misc.2d 66, 264 N.Y.S.2d 302 (1965). In *Holmes v. Camp*, 219 N.Y. 359, 114 N.E. 841 (1916), the court stated: “the interest of a stockholder in the capital of a corporation may be regarded as property located where the corporation is organized and exists . . .” *Id.* at 367, 114 N.E. at 843.

122. 177 U.S. 1 (1899).

123. *Id.* at 13.

within the State whose creature it is . . . ."<sup>124</sup> Under this rule, share certificates of an American subsidiary of a French corporation, regardless of where in the world they may be held, and irrespective of the nationality of the holder, would be considered to have their situs in the United States, specifically in the state of the issuer.<sup>125</sup> Such shares constitute property in the United States, beyond the reach of the French nationalization decree.

A second aspect of the analysis considers the way in which the law locates a corporation for the purposes of choice of law. Under Anglo-American concepts, a corporation is considered a citizen of the state or country of its incorporation.<sup>126</sup> The law of the state of incorporation governs a variety of corporate obligations, including corporate dissolution,<sup>127</sup> the legal relationship between a stock-

124. *Id.* See also *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1932) (concerning the cancellation of the allotted shares and other relief sought, the situs of the stock is in the state of incorporation, New Jersey). Several other circuit courts have also so held. See, e.g., *Kitzer v. Phalen Park State Bank*, 379 F.2d 650 (8th Cir. 1967) ("Corporate shares of stock . . . have long been considered 'property' by the Supreme Court of the United States for jurisdictional purposes in an action to clear title of stock . . . ." *Id.* at 653 (citing *Jellenik*, 177 U.S. 1 (1899)); *Peckham v. Ronrico Corp.*, 211 F.2d 727 (1st Cir. 1954) ("shares in a corporation are personal property located for the purposes of a suit to determine title to the shares in the state which created the corporation." *Id.* at 731); *Albuquerque Nat. Bank v. Citizens Nat. Bank in Abilene*, 212 F.2d 943 (5th Cir. 1954) (for the purposes of administration of estates, rather than the state of decedent's domicile, irrespective of the place where the certificates happen to be, the state of incorporation is situs of its shares of stock. *Id.* at 950); *Miller v. Kaliwerke Aschersleben, A.G.*, 283 F. 746 (2d Cir. 1922) (in a case brought under the Trading with the Enemy Act, "shares of stock being intangible, incorporeal, personal property, their situs for purposes of seizure is in the state which creates the corporation and where it resides." *Id.* at 755).

125. 177 U.S. at 13.

126. Hadari, *The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises*, 1974 DUKE L.J. 1. This is in contrast to the civil law rule which decides the nationality of companies according to their principal place of business, called the *siège réel*, or company seat. *Id.* at 7-11.

The United States Supreme Court early in this century held:

A corporation created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, . . . capable of being treated as a citizen of that State, as much as a natural person . . . . [W]hen the corporation exercises its powers in the State which chartered it, that is its residence, and such an averment is sufficient to give the Circuit Courts jurisdiction. *Doctor v. Harrington*, 196 U.S. 579, 586 (1905) (citing *Louisville C. & C. R.R. v. Letson*, 15 U.S. (2 How.) 193 (1844)). See also *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511 (1934); *Continental Nat'l Bank v. Buford*, 191 U.S. 119 (1903).

127. R. LEFLAR, *supra* note 115, § 252. Leflar states:

[i]f the theory be accepted that a corporation can come into existence, if at all, only

holder and the corporation,<sup>128</sup> and enforcement of stockholder, director and officer statutory obligations.<sup>129</sup> This rule regarding corporate obligations illustrates that incorporation in the United States bestows upon a subsidiary corporation<sup>130</sup> a United States location.

A final aspect of the analysis requires consideration of how courts obtain personal jurisdiction over a corporation. As a general rule, service of process may be made in the state of incorporation<sup>131</sup> or where the corporation does sufficient business to establish minimum contacts.<sup>132</sup> In spite of its ties to the parent, a subsidiary corporation is subject to this general rule. For the purposes of jurisdiction and service of process, courts honor the separateness of parent and subsidiary.<sup>133</sup> The law presumes this separateness.<sup>134</sup>

by the law of the state which creates it, a logical corollary is that the only state whose law can destroy the corporation's existence is the one whose law brought it into being in the first place.

*Id.*

128. *Id.* § 253. *Accord* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 64 (1969).

129. R. LEFLAR, *supra* note 115, § 254.

130. An American subsidiary is one incorporated in the United States. It should be noted that a foreign corporation also can be licensed to do business in the United States without creating a subsidiary. *See, e.g.,* N.Y. BUS. CORP. LAW § 1301 (McKinney 1963).

131. FED. R. CIV. P. 4(d)(3).

132. *Shaffer v. Heitner*, 433 U.S. 186 (1977); *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

133. *See supra* notes 22-26 and accompanying text.

134. *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980) (there is a presumption of separateness). Generally, parent and subsidiary within the multinational enterprise are considered separate entities even where management is identical and the parent owns all of the stock of the subsidiary. Hadari, *The Structure of the Private Multinational Enterprise*, 71 MICH. L. REV. 729, 770 (1973). For further discussion of the multinational corporation, see R. HELLMAN, *TRANSNATIONAL CONTROL OF MULTINATIONAL CORPORATIONS* (1977).

The idea of a separate legal existence for parent and subsidiary is not a new one; it predates the modern era of the large multinational enterprise, as illustrated in *Moscow Fire Insurance Co. v. Bank of New York*, 280 N.Y. 286, 20 N.E.2d 758 (1939), *aff'd per curiam sub nom. United States v. Moscow Fire Ins. Co.*, 309 U.S. 624 (1940), discussed *supra* note 70. There the question entertained by the New York Court of Appeals was whether Soviet nationalization extended to a New York branch of a Soviet insurance company. Answering in the negative, the court said:

we think the Legislature in allowing these foreign companies to do business in this State and country intended to treat the domestic agency largely as a *complete and separate organization*, to place it on a parity with domestic corporations . . . Thus the property of the United States branch of a foreign insurance company acquires a character of its own. That character is "dependent" upon the law of this State.

*Id.* at 309-10, 20 N.E.2d at 768. This holding was later affirmed by the United States Supreme Court. 309 U.S. 624 (1940).

This is illustrated by the fact that while a subsidiary incorporated under the laws of the United States is located in the United States,<sup>135</sup> the presence of the subsidiary does not in and of itself constitute presence of the parent.<sup>136</sup> In order for the parent to be present and amenable to process in the state which incorporates the subsidiary, the two corporations must operate as one so that the subsidiary is no more than a "mere department"<sup>137</sup> of the parent. The subsidiary must be a "mere shell."<sup>138</sup>

These three approaches support the position that American subsidiaries of French corporations must be deemed to be located in

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135. See *supra* notes 126-130 and accompanying text.

136. *Velandra v. Régie Nationale Des Usines Renault*, 336 F.2d 292, 296 (6th Cir. 1964). *Accord* *Cook v. Bostitch, Inc.*, 328 F.2d 1 (2d Cir. 1964). This general rule is drawn from the early decision of the Supreme Court in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). It should be noted that under the rule of *International Shoe v. Washington*, 326 U.S. 310, 316 (1945), the parent may by its own activities establish minimum contacts and thereby subject itself to jurisdiction in the state where its subsidiary is located or does business.

In the *Renault* case the French parent, Régie, owned 100% of the stock of Renault, a New York corporation which in turn owned 100% of Great Lakes Renault, an Illinois corporation which distributed cars in the midwest. 336 F.2d at 295-96. Suit was brought in Michigan, one of the states where Great Lakes sold cars. *Id.* at 296. The court held that "the mere ownership by a corporation of all of the stock of a subsidiary amenable to the jurisdiction of the courts of a state may not *alone* be sufficient to justify holding the parent corporation likewise amenable." *Id.* (emphasis included).

137. *Marantis v. Dolphin Aviation, Inc.*, 453 F. Supp. 803, 805 (S.D.N.Y. 1978). In *Marantis*, the court held that the separateness between parent and subsidiary precluded the parent's amenability to service. *Id.* The subsidiary was incorporated in the state where the parent was headquartered and conducted board meetings in that state. Three of the four principle officers of the subsidiary held the same offices for the parent and all but one of the directors of the subsidiary was an officer or director of the parent. The parent filed a financing statement with the Securities and Exchange Commission indicating that the subsidiary was wholly-owned. The subsidiary purchased for resale from the parent and was a regular customer of the parent. *Id.* These factors might appear to connect parent and subsidiary inextricably, but the court's finding indicates the strength of the presumption of separateness, the court said: "The control over the subsidiary's activities . . . must be so complete that the subsidiary is, in fact, merely a department of the parent." *Id.* (quoting *Delagi v. Volkswagenwerk AG*, 29 N.Y.2d 426, 432, 328 N.Y.S.2d 653, 657, 278 N.E.2d 895, 897 (1972)). *Accord* *Taca Int'l Airlines v. Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97, 256 N.Y.S.2d 129, 204 N.E.2d 329 (1965). See also *Puerto Rico Maritime Shipping Auth. v. Almogly*, 510 F. Supp. 873 (S.D.N.Y. 1981). *But cf.* *Jayne v. Royal Jordanian Airlines*, 502 F. Supp. 848 (S.D.N.Y. 1980) (—in wrongful death and survival actions, the court found that the "easy interchange between the two companies in financial, promotional, and operational matters indicates that ALIA [parent] considers Arab Wings [subsidiary] to be a part of its total airline services offering." *Id.* at 859).

138. *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980).

the United States. The United States bestows upon them their corporate existence. The justification for the territorial exception, as developed in the case law,<sup>139</sup> applies with equal force here. A review by a United States court of French nationalization would not offend French judicial authority or sovereignty since a French court would not be in a position to perform a *fait accompli* over an American subsidiary.

The decision whether to give extraterritorial effect to nationalization decrees of France under the territorial exception as articulated in the federal courts, would be within the discretion of the courts. Such discretion would entail primarily a consideration of the foreign policy ramifications of the nationalization—whether some aspect of the political relationship between the United States and France required deference to French nationalization. Deference to the French takeover would leave American plaintiffs without a remedy. Arguably the courts would hesitate to find the relationship between the United States and France so fragile as to require enforcement of the nationalization law. Perhaps so as not to jeopardize such a remedy, even the relationship between the United States and Cuba, a more politically charged one, was not held to be of such overriding importance as to require enforcement of the Cuban decrees. The discretion afforded the courts is a power reserved but, as yet, not exercised.

The final justification for the territorial exception to the act of state doctrine is the repugnance of courts of the United States for confiscatory takings in view of constitutional notions of due process. Certainly these notions would come into play in the determination by United States courts whether to give extraterritorial effect to French nationalization legislation.

### CONCLUSION

The French nationalization of United States subsidiaries of French corporations is a recent example of a situation envisioned by the courts where the territorial exception to the act of state doctrine might apply. The arguments favoring the conclusion that the sub-

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139. See *infra* notes 69-111 and accompanying text.

sidiaries are property located in the United States equally favor the conclusion that the territorial exception should be invoked. French nationalization is therefore a proper subject of review by United States courts which should find the legislation inapplicable to United States subsidiaries.

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