THE PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

1964

Case Concerning Cuban Nationalizations of United States owned Property, Greece v. United States, 1964.

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No. 1,964

IN THE

INTERNATIONAL COURT

OF

JUSTICE

AT THE

PEACE PALACE, THE HAGUE, NETHERLANDS

THE ROYAL KINGDOM OF GREECE,

Applicant,

V.

UNITED STATES OF AMERICA,

Respondent.

APRIL TERM

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COUNTER-MEMORIAL OF THE UNITED STATES GOVERNMENT

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25 April 1964

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THE ROYAL KINGDOM OF GREECE, Applicant,

V.

THE UNITED STATES OF AMERICA, Respondent.

COUNTER-MEMORIAL OF THE UNITED STATES GOVERNMENT

MAY IT PLEASE THE TRIBUNAL:

P A R T I

STATEMENT OF THE CASE

This proceeding was instituted by the Government of His Majesty King Paul and pursued by his heir, King Constantine of Greece, against the Government of the United States of America. The Hellenic Government accepts jurisdiction under Article 36-2 of the Statute of the Tribunal, and the United States Government submits to its jurisdiction without question.

In June 1962, the Greek flag-vessel Juan de Cuba loaded a shipment of sugar in a Cuban port. The sugar came

from a refinery of the XYZ Refining Company, a Cuban corporation, founded and wholly owned by the U.S. Sugar Co., a Delaware corporation, all of whose stock was owned by citizens of the United States.

In 1961 the Cuban Government nationalized XYZ Co., seizing all its properties in Cuba. No compensation was paid, in accordance with a Cuban decree which provided for expropriation of any property owned by United States citizens and designated by the Administrator as forfeited in retaliation for inimical actions by the Government of the United States. At that time the vessel Juan de Cuba was owned by the XYZ Co. and was seized by the Cuban Government as part of the property of the company. The ship was then registered in Cuba as a vessel owned by the Cuban Government.

The sugar aboard the Juan de Cuba had been sold by the nationalized XYZ Co. to a Greek importing firm. Title is alleged by Greece to have passed upon payment of the purchase price and loading of the vessel. The ship sailed on 15 June 1962. On 17 June the ship's crew forced the master at gunpoint to change course and sail to Florida. The crew did this with the purpose of seeking political asylum.

Officers of the original XYZ Co. brought an action in the Florida state court for possession of the sugar aboard the ship. Their claim was that nationalization of the property without compensation was contrary to international law. The Company also brought an action in United States District Court for possession of the ship.

The Cuban Government retained counsel, who moved in Federal Court for release of the vessel on grounds of sovereign

immunity. No appeal was taken. The Florida court held that the nationalization would not be recognized and that the sugar belonged to the XYZ Co. There was no word from the State Department before this court. After this decision, the Greek buyer deposited with the court funds equal to the value of the sugar so the shipment could be released when the Juan de Cuba sailed for Athens with a new crew. An appeal was taken as far as the Supreme Court of Florida where the lower court decision was affirmed. Nothing in the way of suggestion or directive was heard from the State Department. No further appeal was sought beyond the Florida Supreme Court. The money deposited was duly paid to the officers of the XYZ Co.

Subsequently the Greek government espoused a claim of the Greek firm against the United States asserting that the payment of the money had been exacted in violation of international law. The United States Department of State rejected the claim. Thereupon the Greek Government instituted this proceeding against the United States.

It has been stipulated by both governments that (1) no contention will be made that the courts sitting in Florida, state and federal, lacked personal jurisdiction because the Juan de Cuba was taken there under duress of a defecting crew, and (2) if the Tribunal finds that under the law the sugar belongs to the Greek firm, award shall be in the form of repayment of the funds deposited with the Florida court. Therefore, the instant case is to be decided on the merits. All facts are considered to be hypothetical except that the actual relations between the United States and Cuba during the past few years are to be deemed part of the situation.

P A R T I I

QUESTIONS PRESENTED

1. Did the nationalization by the Cuban government violate the generally recognized principles of international, and if so, did title to the sugar in question remain in the original owner, a United States national?

   A. Did the nationalization violate the basic international requirement of compensation?
   B. Did the nationalization discriminate against United States nationals in violation of international law?
   C. Did the title to the sugar in question remain in XYZ Refining Company?
   D. Does international law sanction unlawful confiscation as a retaliatory measure?
   E. Is the nationality of the XYZ Refining Company determined by the owners?

2. Did the United States violate international law by reviewing judicially the acts of the Cuban Government?

3. Did the United States deny justice to the Greek Importing Firm on the basis of the Florida courts' rulings that the nationalization by the Cuban Government was in violation of international law?

P A R T I I I

STATEMENT OF THE LAW

CHAPTER I

SINCE THE NATIONALIZATION BY THE CUBAN GOVERNMENT VIOLATED INTERNATIONAL LAW, AND WAS UNJUSTIFIED AS A REPRISAL, TITLE TO THE SUGAR IN QUESTION REMAINED IN THE ORIGINAL OWNER, A UNITED STATES NATIONAL.

On July 6, 1960, the Cuban Council of Ministers adopted Law No. 851, which gave the Cuban President and Prime Minister discretional power to nationalize, by forced expropriation,

property in which American nationals had an interest.[1] This law provided inter alia that: (1) the law would not become operative until its publication in the Official Gazette of the Republic of Cuba, Cuban Laws, No. 851, Art. 8; and (2) no appeal would lie against any expropriation carried out thereunder. Cuban Laws, No. 851, Art. 6. That Law No. 851 was never published in the Official Gazette of Cuba and that the XYZ Refining Company was permitted no judicial redress for the seizure of its property indeed indicates the inequity of treatment afforded the American national. In this setting and atmosphere of manifest unfairness, the nationalization causing the loss by an American corporation of the sugar in question occurred.

A. The Cuban Seizure of American-owned Sugar Violated the Basic International Law Requirement of Compensation.

It is a fundamental principle of international law that States must provide adequate and just compensation for the taking of alien-owned property. Chorzow Factory case, P.C.I.J. Ser. A, No. 13 (1928); German Interests in Upper Silesia case, P.C.I.J. Ser. A, No. 7 (1926); Anglo-Iranian Oil case [1952], I.C.J. Rep. 166 (Dissenting Opinion). Of the numerous decisions of international tribunals which support this proposition, the leading decision is the Chorzow Factory case. The

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[1] While the hypothetical facts do not specifically mention this, it is stipulated in the Statement of the Case that the "actual relations between the United States and Cuba during the past few years are to be deemed part of the situation" (S.C. 3). Hence, it is reasonable to assume that the nationalization decree in question was adopted under the authority of Cuban Law No. 851, since this law is the legal foundation for all Cuban nationalization decrees.

Court there forcefully asserted that it was clear as a general principle of international law that expropriation requires the payment of compensation. Innumerable legal writers likewise have asserted that just compensation for the governmental taking of property is an express requirement of international law. Wortley, Expropriation in Public International Law, 33-36 (1959); Bindschedler, Verstaatlichungmassnahmen und Entschadigungspflicht Nach Volkerrech 111 (1950); Fachiri, Expropriation and International Law, 6 BRIT. YB. INT'L L. 159 (1925); Fauchille & Sibert, 32 REVUE GENERALE DE DROIT INT'L PUBLIC 5, 22 (1925); Peselj, International Aspects of the Recent Yugoslav Nationalization Decree, AM. J. INT'L L. 428 (1959); Rado, Czechoslovak Nationalization Decrees; 3 Hackworth, Digest of International Law, 656 (1942); 1 Schwarzenberger, International Law, 205 (3d ed. 1957).

This accepted principle, which indemnifies foreign-owned property upon confiscation, has become part of the Law of Nations not merely because it represents a universally recognized standard of justice, but also because it is absolutely essential to the welfare of every nation. Without its protection, no commercial international intercourse could safely be carried on. See Anderson, Basis of the Law Against Confiscating Foreign-owned Property, AM. J. INT'L L. 525 (1927). One need not be of Herculean mental strength to concede that the principle of just compensation is well-founded in both reason and necessity.

Eastern European countries also recognize a liability to compensate deprived aliens for nationalization of their property, Postwar Nationalization of Foreign Property in Europe, 48 COLUM. L. REV. 1125, 1143 (1948). The agreements reached by the

United States with Poland and Yugoslavia indicate that Communist states have compensated foreigners when their original intention was outright confiscation. See Seidl-Hohenveldren, Communist Theories on Confiscation and Expropriation, Critical Comments, AM. J. COMP. L. 541 (1958). Communist states, in treaties between themselves, consistently recognize the obligation to pay compensation for the seizure of property. Drucker, On Compensation Treaties Between Communist States, 10 INT'L & COMP. L.Q. 238 (1961).

Other states, such as Egypt and Iran, also have acknowledged liability upon confiscation. Egypt eventually recognized the duty to pay compensation after its seizure of the Suez Canal, as did Iran after its seizure of oil properties. See 51 AM. J. INT'L L. 673, 675 (1957); Farmanfarama, The Oil Agreement Between Iran and International Oil Consortium: The Law Controlling, 34 TEXAS L. REV. 259, 261 (1955).

All of the aforementioned states expropriated property with the express desire to alter the existing economic structure of their particular countries. Even if this is the rationale for the expropriation in the present case, no exception to the general principle is warranted, because even among those states with such desires it is the customary practice to compensate for the taking of alien-owned property.

Thus, one is led to the inexorable conclusion that there exists a firmly established rule of international law that expropriation, to be valid, must be accompanied by payment of compensation. This position is further supported by a resolution adopted by the General Assembly of the United Nations on December 14, 1962, by an overwhelming vote of 87 to 2 with twelve abstensions. Cuba was one of the abstaining nations

while Greece, the applicant in this case voted in favor of the resolution. The resolution, in talking of expropriation, declares that: "in such cases, the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law [emphasis added]." U.N. Doc. No. A/AC.97/5/Rev. 2 (1962).

This resolution was the culmination of a long period of study and debate on the subject of "permanent sovereignty over natural wealth and resources," during which a comprehensive report was prepared by the Secretariat of the United Nations which includes a careful analysis of the international law authorities on the requirement of compensation. U.N. Doc. No. A/Ac. 97/5-Rev. 2 (1962), 94-98.

While the international authorities cited talk of "just" or "appropriate" compensation, the issue as to whether the compensation provided in the instant case satisfied this requirement never arises. This is simply because the facts in the present situation clearly indicate that "no compensation was paid" (S.C. 2). Hence, not only was "adequate" or "just" compensation not provided; there was no compensation whatsoever.

Consequently, the decisions of international tribunals, the opinions of legal writers, the custom of the Communist countries, and the recent resolution of the United Nations General Assembly are significant as demonstrative of the respect and obedience accorded this necessary principle of international law. With this perspective, it is incomprehensible that the Cuban Government could have shown its contempt for international law by such blatant disregard for one of its most-embraced principles. The United States submits that such clear and utter

disregard for international law should be condemned by this Tribunal.

B. Nationalization Which Singles out Named Alien Properties is Violative of International Law.

A measure of expropriation, even if not unlawful on any other ground, becomes unlawful under international law, if in effect it is exclusively or primarily directed against foreigners as such. Brierly, Recueil de Droit International 171 (1936), Herz, 35 AM. J. INT'L L. 249 (1941); de la Pradelle, Projet Provisoire de Resolutions (1950); Gidel, Revue de Droit International 117 (1927). This principle of equality of treatment has long been subscribed to by most nations of the world. The decisions of various international tribunals corroborate what is conceded to be the general rule, that discriminatory measures against particular aliens violate international law. German Settlers in Poland case, P.C.I.J. Ser. B., No. 6 (1923).

In the Norwegian Shipowners case, the Permanent Court of Arbitration found that the requisition of Norwegian ships by the United States violated international law, not only because of a lack of compensation but also because of the "discriminatory use of the power of eminent doman." 1 U.N. REP. INT'L ARB. AWARDS 207, 336 (1922).

In another international dispute, the Oscar Chinn case, P.C.I.J. Ser. A, No. 63 (1922), the Permanent Court of International Justice stated, at p. 87: "The form of discrimination based upon nationality and involving differential treatment by reason of their nationality. . . . [emphasis added]."

The United States contends that such "differential treatment" certainly existed in the instant case since the Cuban nationalization was aimed solely at American-owned property (S.C. 1). This indicates once again the clear and obvious failure of the Cuban Government to satisfy the international standards relating to expropriations, standards which are subscribed to by most Latin American countries. Under Art. 25 of the Economic Agreement of Bogota the principle was enunciated in the following terms: "the states shall take no discriminatory action against investments by virtue of which foreign enterpises or capital may be deprived of legally acquired property rights. . . . Any expropriation shall be accompanied by payment of fair compensation. . . . " U.N. Doc. No. A/Ac./ 97/5 Rev. 2 at p. 75 (1962).

Writings from Communist countries also demonstrate the unlawfulness of discriminatory measures of nationalization. See Domke, Foreign Nationalizations, 55 AM. J. INT'L. L. 585, 605 (1961).

The United States submits that, because of the seizure of property without compensation and the discriminatory nature of the seizure, this Court should hold that the Cuban nationalization violated international law, and that as a consequence thereof, the XYZ Refining Company is still the rightful owner of the sugar in question.

C. The Title to the Sugar in Question Should Remain in the Original and Rightful Owner, the XYZ Refining Company.

It may be argued by the Government of Greece that regardless of the Cuban nationalization's invalidity the title to the sugar in question still passed to the Greek national. The failure to pay compensation or the discriminatory nature of

the expropriation, Greece may argue, simply gives the United States a cause of action for damages. The basis for such a claim is that a subsequent innocent purchaser should not be harmed. However, the United States contends that if this Court recognizes the "innocent purchaser" doctrine then this Court should accept the doctrine replete with all of its various elements. To qualify as an "innocent purchaser" one must not have had notice of the invalidity of the title acquired. The United States submits that the Greek national in this case should be held to have possessed such notice and thus be precluded from qualifying under this doctrine. In The Rose Mary case [1953] Int'l L. Rep. 316, 324 (Sup. Ct. Aden 1953), a case where the Swiss government claimed they purchased oil in good faith and without knowledge or notice of the plaintiff's claim, the court aptly stated that: "this was highly doubtful in view of the plaintiff's warnings throughout the world."

The United States has long recognized and vigorously asserted to the world that international law required that compensation must be paid where alien-owned property is expropriated. Note of August 22, 1938 by Secretary of State Cordell Hull to Mexican Ambassador; see also additional United States notes in 3 Hackworth, Digest of International Law, 656, 662. More recently, the United States asserted, with reference to the seizure of land belonging to a United States national in Guatemala, that: "they (states) are under an obligation to pay just compensation for such property. . . 39 DEP'T STATE BULL. 357, 359 (1953).

And with respect to Cuban Law No. 851 specifically, the law from which the nationalization decree in the present

case receives its authority,[2] the United States' Note of July 16, 1960, stated inter alia: "The Government of the United States considers the law to be 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 [emphasis added]." 43 DEP'T STATE BULL. 357, 359 (1960). Hence, if the United States considers this law to be violative of international law, then certainly inexorable logic tells us that a decree based on such law would also be considered invalid.

In view of the aforementioned declarations by the Department of State, the United States' position should have been manifestly clear to Greece and the other members of the community of nations. However, if this was not conclusive, then one need only have looked at the numerous treaties the United States concluded with other states, including Greece, to realize that the Greek Government, and indeed the world, was on notice of the United States' attitude toward expropriation of alien-owned property. Further, both Greece and the United States were signatories of the United Nations resolution of December 14, 1962, which reiterated the existing principles of international law with regard to nationalization. U.N. Doc. No. A/Ac. 97/5/Rev. 2(1962). See, Committee on International Trade and Investment of the Section of International & Comparative Law of the American Bar Ass'n, The Protection of Private Property Invested abroad, 43-47 (1963).

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[2]This is assumed on the basis of the clause in the Statement of the Case which states that "the actual relations between the United States and Cuba during the past few years are to be deemed part of the situation" (S.C. 3). Law No. 851 is the legal foundation for all Cuban nationalization decrees.

It is difficult to understand how Greece can contend that her national, the Greek Importing Firm, qualifies under the "innocent purchaser" doctrine. The Greek Government certainly had knowledge of the generally recognized principles of international law which provide for compensation and forbid discrimination in the event of expropriation. See United Nations resolution of December 14, 1962, U.N. Doc. No. A/Ac. 97/5/Rev. 2 (1962). The Greek government also was aware that the United States considered such action by the Cuban government violative of international law. See 43 U.S. DEP'T STATE BULL. 171 (1960). The Greek Importing Firm should have been on notice as a result of the international nature of its business and the fact that the national's own government subscribed to the existing international law with regard to nationalization. In view of the unequivocal nature of these principles of international law, this Court should not recognize a claim of ignorance.

The United States further submits that compelling policy reasons dictate the conclusion that title to the sugar in question remained in the XYZ Refining Co. First, the victims of such expropriations will rarely obtain effective relief if title is permitted to pass. The victim often cannot challenge the expropriation in the courts of the confiscating country either because of a local law which precludes such a challenge, as in the present case, or because such a suit would be futile. Also, as in the instant case, diplomatic channels are often closed.

Second, it is undesirable to allow a nation to profit from its international wrongdoing with impunity. The effect of this Court's holding that notwithstanding the clear violation of international law by Cuba the title to the sugar still passed to the Greek national would be that international

law was nonexistent. However, a holding that title to confiscated goods remains in its original owner would render such goods unsalable on the international market. Thus, states which expropriate property would be forced, through self-interest, to conform to international standards--a most desirable result.

D. International Law Does not Sanction Unlawful Confiscation as a Retaliatory Measure.

The position that confiscation is justified under international law since it was "in retaliation for inimical action" is untenable because retaliation is no longer a sanctioned rule of conduct among nations. Charter of United Nations, Article 2. The primitive notion of retaliation has been replaced by an expanding concept of the "rule of law" in the international community.

The only possible exception to the general rule of "no retaliation" is the measure of reprisal. However, the United States has been quick to point out that one of the elements of a reprisal is that it must be provoked by a violation of international law. Naulilaa case, Portuguese-German Arbitration Tribunal (1928); North Atlantic Fisheries case, 1 Hague Ct. Rep. (1910). Applying this element to the facts of the instant case we are forced to ask: where is the violation of international law by the United States? The United States submits that close scrutiny of the present facts makes it apparent that no such violation exists. Hence, the Cuban nationalization was not justified in any respect under the generally recognized principles of international law.

E. The Nationality of a Corporation is Determined by the Nationality of its Owners.

Greece may assert that the confiscation of American-owned property represented no international law violation because the XYZ Refining Company was incorporated in Cuba and was, therefore, a Cuban national. The United States contends that the Court should take notice of the fact that all of the XYZ Refining Company's stock is owned by United States citizens (S.C. 2).

The Permanent Court of International Justice, in the Certain German Interests in Polish Upper Silesia case, P.C.I.J. Ser. A. No. 7, 68-69 (1926), adopted what has since been referred to as the "control" test. Additional decisions of arbitration tribunals which adopt this test are cited in 2 Rabel, The Conflict of Laws: A Comparative Study, 57-59 (2d ed. 1960). This test looks beyond the corporate fiction to the actual owners of the corporation to determine nationality. To say that there has been no international law violation because the XYZ Refining Company is owned by Cuba is to border on the ludicrous. A corporation is simply a form of organization which allows individuals to operate and enjoy their property. An injury inflicted upon this "form" as such is a pure fiction. It is the individuals who derive an advantage from the organization and also they who are injured.

The United States' position becomes stronger when it is considered that Cuba disregarded the corporate entity to strike at the stockholders. The expropriation was aimed

directly at American-owned property for what the Cuban government considered to be "inimical actions by the United States Government" (S.C. 2). Greece cannot now be allowed to use that same corporate entity as a shield to ward off review by this Court. The nationality of those at whom the Cuban expropriation was aimed should be accepted as the controlling nationality of the XYZ Refining Company.

In Daimler Co. v. Continental Tyre & Rubber Co., 2 A.C. 307, 340 (1916), the English court pierced the corporate veil and determined the theory of a corporation by the application of a theory of "control."

Also in Charbonnage Frederic Henri S.A. v. Germany, Ann. Dig. 227 (1919-1922), the Franco-German Mixed Arbitral Tribunal determined that the nationality of the stockholders should be the test of control.

The legal writers, in analysis of international practice, state that:

> [O]ne may conclude to the existence of an international rule allowing intervention on behalf of national shareholders of a company (XYZ Refining Co.) that is itself a national of the State (Cuba) oppressing it [parenthesis added]. van Hecke, "Nationality of Companies Analysed," 8 Nederlands Tijdschrift Voor Internationaal Recht 223, 227 (1961). See also, Jones, Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies, 26 BRIT. Yb. INT'L. L. 225, 236 (1949).

Professor Hackworth, a Justice on this Honorable Tribunal, indicates that it is "the established practice of governments to protect the interests of their nationals in foreign companies. . . . " 5 Hackworth, Digest of Int'l L. 842 (1943).

The United States contends that international practice has reflected a broad policy in discarding place of incorporation as determinative when it would cloak violations of international law or effect a result contrary to the principles of international conduct. It is submitted that established criteria prevent the corporate fiction in this case from obscuring a clear violation of international law and frustrating its remedy.

CHAPTER II

THE UNITED STATES DID NOT VIOLATE INTERNATIONAL LAW BY REVIEWING JUDICIALLY THE ACTS OF THE CUBAN GOVERNMENT.

Greece may argue that the United States violated international law because the United States Judiciary did not give automatic effect to the Cuban confiscation of American-owned property. The basis of such a claim is that the United States follows what is referred to as the "Act of State" doctrine and that such doctrine precludes the courts of the United States from questioning the validity of an act of a foreign sovereign.

A. The United States Courts in Fact Applied the Act of State Doctrine.

The United States Government submits that at the time of the United States state court decisions the courts were in fact applying the "Act of State" doctrine as it then existed. While the facts of the instant case are silent as to the specific dates of the state court action in the United States, we do know that such judicial action took place after

June 17, 1962, when the Juan de Cuba sailed into a United States port, and before March 23, 1964, the date of the most recent interpretation of the Act of State doctrine. See Banco Nacional de Cuba v. Sabbatino, 32 U.S. L. Week 4229 (1964).

Between these two dates the "Act of State" doctrine was interpreted as permitting review of the acts of a sovereign nation "where international law impinges." Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 860 (2d Cir. 1962); Menendez Rodriguez v. Aetna Ins. Co., 311 F.2d 437 (5th Cir. 1962); Menendez v. Pan American Life Ins. Co., 311 F.2d 429 (5th Cir. 1962); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 311 F.2d 438 (5th Cir. 1962). International law certainly impinged on the present case because by the very nature of the Cuban government's action, the international standards of compensation and no discrimination must be met. International law sets up certain guidelines within which a government must operate if it is going to expropriate property. Thus, whenever any expropriation takes place, such action is carefully scrutinized under the standards of international law. Consequently, the United States courts at that specific time were completely justified in reviewing the acts of the Cuban Government. Furthermore, Greece cannot now claim the applicability of the "Act of State" doctrine because the theory behind the doctrine is to permit the United States State Department to have complete discretion in the relation between the United States and other sovereigns. This is exactly what is taking place in the present case. The State Department is simply exercising its discretion by agreeing to bring the present controversy before the Tribunal.

B. The Act of State Doctrine is Not a Rule of International Law.

The issue before this Court is whether an "Act of State" doctrine exists on the international level. This is the predominant inquiry because before submitting the present inquiry to this Court, both the United States and Greece stipulated that the basic question before this Tribunal was whether "the Court finds that under the law the sugar belonged to the Greek firm . . . " [emphasis added] (S.C. 4). Since Article 38 of the Statute of this Court states that this Court shall "decide in accordance with international law such disputes as are submitted to it . . . " the United States submits that the matter at hand must be decided by the application of principles of international and not domestic law. Statute, International Court of Justice, Art. 38. Consequently, the "Act of State" doctrine becomes an irrelevant consideration unless it can be shown that this doctrine is of such universal acceptance as to be deemed a general principle of international law.

This doctrine is not a recognized principle of international law but is simply a rule which is followed by only two countries, the United Kingdom and the United States. It has been stated by Hjerner, an eminent international writer, that "the sacrosancity of foreign acts of state . . . is a specifically Anglo-American doctrine having its origin in old English constitutional law and cannot be accepted as a base for a general theory about the effects of foreign confiscation" [emphasis added]. Hjerner, The General Approach to Foreign Confiscation, 2 Scandinavian Studies in Law 179, 204 (1958).

The United States contends that there exists no internationally authoritative case which holds that the courts

of the forum are bound to recognize acts of a foreign state which violate international law. Professor Oppenheim, a prominent international writer, states:

> Whatever may be the rule of international law as to the duty of states . . . to recognize the effects of foreign legislation within the country concerned, it would appear that there is no such obligation with respect to foreign legislation . . . which is in violation of international law [emphasis added]. 1 Oppenheim, International Law, 267-68 (8th ed. H. Lauterpacht, 1955).

Also, according to Hjerner:

> [I]t is difficult to find any settled practice or rule of international law precluding one state from attributing or not attributing any effects whatever to acts of another state. 2 Scandinavian Studies in Law 179, 204 (1958).

European and other foreign authorities indicate not only that the "Act of State" doctrine is not a rule of international law but also that it is not recognized, even in the absence of an international law violation, as a barrier to judicial inquiry. Such a doctrine simply does not exist in most countries of the world community. Throughout the world the cases clearly indicate that courts are free to examine the acts of a foreign state to determine whether to recognize and apply them or to reject them because they violate international law.

In the Anglo-Iranian Oil Co. v. Jaffrate, 1953 Int'l L. Rep. 316 [1953] the Supreme Court of Aden demonstrated well the prevailing attitude of most countries. The Court there reviewed the Iranian nationalization of a British Oil Co., and held that Iran acquired no title to the oil because the nationalization, being without compensation, violated international law.

The courts of France, Germany, Italy, Japan, The Netherlands, and Switzerland, to name a few, all adhere to the

view that the courts of a country have the right and the duty to examine a foreign law, from the point of view of its legality, so as to establish whether it is contrary to any generally recognized principles of international law. Ropit case, 55 Journal de Droit International 674 (1928); M. v. Aktieselskabet K.H., 145 Entscheidungen des Reichsgerichts in Zivilsachen 16 (1934); Anglo-Iranian Oil Co. v. S.U.P.Q.R. Co. 1955 Int'l L. Rep. 23 [1955]; Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, 1953 Int'l L. Rep. 305 [1953]; Davis & Cy. v. Compania Mexicana de Petrolea El Aquila, 1939 Nederlansche Jurisprudentie No. 747; Boehmische Unionvank v. Heynau, 68 B.G.E. II 377 (1942). But more significantly, even Greece does not recognize an "Act of State" doctrine. Efimeris Ellinon Nomicon D. 560 (1937); see also 3 Revue Hellenique de Droit International 62, 68 (1950). Hence, Greece not only rejects recognition of an act of a foreign sovereign when it is in violation of international law, but it goes one step beyond by saying that such a foreign act will not be recognized when it violates the "public policy" of Greece. The United States submits that Greece should not be permitted to impose a non-existent rule of international law on the United States, a rule which Greece herself does not recognize.

This Court should continue to recognize the absence of an "Act of State" doctrine on the international level. To continue to do so will permit municipal courts to review acts of another sovereign when those acts are in violation of international law. The United States submits that in this manner, a substantial body of international law will be developed, a necessity in our modern-day community of nations.

CHAPTER III

THE GOVERNMENT OF GREECE CANNOT CLAIM A DENIAL OF JUSTICE IN THE TREATMENT AFFORDED THE GREEK IMPORTING FIRM BY THE FLORIDA COURTS, BECAUSE OF ITS FAILURE TO EXHAUST ITS AVAILABLE LOCAL REMEDIES.

Reduced to its essentials, the complaint the Greek Government is espousing on behalf of its national is a "denial of justice" by the United States courts in that "the payment of the money was exacted in violation of international law" (S.C. 4). In other words, it is the position of the Government of Greece that the court's failure to recognize the Cuban nationalization and further its declaration that the sugar was owned by the XYZ Co. constituted a violation of international law.

Initially it should be pointed out that the only plea available to Greece to complain of United States local law by a claim of denial of justice. This is substantiated by the Treatment of Polish National in Danzig case, P.C.I.J., Ser. A, [Judgment No. 44] (1935). The Court said: " . . . according to generally accepted principles, a state cannot rely as against another state, on the provisions of the latter's constitution but only on international law . . . " (p. 24). Hence the channel of local law being closed, Greece must rely on international law, a principle of which is "denial of justice." Generally speaking, exhaustion of available judicial remedies is a prerequisite to a valid complaint that the alien has been denied justice. Denial of justice may consist either of denial of access to the courts or of injustice at their hands. It may not be predicated solely on the fact that the decision might have been different or that reasonable men might differ as to

its correctness. There is, therefore, a strong presumption in favor of its correctness, and one who complains, basing his grievance upon an alleged denial of justice, assumes the obligation of establishing that the presumption does not apply to his case. Generally, the presumption will not apply if the decision appears to have been influenced by improper motives; if corruption of the court is shown; if there was prejudice or discrimination against the alien because of his nationality; if there was unconscionable delay by the court or other grave irregularities resulting in serious injustice; or if there was an obvious failure to observe and apply the basic standards of international law, the foundation is thus laid for international adjudication.

This subject was considered by the Committee on Responsibility of States at the 1930 conference at The Hague, which tentatively agreed upon the following statement:

> International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact:
>
> (1) That a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the State;
>
> (2) That, in a manner incompatible with the said obligations, the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice. [Conference for the Codification of International Law, Acts, Vol. IV, Minutes of the Third Committee)League of Nations pub. 1930. V. 17), p. 237].

In the Neer case the General Claims Commission [United States and Mexico] expressed the following view:

> . . . It is immaterial whether the expression "denial of justice" be taken in that broad sense in which it applies to acts of executive and legislative authoritities only. . . . Without attempting to announce a precise formula, it is the opinion of the Commission . . . [first] that the propriety of governmental acts should be put to the test of international standards, and [second] that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. . . . [L.F.H. Neer and Pauline E. Neer (United States v. Mexico), Opinions of the Commissioners (1927), 71].

It is, of course, for this Honorable Tribunal, in the instant case, to determine if the conduct of the United States' courts fell below international standards in not recognizing the Cuban expropriation and awarding the money to the XYZ Co. However, the United States contends that an absolute rule of international law dictates that an exhaustion of local remedies is a prerequisite to any claim of denial of justice. Interhandel case I.C.J. Rep. 227 (1959). The judicial organization in any civilized country provides for a hierarchy of courts and makes strict compliance with the exhaustion of remedies rule especially appropriate. Thus, the first condition of any such claim is that every attempt has been made to exhaust all available local judicial remedies. [See Melilla-Ziat, Ben Kiran claim (No. 53-1924), between Great Britain and Spain, 2 R.I.A.A., p. 615, 731, and Inter-Oceanic Ry. Co. of Mexico claim (1931), between Mexico and the United Kingdom, 5 R.I.A.A., p. 178, at p. 186.]

In 1930, the then Legal Adviser of the United States Department of State, Mr. Hackworth, wrote:

> An important point to be determined in connection with any claim is whether the claimant has exhausted the means available to him in the foreign jurisdiction for redressing his injuries. If local law provides a method of redress, either by appeal to local courts or to administrative authorities, the claimant, before he is entitled to have his case espoused by his Government must . . . show that he has exhausted such remedies and has been unable to obtain justice. [Opinion of the Solicitor for the Department of State (Hackworth), July 21, 1930, MS. Department of State, file 400.00/34.

In 1939 a case was brought before the Permanent Court of International Justice by Estonia for damages resulting from the alleged wrongful withholding by Lithuania of the proprietary rights of an Estonian Company. The case, based upon Lithuania's refusal to recognize the Estonian company as successor to the rights of a Russian company, was disposed of on a preliminary objection, as to which the Court said: " . . . the existence of this rule [exhaustion of remedies] which in principle subordinates the presentation of an international claim to such an exhaustion is [clearly recognized]." The Panevezys-Saldutiskis Railway case, P.C.I.J., Ser. A/B, No. 76, at pp. 4, 21 (1939).

In the Ambatielos case the local remedies rule was again formulated:

> The State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of the State. The Ambatielos claim, Commission of Arbitration: Greece-United Kingdom (1956), H.M.S.O. No. 59-126 (1956). [Emphasis added to quotation.]

As the Arbitrator in the Finnish Ships case between Finland and the United Kingdom had pointed out, the object of this rule

is to enable the territorial sovereign to do justice "in its own, ordinary way . . . and adjudicated upon by the highest competent municipal court." See The Finnish Vessels case, Bagge Sole Arbitrator, 3 R.I.A.A., p. 1479 (1934).

Thus the principle is clear that there must be an exhaustion of remedies before there can be a denial of justice, otherwise the claim is without merit. Before any nation can present a claim at the international level it must first allege and prove an injury. When denial of justice is the claimed injury, as it is in the instant case, a State is not under a duty to make reparation until all the local remedies available to the "injured" alien are exhausted. In other words, until there has been an exhaustion there is, in fact, no injury that can properly be complained of on the international plane.

There are several sound policy reasons for the requirement that local remedies must first be exhausted. First, sovereignty and independence permit the local state to demand freedom from interference on the assumption that its courts are capable of doing justice; secondly, the local government must have an opportunity of correcting the alleged error to the injured alien in its own normal way, and thus avoid, if possible, all occasion for international reclamation; thirdly, there is no opportunity to form even a preliminary judgment whether a wrong has been done, in ordinary cases, until the local remedies have in fact been tried to their fullest; fourthly, if there has been a wrong, it is necessary to determine whether the state is willing to leave the wrong unredressed. It is a sound principle that where there is a judicial remedy, it must be sought. That courts must have a chance to administer justice and avoid international tribunals is in complete accord with the fundamental basis of international

law. See generally, Harvard Research in International Law, 23 A.J.I.L. Spec. Supp. 133, 173 et seq.

The Government of the United States contends that the Greek Government cannot show an injury to her national because at the time of the alleged breach of international law local remedies were still available to the importer in the United States courts.

If the Importing firm felt the Florida courts should not have tried the case it had the right of removal to the United States Federal Court on at least two grounds: (1) diversity of citizenship; and (2) a Federal question was involved. This the Importer failed to do. If he thought the Florida court of first instance was without jurisdiction or power to hear the case he also had the same right of removal to Federal Court. This he failed to do. There was no application for writ of certiorari from the judgment of the Florida Supreme Court to the Supreme Court of the United States. The Importer had this right and failed to exercise it. If there was an injury to the Greek national because of a failure to properly apply international law, the United States has been deprived of the opportunity to correct this situation simply because the national did not take advantage of the local remedies still available to him. Because of the failure to remove to the proper court, the United States Government submits that the Greek national is, at least partially, responsible for the situation of which he now complains.

As was stated in the Ambatielos claim, if a party has failed to exhaust its procedural remedies in the court of first instance, it is estopped, at the international level from relying on its own fault to claim a denial of justice.

The United States Government submits that in the instant case the Greek Importer's failure to exhaust the available local remedies now estops him from relying upon his own fault to show an injury amounting to a denial of justice by the United States' courts. To permit him to do so would be to fly into the teeth of the sound policy of the Rule's existence.

Under the Statement of the Case, it is stipulated that if "under the law" the Court finds the sugar belongs to the Greek firm, the award should be by repayment of the funds deposited with the Florida court (S.C. 4). The United States submits that this Honorable Tribunal cannot find "under the law" that the sugar belongs to the Greek firm because that "law" is international law. Statute, International Court of Justice, Art. 38. International law as shown by the above authorities requires an exhaustion of all available local remedies before the Tribunal reaches the issue as to whether the United States has or has not violated international law by exacting money from the Greek firm. In view of the fact that no advantage was taken of the available United States judicial remedies, the Greek Government, on behalf of its national, cannot now be heard to complain of a denial of justice by the United States in the mantle of its judiciary. This is so because the judiciary, and therefore the United States, has never had a chance to render or deny justice. The claim of the Greek Government on behalf of its national, the Importer, is simply without merit.

P A R T I V

SUBMISSIONS

On the basis of the observations and statements of the law as presented herein the Government of the United States submits to this Honorable Tribunal that:

1. The nationalization by the Cuban Government was invalid in view of the fact that it was made without compensation and was discriminatory, all of this being violative of international law, and because the nationalization was not justified as a retaliatory measure, thus causing the title to the sugar to remain in the United States national.

2. The United States courts did not violate international law by reviewing the actions of the Cuban Government because the "Act of State" doctrine as then interpreted was in fact applied, and because the so-called "Act of State" doctrine is not a rule of international law.

3. The United States has not denied justice to the Greek firm in view of the fact that the said firm failed to exhaust the local remedies available to it in the courts of the United States.

P A R T V

PRAYER

ON THE PRECEDING PRESENTATION OF ARGUMENT AND AUTHORITIES:

May It Please The Tribunal

to ADJUDGE and DECLARE that the claim submitted by the Application of the Royal Government of the Kingdom of Greece is without merit. And, having regard to the fact that the said claim is without merit and that it is unfounded,

May It Please The Tribunal

to DISMISS the claim of the Royal Government of the Kingdom of Greece without prejudice to the Government of the United States of America.

For ALL OF WHICH the Government of the United States of America now prays be GRANTED.

RESPECTFULLY SUBMITTED

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