On the Territoriality Principle in Public International Law

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On the Territoriality Principle in Public International Law

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PREFACE

In the international law of expropriation, the principle which is most often applied is the territoriality principle. The case law of the United States and Western European countries is based upon it. Although there are nuances in individual cases which are partly due to historical developments (and the result of the more or less practical experience of a country's citizens with foreign expropriations), there can be no question that territoriality remains now, as always, the test of recognition.
I. CONCEPT

A. On Vagueness

In Germany the term "territoriality principle" (Gebietsgrundsatz) has several meanings. Generally the term conveys the idea that the legal consequences which flow from state action are effective only within the territory of the acting state.

However, the expression has different meanings in different contexts. The term "territoriality principle" acts much like a veil covering the real subject matter. The principle is applied to limit the effect of acts of state where a state seeks to enforce judicially an expropriation act against property located in another state. In such cases it would be better for a court to say, for example, that "expropriations will be recognized only if and to the extent that the expropriating state stays within the limits of its power." One could then dispense with the vague expression "territoriality principle," just as in the field of private international law one strives to avoid using the amorphous term "qualification" to aid in certainty and predictability.

B. The International Law of Intellectual Property

The international law of industrial property is based primarily on the territoriality principle. Each state decides questions involving the origin, content, protection, transfer and loss of patents, trademarks, etc., but such decisions are effective only within its territory. While property and every other private law right are, in accordance with private international law, either valid everywhere or not valid at all (thereby forming a single legal right), a patent, if it is valid in several states, constitutes in accordance with the international law of industrial property a "bundle" of rights each of which is valid in a single state.

If there also exists a bundle of de facto rights in private international law because each state has its own private international law, such a bundle of intellectual property rights exists de jure in international law because every state's conflict of laws rules divide trademark and patent rights on a state-by-state basis. To adopt a descriptive illustra-

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1. See, e.g., E. Ulmer, DIE IMMATURALGOBERRECHTE IM INTERNATIONALEN PRIVATRECHT (1975) [hereinafter cited as IPR]; Neuhaus, Drobnig, von Hoffmann, & Martiny, Die Immaterialgüterrechte im künftigen IPR der Europäischen Gemeinschaften, 40 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 189 (1976) [hereinafter cited as RABELSZ]; Ulmer, Gewerbliche Schutzrechte und Urheberrechte im IPR, 41 RABELSZ 479 (1977); Troller, Neu belebte Diskussion über des IPR im Bereich des Immateri algüterrechts, PROBLEMI ATTUALI DI DIRITTO INDUSTRIALE, STUDI CELEBRATIVI DEL XXV ANNO DELLA RIVISTA DI DIRITTO INDUSTRIALE 1125 (1977).
tion from English legal history: in private international law the cake is passed around, while in the international law of intellectual property it is divided up. The “bundle” theory is derived from the fact that the protection of intellectual property originally depended on a grant (in the nature of a privilege) from the state. At this point the rules of conflict of laws come to a halt, just as the conflicts rules outlasted the substantive laws of the division of hereditary estates.

Justifiably, the “bundle” theory has been both attacked and defended. It is anchored in a network of international treaties, e.g., the Paris Convention for the Protection of Industrial Property, the Bern Convention on the Protection of Works of Literature and Art, and the World Patent Law Convention. Not much damage is being done to the “bundle” theory by the European Economic Community; it has created a uniform patent in the (not yet effective) Luxembourg Convention on the European Patent for the Common Market (Community Patent) of December 1, 1975. Because of the “bundle” theory, foreign industrial property rights may be claimed in domestic litigation only on a “preliminary question,” as when a domestic complaint for damages is based on a violation of a foreign patent abroad. Other unique problems are posed by this theory, especially for trademarks involving “parallel imports.”

Fortunately, the “bundle” theory needs no discussion here because the territoriality principle serves both the private interests of individuals and especially the interest of communication in the area of intellectual property law. In contrast, public international law is concerned with state interests.

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2. See A. Simpson, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 82 (1961) for several examples of how the fee simple may be divided in the law of estates.

3. E. Ulmer, supra note 1, at 9.


5. Translated from the German Verbandsübereinkunft zum Schutz des gewerblichen Eigentums.

6. Translated from the German Übereinkunft zum Schutze von Werken der Literatur und Kunst.

7. Translated from the German Welturheberrechtsabkommen.

8. Translated from the German Übereinkommen über das europäische Patent für den Gemeinsamen Markt (Gemeinschaftspatent).


10. Troller, supra note 1, at 1128-32.
C. Public International Law

In this domain the territoriality principle does not mean that with regard to the interests of a private party subjective private rights constitute a bundle of rights effective at any given time in a single territory ("the cake is divided up"). Rather, in public international law, the territoriality principle means that certain types of state action (statutes, administrative acts, judicial decisions) which directly serve to advance state interests are generally effective only within the territory of the acting state.

State action of this type includes statutes, administrative acts, and judicial decisions in the areas of:

- military affairs
- police
- construction
- protection of the environment
- tax and customs matters
- social insurance
- criminal law
- the economy, especially state interference with the exercise of private rights by:
  - expropriation
  - exchange and currency regulations
  - foreign trade regulations and
  - to a certain extent by enforcement of anti-trust laws.

II. THE BASIS OF THE TERRITORIALITY PRINCIPLE IN PUBLIC INTERNATIONAL LAW

A. Citizen and Territory

The state is an association of persons or citizens within a territory which (as the most intensive social grouping, as a life-supporting and defensive entity) serves to further the welfare and security of all; this is the purpose or at least the main purpose of a state. The state is able to accomplish this purpose by requiring individuals to sacrifice at least some of their freedom and property (the instrumentalities of the state) in order to be able to act legislatively, administratively and judicially.

Apart from general principles of the law of nations and the Charter of the United Nations, the state is free, i.e., it is subject to no other state. It obeys no commands and categorically refuses to accept any judgment of its conduct: it is "sovereign" (supremus).

What the state claims unilaterally for itself, it universally concedes
to other states: all states are "equal" (as expressed in the maxim "one state-one vote" evidenced in the United Nations General Assembly). Other states are bound to respect the domestic order of a state and must restrain themselves from interfering in its internal affairs.\textsuperscript{11}

Thus Section I of the Final Act of the Conference on Security and Cooperation in Europe,\textsuperscript{12} in declaring the principles guiding relations between participating states, makes reference to the mutual respect of sovereign equality and individuality as well as all the rights inherent and encompassed therein, "including in particular the right of every state to juridical equality, to territorial integrity and to freedom and political independence."\textsuperscript{13}

As an "effective political unit"\textsuperscript{14} each state advances only the interests of its own citizens and not those of the citizens of other states, for example, granting the right to vote and affording diplomatic protection only to its own citizens. The state promotes the interests of its citizens primarily within its own territory. "Territory and population" traditionally have been the principal constituent parts of a state.\textsuperscript{15}

B. Citizen and Territory in the Law of Nations and Private International Law

The personal and territorial sovereignty of states formerly dominated extensive parts of the law of nations.\textsuperscript{16} Private international law was supported by the real and personal statute (\textit{statua personalia et re-alia}) from the Middle Ages to the nineteenth century. These statutes left their after-effects in:

- the "Italian School" of the nineteenth century, which drew a distinction between legal norms which served private interests (and were taken from the law of the state to which the individual belonged) and "ordre public," or legal norms, derived exclusively from the state's own law;
- Zitelmann's system, which deduced the rules of private interna-

\textsuperscript{11} For a complete discussion, see Mosler, \textit{Völkerrecht als Rechtsordnung}, 36 \textit{Zeitschrift für ausländisches öffentliches Recht und Völkerrecht} 6, 15-17, 22-26, 28, 37-39 (1976).
\textsuperscript{12} Translated from the German \textit{Konferenz über Sicherheit und Zusammenarbeit in Europa}.
\textsuperscript{13} Mosler, \textit{supra} note 11, at 16 n.18.
\textsuperscript{14} \textit{Id}. at 26.
\textsuperscript{15} R. Schmidt-Wiegand, \textit{Land und Leute}, 2 \textit{Handwörterbuch zur Deutschen Rechtsgeschichte} 1362-63 (1976); M. Krielle, \textit{Einführung in die Staatslehre} 94-103 (1975). One can even dip into behavioral research for examples of how groups defend their own territory; see R. Ardrey, \textit{The Territorial Imperative} (1966).
tional law from the personal and territorial sovereignty of the law of nations;

— Pillet’s division into “lois permanentes,” which protect the individual and have extraterritorial effect, and “lois generales,” which serve to protect society and have only internal territorial applicability;

— Batiffol’s categorization of legal norms into those on the one hand which seem to promote private interests and therefore deserve to be respected even if foreign, and into those on the other hand which further the general interests of society and above all the state;

— Kegel’s differentiation among the interests represented by the concepts of “party,” “communication,” and “powers.”

C. State Welfare and Justice Between Individuals

The state promotes the welfare and security of all of its citizens within its territory, distinguishing itself from other states which do the same for their own citizens on their own soil. However, the state not only selfishly promotes the welfare and security of its own citizens, i.e., its own interest or the welfare of the state, but also selflessly, as a patron, strives for justice between all individuals, and not just between its own citizens. To the extent that the state selfishly promotes its own interests, the other states will respect it within the boundaries of its power, where it has a free hand. The cake is divided up.

To the extent that the state selflessly strives for justice between individuals, the other states will respect it universally and without limitation. Its power has nothing to do with whether its acts will be recognized and its laws applied by other states; these are questions which will rather be decided by the substantive and procedural principles of private international law. Justice: the cake is passed around.

Insofar as the state promotes its own welfare, one can speak of “power” and, to the extent that the state strives to promote justice between individuals, of “justice.” However, the state also uses power to do justice for individuals (e.g., by executing judgments); justice has its role to play in public law as well, for example, justice in taxation and in social insurance (at least relative justice, assuming one accepts the fairness of tax and social insurance payments).

D. State Power

Together with the concepts of "citizen" and "territory," one should also examine the concept of "state authority."19 State authority is power. Similar to the concept of "de facto possession" found in the law of property (e.g., in § 854(I) of the German Civil Code),20 power is the preponderant probability of being able to enforce one's will. This probability is even more important than actual enforcement, since power (like strength) is depleted when used.21

Other states respect the power of a state as long as it acts within its own territory.22 This is the meaning of the territoriality principle in public international law.

E. The Application of Foreign Public Law

It is consistent with and often required by the concept of justice between individuals that private substantive legal relations are sometimes governed by foreign law (private international law). However, the welfare of a state, its individuality, generally precludes it from promoting the welfare of a foreign state by applying the state's public law. Each state thus basically applies only its own public law (public international law).

To be sure, there is a unanimous agreement today not that foreign public law is never applicable but rather that it is basically inapplicable.23 Thus foreign public law may be applied:

— in cases involving the recognition of foreign judicial decisions dealing with private law claims. Recognition arguably means the application of foreign law. Factors to be considered include foreign legal norms governing the jurisdiction of the court, the way the proceedings went, the finality of the judgment (the law of civil procedure; non-contentious jurisdiction; and to a lesser extent, bankruptcy);
— in cases involving the private law claims of foreign states in order to determine who is authorized to exercise these rights for the foreign state;
— in questions of whether the applicable norms of foreign private

22. See §§ I.C. and II.F. of this Article.
law (and the applicable norms of foreign public law) were validly enacted;
— in questions (e.g., in private international law) of whether a person is a national of a particular foreign state.

One should add to this list the cases in which although foreign public law is not applied, it is nevertheless effective as a fact ("local datum") in the application of domestic legal norms, as when a foreign economic boycott of an enemy is not applied but makes performance by the debtor impossible.

In addition, foreign public law is at least partially applied in cases involving the recognition of foreign state interference with the exercise of private rights. In cases like these the territoriality principle applies to encroachments designed to promote the political and economic goals of the foreign state.24

For certain matters there are rules which provide for limited applicability of foreign public law, e.g., since the Middle Ages in the area of international criminal law.25 When foreign public law is otherwise applicable is currently the subject of controversy.26

F. State Interference in the Exercise of Private Rights

Encroachments by the state into the field of private law may be designed to accomplish various purposes. Foreign state encroachments enforcing private law rights (such as intervention by the execution of judgments or bankruptcy) which also serve individual interests will be more readily recognized (and as norms of foreign public law, more readily applied) than state encroachments which promote political or economic goals. Such goals as expropriation or restrictions on the circulation of money through currency regulations are directed toward promoting the welfare of the state itself.

Since every state basically promotes only its own welfare, e.g., the welfare of its own citizens, and does not serve foreign states or their citizens, it need not recognize foreign state encroachments in the area

24. See § II.F. of this Article.
26. See § III.B. of this Article.
of private law at all where such intervention is motivated by the desire to achieve political or economic goals. The same non-recognition policy could be applied to the foreign public law norms on which the encroachments are based.

From this, one may conclude that "sovereign" states are independent of one another, i.e., they cannot order each other around; they cannot interfere in each other's internal affairs, and other states may not, in the absence of consent, be required to appear before foreign courts (at least not in matters involving acts *iuris imperii* as distinguished from *iuris gestionis*). But these ideas would only be effective in preventing foreign state interference in the exercise of private rights when the encroaching state attempts to enforce its action outside its own territory, as when a foreign state expropriates property located in another state. On the other hand these theories would not adequately justify refusal to recognize foreign state encroachments in the area of private law where such interventions are limited to the territory of the encroaching state, as when the foreign state expropriates property located within its territory. But even here a state may withhold recognition because it moves according to its own political and economic policies and does not serve the interests of foreign states. Even if it is deemed necessary in such cases to recognize the foreign state intervention, the recognizing state is free to adopt its own diametrically opposed intervention. For example, the state may retake the expropriated property as soon as it arrives within its territory and give it back to its original owner.

The recognition of foreign state encroachment into the area of private law is thus an expression of recognizing a state's own political or economic policy. However, at times circumstances are such that it is in a state's own interest to recognize foreign state interference in the exercise of private rights. If expropriations carried out in the expropriating state are not recognized abroad, this could lead to an interruption of commercial relations and perhaps even war between the states concerned. There is thus an interest in international order which sometimes argues in favor of the recognition of foreign state interference in the exercise of private rights.

The line of demarcation between recognized and non-recognized state encroachments on private rights, in particular between recognized and non-recognized foreign expropriations, is drawn voluntarily (and not because required by law) by a state's taking into account power relationships, thereby elevating might to the rank of right. Just as the

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27. See § II.A. of this Article.
"sovereign" state remains lord of its own domain, it concedes the same attributes of "sovereignty" to other states. Whenever a foreign state remains within the territorial limits of its power, its encroachment into the area of private law will be recognized by other states.

Since power is the preponderant probability of being able to enforce one's will, and since enforcement necessarily requires authority (through the enforcement mechanisms of the courts, the police, and the military), and since this authority may only be exercised within the state's territory, it follows that the territoriality principle should be applied to foreign state encroachment on private rights, especially through expropriation.

The territoriality principle stands out with particular clarity in cases involving state interference with tangible personalty. When property is located within a state's territory, the state can invoke the direct use of authority, even employing physical force to take the property away from its former owner.

Concerning "incorporeal," invisible, and intangible rights ("res incorporeae") such as claims, membership rights, trademarks, patents, etc., there is strictly speaking no situs within a given territory. The demarcation lines of power are more difficult to draw here and the territoriality principle more awkward to apply.

Thus one can inquire in cases involving the expropriatory extinction of claims whether the matter should turn on the domicile of the debtor or on the situs of the personal property and the "situs" of intangible rights of the debtor. In the former case the result is that expropriation by the state of domicile will be recognized abroad, while expropriation by other states will not. The latter case results in the expropriation only being effective relative to that property of the debtor located within the territory of the expropriating state; hence, it is ineffective relative to any property the debtor may have abroad.

Similar issues arise concerning the expropriation of membership rights (e.g., corporate shares). If the outcome depends on the personal statute of the corporation, i.e., the location of the head office of the corporation or the law of the place of incorporation, expropriation of membership rights by the state of the personal statute results in the foreign property of the corporation being turned over to the new members. If on the other hand the determination depends on the place where the personal property of the corporation is located or where the

28. See § II.D. of this Article.
29. See § II.A. of this Article.
intangible rights of the corporation have their "situs," the result is that
the expropriation of membership rights is only effective against corpo-
rate property located within the expropriating state, but not abroad.
The same problem is posed when a corporation is dissolved by state
action, or when the state acts not in taking property, but rather in as-
suming control over the corporation, as by substituting its own candi-
dates for the board of directors or by installing its own administrators
or supervisors.

In a general way one can equate the situs of personal property and
the "situs" of the intangible rights of the debtor and of the corporation
in the expropriating state or abroad to that of legal relations in the
expropriating state or elsewhere. The matter nevertheless almost al-
ways concerns the rights to the expropriated property, and it thus suf-
fices to take the place of the property into consideration.

Two exceptions, however, must be stressed. One is favorable to
recognition; the other is not.

Favorable to recognition: although the expropriating state has
overstepped the bounds of its power, its interference in the exercise of
private rights will be recognized if a given state is pursuing the same
political or economic goals.

Expropriations (followed by compensation) carried out by the
Norwegian and Netherlands governments in exile, and which con-
cerned ships, claims, bank credits and bearer debenture bonds relating
to ships which had their "situs" in either England or the United States
and which belonged to either Norway or the Netherlands, were recog-
nized in England and in the United States. To be sure, later retreats
from this position were made in England and in the United States. In
France, recognition was granted to the Netherlands' stock expropria-

30. G. KEGEL, supra note 4, at 512. See also Judgment of Dec. 17, 1963,
Bundesgerichtshof [BGHZ] (W. Ger.) (1964) 17 Neue Juristische Wochenschrift 650: the
duty imposed by the expropriating state to report the existence of property located abroad
provides no justification for someone living abroad to send letters to the expropriating state
authorities, thereby involving the interested parties in criminal proceedings. See also Judgment
of April 14, 1965, BGHZ (1965) 20 Juristenzeitung 680: The press outside the expro-
priating state may call the transferee of the expropriated property its owner, using the
name belonging to the transferee according to the law of the expropriating state.


Federal Reserve Bank, 99 F. Supp. 655 (1951), rev'd in part, 201 F.2d 455 (2d Cir. 1953);
tions in revalorization of securities proceedings. Because of a common policy with the West, the United States embargo against the Eastern Bloc countries was observed in the Federal Republic of Germany.

Unfavorable to recognition: although the expropriating state has kept within the boundaries of its power, its interference in the area of private law will not be recognized if it offends the public order of a given state.

III. THE AREA OF APPLICABILITY OF THE TERRITORIALITY PRINCIPLE

A. The Law of Nations

The territoriality principle for state interference in the exercise of private rights, especially expropriation, must be deemed to constitute a rule of international law. The real controversy in international law thus turns on whether, to what extent, and with what consequences expropriations of property located within the expropriating state (thus about the types of cases in which we are not here interested, i.e., where the expropriating state keeps within the bounds of its power,) constitute violations of international law.

Regardless of whether or not it has done so, every state is free to either recognize or refuse to recognize foreign state encroachments on private rights. As useful as it may be to invoke international law in defending oneself against foreign extraterritorial expropriations, it

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33. 93 JOURNAL DU DROIT INTERNATIONAL 631 (1966), with a critical case comment by Bredin; (1966) D.S. JUR., with a critical case comment by Loussouarn.


35. French case law refuses categorically to recognize uncompensated expropriations even if the property affected is located within the expropriating state at the time of expropriation. See § IV.B.1. of this Article.

36. Support for this view may be found in W. BIRKE, DIE KONFISKATION AUSLÄNDISCHEN PRIVATVERMÖGENS IM HOHEITSBEREICH DES KONFISZIERENDEN STAATES NACH FRIEDENSVÖLKERRECHT 21 (1960); BÖCKSTIEGEL, BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 13, 32-34 (1974).


38. See § II. F. of this Article.
should be noted that the non-recognition of foreign state encroachments on private rights which violate the territoriality principle is based on the national law of the state affected, and not on international law.

B. Public International Law

Every substantive law subject has its own "international" conflicts rules, i.e., a group of legal norms which answer the question of which state's substantive rules are to apply. Thus, for substantive private law there exists a private international law with sub-groupings devoted to the international law of persons, the law of obligations, property law, family law and laws of succession.

In like manner there exists a public international law. As does private international law, it forms a part of the legal system of each state (national law, not the law of nations) and, like private international law, it has its sub-groupings. For example, there is an international administrative law, an international law of taxation, an international social insurance law and an international criminal law.39

State encroachments on private rights which serve to promote only public interests (and not, like official judicial action, the enforcement of private interests) may belong to various sub-groupings. Thus, one may put expropriation in a sub-grouping called international administrative law or perhaps in international economic law, while import and export prohibitions and currency regulations may be classified under international economic law.

While it is fairly clear when foreign public law will be exceptionally applied to cases involving state encroachments on private rights and in many other areas as well,40 much uncertainty exists concerning the circumstances under which foreign public law may or must be applied. Many writers tend to be magnanimous on this question.41

Article 7 of the European Economic Community Commission's preliminary draft of a convention on the law applicable to contracts and non-contractual obligations42 is so vague that it virtually amounts to a "non-rule":

39. See § I.C. and II. E. of this Article.
40. See § II. E. and II. F. of this Article.
42. Preliminary Draft, E.E.C. CONVENTION ON LAW APPLICABLE TO CONTRACTS AND NON-CONTRACTUAL OBLIGATIONS, ART. 7.
When the contract is also connected with a country other than the country whose law is applicable under Articles 2, 4, 5, 6, 16, 17, 18 and 19 (3), and the law of the other country contains rules which govern the matter compulsorily in such a way as to exclude the application of any other law, these rules shall be taken into consideration to the extent that the exclusion is justified by the particular character and purpose of the rules.\textsuperscript{43}

Since the issue here also concerns the welfare of the state, a strong argument could be made that the territoriality principle applies to these cases just as it does to state encroachments on private rights. To the extent that the foreign state has the power to enforce its will, particularly over property located within its borders, the foreign public law should be applied; otherwise not.

IV. CASE LAW ON THE INTERNATIONAL LAW OF EXPROPRIATION

A. The Law of German-Speaking Countries

1. Switzerland

It took a long time for the Swiss Bundesgericht to give up the idea that foreign public law is never applicable. Professor Lalive of the University of Geneva came out strongly against this position at the Wiesbaden Conference of the Institut de Droit International.\textsuperscript{44} In any event, the Swiss Bundesgericht will not recognize foreign expropriations of property located in Switzerland.

In the case Vereinigte Carborundum- und Elektritwerke v. Eidgenössisches Amt für geistiges Eigentum,\textsuperscript{45} the court stated:

\begin{quote}
All property is subject to the sovereignty of the State in which it is located, and its expropriation by another State constitutes an infringement of that sovereignty. There is therefore no need to declare such acts to be generally legal. If the State on whose territory the property is located considers that expropriation of that property does not violate its interests, or that its expropriation should be recognized for special reasons, it can take appropriate action. From the point of view of international law, the territorial state is not bound to recognize the expropriation by a foreign state unless it has agreed by
\end{quote}

\textsuperscript{43} Id.

\textsuperscript{44} Lalive, L'Application du droit public étranger, 56 ANNUAIRE INSTITUT DE DROIT INTERNATIONAL 229 (1975). See also id., Point II, at 552.

treaty to do so.\textsuperscript{46}

The Swiss \textit{Bundesgericht} reaffirmed this basic outlook in the controversial \textit{Zeiss}\textsuperscript{47} case:

In the instant case the question is not whether to apply and enforce the public law of the German Democratic Republic in Switzerland. The expropriated property was located in the East Zone [of Germany]. No one can expect a Swiss court to assist the German Democratic Republic in its attempts to get others to recognize an extraterritorial expropriation ordered by its authorities, especially when the property in question is located in Switzerland.\textsuperscript{48}

On March 27, 1973, the Superior Court of Zürich rejected the petition of the Republic of Ghana to be relieved of the necessity to post security for court costs in a case in which Ghana was requesting the court's assistance in recovering the amount of a bribe which had been paid to a Ghanian official and which had been declared as due and owing to the Ghanian state. The court said:

Decisions of foreign states of a public law nature are categorically denied enforcement in Switzerland (Guldener, Max, \textit{Das internationale und interkantonale Zivilprozessrecht der Schweiz}, Zürich: Schulthess, 1951, p. 97, note 35), and an attachment pursuant thereto is also impermissible. If the defendant (State) has attached in Switzerland the property which is the subject of this litigation, it must expect that it will not be treated any better with regard to the duty to post security than it would be if it had made the attachment relative to a private law claim. The security must therefore be posted.\textsuperscript{49}

2. Austria

In a decision rendered on 1 October 1959,\textsuperscript{50} the Austrian Administrative Court rejected the complaint of a Czech State administrator acting as transferee of the assets of a nationalized mining company. (Czechoslovakia was the nationalizing state.) The complainant objected to the appointment of an Austrian administrator over the com-

\textsuperscript{46} \textit{Id.} at 199 and 25, respectively.


\textsuperscript{48} \textit{Id.} at 130-31 and 191, respectively.


pany's Austrian assets. In finding the complaint inadmissible, the court said:

We find that according to the rules which have secured general recognition in public and private international law, the effect of confiscatory measures taken by a State (nationalization) does not extend to assets outside the borders of that State.

Such a measure (confiscation) always takes place when the former owners are deprived of their property by State action without payment of compensation. In such cases the State action must be denied recognition outside the borders of the State concerned, notwithstanding the existence of a promise to pay compensation, as long as compensation has not in fact been paid in the amount provided. It is not disputed that hitherto no payment has been made to shareholders of Austrian nationality, either individually or in pursuance to any international agreement.

The complainant has attempted to prove that such measures by foreign States are not contrary to the Austrian ordre public because Austria herself has taken confiscatory measures since the end of the Second World War. This argument can be countered by saying that the rule of non-recognition of confiscations of private property without payment of compensation beyond the borders of the confiscating State constitutes a generally recognized rule of international law which must be applied by this court independently of the question of whether the legislation of the forum State itself has invariably adhered to that rule. In ruling on the complaint now before the court, it is therefore unnecessary to inquire whether the strictures directed against individual pieces of Austrian legislation are justified, because the answer to the question of the effect in Austria of measures of nationalization taken by the Republic of Czechoslovakia, which must be decided in accordance with rules of international law, does not depend on such a consideration.51

The Austrian Supreme Court later took the same position in a similar case involving the establishment of an association of shareholders (communio incidens) to look after the Austrian assets of a foreign nationalized corporation:

According to the constant jurisprudence of the Austrian Supreme Court the confiscation extends only to the assets located within the territory of the confiscating State, and not to the Austrian assets of the company. The decisive factor is the confiscation without payment of compensation, and not the legal form in which the con-

51. *Id.* at 14.
This was in accord with an earlier decision reached by the same court: "Every act of a foreign state intended to deprive a person of his economic or legal rights through nationalization is only territorially—restricted to the territory of the confiscating state—effective."53

The court had an opportunity to refine these ideas in a 1965 case:

The Austrian Supreme Court has developed settled case law holding ineffective foreign confiscations of property located outside the confiscating State. However, in view of the territorial sovereignty of the confiscating State, it would appear to be stretching this principle too far to apply it in cases involving property located within the confiscating State at the time of the confiscation but which later left the country.54

Doubts concerning the question of whether an association of shareholders (communio incidens) of a Czech corporation possessed capacity to be sued were dispelled by the court, which stated:

The Austrian Supreme Court is of the opinion that foreign expropriations without compensation are contrary to Austrian ordre public and will not be recognized regardless of whether the confiscation involved the whole corporation or only its shares, and regardless of the nationality or domicile of the shareholders affected. Such State action is effective only within the territory of the confiscating State.55

But the existence of a treaty may change matters. In applying the Austro-Czechoslovak Property Treaty of 19 December 1974,56 the Austrian Supreme Court said:

It is not necessary for us to decide here who would basically be regarded as the owner of property located in Austria. The Austrian Supreme Court has repeatedly expressed the opinion that it should be a communio incidens, an association of the partners, shareholders

and other possible members of the former juridical person. According to Faschings, property located within the country is “to be treated like any other type of legal entity which is vested by the national legal system with the capacity to sue and be sued.” Beitzke speaks in terms of a “special property” since here it is not a *communio incidens* of members of the former nationalized entity that is being sued as party defendant (the public administrator would lack representative capacity for this) but rather each and every entity possessed of legal capacity to sue and be sued over which Dr. G. M. has been granted administrative responsibilities, and that includes “the property of the former Raiffeisen savings bank located in Austria . . .” (as is stated in the already cited text of the decree appointing the administrator). The only “party defendant” here is thus the above described “special property” and not the previously alleged *communio incidens*.

The sole consideration in determining the legal basis for recognizing that such a “special property” possesses the capacity to sue and be sued is the existence of this “special property.” Should the “special property” disappear, so also would all possibility of its being able to participate in litigation.

In Article 3(1) of the Austro-Czechoslovak Property Treaty of 19 December 1974, Czechoslovakia assigned to the Republic of Austria all proprietary rights and interests located in Austria of which Czechoslovakia had claimed ownership based on Czech confiscation and nationalization decrees. These rights were effected as of the date of the treaty, 9 September 1975, in the name of Austria as well as Czechoslovakia. Question of whether the Republic of Austria “took over” the Czech legal position entirely (as several deputies critically remarked during parliamentary debates on the treaty), and thereby tacitly recognized the confiscatory policies of Czechoslovakia aimed at property located in Austria (which would mean a departure from prior existing adherence to the territoriality principle), or whether the Republic of Austria, despite the “assignment” to it, managed to maintain the territoriality principle. In favor of the latter, it would have been more appropriate to utilize phraseology which would have assigned the property in question “to the disposal” of the Republic of Austria. In both instances, the general assignment in

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57. 2 H.W. FASCHINGS, KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN 117 (1959).
58. 1 ZEITSCHRIFT FUR RECHTSVERGLEICHUNG 178-83 (1960).
61. See XIII Gesetzgebungsperiode des Nationalrats, 146th and 150th Sessions, at 14116 and 14629, respectively.
Article 3 (1) of the Treaty of all properties described therein, including the "special property" of the former Raiffeisen savings bank which existed until 9 September 1975, had the effect of "extinguishing these proprietary rights as such, thus also eliminating any possibility that the 'special property' of the former Raiffeisen savings bank might have legal capacity to sue and be sued.\(^{62}\)

3. Arbitration Tribunals within the Framework of the Austro-German Property Treaty

There are two binding opinions rendered by the arbitration tribunals established pursuant to the Austro-German Property Treaty of June 15 1957\(^{63}\) which addressed themselves to the problem of the territoriality of nationalization.

In *Mannesmann AG Düsseldorf v. Dr. Berchtold und Buchsbaum*,\(^{64}\) the defendant challenged the legal standing of Mannesmann AG Düsseldorf to sue. The plaintiff in turn desired to prevent the defendant from using the name "Mannesmann" and related company insignia. The defendant alleged that Mannesmann AG Düsseldorf was not the legal successor to Mannesmann AG Berlin, which had been dissolved in East Berlin. The arbitration tribunal stated:

The seizure of the plant of the co-plaintiff in Berlin-Adlershof by the Russian occupation forces the subsequent transfer of this plant to a state enterprise had no legal effect whatsoever on the plaintiff's property in the Federal Republic of Germany and Austria. In both the law of nations as well as in private international law and international administrative law the effect of sovereign State action is governed by the principle of territoriality.

Confiscatory measures taken against private property, whether clothed in the form of a statute or carried out by administrative action or sheer physical force, encompass only that property which is subject to the territorial sovereignty of the confiscating State, and do not have any extraterritorial impact. That is why in the case of juridical persons it is irrelevant whether the confiscatory measures were directed at the property of the juridical person or at participatory rights in such a person. In both instances the rights of the original owners of the corporate assets outside the territory of the confiscating

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\(^{63}\) Austro-German Property Treaty of June 15, 1957.

State remain undisturbed. An additional rather technical legal problem is thus posed, namely, whether this property belongs to the original owners as a *communio incidens* without its own legal personality, or whether the old corporation continues to exist with regard to the seized property.\(^{65}\)

In the second binding opinion, *W. Schulz, A. Hillmann und W. Schulz & Co., Bad Liebenau (BRD) v. G. Wurzer, Wien*,\(^{66}\) the arbitration tribunal discussed the question of whether the plaintiffs could validly press a claim of the firm W. Schulz und Co., which originally had its head office in the German Democratic Republic, (East Germany) against the defendant if the firm W. Schulz und Co. had retained its head office in East Germany:

According to the so-called principle of territoriality, acts of expropriation are effective only within the territory subject to the jurisdiction of the taking State. Within the sphere of the free States, *ordre public* shall be opposed to the expropriations connected with the socializations in the Eastern Zone.\(^{67}\)

4. West Germany

As evidenced by the following citations, the territoriality principle is well established in Germany. Foreign public law will not be applied to determine domestic legal relations in conflict of laws situations:

a) The applicability of the Soviet Zone currency regulations to determine the legal relations of the parties does not depend, as the appellate court found, on whether the loan relationship is governed by Soviet Zone or West German private law. Such a way of looking at the matter fails to take into consideration the basic difference between private and public conflict rules. It would mean that the public law of a foreign State or of another legal system, at least in cases where the public policy exception of Article 30 of the Introductory Law to the Civil Code is not applied, would determine domestic legal relations with reference to the principles applicable to private international law. There is no support for this view in West German positive law today.

The conflicts rules of private law, circumscribed by provisions of customary or statute law, are founded on the idea of the recognition

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\(^{65}\) I. Seidl-Hohenveldern, *supra* note 64, at 140.

\(^{66}\) Special ed. No. 2 to pt. IV, No. 13, WM 5 (Feb. 24, 1964) (binding opinion No. 50); I. Seidl-Hohenveldern, *supra* note 64, at 164-66.

\(^{67}\) Id.
and application of foreign private law. In the field of contract law the principle of party autonomy is widely recognized. The point to be stressed here is that the primary purpose of our system of private law is to strive for justice between individuals.

The territoriality principle will be applied by German courts where foreign public law is sought to be asserted as governing an extra-territorial dispute:

By way of contrast, the conflicts rules of public law are impregnated with the idea of territoriality. They are subject to the principle that the provisions of public law have basically no effect outside the borders of the legislating State.

b) This principle of non-applicability of foreign public law, which the Federal Supreme Court has recognized repeatedly in case law involving the international and interzonal law of expropriation, must be applied in the instant case involving a loan relationship to the extent that the validity of the assignment of the claim depends on the construction of the transfer restriction provisions of the Law of 15 December 1950.

To be sure, the transfer restriction provisions of foreign law (especially assignment prohibitions, which by their nature pertain to public law) may serve exclusively or predominantly to protect individual interests or to strike an equitable balance between them. It is also not beyond the realm of peradventure that under certain circumstances such public law, despite its territorially restricted character, may be permitted to exercise a certain influence on internal private law relationships.

Where foreign public law serves to advance incompatible economic and political goals, the courts have held that public law conflicts rules will be applied:

The legal outcome would be different, however, if a public law transfer restriction served not to achieve a significant balance of the private interests of the parties, but rather to accomplish the economic and political goals of the legislating State. In such a case, because of its incompatible purpose, the public law norm would have no inter-

69. H. Soergel, W. Siebert & G. Kegel, supra note 9, preliminary comment to art. 7, comment III(1)(a)(ii) and comment VI(2)(b,bb).
70. Einige Grenzfragen des ordre public in Fällen entschädigungsfreier Konfiskation, supra note 68.
71. See 9 BGHZ 34, 38 (1953); 12 BGHZ 79, 84 (1954); 18 BGHZ 1, 8 (1956); 23 BGHZ 333, 336 (1957); 25 BGHZ 127, 129 (1958); and 25 BGHZ 134, 143 (1958).
72. See 80 BG II 53, 61 et seq.
nal effect on the private contract relationship it pretended to govern. Instead, the legal relationships in question would be governed only by the law of the State which, based on private law conflict rules, is found to be competent. As a matter pertaining to international administrative law, the effectiveness of the transfer restriction, which was intended to achieve State interests, is governed by public law conflict rules.\(^7\)

c) In accordance with the public law conflict rule of territoriality, the effect of the Law of 15 December 1950 is basically limited to the area of the Soviet Zone. Courts of the Federal Republic of Germany only have to respect and execute the statute if and to the extent that the authorities in the Soviet Zone are in a position to enforce its provisions.\(^7\) Such is not the case here because the instant claim is governed by the applicable rules of Federal German law.\(^7\) Such sovereign interference in private claims is justified by the fact that the interfering State is only able to enforce its decrees against those who are subject to its power, e.g., those judgment debtors who reside within the State’s jurisdiction.\(^7\)

The territoriality principle will be applied in other areas of the law besides expropriations:

These principles are not limited to expropriations. They are also applicable to legal restrictions on the transfer of currencies. This is so since otherwise the right of the creditor to enforce his claim in accordance with local private law would be restricted or defeated, with the result that the substance of the claim would thus be affected by a public law intervention outside the territorial sovereignty of the Soviet Zone. The courts of the Federal Republic are not authorized to enforce a rule having such an extra-territorial effect.\(^7\)

However, treaties may override these principles where applicable:

d) The applicability of the territoriality principle in cases of this type may be restricted by the terms of an international treaty, such as

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75. Judgments of July 11, 1957, 25 BGHZ 127, 129 (1958), 25 BGHZ 134, 139 (1958); see also § 23 ZPO.

76. 9 BGHZ 34, 39 (1953).

77. See Judgment of April 6, 1951, Dist. Ct. of Kiel; E. Riezler, Internationales Zivilprozessrecht und Prozessuales Fremdenrecht (IZRspr) 349; see also Judgment of June 4, 1948, Dist. Ct. of Hanover, IZRspr 332.
the Bretton Woods Agreement of 1944. However, this restriction is inapposite here since the Soviet Zone is party to no such convention. It is only in this connection that the contrary views developed by Zweigert and Wengler disregarding the territoriality principle and applying the currency regulations of a foreign State are to be evaluated.

Consistently, however, in the area of attempted foreign expropriation of property located within West Germany, the public law of the expropriating state is given no force:

The confiscatory measures of Czechoslovakia can have no effect on property located outside Czechoslovakia and which is currently the subject of this law suit. It makes no difference whether the res expropriated was only the property of the cooperative (as found to be the fact by the appellate court) or whether the decrees of 19 May and 25 October 1945 also perpetrated an expropriation of the membership rights of the shareholders concerned (as the Federal Supreme Court assumed.) Even under the latter broader interpretation, property located outside Czechoslovakia would not be affected by the confiscation.

Where expropriation of property of a corporate entity is attempted by a foreign state, West German courts have held the corporation to be "divisible" with the result that the West German corporate property is beyond the reach of the expropriating state:

a) The Federal Supreme Court has consistently held that Soviet Zone expropriation measures have no effect on property located in the Federal Republic. Thus, a company expropriated in the Soviet Occupation Zone continues to exist in the Federal Republic of Germany to the extent that it has property here.

b) The property of a juridical personality and the person itself may also be split when all or almost all of the membership rights in it are
expropriated. Should this occur to a company with its head office in the Soviet Occupation Zone, company property located in the Federal Republic is deemed to belong to a so-called "divisible company" legally distinct from and composed of the former members of the expropriated company.

Nor may an expropriating foreign state legitimize its claims in a West German proceeding by clothing the expropriation in the garb of "private law":

c) In this regard expropriatory measures include not only sovereign acts but also those which tend to exert an expropriatory impact, although not designated as expropriation and outwardly appearing to be of a private nature. The appointment of receivers, administrators or corporate officers may thus be regarded as an expropriation, depending on the purpose, extent, actual impact and duration of the interference. In cases, however, where no disguised or otherwise factually accomplished deprivation of property is apparent, but rather where only measures of a temporary nature have been taken, these measures will normally have a territorially restricted effect, at least where they are not blatantly provisional. Thus, for example, official decrees pertaining to property located in another jurisdiction are ineffective or in any case require special recognition by the sovereign concerned. They do not, however, result in the splitting of the company property or of the company itself.

German courts extend these protections to participatory shareholders' rights:

The decisive factor in evaluating foreign expropriatory measures is that such compulsory sovereign acts can have no extraterritorial effect. This is an expression of the general principle of the non-applicability of foreign public law, to the extent that it promotes political or economic policies. If, to continue with this reasoning, the expropriation of all or almost all of the membership rights is to-

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86. See Judgment of Jan. 30, 1956, 20 BGHZ 4, 10, WM 349 (the first PREVAG decision); see also Judgments of Feb. 20, 1961, WM 423 (1961); Dec. 18, 1963, WM 734 (1964); 42 BGHZ 1 (1963); Nov. 12, 1959, WM 1456 (1959); 31 BGHZ 168 (1960).


day regarded as tantamount to a territorially limited attack on the company itself, this is because experience has shown that some States have been very active in appropriating to themselves corporate assets by the indirect means of confiscating the shares of the corporation, leaving intact the corporate juridical personality.\(^9\) Since this led to attempts, aided by the notion that the corporate shares are located at the head office of the corporation,\(^9\) to extend the effect of the expropriation beyond the borders of the acting State, it seemed necessary, in choosing between a [formalistic] legal construction and a realistically related application of the territoriality principle, to opt for the latter.\(^9\)

It should be noted, however, that adequate grounds for so deciding only exist where participatory shareholder rights have been expropriated to such an extent that the corporation has itself economically been expropriated, with the taking of shareholder rights employed only as an indirect means to achieve this goal.\(^9\)

Where, however, only certain shares have been expropriated, other States need not regard this as an interference in their sovereign control over local property rights. In such a case, these proprietary rights belong not to the members as individuals but rather to the company, which continues to exist as a private economic enterprise. The preservation of sovereignty does not necessitate here forcing those members who were not affected by the expropriation to accept, possibly against their will and interest, a splitting of the company and thus also of their shares, a circumstance which could trigger disastrous economic consequences.\(^9\)

It is not necessary for us to decide here whether or not an expropriated minority can ever be helped.\(^9\)

In another decision,\(^9\) the German Supreme Court held that intangibles are accorded protection from foreign expropriation:

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94. Kuhn, *supra* note 93 at 2, 8, and 10.


In accord with the principles of international order, German case law pertaining to interstate and international legal relations recognizes the effectiveness of such foreign compulsory measures only to the extent that they affect objects within the jurisdiction of the acting sovereign. In favor of the defendant it may be assumed that the expropriatory features of Order No. 167 also included the administrated loan claim which the Leuna Works in Merseburg had against the defendant, as evidenced by the temporary continued payment of interest to the Soviet authorities. Nevertheless the principle still applies that such foreign compulsory measures affect only that property of the debtor which is located on the territory of the expropriating State and are not effective against property located elsewhere. 98

The measures directed against the company, as is always the case in expropriations of private law juridical personalities, were not able to touch its property in West Germany. The company continues to remain the owner of this property, as has consistently been held by the case law of the Federal Supreme Court. 99 In the meantime this company has effectively established its head office in the Federal Republic and is identical with the plaintiff.

In cases of claims, although the situs of the claim normally is the domicile of the debtor, the territoriality principle is applied to limit the effect of expropriation of property of a juridical personality:

In accordance with the "territoriality principle," compulsory State expropriations have no effect outside the expropriating State because the legislative competence of every State ends at its borders. Obviously, the question is how these principles affect the instant claim. The expropriation of property will thus be recognized only if the expropriated property is located within the expropriating State. In cases involving claims, it is normally assumed that the locus of the claim is the place where the debtor has his domicile or residence. For juridical personalities as debtors, it is the place where the head office is located. If one were to therefore recognize the expropriation as being completely effective here, because the debtor formerly had its head office in the Soviet Occupation Zone, this would permit the measures to have an impact on property outside the Soviet Zone. For in this case the debtor was a company which had considerable


property also outside the Soviet Zone, namely in the territory of the present Federal Republic of Germany, and which it is continuing to operate here. If the territoriality principle is really valid, that is to say, an effect on property outside the borders of the expropriating State will not be recognized, then the seizure of a claim cannot ordinarily be conclusive and the effectiveness of an expropriation of the claim cannot therefore be accepted, because at the time of the State action the debtor had his domicile or head office within the territory of the expropriating State.

In applying the territoriality principle to East European expropriations (and also in general), the Federal Supreme Court has said that the decisive factor is not the seizure of a claim but rather whether it pertains to property located outside the expropriating State.\(^{100}\)

Intellectual property is similarly protected. In the *Solzhenitsyn* case\(^ {101}\) ("14th of August") the Federal Supreme Court explained the limitations of extraterritorial application of Soviet copyright laws:

3. Contrary to the opinion of the appellate court, the existence of a State foreign trade monopoly in the U.S.S.R. does not prevent us from giving legal effect to the demand contract. To be sure, the State foreign trade monopoly prohibits a copyright holder possessing Soviet citizenship from gainfully exploiting his rights.\(^ {102}\) Such foreign public law prohibitions, regardless of what State's law would be applicable to govern issues involving the conclusion of the contract, are basically restricted in their effectiveness to the territory of the foreign State in question. Public conflicts law is ruled by the territoriality principle.\(^ {103}\) This is so, as the Federal Supreme Court has indicated, at least as to those foreign public law currency restrictions which serve, not to protect private interests, but rather to advance the economic and political goals of the legislating State. The latter happens to be the case here. The concentration of all foreign trade in the hands of the State (or in certain entities determined by it) is essentially a political-economic decision serving to accomplish the goals of State economic planning. For this reason the effects of the State monopoly of foreign trade in the U.S.S.R. are basically limited to the territory of the U.S.S.R. Article 25 of the Basic Law (Federal Ger-

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man Constitution), which requires observation of general rules of international law does not, according to Blumenwitz, relate to the foreign trade monopoly of the Soviet State.

The courts of the Federal Republic thus have to respect and enforce the State foreign trade monopoly of the U.S.S.R. only and to the extent that the authorities of the U.S.S.R. are themselves in a position to carry out its principles.

In a case involving the expropriation of claims, the Federal Labor Court declared:

Polish or French legislation can expropriate and thereby liquidate claims only insofar as its legislation is effective. Expropriatory legislation is no longer effective and valid outside the territory of its enactment (territoriality principle). Therefore the claim owned by a German living in the Federal Republic is not affected by the expropriatory legislation of another State. If a German creditor domiciled in the Federal Republic has been expropriated in a debtor State (here Poland or France) and he has another debtor or attachable property outside the debtor State, his claim to that extent has not been expropriated. The only controversy here involves the so-called “divisible” expropriation of a claim. The plaintiff, domiciled in the Federal Republic, is pressing a claim against a debtor which cannot be affected by any type of Polish or French expropriatory legislation. The plaintiff has found in the Federal Republic property against which it may proceed, namely, the rights which the defendant has to the redemptive values which the Federal Debt Administration has distributed.

In a plenary session the Federal Supreme Court had an occasion to apply the territoriality principle in interpreting the Allied High Commission Statute as it related to a Dutch expropriation of German shares in a corporation. The court began its analysis with a general discussion of the territoriality principle.

The starting point for an analysis of the scope of the Statute is the objective status of the law before the Statute was enacted, that is, before 1951. Since the Statute is connected in point of time with the law as it then existed, we must start from there.

a) At that time the territoriality principle, which set clear limits to

106. See H. SOERGEL, W. SIEBERT, G. KEGEL, supra note 9, comments 537-43 to art. 7.
uncompensated expropriations (confiscations) of the property of foreigners, was generally and universally recognized. It provided that such sovereign acts of a State could only affect property located within that State, but not elsewhere.

The court then discussed the situations in which the territoriality principle applied:

The limitations inherent in the territoriality principle apply (and always did apply) not only when the property of a juridical personality is expropriated, but also to confiscations of the membership rights in a juridical person, at least when the corporate shares are (as here) all or almost all owned by foreigners. It is only natural that in this type of case the law considers the seizure of the membership rights to be tantamount to the seizure of the juridical person. It thus cannot reach any further than could an ordinary confiscation of foreign property. To do otherwise in cases of this type would be to disregard and, by artificial legal reasoning, to eliminate the territoriality principle entirely, as exemplified by the seizure of all or almost all of the available membership rights in a juridical person instead of its property. It is not right to evaluate the scope of the respective expropriation in both cases differently and to apply the territoriality principle to one and not to the other. This corresponds to international legal thinking from the time that the territoriality principle was generally accepted, that is to say, before the Statute went into effect.

The court next discussed the “divisibility theory” and its relationship to the territoriality principle:

c) The so-called “divisibility theory” is irrelevant to a determination of the status of the law before the Statute went into effect. In accordance with this theory, which took on its present form around 1952 (after the Statute was enacted), a “divisible company” is created when an expropriation decree fails to effectively transfer all of the affected company’s property to the expropriator. The “divisibility theory” applies only to the consequences of the confiscation, to the extent that these pertain to company property located outside the confiscating State, regardless of whether the confiscation is directed against the company itself or against membership rights in it. In or-

110. Beitzke, Probleme der Enteignung, FESTSCHRIFT FÜR LEO RAAPE 93, 102-03 (1948); see also Judgment of Nov. 12, 1959, 31 BGHZ 168, 171.
der to answer the question (which is decisive here) of whether and to what extent uncompensated expropriations can in any way affect company property located abroad, the "divisibility theory" must necessarily refer back to the already existing and internationally recognized territoriality principle.

Finally, in another decision, the Federal Supreme Court took this position on the expropriation of claims and the "divisible company":

2. . . . [T]he appellate court did not err in approving the creation of a "divisible company."

b) The Federal Supreme Court has consistently held that the private law consequences of State expropriations and seizures end at the borders of the acting State. Foreign expropriatory measures thus affect only that property which is located in the territory of the expropriating State, and not that which is located in Germany. The property which remains unaffected by the expropriation or seizure does not become ownerless. Rather, the pre-State action owner continues to be the legal owner. In cases, as in the instant suit, where the owner is a juridical person, this corporate form continues to exist for this purpose. The same result would be forthcoming if the foreign State expropriated not only the property of the juridical person, but also (as in the instant case) the membership rights in it. If the CB Company in Belgium should be completely dissolved (say through winding up), the result, contrary to the view of the defendant, would be no different. For even in this event the CB Company would continue to exist for the purpose of exercising ownership rights of that part of its property not affected by the seizure and expropriation.

The question of whether the CB Company has property in Germany to justify the plaintiff's continued existence as a "divisible company" is governed by German law.

Federal Supreme Court and the overwhelming majority of legal scholars identify the locus of a claim as the domicile of the debtor.\textsuperscript{120} The same basic concept is found in the provisions of section 23(2) of the German Code of Civil Procedure.

It is another question whether the loan claim has not been affected by the seizure and expropriation to the extent that the defendant had property in Belgium which could be used to satisfy the claim.\textsuperscript{121} We need not answer this question since the existence of possible Belgian State action would not change the fact that the claim had its locus in the domicile of the defendant in Aachen.\textsuperscript{122}

c) On appeal, the defendant is attempting to invoke the territoriality principle and to apply it to the facts of this case. His attempt must fail, however.

cc) To be sure, in its decision of 13 December 1956\textsuperscript{123} the Federal Supreme Court declined to apply the territoriality principle. That case, however, dealt with Dutch legislation expropriating corporate shares located in Germany but which the Allied Occupation Powers had handed over to the Dutch government. These facts, of course, are quite different from those in the instant case, where there has been no such handing over.\textsuperscript{124}

The latest comprehensive analysis of the territoriality principle in the German international law of expropriation is given by Stoll.\textsuperscript{125}

B. Romanist Law

1. France

In \textit{Fondation Carl Zeiss Stiftung v. Fondation Carl Zeiss Heidenheim},\textsuperscript{126} the Cour de Cassation said in a 1966 decision involving the expropriation of trade marks:

Having held . . . that the trade marks in issue had been regis-


\textsuperscript{121} \textit{H. SOERGEL}, \textit{W. SIEBERT} \& \textit{G. KEGEL}, \textit{supra} note 9, at 541; \textit{Wengler, Die Belegenheit von Rechten}, \textit{in} \textit{FESTSCHRIFT DER JURISTISCHEN FAKULTÄT DER FREIEN UNIVERSITÄT BERLIN ZUM 41, DEUTSCHEN JURISTENTAG IN BERLIN} 285, 336 \textit{et seq.} (1955).

\textsuperscript{122} \textit{Wengler, supra} note 121, at 336.

\textsuperscript{123} \textit{Judgment of Dec. 13, 1956, WM 56 (1957), also reported in MONATSSCHRIFT FÜR DEUTSCHES RECHT 276 (1957), with comment by Beitzke.}

\textsuperscript{124} \textit{Judgment of May 5, 1977, WM 730.}

\textsuperscript{125} \textit{See} H. \textit{STOLL}, \textit{STAUDINGERS KOMMENTAR ZUM BGB}, comments 197-221, 3-125 of Part II on the Introductory Law (EGBGB) (1976).

\textsuperscript{126} \textit{47 INTERNATIONAL LAW REPORTS} 129, 132 (1974).
tered in France, the Court could deduce that this localisation of the trade marks had rendered inoperative in France all the measures of appropriation which occurred in the German Democratic Republic.\textsuperscript{127}

In many cases French courts have decided that a nationalization is only effective in the nationalizing state; therefore the expropriated party remains liable for debts incurred in France with regard to the later nationalized property.

Thus, the \textit{cour d'appel} of Paris said in a case decided on April 11, 1957:

The Egyptian laws providing for the seizure and confiscation of the property of the royal family apply only to property in Egypt and are of no effect so far as concerns the application of Article 14 (Code Civil).\textsuperscript{128}

In two decisions handed down on April 23, 1969, the \textit{Cour de Cassation} took the same position relative to the debts in France of refugees from Algeria: "No legal effect will be given in France to a seizure carried out by a foreign State unless equitable compensation has been provided in advance.”\textsuperscript{129}

The same formula, word-for-word, appears in the decision of the \textit{Tribunal de Grande Instance} of Paris in the \textit{Braden Copper Corporation} case.\textsuperscript{130} The application of the citation in this case, which dealt with Chilean copper and not with the liability for debts, indicates that not only is the territoriality principle at stake, but also that expropriations by a foreign State of property located in its territory would not be recognized in France because in violation of French \textit{ordre public}.

Boulanger denies that there is any need to recognize extra-territorial nationalizations and considers such recognition highly unlikely where compensation is doubtful.\textsuperscript{131}

\textsuperscript{127} Id. at 132.
\textsuperscript{130} Corporacion del Cobre v. Société Braden Copper Corporation, 100 Clunet 227, 229 (1973).
\textsuperscript{131} BOULANGER, LES NATIONALISATIONS EN DROIT INTERNATIONAL PRIVE COMPARÉ 264 (1975).
2. Belgium

In a 1947 case, the Cour d’appel of Brussels addressed itself to the winding up of the affairs of a corporation:

[We have decided] that the contingent claims . . . of the Soviet government would involve the application in Belgium of a political measure taken by a foreign State and could not be entertained by the Belgian courts.\(^{132}\)

In a case decided by the Tribunal de commerce of Brussels in 1963, the court had to consider the impact of an Egyptian law on corporate shares located in Belgium. Belgian and American shares, belonging to A, had been transferred for deposit from the Banque de Port Said to the Banque de la Société Générale in Belgium. A had previously placed them on a deposit with the Banque de Port Said. In 1959 a receiver was appointed to take possession of A’s property in Egypt. The Banque de Port Said opposed A’s demand that the Banque de la Société Générale hand over his shares to him because of the appointment. Nevertheless, the court ordered that the shares be delivered to A by the Banque de la Société Générale in Belgium. In its decision the court said:

It follows that only Belgian law is competent to govern the legal incidents of the contested shares and that the . . . Egyptian law cannot extend its effect onto corporeal property located in Belgium.\(^{133}\)

3. Netherlands

In 1959, the Superior District Court of Amsterdam decided a case dealing with Indonesian nationalization of the Dutch account of a former Dutch firm. In its decision the court remarked on the territoriality principle:

[T]he measures of control and nationalization, also in the view of the Bank Indonesia, have only territorial effect. All six lots of tobacco, however, had already been shipped to the Netherlands, before the above mentioned Act on Nationalization of Netherlands Enterprises of December 31, 1958 entered into force, even though it did so retroactively on December 3, 1957.\(^{134}\)

After decades of controversy, the First Department of the District Court of ‘s-Hertogenbosch handed down a decision in 1975 which

\(^{134}\) Judgment of June 4, 1959, 30 I.L.R. 28, 32.
finally brought to an end the litigation involving the Czech nationalization of the Dutch firm Bata. By invoking the territoriality principle, the court dismissed the complaint of the Czech successor state enterprise:

Whereas the court, in line with a large number of authors, as indicated in the papers of the defendant, and on the basis of the opinion submitted by Professor M. Bos, Vice President of the International Law Association, with which opinion the court agrees, subscribes to the point of view that the nationalization laws in question, in the absence of any treaties to the contrary, can have effect only within the Republic of Czechoslovakia, so that the assets of Bata A. S. which were located elsewhere were not affected thereby, and Bata A. S. therefore remained the legal owner of the claim against defendant situated in the Netherlands.

Whereas even if this were not the case, Netherlands public policy prevents the enforcement within this country of the nationalization of Bata A. S., since it was not effected from the standpoint of a penal sanction but nevertheless occurred without any real possibility for the expropriated party to obtain any suitable indemnification, as has been explained at length by defendant and has not been specifically denied by plaintiff. . . .

4. Italy

In a 1956 case involving the Zeiss Company, the Appellate Court of Milan declared:

The confiscation of property without payment of appropriate compensation is a violation of the Italian Constitution. Since the nationalization or confiscation carried out by the East German government is devoid of any effect in Italy, it must be assumed that the prior existing legal situation will be judicially regarded as valid.

In a 1967 monograph, Mengozzi accepts the territoriality principle, not as a rule of international law, but rather as a rule of Italian private international law.

5. Brazil

In a 1953 decision, the Federal Appellate Court of Brazil held that a deposit of shares set up by the Bata firm in Brazil did not belong to

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137. MENGOZZI, L'EFFICACIA IN ITALIA DI ATTI STRANIERI DI POTESTÀ PUBBLICA SU BENI PRIVATI, 322 (1967).
the Czech state enterprise Bata, but rather to Jan Bata in his own name and in the name of the other shareholders:

Having found that there had been a confiscation and that this type of acquisition of property was contrary to the provisions of our Constitution, the trial court ruled that it could produce no effect in Brazil where it must be considered null and void. We hereby affirm since the plaintiff has not proved his case. Brazil has no interest in the fact that a [foreign] State, on its territory, has taken the property of its own nationals. What cannot be countenanced, however, is the granting of legal effect in this country to the confiscation by recognizing as valid an act prohibited by our Constitution. In the instant case we see a penetration into our domestic economy by a country which, although it maintains [diplomatic] relations with Brazil, is subject to a political and social regime which, if not opposed to, is at least different from ours. The penetration which is being attempted cannot produce good results. Confiscation, nationalization and the seizure of property by governmental decree will produce their effects in Czechoslovakia. In Brazil, however, this type of property acquisition is prohibited by Article 141 of our Constitution.138

C. Nordic Law

1. Denmark

In a 1952 case involving a controversy between the former Czech owner of a private corporation and the nationalized state enterprise, the Court for West Denmark said: “The nationalization decree could have no legal force as regards the claim on the Danish company.”139

The Court for East Denmark reached a similar conclusion in a 1955 case in which both the Soviet Trade Representation and the former shareholders of an Estonian company claimed the right to company property located in Denmark:

The defendants maintain, and the court agreed, that the fact that the nationalization has been carried out by taking possession of a juridical entity does nothing to change the principle that an act of nationalization can have no effect outside the territory of the nationalizing State.140

139. Judgment of May 12, 1952, 19 I.L.R. 18, 19 (1952); 81 Clunet 480, 482 (1954).
140. 87 Clunet 497 (1960).
2. Sweden

In *Estonian State Shipping Co. v. Jacobson*, the Swedish Supreme Court said:

The right [to bank credits in Sweden] claimed by the State Shipping Company derives from a nationalization that has the character of a confiscation. As such nationalizations cannot be given legal effect as regards property in Sweden, the State Shipping Company has not proved a better right to the deposited amount.

In a 1954 case the Court of First Instance stated:

Considering the principles generally applicable regarding territorial limitation in international legal relations and having regard to the nature and purpose of the administration to which the firm operated by Molnar has been subjected in Hungary ever since September 1948, the compulsory administration cannot be regarded as including property which was already situated in this country before the administration was established.

A similar statement by the Swedish Supreme Court may be found in a 1961 case dealing with a claim by the Bulgarian State to payment of Swedish credits of a Bulgarian at the Swedish-Bulgarian Clearing House: “The present action, therefore, as relating mainly to a foreign interest of a public law character, should not be considered on its merits.”

Bogdan, a Swedish scholar, has recently come out in favor of the “principle of isolation.” This principle, which is largely coextensive with the territoriality principle, is based on the idea that the state of the forum will normally not enforce foreign expropriatory measures within the forum state, thus “isolating” them, because it has no interest in so serving the interests of foreign states.

D. Anglo-Saxon Law

1. United Kingdom

British courts have rejected attempts by foreign governments to expropriate ships of their nationality in British waters. In *The Jupiter No. 3*, the court said: “[A]s the Jupiter had never been within the jurisdiction of the R.S.F.S.R., it was and could not be affected by the na-
tionalization decree of the R.S.F.S.R."\textsuperscript{146}

In \textit{Bank voor Handel en Scheepvaart N.V. v. Slatford},\textsuperscript{147} the court expressly refused to follow \textit{Lorentzen v. Lydden}\textsuperscript{148} and withheld recognition of the precautionary expropriation of the credits of a Dutch bank in London by the Dutch government in exile.

Russian nationalization measures were basically granted no effect on the property of Russian companies in England. As the court said in \textit{Cheshire v. Huth}:\textsuperscript{149} "These confiscatory decrees have no extraterritorial effect, though they are effective in Russian territory."\textsuperscript{150}

The decisions are also unanimous concerning the non-recognition of the disposal authorizations of the Commissarial Administrators appointed by the Third Reich. Thus, in \textit{Frankfurter v. Exner},\textsuperscript{151} the court said: "Schober would appeal in vain to the courts of this country to assist him in establishing his claim to property which was, and always had been, situate within the jurisdiction."\textsuperscript{152}

In the same vein the High Court of Justice in \textit{Novello & Co. v. Hinrichsen Edition Ltd.}\textsuperscript{153} concluded: "[T]he courts of this country will not give effect, so far as regards assets situate within their jurisdiction, to the law of a foreign country which is confiscatory in policy."\textsuperscript{154}

2. United States

As enunciated by the United States Supreme Court, the "Act of State Doctrine" requires respect only for expropriations which have been carried out in the territory of the expropriating state:\textsuperscript{155} "We decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign Government . . . ."\textsuperscript{156}

This interpretation was followed by the Fifth Circuit four years later:

Moreover, we conclude that in light of the fact that the government of Cuba did not have physical control over the species of prop-

\textsuperscript{146} \textit{The Jupiter No. 3}, 3 Ann. Dig. 139 (1927).
\textsuperscript{147} 1 Q.B. 112, 266 (1951); 18 I.L.R. 171, 183 (1951).
\textsuperscript{148} See note 31 supra.
\textsuperscript{149} [1946] 79 Lloyd's List L.R. 262.
\textsuperscript{150} Id. at 849.
\textsuperscript{151} 1 Ch. 629 (1947); 14 I.L.R. 8 (1947).
\textsuperscript{152} Id. at 644 and 11, respectively.
\textsuperscript{153} 18 I.L.R. 24 (1950).
\textsuperscript{154} Id. at 26, 27.
\textsuperscript{156} Id. at 428 and 37, respectively.
The Territoriality Principle

The property represented by this claim against Standard Cigar Company, it would not be a violation of the Act of State Doctrine for the courts to hold that, had the Cuban government taken all of the steps that its unlimited power would have permitted it to take, such conduct by the Cuban government would not be recognized by the United States Courts. Nothing in the Sabbatino Case requires that the Doctrine be extended thus far. It should be noted that in the Sabbatino Case the res that was subject to confiscation by the Cuban government was physical property present in Cuba; whereas the res here is a credit owned (sic) by an American company in Tampa, Florida.157

The rights claimed by Cuban intervenors to credits which had accrued in the United States prior to the date of the appointment of the intervenors have generally been refused recognition. As stated in F. Palicio y Compania, S.A. v. Brush:158

The confiscation of the Cuban properties certainly could not extinguish their rights to conduct this business here in the names of the confiscated entities. Otherwise, extraterritorial effect would be given to the decrees of confiscation in this country, an impermissible result patently contrary to United States policy and laws.159

A similar holding was reached in Menendez v. Faber, Coe & Gregg,160 a case cited for this proposition by the Attorney General in his brief to the United States Supreme Court in Alfred Dunhill of London, Inc. v. Republic of Cuba.161 The Supreme Court's opinion in Dunhill dealt only peripherally with the territoriality principle, but did not in any way place it in doubt.162

The uncompensated seizure of the property of the branch of a West Pakistani bank located in East Pakistan (now called Bangladesh) by Bangladesh could have no effect on credits owned by the branch in the United States. In Rupali Bank v. Provident National Bank,163 the court said:

Since the dollar account was located in Philadelphia the act of state doctrine does not preclude this court from enforcing the public policy of the United States and the Commonwealth of Pennsylvania

159. Id. at 492.
162. Id. at 685-90, 691 n.8, 697 n.11, 703-05, 714-18.
which is vehemently opposed to confiscation without compensation.\textsuperscript{164}

In a similar case the court rejected the argument that during World War II the United States had approved extraterritorial confiscations:

It would hardly be "consistent" with American public policy to create a special exception for extraterritorial seizures committed in wartime. Aside from the antagonistic effect which such an exception would inevitably have on our foreign relations with previously friendly nations, this court has already recognized that citizens of friendly sovereigns have a legitimate expectation that their property interests in the United States will receive the benefit of any protection our law affords.\textsuperscript{165}

When a bank in Uganda wanted to recall an irrevocable letter of credit opened at a New York bank in favor of an Israeli company, referring to a decree of the Ugandan Finance Minister prohibiting all payments to Israeli nationals, a New York court recognized the right of the beneficiary to enforce his claim against the credits of the Ugandan bank. As the state court explained in \textit{J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda Ltd.)}:\textsuperscript{166}

Laws of foreign governments have extraterritorial jurisdiction only by comity. The principle which determines whether we shall give effect to foreign legislation is that of public policy and, where there is a conflict between our public policy and application of comity, our own sense of justice and equity as embodied in our public policy must prevail. It is clear, that no attempted confiscatory or discriminatory act of the Ugandan Government, enforced or enacted after the issuance of letter of credit 110/84 could diminish the beneficiary's rights in respect to reimbursement and defendant's funds located in New York . . . . Although the letter of credit when made was valid under the laws of Uganda, by virtue of subsequent governmental action the contract became unenforceable in that country. This action, however, was of no force in New York and the doctrine of impossibility of performance lends no comfort to defendant.

Neither does the Federal act of State doctrine apply. The essence of this legal principle is that the courts of this country cannot question an act of a recognized foreign Nation committed within its own territory, no matter how grossly that sovereign has transgressed

\footnotesize{\textsuperscript{164} \textit{Id.} at 1290.}  
\footnotesize{\textsuperscript{165} United Bank Limited v. Cosmic International Inc., 542 F.2d 868, 877 (2d Cir. 1976).}  
\footnotesize{\textsuperscript{166} 37 N.Y.2d 220, 333 N.E. 168, 371 N.Y.S.2d 892 (1975).}
its own law. The doctrine is not applicable here since a debt is not "located" within a foreign State unless that State has the power to enforce or collect it [citations omitted].

3. Canada

The Supreme Court of Canada rejected an attempt by the Estonian state enterprise shipping line to enforce claims against a vessel which happened to be in Canada at the time of nationalization, even though a twenty-five percent compensation was provided in the Estonian nationalization statute. In concurring dissenting opinions, it was pointed out in *Estonian State Cargo and Passenger S.S. Line v. Laane and Baltser (The Elise)*:

Moreover, the Decrees are of an evident confiscatory nature and, even if they purport to have extraterritorial effect, they cannot be recognized by a foreign country, under the well-established principles of international law.

The effect of the Estonian Nationalization Decree in the Courts of Canada is a different matter. On October 8, 1940 the ship was not in the jurisdiction of the new Republic and, therefore, the decision in Luther v. Sagor has no application as the goods there in question were at the date of the Decree of the Russian Socialist Federal Soviet Republic within the jurisdiction of that country.

E. The Hardtmuth Cases

The position of the courts of several different States on the same facts was very clearly expressed in the *Hardtmuth* cases. Here, representatives of the Hardtmuth Company, which had been nationalized in Czechoslovakia, filed claims in the courts of countries where the company had trademark or other types of property rights. This worldwide litigation resulted in a victory for the company representatives. The Czech state enterprise entered into a cooperation agreement on terms favorable to the company representatives.

In the case the Belgian *Cour de Cassation* decided:

[T]hat the Czech nationalization decrees are not intended to regulate the legal relations and interests of private parties, but to serve directly by way of confiscation the sole interest of the legislating

167. *Id.* at 899-900.
169. *Id.* at 200, 201.
State, a power which it possesses only on its own territory, under the
pain of [otherwise] intolerably infringing the sovereignty of other
States on the territory of which is located property which he legislat-
ing State claims to be subject to its measures.\textsuperscript{171}

The court thus affirmed similar statements of the \textit{Cour d'appel} of
Brussels.\textsuperscript{172}

The \textit{Cour d'appel} of Paris reached a similar decision in 1958:

We further find that the nationalization of the business of the
partnership of Hardtmuth in Czechoslovakia is contrary to French
public policy, and that no effect can be given in France to rights
which are said to have been acquired abroad by reason of such
nationalization.\textsuperscript{173}

So also this statement by the highest Italian appellate court:

Since in fact that property and those rights were unaffected by the
measures of confiscation and nationalization, which had no effect
outside Czechoslovakia, the Court of first instance decided, abso-
lutely correctly, that . . . the fact that there had been no liquidation
did not deprive the partners of the property or the joint power to
dispose of the assets abroad.\textsuperscript{174}

Similar decisions were reached by:

— the Appellate Court of Amsterdam on 2 April 1958;\textsuperscript{175}
— the Oslo City Court on 11 July 1959;\textsuperscript{176}
— the Austrian Supreme Court on 2 June 1958;\textsuperscript{177}
— the Svea Court of Appeals, Sweden, on 26 February 1962.\textsuperscript{178}

The Swiss Federal Court handed down this decision in 1957:

Czechoslovakia could not confer powers incompatible with
Swiss law on the defendant in Switzerland even by means of expro-
piating the name used by the company. To hold otherwise would
stand in direct contradiction to a well-established rule, namely, that
the Czech expropriation decree, as public law, will not be enforced in

\textsuperscript{171} Judgment of June 2, 1960, Revue de droit international et de droit comparé 32
(1962).
\textsuperscript{172} Judgment of March 17, 1959, 46 I.L.R. 31, 36 (1973).
\textsuperscript{175} Judgment of Apr. 2, 1958.
\textsuperscript{176} 30 I.L.R. 33, 48-49 (1959) (Oslo City Court).
\textsuperscript{177} 31 Sammlung der Entscheidungen in Zivilsachen No. 83, 280; Clunet 746 (1962),
\textsuperscript{178} See BOGDAN, supra note 145, reprinted in \textit{Nordisk Immateriellt Rattsskydd}
110 (1962).
Switzerland and the company may not be deprived of any locally protected rights.\textsuperscript{179}

F. Quasi-International Arbitration

The territoriality principle has also been recognized and applied as a general principle of law by a quasi-international arbitration tribunal. In concession agreements concluded in 1955 and 1971 with California Asiatic Oil Company and Texaco Overseas Petroleum Company, Libya agreed to submit any disputes arising therefrom to a quasi-international arbitration tribunal. In 1974 Libya nationalized all the property of both companies. When the companies desired to open up the arbitration procedures, Libya refused to name the arbitrator which it was entitled to appoint. Pursuant to the provisions of the concession agreement designed to cover such an eventuality, the companies requested the President of the International Court of Justice (I.C.J.) to serve as sole arbitrator. In its memorandum of 26 July 1974 to the President of the I.C.J., the Libyan government argued that the nationalization of the companies not only rendered their agreements with Libya null and void, but also destroyed the companies' legal personalities. They thus were arguably precluded from relying on the arbitration clause. The President of the I.C.J., Mr. Jimenez de Arechaga, appointed M. Dupuy (from Nice, France) as sole arbitrator. His arbitral award contains the following language:

This tribunal cannot recognize nationalization measures of such radical effect. Even though they extend to all the assets of the companies located in the territory of the nationalizing State, they cannot claim to have destroyed the companies as legal entities. . . . [I]t is a well-known rule that nationalizations produce in principle no extraterritorial effect, and that they cannot, in any event, affect the existence of companies as legal entities where such companies do not possess the nationality of the nationalizing State.\textsuperscript{180}

V. THE RECOGNITION OF THE TERRITORIALITY PRINCIPLE BY EXPROPRIATING STATES

The hopeless position faced by expropriating States attempting to obtain physical control over extraterritorially located property which

\textsuperscript{179} Judgment of Sept. 13, 1957, 83 BGE II 312, 335 (1957); 24 I.L.R. 46 (1957).

they have expropriated has prompted courts and ministries to either
decide to bring an action or concede failure in one already brought.

Thus, in a 1948 decision, the Austrian Supreme Court applied the
territoriality principle to restrict to property located in Austria the ef-
fect of a post-World War II Austrian anti-Nazi law (Verbotsgesetz)
which provided for the forfeiture of property belonging to the Nazi
Party and its organizations. In applying this statute to a legacy be-
queathed to the National Socialist Teachers' Association in 1942 the
court said:

According to section 1 of the statute all the property of such
dissolved juridical persons is forfeited as a matter of law to the Aus-
trian State. Since the statute creates property rights in favor of the
Austrian State, no special transfer is necessary. The basic rule gov-
erning the law of property and expropriation is the lex rei sitae.\textsuperscript{181}
The statute, therefore, is applicable only to property, whether mova-
ble or immovable, which is located in Austria. With regard to the
instant case, this means that the property of the National Socialist
Teachers' Association (to the extent it is located in Austria), includ-
ing the rights which it acquired under the bequest from Johann K.,
has been forfeited to the Republic of Austria. It constitutes, there-
fore, a substantive legal inheritance of the Republic of Austria, which
is the legal successor of the Nazi Teachers' Association. Property of
the legator located abroad (in Rohle, the Sudetenland) is not affected
by this acquisition.\textsuperscript{182}

In a 1957 decision involving the compensated nationalization of
the Greek airline company TAE, the Greek Conseil d'Etat stated:

Since the State action carrying out the expropriation was a tak-
ing of [private] property for reasons of public welfare, it constituted
an exercise of State sovereignty and may therefore basically not be
extended beyond the territorial borders of the State and bring about
consequences there. As a result, the expropriation statute is in force
only with respect to property located within the State which has en-
acted the statute, and is applicable only to such property. The statute
may thus not determine the legal fate of property that was located
outside the acting State at the time the expropriation statute was en-
acted. With regard to this property the owner continues to retain the
right of disposal. For these reasons that part of the expropriatory
statute which purports to reach TAE property abroad is inapplicable.

\textsuperscript{181} I. Klang, Kommentar zum Allgemeinen Burgerlichen Gesetzbuch 312.
It follows that the Royal Decree of 28-30 November 1956, which is based on this legislation, is without effect to the extent that it purports to expropriate TAE property located in its offices abroad. To this extent the decree must therefore be invalidated.\textsuperscript{183}

Similarly, Egypt under Nasser had first attempted to include the foreign properties of the Suez Canal Company in this nationalization, but then backed off, even amending the Egyptian statute.\textsuperscript{184}

The same result was reached in litigation involving claims filed by the Egyptian State administrator against French property following the Suez affair:

Assuming that the forced transfer was intended by the Egyptian authorities to have an extra-territorial effect, and that this was in accord with the legal provisions promulgated by them at that time, but which were however not communicated to this court, [we conclude] that at least the Zurich agreement expressly provided that it would apply "only to Egyptian territory."\textsuperscript{185}

For the same reason the Algerian government, convinced that its legal position was hopeless, finally abandoned its efforts in 1971 to extend its expropriatory measures to include the Tunesian stretch of a natural gas pipeline, originally the property of a French company, only one-third of the length of which ran through Algeria, with the rest located on Tunesian soil.\textsuperscript{186}

VI. CONCLUSIONS

The territoriality principle is an inexact concept. In public international law it means: State acts (such as legislation, administrative acts, judicial decisions) which serve to promote, not justice between individuals, but rather the welfare of the state, are basically effective only within the territory of the State. State acts which interfere with the exercise of private rights in order to advance the welfare of the State (such as, above all, expropriations) will nevertheless be recognized in the interest of international order (and rules of foreign public law will

\textsuperscript{185} Judgment of July 9, 1963, Tribunal de grande instance de la Seine, Annuaire Francais de Droit International (AFDI) 874, 875 (1964).
\textsuperscript{186} See Manin, Le Differend Franco-Algerien relatif aux hydrocarbures, AFDI 169 (1971).
thereby be applied) when and to the extent that the acting State has confined the exercise of its power to its own territory and has not encroached upon the territory of a foreign State.