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ENFORCEMENT/RECOGNITION OF FOREIGN CONFISCATORY LAWS IN SINGAPORE

TAN YOCK LIN*

Taking its departure from the Court of Appeal decision in *Republic of the Philippines v Maler Foundation*, this article argues that the authorities support a self-supporting rule for accepting or rejecting a foreign confiscatory law. This rule, not unlike the rule against direct or indirect enforcement of a foreign penal, revenue or other public law, is based on considerations of territorial sovereignty and is not a choice of law rule that selects the lex situs as governing law. The implications of a rule based on considerations of sovereignty and in particular the contrast with an analysis based on the lex situs rule are elaborated.

I. INTRODUCTORY

In the recent case of *The Republic of the Philippines (ROP) v Maler Foundation*,[1] the Singapore Court of Appeal was presented with an opportunity to clarify the complicated interrelations of three closely allied doctrines which meet and overlap in producing the same or a similar outcome of non-examination of the merits of a disputed issue. This article seeks to show that the Court's success was only partial. The Court clarified that the doctrine of "territorial act of state" is not based on considerations of political legitimacy or the separation of judicial, executive, and legislative powers and that the principle of judicial restraint or non-justiciability is limited to foreign executive and legislative acts. With respect, it failed, however, to fully address the nature of a confiscatory judgment when it decided that the forfeiture judgment of the Supreme Court of the Philippines (SCP) in that case was a judicial act and that a judicial act should fall out of the act of state doctrine. This article takes the judgment as a point of departure and argues that there is an alternative analysis which is more consistent with the authorities. Even where confiscation of property (by which is meant a taking away of property by virtue solely of sovereign authority as opposed to a patrimonial or commercial taking) is imposed in judicial proceedings, and not directly by way of a legislative or executive decree, there may be a preliminary

* Professor, Faculty of Law, National University of Singapore.

[1] [2014] 1 SLR 1389 (CA) [*ROP v Maler Foundation*] affirming [2012] 4 SLR 894 (HC).

question of whether the judicial forfeiture is an act of governmental character.[2] The article's central argument is that considerations of sovereignty provide an authentic basis for testing the governmental character of a judicial act, and that only if it turns out not to be such will a question of justiciability of the judicial forfeiture as a foreign judgment arise.

This argument is developed by re-visiting a debate, prominent in the 1950s, as to whether the recognition of a seizure of property by a foreign state was a matter of the choice of law or a matter of territorial sovereignty. In section III of this article, the Court of Appeal's view that the former is the case and its implications are outlined. In section IV, the alternative analysis that recognition is a matter of territorial sovereignty is explained and contrasted. The sections following defend and enunciate the alternative analysis by an examination of recent English authorities with a view to showing that it provides a better fit with the authorities. This is not an arid debate. If the validity of seizure is a choice of law matter turning on the principle of lex rei sitae, the forum court will apply the rule of decision of the third country which it determines to be the country of the situs. Public policy may also be invoked to exclude the lex situs as applicable law, and the doctrine of renvoi may possibly be relevant.[3] In particular, where the seizure is ordered by a foreign court which designates its order as an *in rem* judgment of the court, the forum court will not undertake an independent review according to the lex fori whether the order would be an *in rem* judgment. If however the validity of seizure depends on considerations of sovereignty, the forum decides exclusively whether there is a territorial seizure, in which case it will be recognised, or an extraterritorial seizure to be rejected. Whether a third country in which the confiscated property is situate will recognise the seizure is completely immaterial. It is also highly doubtful whether the effects of a territorial confiscation can be excluded by virtue of public policy while public policy will be entirely irrelevant in the case of extraterritorial seizure.

Section VI particularly shows how the alternative analysis could have worked out if on the facts of *ROP v Maler Foundation* the court had had to determine the preliminary question whether the judicial seizure was in substance an assertion of sovereign authority, as opposed to an adjudicative disposition of private rights. Section VII addresses the remaining question left unclear in the authorities as to whether there is a valid distinction between confiscation regarded as punitive expropriation and non-punitive expropriation. The still uncertain nature of the rejection of a territorial confiscation on penal grounds is discussed in this context. In the conclusion, it is pointed out that the article does not suggest that the alternative analysis would have altered the result in *ROP v Maler Foundation*. For a different result to be in contemplation, a party opposing the ROP's claim which was founded on the forfeiture judgment would have had to have participated in the forfeiture proceedings or be privy in interest to the Marcos Estate which was the defendant in those proceedings. These facts were either non-existent or never pleaded if they were true.

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[2] The use of this terminology is not intended to refer to American governmental interest analysis. Nor is any reference to the American act of state doctrine intended.

[3] The question of the applicability of renvoi in relation to the determination of title to movable property has been discussed in several recent cases beginning with Millett J's judgment in *Macmillan v Bishopsgate Investment Trust* (*No. 3*) [1995] 3 All ER 747 (ChD) (*Cf* the Court of Appeal in [1996] 1 All ER 595) but will not feature in this article.

II. Background

The Singapore case was a sequel to a long running litigation on two major fronts. On the first, there were actions brought in the United States (US) by the Republic of the Philippines (ROP) to recover misappropriated property from the estate of the former President Marcos. The second front comprised actions also in the US by certain tort claimants, the human rights victims of the former President Marcos's oppression (HRVs), to recover damages, from his estate. Some of this backdrop, in particular the later developments, sufficiently appear from the Singapore judgment. The earlier gaps may be gleaned from a litany of cases contested vigorously in the US courts from as early as 1986, when the ROP attempted to recover substantial properties in New York as well as California, alleging that these were illegally appropriated by Marcos. Worldwide injunctions were successfully obtained from both the New York and Californian courts, and affirmed respectively by the Court of Appeals for the Second Circuit[4] and Ninth Circuit,[5] pending trial of the merits. Both suits were settled subsequently and the injunctions dissolved.

Meanwhile, also as early as 1986, tort claims were brought by Celsa Hilao in Hawaii against Marcos, later substituted as defendant by his estate.[6] The suit became part of multidistrict proceeding MDL 840 involving 9,539 HRVs like Hilao who were eventually awarded a judgment of nearly US$2b in total. This judgment subsequently affirmed on appeal,[7] included a worldwide injunction restraining the transfer of funds or assets held on behalf of, or for the benefit of, the defendant pending satisfaction of the judgment. Around 1996, in the wake of several failed attempts by the HRVs to collect on the judgment in the US,[8] the legal nominal owners of certain Swiss deposits, the Foundations, attempted to dispose of them in defiance of the injunction. As sanction for the contempt of court, Walter Chinn, Clerk of the United States District Court for the District of Hawaii, at the direction of the district court, executed an assignment of the property rights in the Swiss deposits, in the stead of the legal representatives of the Marcos Estate, for the benefit of the HRVs (the Chinn assignment).

In 1998, the Swiss deposits, which had been frozen in Switzerland at the behest of the ROP from about 1986/7,[9] were released for deposit by the Philippine National Bank (PNB) in escrow in Singapore with various banks including the WestLB to abide a determination of proper disposal by a competent court in the Philippines. That determination was finally affirmed in 2003 by the SCP in favour of the ROP. Armed with the judgment of the SCP that the assets were forfeited to the ROP under

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4 806 F. 2d. 344 (2nd Cir, 1986).

5 862 F. 2d. 1355 (9th Cir, 1988) cert. denied 490 U.S. 1035 (1988).

6 Marcos died during the pendency of the actions. His estate as substitute defendant was represented by his wife and son.

7 *Hilao v Estate of Marcos* 103 F. 3d. 767 (9th Cir, 1996).

8 Hilao apparently 'registered' the judgment in Singapore in 2005. No mention of this appears in the reported judgment.

9 The ROP sought IMAC assistance from the Swiss federal government to attach property in the custody of Marcos, alleging that Marcos and members of his family used their governmental powers to divert state funds to themselves. Cantonal orders freezing all assets belonging directly or indirectly to Marcos and/or his family were immediately issued. Appeals against these orders were dismissed by the Swiss Federal Supreme Court.

Republic Act No. 1379, the ROP claimed the funds from the WestLB.[10] The HRVs in competition with the ROP also claimed the funds by giving notice of the Chinn assignment to the bank which took out an interpleader. The remaining two claimants were the Foundations as residual legal owners and the PNB claiming legal title as trustees under the escrow agreement.

So in a somewhat convoluted fashion, a fight over property which began in the US migrated to Singapore and resumed in interpleader proceedings where the ROP relied on the US doctrine of act of state with a view to 'immunising' the forfeiture judgment from scrutiny and invalidation on the ground that it had purported to confiscate property outside the Philippines. The Court of Appeal's refusal to go down the same road inevitably required an examination of the rationale behind the American doctrine and a comparison with the different rationales underpinning the Singapore doctrine; as well as, of course, an examination of the common law authorities as against the US authorities.

III. Territorial Act of State and Rationale

In essence, the Court of Appeal decided that the forfeiture judgment in question was a judicial act and that a judicial act was not a territorial act of state. It was, as such, valid or not valid according to the rules of recognition of foreign judgment; and the question was not whether its legality or validity was non-reviewable under the doctrine of act of state. On the facts, those recognition rules dictated that the forfeiture judgment in question was not to be recognised. It had been pronounced in respect of property situate outside the jurisdiction and hence the court giving the judgment lacked international jurisdiction which was requisite under the rules of recognition of a foreign judgment if an *in rem* judgment was to be valid. This ultimate conclusion was reached in a more elaborate process involving a number of discrete steps.

First, the Court of Appeal examined the basis and rationale of the act of state. It rejected the separation of powers rationale which the US Supreme Court had adopted in *Banco Nacional de Cuba v Sabbatino*,[11] and circumscribed in *W. S. Kirkpatrick & Co Inc v Environmental Tectonics Corporation International*.[12] The 'constitutional' rationale casts the doctrine of act of state as entirely a constitutional, and hence domestic, substantive law doctrine. When the relief sought or defence interposed depends on the invalidity of an act of state, it enjoins a court to uphold the act of state free of any challenge to its merits so as to avoid usurping the powers and authority of the executive or legislative arms of the forum government. Incidentally, it has been stated elsewhere that this rationale does undergird the common law doctrine of Crown or 'domestic' act of state (not adverted to in any detail in the judgment)[13] but

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[10] Apparently, no dispute arose with respect to deposits held in escrow at other banks. Following the judgment of the SCP in 2003, the PNB succeeded in remitting them to the ROP. See *Re Philippine National Bank* 397 F. 3d. 768 (9th Cir, 2005). Note also that in Singapore, an earlier claim that the ROP's claim was incontestable on account of sovereign immunity was rejected by the Singapore Court of Appeal in *Republic of the Philippines v Maler Foundation* [2008] 2 SLR(R) 857.

[11] 376 U.S. 398 (1964).

[12] 493 U.S. 400 (1990).

[13] See *ROP v Maler Foundation* at para 49.

at paragraphs [48] and [52] of its reported judgment, the Court of Appeal apparently preferred to conceive of the *foreign* act of state doctrine in Singapore as based on a combination of judicial restraint, comity and a territorial choice of law rule in relation to acts of a foreign sovereign that affect property within its jurisdiction. This was described as the traditional English common law approach.

Second, the Court apparently decided that, in relation to the forfeiture of property, the territorial act of state is a choice of law rule. The Court of Appeal, like Lord Wilberforce in *Buttes Gas & Oil Co. v Hammer*,[14] acknowledged that the common law territorial act of state is a specific variety of act of state affecting property within the jurisdiction of the foreign state.[15] Although subsumable under the doctrine of non-justiciability, it is distinguishable from that wider doctrine which precludes examination of the legality, validity and morality of an act of state. However, whereas Lord Wilberforce merely recorded counsel's submission in that case that the doctrine of territorial act of state operating on property within the state was a choice of law rule, the Court of Appeal accepted that that was the case under the common law,[16] citing among other things, the English Court of Appeal's 'approach' in *Peer International Corpn. v Termidor Music Publishers Ltd*.[17]

This analysis of forfeiture of property as a choice of law question governed by the lex situs would sufficiently explain why the Court of Appeal went on to accept the forfeiture ordered by the SCP as a judicial act and to hold that both the subset of territorial act of state and the larger genus of non-justiciable foreign act of state do not extend to judicial acts and are limited to executive and legislative acts.[18] In other words, if the forfeiture of property did not implicate considerations of sovereignty but merely the protection of property rights as a matter of choice of law, there remained only the question of justiciability of the forfeiture of the property in question. The Court decided that the forfeiture judgment of the SCP was a judicial act relating to property which was justiciable in accordance with the rules of recognition of a foreign judgment.

That would have been sufficient to dispose of the claim of the ROP which was based on validity of the forfeiture judgment but the Court of Appeal further observed that even if the judgment had not been lacking in international jurisdiction, its recognition would have amounted to an indirect enforcement of a penal law. This was because it was imposed on assets obtained presumptively from illegal sources in favour of the state in proceedings instituted by the state as a means of punishing and deterring public officials. The Court also placed some reliance on concessions by the expert witness for the ROP that the law providing for forfeiture "[partook] in the nature of a penalty" and that the "forfeiture proceedings under RA 1379 are a means of punishing and deterring public officials to advance a State interest."[19]

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14 [1982] AC 88 (UKHL).

15 *ROP v Maler Foundation* at para 48.

16 *ROP v Maler Foundation* at para 48.

17 [2004] Ch 212 (EWCA).

18 In *ROP v Maler Foundation* at para 52, the Court of Appeal recognised that to cover the act relating to outside property would be to give the doctrine a positive effect. At para 53, the Court said it was not evident how the conceptual underpinnings of the common law act of state doctrine could justify extension of the doctrine to cover judicial acts.

19 Although he strenuously denied that the RA 1379 imposed a penalty: *ROP v Maler Foundation* at para 69.

IV. Alternative Analysis

The holding of the Court of Appeal draws a sharp distinction between executive and legislative acts on the one hand and judicial acts on the other. Taking this approach means that even if the purpose of a judicial act is substantially to give effect to a legislative decree to confiscate or forfeit property within the state (as where the object of judicial proceedings is merely to gather evidence of the existence and whereabouts of the assets to be confiscated), it would not be a territorial act of state. It would be a judicial act. That being the case, the consequences of any change of title as a result of the forfeiture will be judged as a judicial act and subject to the defences of public policy, breach of natural justice, and so forth. If the judgment is to be recognised abroad, the requirement of international jurisdiction as defined for the purposes of recognition of a judgment will have to be met. The judicial act will also be applied to persons privy to the interest dealt with.

More critically in a case such as *ROP v Maler Foundation*, the characterisation of the judgment as an *in rem* judgment, it is submitted, will be reserved to the foreign state in which judgment was given. As can be seen from several other cases, a court asked to recognise or enforce a foreign judgment must apply the foreign law, *ie* the law where the decision was made, to determine whether the decision in question is a judgment of a court of law as opposed to an administrative or legislative decision. In *Berliner Industriebank AG. v Jost*,[20] where it was submitted that the decision of a German court was never a judgment but an administrative decision, the English Court of Appeal answered that it was necessary to apply the German law and, *inter alia*, referred to a decision of the German Supreme Court that the decision made by entry in a certain judicial record operated as a judgment. By virtue of German law, the judgment was also found to be an unappealable judgment binding on the defendant-bankrupt for all purposes as he had not objected to the entry.[21] In a similar vein, the nature of the judgment—as to whether it is a fresh judgment—must be decided by the foreign law.[22] The rule that for the purposes of applying the common law rules of judgment, the forum court will classify judgments according to whether they are *in personam* or *in rem*, does not detract from this required reference to the foreign law though it is qualified. If the foreign law does not rely on a similar classification, the forum court of necessity must determine whether the judgment is one or the other by examining such features of the judgment derived from the foreign law as would be characteristic of an *in personam* or *in rem* judgment. Thus, if the purpose of the judicial order is to establish a personal liability to repay moneys, it would be an *in personam* judgment.[23] The way the proceedings are classified for the purposes of jurisdiction is immaterial and an *in personam* judgment may be given in insolvency proceedings. This was what occurred in *Berliner Industriebank AG. v Jost* where the forum court determined on the basis of expert opinion and the recorded cases that the German entry made in bankruptcy proceedings was a

[20] [1971] 2 QB 463 (EWCA).

[21] For a decision to be final and conclusive for the purposes of the English concept of issue estoppel, it must be final and conclusive (and establish an issue estoppel) under the law of the place where the decision was made: *Carl Zeiss Stiftung AG v Rayer & Keeler Ltd* (*No. 2*) [1967] AC 853 (UKHL) at 919 and 969.

[22] *Poh Soon Kiat v Desert Palace* [2010] 1 SLR 1129 (CA).

[23] As in *Re Flightlease (Ireland) Ltd* [2012] IESC 12 (Irish SC).

judgment to pay a debt which would have thus been enforceable as an *in personam* judgment against the defendant if it had not become statute barred under the lex fori.[24] In *Murakami Takako (executrix of the estate of Takashi Murakami Suroso) v Wiryadi Louise Maria*,[25] the Singapore Court of Appeal likewise decided that a judgment given in Indonesian divorce ancillary proceedings declaring the respondent joint owner of three properties in Singapore was not an *in rem* but an *in personam* judgment. It was in that context that the Singapore Court of Appeal said that:

> "[I]n order to determine whether Judgment 203 is a judgment *in personam* or a judgment *in rem*, it is necessary to consider the nature of the judicial proceedings that led to Judgment 203 and the intention of the Supreme Court of Indonesia as to the effect of the order on the parties to the proceedings. *In this connection, it is not relevant to this court whether Indonesian law recognises the concepts of a judgment in rem and a judgment in personam.* What is relevant to this court is the substance of Judgment 203 and its effect or intended effect on the parties thereto."[26]

However, where the court giving the foreign judgment is a common law court, the Court of Appeal's remarks should not be taken to mean that the classification of the judgment has nonetheless to be undertaken in accordance with how the lex fori would have determined it if the same proceedings had taken place in the forum and judgment had been given by the forum court. Certainly, the remarks should not mean that the decision of the foreign court that it has delivered an *in rem* judgment may be ignored. The decision of the UK Supreme Court in *Rubin v Eurofinance S.A.*[27] sheds useful light on this matter. Although a majority of the Supreme Court reversed the English Court of Appeal, no Justice of the Supreme Court questioned the correctness of the Court of Appeal's holding in the first case that the judgment ex facie was an *in personam* judgment.[28] The judgment in question was a judgment of the New York court, which all know recognises the concepts of *in rem* and *in personam* judgment. It is submitted thus that in *ROP v Maler Foundation*, the Singapore Court of Appeal was not wrong substantially to have applied the original court's characterisation of its own judgment.[29] If the original court recognises the common law concept of an *in rem* judgment, the forum court applying the foreign law cannot possibly come to any other conclusion than that the judgment is an *in rem* judgment. So if the foreign state defines the judicial act as the rendering of an *in rem* judgment, and there is no evidence otherwise that the foreign law conceives of an *in rem* judgment in some peculiar sense, the forum court will be bound by this characterisation and will accept it as conclusive. Even if the characterisation of the judgment as *in personam* or *in rem* depends on the lex fori, and not the foreign law, it is hard to imagine, where the original court declares that it has given an *in rem* judgment intended to bind and with the effect of binding all parties interested in the subject property, that there

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24 Although on the point of limitation of time, the authority of *Berliner Industriebank AG. v Jost* is doubtful following the decision of the House of Lords in *Lowsley v Forbes* [1999] 1 AC 329.

25 [2007] 4 SLR(R) 565 (CA).

26 [2007] 4 SLR(R) 565 at para 30 [emphasis in italics added].

27 [2013] 1 AC 236 (UKSC) [*Rubin v Eurofinance*].

28 [2011] Ch 133.

29 *Poh Soon Kiat v Desert Palace* [2010] 1 SLR 1129 (CA); *Murakami Takako (executrix of the estate of Takashi Murakami Suroso) v Wiryadi Louise Maria* [2007] 4 SLR 565 (CA).

will be significant cases where the forum court can objectively regard the judgment to the contrary as an *in personam* judgment. The international context so far from requiring a broader approach to be taken would demand accepting the classification of the judgment by the court if actually made.[30]

The alternative analysis predicates that the question whether there is a territorial or extraterritorial confiscation or forfeiture of property is one and the same as the question of whether it would be contrary to the principle of territorial sovereignty to recognise and give effect to it. There is already well-settled authority that whether a governmental act in question is executive, legislative or judicial, as long as it is an assertion of the sovereign authority to punish a criminal offender or tax a person, the forum court will recognise but not enforce the act, directly or indirectly.[31] This proposition, well established with respect to penal and tax laws, has recently been affirmed as true also of a foreign public law.[32] In these recent cases, the courts have rejected the widely canvassed view that alternative considerations of justiciability are relevant. Only considerations of sovereignty matter.[33] That being the case, there is no doubt that the fact that the penal or revenue act is judicial is not so important as its sovereign character. A criminal fine is typically, if not invariably, imposed by judicial process. Nevertheless, the penal judgment cannot be enforced in the forum. The same is true of tax judgments. There is no difference with indirect enforcement of either penal or tax judgments. In a well-known case, *USA v Inkley*,[34] the forum court held that the bailbond imposed a court could not be enforced as it would amount to indirect enforcement of a foreign penal law. Similarly, the fact that the judgment is an *in personam* judgment, and not a penal judgment, is inconsequential. Considerations of sovereignty are paramount; and an *in personam* or *in rem* judgment which would otherwise be enforceable or capable of recognition, as the case may be, will be refused enforcement or recognition in the forum to the extent that it will amount to indirect enforcement of a penal law. Importantly, it is to be noticed that the refusal to enforce a foreign penal or tax law is not that the law is not applicable under the conflicts rules. Even if the law is applicable, the non-enforcement of the penal or tax is dehors the choice of law rule except where the case is essentially that the penal or tax law is not being enforced but noticed. As Lord Denning explained in *Regazzoni v K. C. Sethia* (*1944*) *Ltd*, while "courts will not enforce [revenue or penal] laws at the instance of a foreign country, [i]t is quite another matter to say that we will take no notice of them. It seems to me that we should take notice of the laws of a friendly country, even if they are revenue laws or penal laws."[35]

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30 *Cf* the existence of international jurisdiction by way of voluntary submission has provided an occasion for a not too dissimilar discussion. See *Rubin v Eurofinance* at para 161.

31 See *US v Harden* [1963] SCR 366, 41 DLR (2d.) 721; *US Securities Exchange Commission v Manterfield* [2010] 1 WLR 1239 (EWCA). The fact that a judgment is pronounced rather than an executive or legislative act performed does not take the case out of the penal or the revenue rule.

32 See *Government of Iran v The Barakat Galleries Ltd* [2009] QB 22.

33 In relation to the revenue rule, see *Relfo Ltd (in liq) v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657 (SGHC) at para 53. See also *Government of India v Taylor* [1955] AC 491 (UKHL) and Lord Denning MR in *Attorney General of New Zealand v Ortiz* [1984] AC 1 (UKHL) explaining the proposition that the courts will not enforce or otherwise lend their aid to the assertion of sovereign authority by one state in the territory of another. See also *Mbasogo v Logos Ltd* [2007] 2 WLR 1062 (EWCA).

34 [1989] QB 255.

35 *Regazzoni v K. C. Sethia* (*1944*) *Ltd* [1956] 2 QB 490 at 515–16 (CA) *affd* [1957] 3 All ER 287 (UKHL).

If like the penal and tax rule, the seizure of property by a foreign state is a matter of considerations of sovereignty, then whether the seizure is by way of a legislative or executive or judicial act is immaterial. There is the same question to be answered as to whether the foreign government is seeking essentially to execute its confiscatory measure outside its territory or recognition of a seizure of property within its territory. If the property has been actually seized within the territory by reduction of the property to possession, the forum court will not question its validity but will recognise it as a valid assertion of sovereignty. If however the property is to be seized, in effect, outside the territory of the foreign state and in the territory of the forum, the forum court will not give effect to the seizure within the forum territory by completing or executing it and giving effect to the consequences of the purported seizure. To do so would violate the sovereignty of the forum state. Likewise, if the property is not in the forum state but in a third state, the forum court will not give effect to the seizure since to do so would violate the sovereignty of the third state.

V. Considerations of Sovereignty Rather than Choice of Law

If the alternative analysis is to be correct, considerations of sovereignty must be paramount so far as confiscation as an act of state is concerned. A particularly detailed study on territorial confiscations which included both English and American authorities conducted by Adriaanse in the 1950s concluded in this manner: "State sovereignty plays a prominent part: this is illustrated in territorial confiscations by the act of state doctrine and in extra-territorial confiscations by the rejection of the operation of the foreign state authority on domestic territory."[36] Adriaanse perceived that the question of territorial confiscation involved a conflict between 'the respect due to the foreign act of state [and] the respect for the inviolability of private property as incorporated in the law of the forum'.[37] This conflict, he answered, was resolved by preferring the former consideration.[38]

Turning to extraterritorial confiscations, Adriaanse observed that what was meant by rejection of 'enforcement' of extraterritorial confiscations was in fact a refusal to recognise the effects of the extraterritorial confiscation on the territory of the forum. With respect, this must be so since it is immaterial whether the property confiscated was in the forum at the time of confiscation or in another country. The fact that the property is outside the territory of the confiscating state is or should be sufficient to lead to the rejection of extraterritorial confiscation. Two divergent theories accounted for this rejection. One posits that extraterritorial 'validity' is contrary to public policy whereas the other posits that an extraterritorial seizure of property cannot be recognised and given effect to because, by its very nature as an act of state, a seizure of property cannot be applied extraterritorially. Adriaanse argued that the latter theory was correct. A self-supporting rule could be framed

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36 *Confiscation in Private International Law* (The Hague: Martinus Nijhoff, 1956) at 127.

37 Admittedly, the reference to 'respect' suggests a weaker notion of sovereignty, *viz*, comity of nations. Adriaanse, however, meant that the principle of territorial sovereignty was sufficient to oblige courts to recognise a territorial confiscation, and not that there was any further need for the courts to determine, in the exercise of their discretion, whether to accord respect to the assertion of territorial sovereignty by the foreign state concerned.

38 *Confiscation in Private International Law* (The Hague: Martinus Nijhoff, 1956) at 136.

for the rejection or non-recognition of extraterritorial confiscations.[39] Such a rule would acknowledge the common thread behind the almost unconditional acceptance of territorial confiscation and unconditional rejection of extraterritorial confiscation.

The opposing view was the governing law view that the foreign confiscatory rule is the governing law under the *lex rei sitae* principle. When the confiscatory rule of the foreign state is applicable under the *lex rei sitae* principle, the forum will give effect to it. This means that when the confiscatory rule purports to apply to property not situate in the foreign confiscating state, it will not be applicable by virtue of the conflicts rules which designate the law of the other foreign state in which the property is in fact situate as the lex situs. Relegating the governmental act to the background, this view stresses the respect for the inviolability of private property. Supporters of the governing law view, to be sure, do not always rely exclusively on the respect for the inviolability of property. For instance, also writing in the 1950s, Seidl-Hohenveldern advocated a more eclectic support which drew on considerations of sovereignty as well.[40] There were three principles (maxims) underlying the governing law analysis. The principle of territoriality demanded that a state is sovereign so far as the fate of property within its territory is concerned. To this, he added two other principles, namely the principle of protection of private property and the principle of respect due to the foreign governmental act as a matter of the comity of nations. Courts respect the sovereign right because this right is also the basis for the forum's claim to determine title of property within its own territory. As has been pointed out, the governing law view clearly underpins the decision in *ROP v Maler Foundation*.

It is, however, submitted that when the judgments of both the English Court of Appeal and House of Lords in *Kuwait Airways Corp v Iraqi Airways Co* (*Nos. 4 & 5*)[41] are examined, the proposition that the acceptance or rejection of confiscatory measures depends on considerations of sovereignty continues to provide the best fit for the authorities. The latter decision in particular does not provide any support for any shift of the basis of recognition of foreign confiscatory rules to a choice of law predicate. The facts of the case in a short compass involved a foreign legislative decree which changed title to ten aircraft belonging to the Kuwait Airways Corporation (KAC). The aircraft were seized when the Iraqi army had earlier invaded Kuwait and were removed and flown by the Iraqi Airways Company (IAC) to Iraq as directed by the Iraqi government. When the aircraft were in Iraqi territory, their ownership was changed from the KAC to the IAC as a consequence of passage of Resolution 369 which purported in addition to constitute the IAC as universal successor of the KAC.[42] Both appellate courts agreed in the result, but not altogether in the reasoning. The Court of Appeal dealt with the issue in terms of acceptance or rejection of a foreign confiscation of property. The subsequent change of title by universal

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39 *Confiscation in Private International Law* (The Hague: Martinus Nijhoff, 1956) at 157.

40 As recounted by F. Adriaanse, *Confiscation in Private International Law* (The Hague: Martinus Nijhoff, 1956) at 135-136. *Cf* I. Seidl-Hohenveldern, 'Extra-territorial Effects of Confiscations and Expropriations' (1950) 13 Mod L Rev 69.

41 [2002] 2 AC 883 [*KAC* (*Nos. 4 & 5*)].

42 The case was an appeal to the HL from decisions on issues of the justiciability of violations of international law or contravention of forum public policy which the HL had in an earlier appeal remitted to the lower court (after the HL decided that the claim of sovereign immunity did not extend to events subsequent to the seizure of the aircraft in Kuwait).

succession was an integral part of the earlier invasion, annexation of Kuwait and confiscation of its assets. It could not be divorced from the earlier confiscation. Taking its complexion from the earlier event, it was in substance confiscatory. The House of Lords focused on the events which occurred after the aircraft had been removed to Iraqi territory, in particular the detention of the aircraft in Iraq by the IAC prior to, and following, the change of ownership. Separability of these later events from the seizure of the aircraft in Kuwait was insisted upon; and the Court of Appeal had erred in integrating the earlier confiscation and the change of ownership by universal succession from the KAC to the IAC. Although both acts were an integral whole, or part of, the same concerted contrivance to seize the assets of Kuwait, the change of ownership was in relation to their retention and not confiscation.

On those facts, as the House of Lords predicated, there would be no issue of recognition of confiscation of property by a foreign state. In fact, no one suggested in view of the nationalisation of the KAC that an issue of the existence of the KAC and hence an indirect issue of confiscation of the assets of the KAC arose. If that had been the case, the authorities such as *Russian Commercial & Industrial Bank v Comptoir d'Escompte de Mulhouse*[43] would have been cited and considered. In any case, even if the legal personality of the KAC had disappeared, there was no question of extraterritorial effect of a foreign confiscation as their Lordships perceived it. This was because the change of title which related to the aircraft already within the territory of Iraq was expressly demanded by Resolution 369 as a distinct matter from the nationalisation of the KAC. Whether or not the legal personality of the KAC had been eradicated, there was only a choice of law question of whether the change of title expressly stipulated by Resolution 369 was applicable by virtue of the lex situs rule. It was for those purposes of determining whether the lex situs rule should be applied to the transfer with respect to the aircraft in Iraq, that their Lordships had to decide whether the act of state applicable under the lex situs rule should be non-reviewable. All members of the House of Lords agreed that the act of state was exceptionally reviewable on account of a flagrant breach of public international law. The important point, however, for the purposes at hand is that the prominence of the lex situs rule had nothing to do with the confiscation of the aircraft in Kuwait by the Iraqi Government. The act of state doctrine which the HL considered related to a different governmental act—the change of ownership from the Iraqi government to the IAC for the purposes of authorising the retention and deployment of the aircraft in the IAC's fleet.

On the facts predicated in the Court of Appeal, which did not separate the act of confiscation and the act of retention, the focus on substantial confiscation of the aircraft meant that the question was one of acceptance or rejection of a confiscatory measure.[44] This was evident in the manner in which the Court addressed counsel-for-IAC's three arguments seriatim; namely (1) that Resolution 369 constituted an act of state which must be recognised as effective; (2) that the principle of non-justiciability applied, and; (3) that even if the resolution would not be recognised for the purpose

[43] [1925] AC 12 (UKHL).

[44] Although the issue was not framed as one relating to the confiscation of property in an occupied country to be resolved according to the law of nations. *Cf N.V. De Bataafsche Petroleum Maatschappij v War Damage Commission* [1956] SLR (46-56) 12 (CA) where the lex situs rule was applied to a rule divesting the owner of the land of oil in situ.

of the act of state doctrine, and the principle of non-justiciability had no application, it would still have to be recognised for the purpose of the basic rule of lex situs, so that KAC would fail to prove double actionability in any event. In these submissions, counsel implied that the consideration of recognition of the act of state was distinct from the choice of law determination referred to in his third submission. The Court of Appeal did not question counsel's implication that an issue of confiscation arose dehors the lex situs rule and dealt with it without reference to the lex situs rule. If there had been an act of confiscation, the question would be whether the seizure of property by sovereign authority should be recognised. That this would not depend on the lex situs as applicable law, that it would not be a matter of choice of law but of sovereign authority appeared in the discussion. In its more general discussion of the territorial act of state doctrine, the Court of Appeal evidently regarded the territorial act of state doctrine as "the prima facie rule that a foreign sovereign is to be accorded that absolute authority which is vested in him to act within his own territory as a sovereign acts", reflecting both the private and public international law's "concepts as to territorial sovereignty".[45] So then juxtaposing the judgments of both appellate courts, there is no contradiction between them about the nature of a confiscatory measure. Nothing in the House of Lord's judgments which was concerned with the change of title (not resulting from a seizure of property) as a governmental act suggested that there was any criticism of the Court of Appeal's appraisal of the effects of confiscation or seizure of property as a governmental act; though admittedly, the Court of Appeal preferred to re-interpret as "founded primarily on a view as to the comity of nations, rather than on concern as to giving offence to the foreign sovereign or as to the absence of judicial standards…each sovereign says to the other: 'We will respect your territorial sovereignty. But there can be no offence if we do not recognise your extraterritorial or exorbitant acts."'[46]

This separation between the confiscatory rule and the lex situs rule is important. The similarity in outcome between the lex situs rule and the recognition of territorial confiscation is acknowledged. But it is a superficial similarity. Where considerations of sovereignty apply, the forum court applies its own characterisation of whether there is a seizure of property within the territory of the foreign sovereign. On the other hand, if the confiscatory rule is applicable by virtue of the lex situs rule, the court applies it as the governing law.

To be more clear about the differences, suppose that property situate in country X is confiscated in country Y and that at the time of proceedings in the forum, the property is situate in the forum. Where the question is one of sovereignty over property, the forum court will not question the validity of the confiscation if there is seizure of the property within the sovereign's territory but will reject the confiscation if the property is not within it. In the hypothesised facts, there will not be recognition of the confiscation as the property was not sited in Y at the time of confiscation. The court reaches this conclusion without referring to the lex situs (the law of Y) at the time of confiscation. It does not ask whether under the law of Y the confiscation would be regarded as valid. Whatever may be the position under the law of Y, the rule of decision is that the forum will not recognise, and hence give effect to, an extraterritorial confiscation. However, where the question is one of governing law, the result may be very different if the confiscation could be valid under the law of Y.

[45] [2002] 2 AC 883 at para 318.

[46] [2002] 2 AC 883 at para 318.

In other words, in *ROP v Maler Foundation*, if it be assumed that the ROP's claim to the Swiss deposits should have been regarded as an extraterritorial confiscation of property, the fact that the Swiss law would recognise the forfeiture judgment would have made no difference to the analysis. It would not have been possible to contend that recognition by the Swiss law, the lex situs or governing law of the Swiss deposits, would have made the change in ownership effective, so that the effects of the change should be recognised in Singapore. The ROP had not, of course, contended that the position of Swiss law towards the confiscation was relevant; albeit there was evidence that Swiss law would have recognised the confiscation.[47] Be that as it may, under the alternative analysis, concurrent approval by a second lex situs where the confiscated property has successfully been removed to, or is situate in, is immaterial. The forum refuses to give effect to the confiscation as an expression of sovereignty without consulting or further reference to the second lex situs and without regard to it.

Moreover, in determining whether the forum should recognise a foreign confiscation, the court focuses on whether there is in fact seizure of the property. The rule of vesting of title of the foreign confiscating state is ignored. If the foreign state purports to seize and by its rule deems the mere vesting of title to be seizure without actual seizure of the confiscated property, the forum will not characterise the seizure as an effective seizure. The confiscated property must in fact have been reduced to possession in the territory of the confiscating sovereign, regardless whether delivery of possession is essential under the confiscatory rule.[48] The governing law view is different. Where acts of the sovereign relate to property which was located within a foreign territory and later removed from the jurisdiction before the property could be reduced to possession, the *lex situs* at the time of the act would be the law of the foreign territory and the transfer of title will be valid under that law where that law vests title in another without any further need for 'perfection' of title by delivery of possession.

The chief difference, of course, lies in the very limited degree to which a territorial confiscation can be questioned when considerations of sovereignty are preeminent. A territorial confiscation is almost unconditionally accepted as being an assertion and execution of sovereign authority within the foreign state. So it has been held that unless there are exceptional circumstances, to be highlighted below, the court will recognise without considering the merits the compulsory acquisition laws of another state and acknowledge the change of title to property within that state's control with all its consequences.[49] This is not so if the lex rei sitae principle applies; for the applicable law can be displaced by another applicable law by way of exception to the lex situs rule, or rejected on grounds of public policy, conflict with a forum mandatory statute and so on. Of course, the consequence of the attribution of sovereign authority to affect property within the state by the sovereign—which is that the validity and legality of the event will not be questioned—explains also why recognition of a territorial confiscation can roughly be said to be subsumable under a wider notion of non-justiciability. It is not, however, the wider doctrine of non-justiciability which

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[47] Since that was the escrow condition.

[48] See *Government of Iran v The Barakat Galleries Ltd* [2009] QB 22 at para 148. If the title were already perfect under the lex situs without delivery or taking of possession and if the court were merely enforcing the lex situs as a choice of law, there could be no basis for requiring perfection of title according to the substantive lex fori where it requires perfection by delivery of possession.

[49] *Williams & Humbert Ltd v W. & H. Trademarks* (*Jersey*) *Ltd* [1986] 1 AC 368 (EWHC decision, reported under and with EWCA's and UKHL's decisions on appeal).

demands recognition of, or gives effect to, the change of title implicit in a territorial confiscation. That is the result of the forum affording, as a matter of considerations of sovereignty, recognition to the change of title to property which is or has come under the control of the confiscating state.

On the other hand, the alternative analysis conceives that the rejection of an extraterritorial confiscation is like the rule against the enforcement of a foreign penal, tax or other public law because like them, it is underscored by and reflects considerations of sovereignty. The only difference between them stems not from the underlying considerations of sovereignty but from the positive or negative nature and effects of the sovereign acts concerned. Penal and tax judgments in their nature call for affirmative execution against the defendant. No act against a related third party will be operative against the defendant and an act inflicted on him will be effective whether or not it is also effective against third persons. A confiscatory measure, in contrast, operates by immediate but passive exclusion of all others with property rights and, of course, all others without. Nothing affirmative is needed for its acceptance if there is seizure of the property in question within the territory and nothing more will justify its acceptance if there is no seizure within the territory. Consistent with the nature of property as exclusionary, it does and should not matter whether we speak of the recognition of territorial confiscation and the non-enforcement of extraterritorial confiscation. The so-called refusal to enforce an extraterritorial confiscation is in essence a refusal to recognise the effects of a confiscation which has not been executed in the territory of the foreign state. Conversely, the territorial act of state doctrine, as it relates to confiscation of property, has been spoken and conceived of as involving an enforcement of territorial confiscation and non-enforcement of extraterritorial expropriation. To speak of the enforcement of a territorial confiscation is not completely wrong since when it applies the court will go beyond recognising the existence of the territorial confiscation and will provide such relief as may be necessary (including delivery up) to give effect to the change of title it brings about. But it is better to appreciate that such relief is the consequence of accepting the change of title which has been effected by a territorial confiscation.

Besides *KAC* (*Nos. 4 & 5*),[50] there are two authorities to consider. The first contains a prominent re-statement of the position with respect to foreign confiscatory decrees, but the fact that there is no recent change in basis from considerations of sovereignty to choice of law is also discernible. In *Williams & Humbert Ltd v W. & H. Trademarks* (*Jersey*) *Ltd*,[51] Nourse J, as he then was, classified the foreign confiscatory cases into three classes,[52] which the Court of Appeal in that case accepted as being correct and endorsed in a subsequent case,[53] in these terms:

> *Class 1 laws*, which the English courts will not recognise: A. Foreign confiscatory laws which, by reason of their being discriminatory on grounds of race, religion or the like, constitute so grave an infringement of human rights that they ought not to be recognised as laws at all. B. Foreign laws which discriminate against nationals of this country in time of war by purporting to confiscate their movable property situated in the foreign state.

50 [2002] 2 AC 883.
51 [1986] 1 AC 368.
52 [1986] 1 AC 368 at 379.
53 *Settebello Ltd v Banco Totta and Acores* [1985] 1 WLR 1050 (EWCA) at 1056.

> *Class 2 laws*, which will be recognised, but to which effect will not be given: A. Foreign laws confiscating property situated in the foreign state, if they are penal. B. Foreign laws which purport to confiscate property situated in this country.
>
> *Class 3 laws*, to which effect will be given provided that they do not fall within Class 1: Foreign laws which confiscate property in the foreign state and where title has been perfected there.

In this passage, one salient point stands out if Nourse J's classification and the Court of Appeal's re-statement are contrasted. Nourse J describes a class 2 situation in terms of not enforcing directly or indirectly the foreign confiscatory law, saying that "English law, while recognising foreign laws not falling within class I which confiscate property situated in the foreign state …will not directly or indirectly enforce them here if they are also penal".[54] The Court of Appeal avoids using the term 'enforcement' but speaks of recognising but not giving effect to the territorial foreign law confiscating property if it is penal. This language, as was just shown, underlines the exclusionary nature of property; the so-called refusal to enforce an extraterritorial confiscation is in essence a refusal to recognise the effects of or give effect to a confiscation. A second point is that, in both accounts, the classification of foreign confiscatory laws is self-standing and compares to the penal and tax rules. There is no reference to the act of state doctrine or foreign public laws in the classification. Where class 2 laws are concerned, there is no suggestion that extraterritorial confiscations are not given effect to because foreign public laws will not be enforced.

In the House of Lords, this classification was not the subject of any further comment, adverse or favourable. Nevertheless, if the same self-standing nature were not premised, it could hardly have escaped comment from their Lordships. If anything, the character of the rule whereby the courts recognise a territorial confiscation of property even more clearly appeared in their Lordships' judgment. Lord Templeman, with whose judgment their Lordships agreed, considered that the rule was one of both national and international law. His Lordship stated that there is undoubtedly a domestic and international rule that the courts will recognise a territorial compulsory acquisition and that prevents one sovereign state from changing title to property situate in another sovereign state.[55]

This article has not overlooked that the English Court of Appeal in *KAC* (*Nos. 4 & 5*) envisaged a more expansive role for public policy in relation to a territorial confiscation than the English Court of Appeal in *Williams & Humbert Ltd v W. & H. Trademarks* (*Jersey*) *Ltd.* Conceiving the rejection of territorial confiscations on grounds of discrimination or penalty to be subsumable under the rubric of public policy, the Court went on to countenance that it would be contrary to public policy to recognise a confiscation contrary to the law of nations. This rejection of a territorial confiscation against the law of nations revived what had been broached in *Anglo-Iranian Oil Co. Ltd v Jaffrate* (*The Rose Mary*),[56] where the Supreme Court of Aden rejected a territorial confiscation of grounds of public policy and the law of nations. But the English Court of Appeal in both *A.M. Luther Co. v James Sagor*

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[54] Lawrence J, who decided *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140, certainly relied on the penal rule.

[55] [1986] 1 AC 368 at 427-428.

[56] Campbell J, [1953] 1 WLR 246 (Supreme Court of Aden).

& Co.[57] and *Princess Paley Olga v Weisz*[58] held that where a territorial confiscation was executed by a government which was recognised by the forum state, the court was bound to give effect to it. The Court of Appeal in *KAC* (*Nos. 4 & 5*) explained these cases as influenced by early views of non-justiciability. When the notions of territorial act of state and non-justiciability were separated, as they now are, there should be no obstacle in the way of a more expansive public policy exclusion of a territorial confiscation.

It cannot, however, be said that the Court of Appeal's view in *KAC* (*Nos. 4 & 5*) was endorsed on the appeal to the House of Lords which, as has been mentioned, focused on the justiciability of the change of title according to the lex situs rule and conflicts between the double actionability rule and public policy. Since the issues in that case related to conversion of the KAC's aircraft, the pertinent conflict rule was not so much the lex situs rule but the double actionability rule which posits that as a general rule subject to a flexible exception, an act of commission or omission is not actionable as a tort in the forum unless it would be so actionable had the act been done in the forum and it gives rise to civil liability where it is done. The change of title to the aircraft which was effected under Resolution 369 obviously negatived civil liability under the law where the alleged conversion occurred (the lex loci delicti). But it also obviously constituted a flagrant breach of international law and a majority of their Lordships resolved the inconsistency by disapplying the lex loci delicti, for the sake of upholding the forum's public policy. Though the majority was in that case more concerned with the inconsistency between the lex loci delicti and the forum's public policy in relation to a flagrant breach of international law,[59] there is no question that as a general rule a rule of private international law such as the lex situs rule or the double actionability rule must be excluded by recourse of public policy when applying the applicable law would be repugnant to essential justice or morality. However, as Scrutton LJ said in *A.M. Luther Co. v James Sagor & Co*: "But it appears a serious breach of international comity, if a state is recognised as a sovereign independent state, to postulate that its legislation is contrary to essential principles of justice and morality."[60] In the present view, the development of an exception rejecting confiscations which are egregious violations of international law alongside the rejection of discriminatory confiscations may be defensible. However, anything wider in the name of public policy would impair the necessarily more absolute character of a rule based on territorial sovereignty.

Last but not least, the alternative analysis in terms of considerations of sovereignty is consistent with the English Court of Appeal decision in *Peer International Corp v Termidor Music Publishers Ltd*.[61] In that case, there were rival claimants to copyrights originating in England. The claimants were the owners. The defendant exclusive licensees claimed title through a Cuban entity to whom title to the disputed copyrights had been vested by Cuban legislation (Law 860) (held to be confiscatory). Counsel for the defendants presented rule 120 of *Dicey & Morris on the Conflict of*

57 Bankes, Warrington, and Scrutton LJJ, [1921] 3 KB 532 (EWCA).

58 Scrutton, Sankey, and Russell LJJ, [1929] 1 KB 718 (EWCA).

59 See E. Peel, "The Scope of Double Actionability and Public Policy" (2003) 119 LQR 1 and A. Briggs, "Public Policy in the Conflict of Laws: a Sword and a Shield?" (2002) 6 SJICL 953. Both stress that public policy exclusion must remain exceptional.

60 [1921] 3 KB 532 at 558-559.

61 [2004] Ch 212 (EWCA). *Cf ROP v Maler Foundation* [2014] 1 SLR 1389 at para 48.

Laws[62] as a "lex situs" rule (as reported, the words lex situs were placed within inverted commas). The rule had two facets: (1) "First, United Kingdom courts would recognise as valid and effective governmental acts relating to property situated outside that jurisdiction if the law of the state where the property is sited does so. Second, United Kingdom courts will not recognise a governmental act affecting property situated in the United Kingdom."[63] Counsel submitted that just as the first facet was qualified by public policy (citing *KAC* (*Nos. 4 & 5*) as authority), so also the second was "not absolute where the act of the foreign state was benevolent, as was Law 860, and its policy was in accordance with United Kingdom public policy considerations." Certainly, if rule 120 were truly a lex situs rule, public policy should be relevant as a matter of principle, even with respect to counsel's second facet of rule 120; although it would be a further question whether public policy could be both exclusionary and inclusionary. However, though the Court of Appeal did not question the description of rule 120 as a "lex situs" rule, the submission that public policy was relevant in the inclusionary sense to the extraterritorial effect of Law 860 was unconditionally rejected. It is submitted that this holding as to the irrelevance of public policy would be consistent with the fact that Law 860 was confiscatory; as has been argued, the rejection of extraterritorial confiscatory measures is almost unconditional.

VI. *In Rem* Judgment of a Governmental Nature

If considerations of sovereignty are paramount with respect to the effects of a sovereign seizure of property, then there cannot be a difference between judicial and non-judicial confiscation. The forum court must equally as with penal or tax judgments decide according to its own notions of territorial sovereignty whether a judicial forfeiture is in substance an assertion of sovereign authority. This entails that the court should need to ask whether the judgment disposes of rights inter partes (so that it is an adjudication of private property) or whether in substance the forfeiture judgment is a governmental act.[64] Applying the rules of recognition of a foreign judgment, the Court of Appeal in *ROP v Maler Foundation* characterised the forfeiture judgment as being an *in rem* judgment because in terms the SCP considered that "the Forfeiture Proceedings were proceedings against a res, and had framed its orders in the Forfeiture Judgment as a forfeiture of title to the Swiss Deposits instead of a judgment directed against Mrs Marcos or the Marcos Estate personally."[65] Further, it was of a civil nature because "[t]he Forfeiture Resolution also endorsed an

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[62] L. Collins (gen ed) *Dicey & Morris on the Conflict of Laws*, 13th edn (London: Sweet & Maxwell, 2000), vol 2, at 995.

[63] L. Collins (gen ed) *Dicey & Morris on the Conflict of Laws*, 13th edn (London: Sweet & Maxwell, 2000), vol 2, at 995.

[64] Although the rule is often stated in the negative to effect that the courts "have no jurisdiction to entertain an action … for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state", the correct expression of it is that the court simply declines to exercise its jurisdiction in such cases. In *Re State of Norway's Application* [1990] 1 AC 723 (UKHL) at 808, Lord Goff of Chieveley said: "At all events the rule cannot, in my view, go to the jurisdiction of the English court. What the English court does is simply to decline in such cases to exercise its jurisdiction, and on that basis the relevant proceedings will be either struck out or dismissed."

[65] [2014] 1 SLR 1389 at para 65.

earlier decision of the Philippine Supreme Court in *Republic v Sandiganbayan* 200 SCRA 667 [1991] that 'forfeiture proceedings [were] actions *in rem* and therefore civil in nature'."[66] All these adequately proved that the judgment was an *in rem* civil judgment for the purposes of the rules of recognition of a foreign judgment, because as the Court of Appeal had earlier laid down in *Poh Soon Kiat v Desert Palace*,[67] a judgment must be characterised by reference to the law of the original forum for the purposes of recognition-of-judgment rules.

But where the question is whether there is a judicial seizure of property which is tantamount to an assertion of sovereign authority, the situation must be different. This question must be answered in accordance with the forum's notions of sovereignty;[68] and for that purpose, the court asked to accept the judgment must consider the substance of the foreign proceedings and of the relief to be accepted. The foreign state's own characterisation of what has been done is irrelevant. That being the case, several difficulties could arise with respect to the forfeiture judgment in *ROP v Maler Foundation* if the forum must apply its own, and not the foreign state's, characterisation of the judicial act. The first difficulty is that for a judgment to be an *in rem* judgment disposing of private property rights, the subject property must be situate within the jurisdiction of the court.[69] Without this, in common law terms, it would be impossible to institute and perfect proceedings *in rem* of a private nature.[70]

Second, as to the subject matter of the forfeiture proceedings in that case, there is a difficulty in that the forfeiture proceedings did not appear to disclose a basis of judgment known to private property law. If the judgment of the SCP had declared that the ROP was entitled to recover property wrongfully taken from it by Marcos under some notion of fiduciary accountability or constructive trust or equitable lien or restitutionary proprietary right, there could be no serious contention that it was not a determination of beneficial ownership. But there are serious doubts whether the judgment was indeed such a judgment determining ownership of the funds. Apparently, the ROP, by invoking the Republic Act No. 1379,[71] had not sought to recover but to confiscate property legally owned by Marcos on the basis of a presumption of acquisition by illegal means.

One cannot be definitive about this point of characterisation since additional facts or considerations which were necessary to shed light on the point, not taken before the Court of Appeal, were missing from the judgment of the Court of Appeal as

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[66] [2014] 1 SLR 1389 at para 65.

[67] [2010] 1 SLR 1129 (CA).

[68] See *Huntington v Attrill* [1893] AC 150 (PC) and *US Securities Exchange Commission v Manterfield* [2010] 1 WLR 172 (EWCA).

[69] In the absence of evidence of the foreign law, the court will determine the nature of a judgment whether *in rem* or *in personam* in accordance with the three conditions stated by Blackburn J in *Castrique v Imrie* (1869-1870) LR HL 414 (UKHL) at 429.

[70] In *Calyon v Michailaidis* [2009] UKPC 34 at para 20, where the subject property was not "so situated as to be within the lawful control of the State [Greece]", the Privy Council, agreeing with the Court of Appeal of Gibraltar, held that the judgment of the court which determined its ownership did not satisfy the first test for a judgment *in rem*, laid down by Blackburn J in *Castrique v Imrie* (1869-1870) LR 4 HL 414 (UKHL) at 429.

[71] In full, "An Act Declaring Forfeiture in Favor of the State Any Property Found To Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceedings Therefor", Republic Act No. 1379, 51:9 O.G. 4457 (approved on 18 June 1955).

well as the judgment of the SCP.[72] One missing consideration was whether property, legally owned by Marcos and never at any prior material time owned by the ROP, would be presumed to have been used in the commission of the crimes which Marcos had committed and therefore to be confiscated.[73] Another would be whether the presumption of illegal source or acquisition of funds was rebuttable or would be irrebuttably binding on third parties interested in the funds. A judicial determination that the vesting of property in the state is subject to pre-existing property rights and incapable of impairing them, would more likely be a 'private' judgment establishing property rights rather than a 'public' judgment taking away property by, *inter alia*, extinguishing the pre-existing interests of third persons. In either event that has been surmised, the judicial judgment would be a judgment of a governmental nature. It may be necessary in such proceedings to establish by evidence the identity, nature, quantum, and whereabouts of the assets to be confiscated. There may be a need to resolve doubts about whether the asset is actually in someone else's ownership or nominee-ship. But if, for instance, the object of the proceedings is not to establish ownership but to take it away by execution of penal condemnation of criminal culpability, what could the forfeiture judgment be but a penal *in rem* forfeiture judgment as opposed to an *in rem* determination of ownership?[74] There would, in these circumstances, be a marked contrast with a judgment in favour of a creditor ordering the judicial sale of property for the purposes of satisfying the judgment debt. Such a judgment would merely be an *in personam* judgment if the creditor was not enforcing a pre-existing property interest such as a maritime lien.[75]

Another set of facts would be crucial if the governmental character of the judicial forfeiture must be inquired into: namely, facts pointing to the existence of a lis inter partes. This is because the absence of a lis inter partes will be particularly telling against the private nature of the jurisdiction in question. The fact that there is a determination of the existence of property rights is not of itself conclusive that the determination is of a private *in rem* nature and not a governmental nature.[76] As Lord Hoffmann stated in one place: "Judgments *in rem* and *in personam* are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person."[77] This implies that for the characterisation of a judgment as being *in rem*, or for that matter, *in personam*, there must be a lis inter

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[72] The US case of *Re Philippine National Bank* 397 F. 3d. 768 (9th Cir, 2005) suggests that the action was one for the recovery of property stolen from the Philippines and its people. Other US cases indicate that the property was derived from foreign aid funds siphoned to the coffers of Marcos and his family and included profits made illegally by Marcos and members of his family abusing their positions of control over state companies.

[73] It was, however, clear that the confiscation was retrospective in nature.

[74] Under US law, an *in rem* forfeiture proceeding which enforces penal laws is conceived as doing so against property rather than persons. "It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient": *US v Ursery* 518 U.S. 267 (1996) at 275 quoting *Various Items of Personal Property v US* 282 U.S. 577 (1931) at 581. It is interesting also to note that under US law, the judicial confiscation of property seized which does not involve the personal conviction of the offender charged is a civil in rem forfeiture. The property must, however, have been previously seized for in rem civil forfeiture proceedings to be properly constituted. See *Dobbins' Distillery v US* 96 U.S. 395 (1877).

[75] See *Castrique v Imrie* (1869-1870) LR 4 HL 414 at 427-428.

[76] *Pattni v Ali* [2007] 2 AC 85 (PC) at para 23.

[77] *Cambridge Gas Transportation Corpn. v Official Committee of Unsecured Creditors of Navigation Holdings Inc* [2007] 1 AC 508 (PC) at para 13.

partes.[78] A judgment is the outcome of an adjudication of disputes between parties which they have chosen to submit to the court, so that the court is constrained only to adjudicate the submitted disputes and not any other issues which they have not submitted. It is of course true that an *in rem* judgment adjudicates title and dispositions of property against the whole world (and not merely as between parties and their privies in the litigation before the court).[79] So the object of *in rem* proceedings is exactly to arrive at such a determination. But the proceedings must be initiated by a party against the *res* (meaning against the necessary parties), and open to be defended by parties with a contrary interest in, or title to, the property, or there cannot be a lis inter partes. Support for this comes from the *Republic of India v India Steamship Co* (*No. 2*)[80] which was concerned with the nature of *in rem* proceedings against a ship. In theory at least, and by a fiction, "when proceedings *in rem* are commenced by the issue and service of a writ *in rem*, the only parties to the proceedings are the plaintiffs. The *res* is the subject matter of the action, not a party to it."[81] Nevertheless, it was held that in reality, stripping away the fiction,[82] the owners of the ship are the real party to the admiralty *in rem* proceedings; at least "for the purposes of section 34[83] an action *in rem* is an action against the owners from the moment that the Admiralty Court is seised with jurisdiction."[84] This insistence on a necessary defendant is especially important, if not inevitable, where the *res* is not physical or tangible property but a chose in action to be realised against a person.

As to this matter, the judgments of the SCP disclose that there was a lis inter partes in the sense that the Marcos Estate, the purported beneficial owner of the Swiss deposits, was a party to the pertinent proceedings which took the form of a hearing rather than a trial. That means that one can go on to consider whether it was open to interested persons to join as parties to the proceedings. The judgment of the Court of Appeal mentions in the narrative of background facts that the ROP when requesting the release of the Swiss deposits stated that the claims of the HRVs against the Marcos Estate would be dealt with by the Probate Court in the Philippines.[85] So it appears that the HRVs who would be privy to the Marcos Estate if the Chinn assignment was effective in the Philippines might not have been entitled to participate as a party in the forfeiture proceedings. Beyond that, the judgments of the SCP are silent. They do not mention anything else that would shed further light on this point. Under the forum's characterisation of a lis inter partes, there of course would not be any requirement that all parties claiming an interest in the property must be joined. It would suffice that they may apply to be joined as parties. Still, necessary parties must be sued or joined as parties. In this case, one would anticipate the participation as necessary parties of the PNB and WestLB where the deposits were held in escrow. This follows since it was only a decision against the PNB and WestLB in their 'representative'

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[78] The general rule is "that the plaintiff must sue in the Court to which the defendant is subject at the timing of the suit": *Sirdar Gurdyal Singh v Faridkote Rajah* [1894] AC 670 (PC) at 683.

[79] *Pattni v Ali* [2007] 2 AC 85 (PC) at para 21.

[80] [1998] AC 878 (UKHL).

[81] As counsel submitted.

[82] The purpose of the fiction, which was to enlarge the admiralty jurisdiction, was spent with the passage of the Judicature Acts. See *Republic of India v India Steamship Co* (*No. 2*) [1998] AC 878 (UKHL).

[83] Civil Jurisdiction and Judgment Act 1982.

[84] [1998] AC 878 (UKHL) at 913.

[85] [2014] 1 SLR 1389 at para 15.

character that would adversely bind all persons, whether also parties or not, with a claim to the funds. If, however, it was not necessary to join them as parties, even though control over the property was constructively with them, or worse, if they could not be joined as parties even if they so wished, it would be hard to see that a private law judgment conclusively establishing the titles, interests or dispositions of property was to be the outcome of proceedings under Republic Act No. 1379. In fact, the participation of the PNB or WestLB as a party to those proceedings never happened; and the mere conditional release of the funds by agreement of the Federal Swiss Supreme Court could not count as having the effect of deeming the PNB or WestLB as a party to the proceedings. Nor could it have the effect, without more, of deeming consent on the part of the PNB or WestLB to submit to the jurisdiction of the Philippines court.[86]

All things considered, the *in rem* forfeiture judgment on such facts as are available or deducible from the judgments of the SCP and the Court of Appeal seemed to be either a penal judgment predicated on a criminal charge of theft of state property or a confiscatory act in the form of a civil judgment. In either case, the governmental character of the judicial act would be inescapable.

VII. Whether There is a Distinction Between Confiscation and Expropriation

If considerations of sovereignty are paramount, the final question which should be answered is whether there is a difference between a confiscation and an expropriation of property; and if so, whether the forfeiture of property in *ROP v Maler Foundation* was a confiscation or an expropriation. A superficially similar issue was disposed of by way of *obiter dicta* in that case. Since the Court of Appeal had determined that there was an *in rem* civil judgment in favour of the ROP, the question for the Court, assuming that the judgment was entitled to recognition, was whether the ROP was nevertheless seeking indirectly to enforce a penal law by seeking recognition of the forfeiture judgment. The Court observed that the recognition of the forfeiture judgment in any case would be indirect enforcement of a penal law because it was imposed on assets obtained presumptively from illegal sources in favour of the state, in proceedings instituted by the state, as a means of punishing and deterring public officials. The Court also placed some reliance on concessions by the experts that the law providing for forfeiture was of a penal nature.

Even in these terms, there are doubts about whether the 'penal rule' was really engaged. Vital to the characterisation of an enforcement of a penal law is the distinction between the purpose of punishing an offence against the public justice of the state and that of affording a private remedy to a person injured by the wrongdoer.[87] The purpose of Republic Act No. 1379, the law providing for forfeiture, however, was not clearly the prohibited purpose since what was provided for was a means to recover property allegedly stolen from the ROP, the injured party, by Marcos, the wrongdoer. For that reason, the purpose of seeking recognition of the forfeiture judgment was not clearly the prohibited purpose. If forfeiture had followed upon

[86] *Cf Copin v Adamson* (1875) 1 Ex D 17 (EWCA).

[87] *Raulin v Fischer* [1911] 2 KB 93.

conviction (in the case before the Court of Appeal, forfeiture did not follow upon conviction), in that it was decided at those proceedings that Marcos had beyond reasonable doubt committed and would be convicted of the named charged offences, in consequence of which the forfeiture of his property would be ordered, there might be a stronger impression of indirect enforcement of a penal law. However, if forfeiture had followed *upon* conviction but not *in consequence of* conviction, it would be doubtful if the same impression of indirect enforcement would arise. Few, after all, would regard a civil *in rem* forfeiture proceeding (where proof is based on the civil standard of proof) after a criminal prosecution as a second punishment within the double jeopardy rule. The penal characterisation of the action to enforce the forfeiture judgment which the Court adopted would not be utterly implausible, although forfeiture is not to be imposed upon conviction or upon a finding of criminal guilt and in consequence of it. But it would go against the modern trend exemplified in the authorities shortly to be discussed, which favours a more restrictive penal characterisation.[88] Third, the Court of Appeal's reliance on the purposes of the confiscatory rule (Republic Act No. 1379) as being punitive seemed to depend not on the objectively stated purposes of the Act which were in terms of the recovery of stolen property. The Court's characterisation of the purposes as punitive seemed thus to be based on the 'true' intention of the legislature in enacting the Act. There are certainly authorities which direct attention to the true intention when deciding whether there was an extraterritorial confiscation. In the recent case of *Peer International Corpn v Termidor Music Publishers Ltd*,[89] which has previously been mentioned, the English Court of Appeal would also appear to have had regard to the intention to confiscate when characterising Law 860 as confiscatory. Support for a similar interpretational approach to penal laws however is lacking.

A more pertinent point is that, if the essential question was whether the judicial forfeiture as a governmental act should be accepted, the critical question would be whether considerations of sovereignty which underlie the recognition of a seizure of property are sufficient of themselves to lead to recognition or non-recognition. Reference to Adriaanse's thesis again proves immensely helpful. He considered the view that an extraterritorial confiscatory measure is refused enforcement because it is penal.[90] That was a popular view in the 1950s. He found however, more supposition than justification for the view. He argued therefore that the non-enforcement of extraterritorial confiscation was a self-supporting rule "so that it would not be necessary to apply conceptions such as penal law, odiosa and such-like, though several confiscatory measures may have a penal character or may be considered odiosa."[91]

This does not deny that there is certainly older authority supporting a penal complexion in confiscations of property. One of the oldest is the judgment of Lord Ellenborough in *Wolff v Oxholm*.[92] To an action to recover a debt due to the plaintiffs, who were British subjects, the Danish defendant claimed that he had paid the debt as required under the law of Denmark which had declared debts due by Danes to British subjects, to be sequestrated and detained during the war with Britain. The

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88 See *US Securities Exchange Commission v Manterfield* [2010] 1 WLR 172 (EWCA).
89 [2004] Ch 212 (EWCA).
90 *Confiscation in Private International Law* (The Hague: Martinus Nijhoff, 1956) at 155-156.
91 *Confiscation in Private International Law* (The Hague: Martinus Nijhoff, 1956) at 157.
92 (1817) 6 M & S 92.

defence failed. The Court held that the law was not binding in England though valid in Denmark and that in any case the defendant's payment to the Commissioners was voluntary, and not under the compulsion of legal proceedings founded on the ordinance. The penal nature of the Danish law in question, however, was not in doubt. This may explain why in a subsequent case it was suggested that "any exercise by His Majesty of his right of forfeiture, even if valid here, would not be recognized elsewhere. It might well be regarded as a penal law of which no notice would be taken in the Courts of another country."[93] This observation inspired by *Wolff v Oxholm* purports to reject an extraterritorial confiscation as being penal in nature. However, in the recent case of *Williams & Humbert Ltd v W & H Trademarks (Jersey) Ltd*,[94] Nourse J at first instance saw no entailment between a confiscation and a penal law. In class 2 situations, foreign extraterritorial confiscations are recognised but not given effect to in the forum, without more. On the other hand, it is predicated that a territorial confiscation is not penal per se and is to be recognised; effect however will not be given to it if it is in fact penal in nature. In this view, the Court of Appeal was in full agreement.

The view of writers supporting a distinction between expropriation and confiscation seems also to be founded on the same appreciation that unlike an extraterritorial expropriation, an extraterritorial confiscation would be penal in any event. In the 1950s, this distinction between confiscation and expropriation was popular. A confiscation was a seizure without compensation and therefore penal whereas expropriation was a seizure with adequate compensation and therefore not penal. This distinction seemed to be echoed by Scott LJ in *A/S Tallinna Laevauhisus v Estonian State Steamship Line*[95] where he said: "If the decree did apply, the legislation involved taking 75% of the moneys without compensation, and English law treats as penal foreign legislation providing for compulsory acquisition of assets situate in this country".[96] Distinguishing *AM Luther Co v James Sagor & Co*,[97] he added that "the crucial point [in that case] was that the property which was held to have passed, was within the territory of the foreign state, and not in England."[98] Two other cases decided in that period must be noticed. In *Lorentzen v Lydden & Co Ltd*,[99] the Norwegian Government in exile passed an Order in Council expropriating property situate elsewhere than in Norway. It seemed to have been decided that extraterritorial enforcement of the expropriatory measure was possible unless there would be public policy repugnance, but that there was none in this case since England and Norway were engaged in a desperate war for survival. However, in *Bank voor Handel en Scheepvaart NV v Slatford* (*No. 1*),[100] Devlin J held, not following the case earlier mentioned, that there was no material distinction between confiscatory and expropriatory measures so far as extraterritorial effect was concerned. Both alike would not be accorded extraterritorial effect. He further held that it was not for the court to consider whether in the circumstances such measures should be recognised on the

93 *Re Ferdinand, ex-Tsar of Bulgaria* [1921] 1 Ch 107 at 144.
94 [1986] 1 AC 368.
95 [1947] Ll LR 99 (EWCA).
96 [1947] Ll LR 99 (EWCA) at 111.
97 [1921] 3 KB 532 (EWCA).
98 [1947] Ll LR 99 (EWCA) at 111.
99 [1942] 2 KB 202.
100 [1951] 2 All ER 779 (KB); not affected by the decision on appeal.

ground of public policy even when they had been made for the purposes of keeping property out of the hands of a common enemy.

When the more recent English authorities are examined, the equiparation between an extraterritorial confiscation and penal law is proved to be untenable. The House of Lords decision in *Williams & Humbert Ltd v W. & H. Trademarks* (*Jersey*) *Ltd*[101] is an authority that implies that an act of territorial compulsory acquisition is not penal merely because no compensation is payable.[102] Nor does it become penal by reason only that the plaintiff's property alone is compulsorily acquired.

It does not, however, appear from the discussion in the House of Lords that their Lordships unreservedly rejected Nourse J's proposition that a territorial confiscatory act may not be given effect to if the act is also penal in the narrower sense of being a vindication of the public justice. The point being considered would require a comparison of the principal authority relied on by Nourse J at first instance and the way the House of Lords dealt with it. To Nourse J, *Banco de Vizcaya v Don Alfonso de Borbon y Austria*[103] was authority that a confiscation of the property of a treasonous subject would be rejected as being a 'penal' act. He described this as falling within a class 2 situation; namely that "English law, while recognising foreign laws not falling within class I which confiscate property situated in the foreign state…will not directly or indirectly enforce them here if they are also penal".[104] Ignoring the penal context, Lord Templeman in the House of Lords, however, explained the decision as an illustration of the rule against enforcement of an extraterritorial confiscatory law—in terms that the public law of a state cannot change title to property which never comes within the jurisdiction of that state. Lord Templeman considered another possible authority. This was *Frankfurther v W. L. Exner Ltd*,[105] which was not relied on by Nourse J but, as counsel submitted, decided that the Austrian confiscatory decree in question was a penal law which could not be enforced. Lord Templeman again explained that case differently. It involved the enforcement of a foreign law which offended principles of human rights or the enforcement of a title to property conferred by Spanish law to property situate in England.[106] A little later on, responding to a further submission that the plaintiffs' claim was substantially an attempt to collect the assets by the state, he added that "[t]he principle that a country cannot collect its taxes outside its territories cannot be used to frustrate or contradict the principle that the courts of this country will recognise the law of compulsory acquisition of a foreign country of assets within the foreign country and will accept and enforce the consequences of that compulsory acquisition."[107] If Lord Templeman meant to signify that there was to be no fallback on the tax rule in a compulsory acquisition case, it could be argued that likewise there could be no fallback on the penal law rule

[101] [1986] 1 AC 368 (UKHL).

[102] *Per* Lord Templeman, [1986] 1 AC 368 (UKHL) at 431: "the courts of this country will recognise the law of compulsory acquisition of a foreign country and will accept and enforce the consequences of that compulsory acquisition."

[103] [1935] 1 KB 140 [*Banco de Vizcaya*]. There are other inconclusive authorities such as *Novello & Co Ltd v Hinrichsen Edition Ltd* [1951] 1 Ch 595 (ChD) affirmed in [1951] 1 Ch 1026 (EWCA); *Laane & Baltser v Estonian State Cargo & Passenger Steamship Line* [1949] 2 DLR 641 (SCC).

[104] [1986] 1 AC 368 (UKHL) at 379.

[105] [1947] Ch 629 (ChD).

[106] [1986] 1 AC 368 (UKHL) at 432.

[107] [1986] 1 AC 368 (UKHL) at 433.

in such a case. Suppose a confiscation order was made following a determination of the criminal defendant's guilt and conviction and the subject property was seized but was somehow subsequently secreted abroad. If the court of the forum in which the property is found could not assist the foreign state in recovering the property, the penal law rule would be used to frustrate the recognition of territorial confiscation. However, more recently, the English Court of Appeal in *Government of Islamic Republic of Iran v The Barakat Galleries Ltd*[108] has continued to cite *Banco de Vizcaya* as a penal law authority. So the point remains uncertain.

It is submitted that in any case, the recent authorities establish that a seizure of property is recognised if it takes place within the territory and not recognised if it does not. Moreover, they indicate that the question of indirect enforcement of a penal law is a distinct and separate one. The question is not trivial since there are clearly cases where confiscation is imposed as punishment for a crime. However, its practical significance is limited. Obviously, if an extraterritorial confiscation will be rejected in its own terms, without reference to the penal law rule, the possibility of refusal to enforce the penal law is largely academic. The real significance of a self-standing penal law rule is in relation to territorial confiscations. If so, it can lead to the rejection of a territorial confiscation that would otherwise be recognised. Suppose that confiscation is imposed as punishment for a crime and executed, but that the property seized is afterwards clandestinely removed from the foreign state to the forum where it is sold to the defendant. Where a claim is brought to recover the property, it will be open to the defendant to raise the penal law rule against the claim. The claim would succeed under the recognition of the territorial confiscation. But if the confiscation was imposed as punishment for a crime, it could be held that to give relief in these circumstances would amount to indirect enforcement of a penal law.

To arrive at this conclusion, some uncertainty about the judicial test to be applied for ascertaining when there will be indirect enforcement of a penal law will need to be clarified. In *Williams & Humbert Ltd v W. & H. Trademarks* (*Jersey*) *Ltd*,[109] Lord Templeman accepted that a claim of indirect enforcement could not succeed unless there was an existing claim under the revenue law of the foreign country which remained unsatisfied.[110] When the case was earlier before the English Court of Appeal, Fox LJ had said in relation to the material facts there that "[t]he Spanish confiscatory decrees had been passed and put into effect; the change in ownership resulting from that had already taken place." As a consequence, all three levels of court held that the claim could not be described accurately as an attempt to enforce the Spanish government decrees directly or indirectly; "so far as the decrees are concerned there is nothing left to enforce".[111] As to whether an unsatisfied claim was also an essential element of the indirect enforcement of a penal rule, the Court of Appeal and Lord Templeman refrained from expressing a view. Lord Mackay of Clashfern, however, was prepared to suppose that the same test was applicable to the

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108 [2009] QB 22 (EWCA).

109 [1986] 1 AC 368 (UKHL).

110 Counsel submitted that the revenue rule applied "because the object of the plaintiffs in the trademark action and the banks' action is to collect assets which will indirectly enure for the benefit of a foreign government." Lord Templeman dismissed the submission, saying that the revenue rule only concerned a revenue claim.

111 [1986] 1 AC 368 (UKHL) at 396.

penal rule, although he took care to point out that what was needed was the existence of an unsatisfied claim and not the instigation of the foreign government to bring the claim so that the proceeds of the action would be applied by the foreign government forthe purposes of a penal, revenue, or other public law of the foreign State.[112] In contrast, it could be argued that there was some indication that the Court of Appeal preferred to regard penal laws as strictly local. If so, even when the entire object of a penal law had been satisfied, the court should remain without jurisdiction to give effect to an instigation to obtain the proceeds in the forum, and thereafter apply the proceeds of the confiscation in the territory of the foreign sovereign.

VIII. Conclusion

The debate between those who say a seizure of property by a foreign state is effective as a matter of choice of law principles, and those who say it is a matter of territorial sovereignty, remains relevant. The authorities have not clearly preferred the first view but, as argued, are more consistent with the second. The debate is not an arid one. Under a choice of law analysis, the question whether the seizure is judicial is to be determined by the foreign law where the seizure was made, and if the question is in the affirmative, the forum court will be asked to recognise the foreign judgment in accordance with the rules of judgment. In advancing the alternative analysis, this article concludes that a judicial forfeiture belongs to the same category of rules as penal and tax judgments if it is in substance an execution of sovereign authority to seize property. The forum court will not be concerned with whether the seizure is judicial according to the foreign law, but will determine whether, according to the lex fori, the seizure is an assertion of sovereignty and whether it is territorial or extraterritorial. The judicial seizure will not be recognised if it is extraterritorial.

In coming to these conclusions, the article does not suggest that the result in *ROP v Maler Foundation* would be different if the alternative analysis had been pursued. On the facts, the Singapore Court of Appeal having regard to the law of the ROP determined that the forfeiture judgment was an *in rem* judgment which was intended to bind, and would have bound, all claimants to the subject property to which the judgment related if the SCP had had international jurisdiction over the subject property. Since international jurisdiction was absent, the *in rem* judgment was not to be recognised. Under the alternative analysis, there would be no difference in the result since the forfeiture judgment was an extraterritorial sovereign seizure of property which could not be accepted. For a difference between the two analyses to result, the HRVs would have had to be found to be privy in interest to the Marcos Estate, which was the respondent in the forfeiture proceedings, or would have had to have participated in the forfeiture proceedings in the Philippines and tacitly consented to be bound by any resultant judgment. Although the determination of property rights in those proceedings would not bind the whole world for want of international jurisdiction, it would, in the *Pattni v Ali* sense, be binding *in personam* on immediate parties to the proceedings, as the Privy Council in that case was prepared in an *obiter*

[112] [1986] AC 368 (UKHL) at 440-441.

dictum to entertain.[113] This consideration, however, would be immaterial under the alternative analysis—an extraterritorial confiscation will be rejected unconditionally.

IX. Epilogue

It could be suggested that the English Court of Appeal decision in *Peer International Corpn v Termidor Music Publishers Ltd*[114] supports a 'new' distinction between confiscation and expropriation of property. The distinction is not that confiscation is penal whereas expropriation is not. It would be that whereas a confiscation is recognised or not recognised according to considerations of sovereignty, an expropriation of property is recognised and given effect to as a matter of choice of law, namely in accordance with the lex situs rule. This was not the case in *KAC* (*Nos. 4 & 5*) which, as earlier submitted, was not regarded in the House of Lords as giving rise to issues of confiscation, or expropriation for that matter. Nor was it so in *Bank voor Handel en Scheepvaart NV v Slatford* (*No. 1*),[115] which was also previously mentioned. Devlin J refused in that case to give extraterritorial effect to a foreign expropriatory decree because, *inter alia*, it would not be consistent with the lex situs to do so. He did not apply the lex situs but referred to the rejection of an extraterritorial expropriation as being consistent with the lex situs as supporting reason for the judgment. Nor was any such distinction alluded to in *Williams & Humbert Ltd v W. & H. Trademarks* (*Jersey*) *Ltd*,[116] where Nourse J regarded confiscatory laws as merely a particular kind of expropriatory laws. If, however, there is such a distinction between confiscation and expropriation, at least three implications would arise. A territorial expropriation of tangible movable property may be effective despite the absence of reduction to possession. Second, if the property is situated outside the expropriating state, the law where it is situated, and not the substantive lex fori, will determine whether the expropriation will be recognised and given effect to. Third, the doctrine of public policy will be relevant.

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[113] "As presently advised, though the arguments did not address the point (or it may be need to under the terms of the two preliminary issues presently in issue), their Lordships would think it clear that, where a court in state A makes, as against persons who have submitted to its jurisdiction, an *in personam* judgment regarding contractual rights to either movables or intangible property (whether in the form of a simple chose in action or shares) situate in state B, the courts of state B can and should recognise the foreign court's *in personam* determination of such rights as binding and should itself be prepared to give such relief as may be appropriate to enforce such rights in state B": *Pattni v Ali* [2007] 2 AC 85 (PC) at para 27.

[114] [2002] 2 AC 883 (EWCA).

[115] [1951] 2 All ER 779 (KB). Not affected by the appeal.

[116] [1986] 1 AC 368 (UKHL).