International Law—Judicial Interference with Foreign Affairs—Proving Acquisition of Title to Property by Foreign Government—[Federal].—The plaintiff, rebel-controlled branches of the Bank of Spain,2 sued the defendants, a federal reserve bank, a steamship company, and the superintendent of the United States government assay office,2 to recover a shipment of silver which the Spanish Loyalist Government sold to the United States. The Loyalist Government had obtained possession of the silver from the Bank of Spain by secret decree. The plaintiff argued that the decree failed to pass title to the Loyalist Government because it was made by government officials acting for private gain and was not published as required by law. On appeal to the Circuit Court of Appeals for the Second Circuit from a judgment for the defendants, held, that the Secretary of the Treasury’s determination that the Loyalist Government had title to the silver is not conclusive in court; that on independent determination by the court, the Loyalist Ambassador’s assertion of title is probably sufficient, but that, in any event, the proof of the particular governmental orders and decrees purporting to transfer title is conclusive. Judgment affirmed.3

Banco de Espana v. Federal Reserve Bank.4

Although courts recognize the desirability of protecting the United States in its conduct of foreign affairs from interference by domestic courts,5 legal doctrines developed to accomplish this result fail to cover all the situations where such interference may occur,6 and do not completely cover even the specific problem of purchases from a foreign government, involved in the instant case.7 If the purchase is by treaty, courts deny themselves jurisdiction on the ground that a “political question” is involved.8 Or if the title to the property is attacked by suit against the United States, govern-

1 The newspapers spoke of the plaintiffs as “agents of Franco.” New York Times, col. 6, p. 32 (June 5, 1938). At the commencement of the present suit the Franco Government had not been recognized by the United States. Since an unrecognized government or an agency created by it probably cannot sue in American courts, the plaintiff’s power to sue seemed doubtful. Dickinson, The Unrecognized Government or State in English and American Law, 22 Mich. L. Rev. 29, 118 (1923). The subsequent recognition of the Franco Government on April 2, 1939, before the present case was decided, apparently removed this objection.

2 The Federal Reserve Bank acted as fiscal agent for the United States, the steamship company brought the silver to the United States, and the superintendent had custody of the silver.

3 The court also affirmed the dismissal of the suit against the superintendent as being in effect a suit against the United States and violating the government’s immunity from suit.

4 114 F. (2d) 438 (C.C.A. 2d 1940).

5 See notes 8 and 15 infra.


7 In terms of real parties, the instant case was a suit by the Nationalist Government of Spain, at first unrecognized, and later recognized as the successor of the Loyalist Government. Its original purpose was to tie up the proceeds from the silver sale so that the money could not be used to purchase munitions for the Loyalist Government.

8 Clark v. Braden, 16 How. (U.S.) 635 (1853) (refusal to inquire into validity of treaty with the King of Spain, selling Florida to the United States and revoking land grants to Spanish citizens); Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485 (1924); Weston, Political Questions, 38 Harv. L. Rev. 296 (1925).
mental immunity prevents judicial interference. On the other hand, if the United States has to sue for possession of property purchased from a foreign government, it is forced to prove to a domestic court the validity of the foreign government's title. Similarly, if the government in obtaining title employs private agents, as was done in the present case, suit may be brought against the agents. This possible liability of the agents may make it difficult for the government to secure agents, and may even impose liability on the government because of a moral obligation to compensate agents who have been forced to pay a judgment. Moreover, the danger that the government's title to property purchased from a foreign government may be contested impairs the marketability of the property.

Undesirable judicial interference might be eliminated by extending governmental immunity to agents of and purchasers from the government. Such an approach, however, not only seems to be barred by prior decisions, but is also contrary to the legislative trend toward reducing governmental immunity. Nor would extension of governmental immunity aid the United States where it is suing for possession of property. A second possible solution would be for the courts to refuse to take jurisdiction on the ground that a "political question" is involved. Application of this doctrine, however, has usually been confined to cases involving a transfer by treaty, and there is small likelihood that courts will apply it in cases where an agent or a purchaser is involved. The third possibility, and the one adopted by the court in the instant case, is to hear the case but to apply the well-recognized rule of international law that courts will not sit in judgment on the legality of a foreign government's acts within the foreign government's jurisdiction. Application of this rule, of course, tends to prevent embarrassment of the United States government in the conduct of foreign affairs only when the property is within the jurisdiction of the foreign government at the time of the transfer. Moreover, the extent to which the application of the rule prevents em-

9 See note 3 supra.
10 Cf. The Tervaete, [1922] Prob. 197, 259 (no maritime lien on ship owned by Belgian Government at time of collision but subsequently transferred to private party because imposition of such a lien after the ship passed into private hands would deprive the Belgian Government of some of the value of its property).
12 See, e.g., McGuire, Tort Claims against the United States, 19 Georgetown L.J. 133 (1931); Borchard, Government Liability in Tort, 34 Yale L.J. 1, 32 (1924).
13 Field, The Doctrine of Political Questions in Federal Courts, 8 Minn. L. Rev. 485 (1924); Weston, Political Questions, 38 Harv. L. Rev. 296 (1925).
16 Compare the problem involved in the attempted confiscation by the Soviet Russian Government of assets in the United States of Russian insurance companies and the subsequent
barrassment depends upon the kind of proof required as to acts of the foreign government. The position of the court in the instant case, requiring proof of the particular governmental acts upon which the foreign government's assertion of title was based and refusing to adopt the statement of the accredited representative of the foreign government as conclusive proof of the fact that the foreign government has executed those acts, may cause serious embarrassment. This approach imposes on the United States the almost impossible task of determining, before purchasing, what acts took place in the foreign state and of obtaining sufficient proof of the acts to satisfy a domestic court. Such an inquiry might affront the foreign government. Moreover, since acts of a foreign government need not be even "colorably valid,“ and since, therefore, any acts claimed by the foreign government to be sufficient to pass title have that effect, it would seem that the "acts" themselves become irrelevant. For instance, where the foreign government's acts take the form of a secret decree transferring title to it, proof of governmental acts ultimately depends on statements of government officials. The only effect of the requirement of proof of the particular acts would be to change the result of a case in which proof of the acts is not possible. If the foreign government is no longer in existence, as was almost the situation in the instant case, it may be impossible to obtain proof of any "acts" of the government.

It appears to be preferable, then, for courts to accept the statement of the representative of the foreign government as conclusive. An analogy is found in an English case in which, when the diplomatic immunity of an alleged member of a foreign mission was in question, it was held that a statement by the foreign office was conclusive. Even if this rule were adopted in cases involving purchase by the government, it would not necessarily be applicable to cases involving purchases by private persons. In the latter cases, embarrassment to the United States in the conduct of foreign affairs is more remote and can arise only if the foreign government takes offense at the domestic court's decision and makes diplomatic representations. But even here, judicial interference violates the foreign government's immunity from suit by compelling it to defend its actions in court and injures the market for its property.

Labor Law—National Labor Relations Act—Employer Required to Embody Collective Bargaining Agreements in Writing—[Federal].—The petitioner, an employer, having arrived at an accord as to wages, hours, and conditions of work with the col-

tranfer of claims to such assets to the United States government. Confiscation and Corporations in Conflict of Laws, 5 Univ. Chi. L. Rev. 280 (1938); Guaranty Trust Co. v. United States, 304 U.S. 126 (1938). A similar problem now exists with respect to Dutch, Danish, Norwegian, Belgian and Latvian assets being held by American banks. See The Chase Wants to Know, 37 Time, No. 7, at 57 (Feb. 10, 1941).

17 114 F. (2d) 438, 444 (C.C.A. 2d 1940). In Princess Paley Olga v. Weisz, [1929] 1 K.B. 718 (C.A.), the original seizure of the property was by local soviets without authority from a government, but the Soviet Government later ratified the seizure.


20 See note 10 supra.