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A. B. Conant, Jr.

THE ACT OF STATE DOCTRINE AND ITS EXCEPTIONS: AN INTRODUCTION

*A. B. Conant, Jr.***

The act of state doctrine[1] poses a serious obstacle for plaintiffs seeking redress in United States courts for wrongful public acts by a recognized foreign sovereign within its own territory. Depending on the circumstances, however, various exceptions to the Doctrine may be invoked. This article is intended to be a brief introduction to the Doctrine and its exceptions and a survey of recent cases in which the Doctrine was construed by United States courts. The present inquiry into the nature and scope of the doctrine begins with the seminal case, *Underhill v. Hernandez*,[2] where it was held that:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through means open to be availed of by sovereign powers as between themselves.[3]

Almost all of the early case law around which the doctrine developed involved situations in which plaintiff was asserting the

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* The author has kindly submitted this paper as a background summary of the legal theory underlying the legislation proposed by Representative Albert Gore, *infra*.

** B.A., 1961, North Texas State College; J.D. *cum laude*, 1963, Baylor University.

1. The doctrine of sovereign immunity will often hinder judicial redress also. Although the Act of State Doctrine and the doctrine of sovereign immunity are interrelated, the latter doctrine is outside the scope of this article. In addition, no attempt will be made in this article to analyze the possible effects of proposed antitrust legislation on the Act of State Doctrine. It should be noted, however, that such proposed legislation may significantly affect prior decisions in this area. *See* Hunt v. Mobile Oil Corp., 550 F.2d 68 (2d Cir.,), *cert denied*, 432 U.S. 904 (1977); Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir., 1976); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

2. Underhill v. Hernandez, 168 U.S. 250 (1897).

3. *Id.* at 252.

wrongful taking of property by revolutionary governments or military officials in the midst of political turmoil. The net effect of these decisions was to establish a rule that expropriation, nationalization, or confiscation of property by a foreign government (either before or after the taking) would be recognized by United States courts.[4]

The modern restatement of this rule and the current foundation for development of most act of state doctrine case law is found in *Banco Nacional de Cuba v. Sabbatino.*[5] In *Sabbatino* the Supreme Court stated that:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[6]

The range of foreign governmental activity which is exempt from judicial examination under the act of state doctrine remains ambiguous. It is perhaps broader than the "taking of property" upon which the Court's decision in *Sabbatino* was grounded. However, it is questionable whether it reaches as far as the New York Court of Appeals interpretation in *French v. Banco Nacional de Cuba.*[7] In a footnote in *French,* the New York Court stated that: "It is immaterial what form an act of state takes—whether it be an expropriation or confiscation, a conversion or breach of contract . . . as long as such act is committed by the foreign government

4. *See, e.g.,* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); Shapleigh v. Mier, 299 U.S. 468 (1937); Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). *Underhill* is an interesting exception. Plaintiff, Underhill, was an American citizen caught up in a revolution against the Venezuela government after having constructed a waterworks system for the city of Ciudad Bolivar. He was captured by revoluntionary forces and forced to operate the waterworks for a two month period before being allowed to leave the country. Underhill's suit against his captors for false imprisonment and other alleged injuries resulted in a directed verdict against him on Act of State grounds since the United States had subsequently recognized the revoluntionary government.

5. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

6. *Id.* at 428.

7. French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 53; 242 N.E.2d 704 (1968) 295 N.Y.S.2d 433.

within its own territory."[8] (cites omitted).

In fact, all acts by a foreign government are probably not exempt. In *Alfred Dunhill of London, Inc. v. Republic of Cuba,*[9] Mr. Justice White, speaking for four members of the Court, wrote:

> [W]e are nevertheless persuaded by the arguments of petitioner and by those of the United States that the concept of an act of the state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities. Our cases have not yet gone so far.[10]

Although this holding was asserted not to state a new legal principle,[11] Mr. Justice Stevens, while concurring in the balance of Justice White's opinion, declined to join in that holding.[12] Justices Marshall, Brennan, Steward and Blackmun dissented.[13] Assuming that the act of state doctrine does not include the commercial acts of a foreign state, "the line between commercial and political acts of a foreign state often will be difficult to delineate"[14] and the question of which acts are protected from judicial scrutiny by the doctrine remains unsettled.[15]

The act of state doctrine does not prevent judicial scrutiny of actions taken by a foreign state outside its territorial jurisdiction or which purport to have extra-territorial effect.[16] This limitation

8. *Id.* at 754, 242 N.E. 2d at 709, 295 N.Y.S.2d at 441.

9. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

10. *Id.* at 695.

11. As Justice White pointed out, "Distinguishing between public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other hand is not a novel approach." *Id.*

12. *Id.* at 715 (Stevens, J. concurring).

13. *Id.* at 715 (Marshall, J. dissenting). This division led a Texas court to question "the validity or existence" of the commercial act limitation on the Doctrine. Hunt v. Coastal States Gas Producing Company, 570 S.W.2d 503, 508 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ granted).

14. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 715 (Powell, J. concurring).

15. *See* Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965); National American Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978); Industrial Investment Development Corp. v. Mitsui & Co., Ltd., [1978-1] Trade Cas. ¶ 62,130 (S.D. Tex. 1978).

16. Baglin v. Cusenier Co., 221 U.S. 580 (1911); Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir.), *cert. denied,* 409 U.S. 1060 (1972); Tabacalera Sereriano Jorge, S.A. v. Standard Cigar Company, 392 F.2d 706 (5th Cir.), *cert. denied,* 393 U.S. 924 (1968); Republic of Iraq v. First Nat'l. City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966); Zwack v. Kraus Bros. & Co.,

gives rise to difficult questions concerning the situs of a sovereign's actions and their effects. However, there is one limited area in which the situs question has been definitively resolved. The courts will not consider issues which have been created by a boundary dispute between nations on the ground that a "political question" is presented.[17]

A final question concerning the coverage of the doctrine is posed by the language of *Sabbatino* limiting its effect to cases not controlled by a "treaty of other unambiguous agreement regarding controlling legal principles."[18] The term "treaty" is clearly defined in United States law, however, the meaning of "other unambiguous agreements regarding controlling legal principles" is not. Professor F. A. Mann remarked in *Studies in International Law* with regard to the *Sabbatino* decision:

> In the present context, the operative words are: "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles." Where there is agreement of this kind, there exists a rule of international law . . . . Nor is it likely that "unambiguous agreement" should be read as being *ejusdem generis* with "treaty." If this were so, the phrase would have been otiose, since it would add nothing to the term "treaty."[19]

The potential problems posed by the "unambiguous agreement" language in *Sabbatino* are legion. For example, does the doctrine apply where there is a contract (or concession) between a foreign sovereign and a private party and the sovereign subsequently breaches the agreement (a situation which did not exist in *Sabbatino)?* The Court of Civil Appeals of Texas had an opportunity to consider this question in *Hunt v. Coastal States Gas Producing Company.*[20] The *Hunt* court was faced with the problem of whether an oil concession, issued and subsequently expropriated by the Libyan government was an "unambiguous agreement" such as to remove it from the Doctrine. Unfortunately, the court's opinion fails to clarify the matter. After quoting the Doctrine as set forth in *Sabbatino,* the court said: "We have examined subsequent

237 F.2d 255 (2d Cir. 1956); Kalmich v. Bruno, 450 F. Supp. 227 (N.D. Ill. 1978).

17. Occidental of Umm al Qaywayn v. A Certain Cargo, 577 F.2d 1196 (5th Cir. 1978), *cert. pending.*

18. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

19. F. MANN, STUDIES IN INTERNATIONAL LAW, 469-70 (1973).

20. Hunt v. Coastal States Gas Producing Company, 570 S.W.2d 503 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ granted).

cases which cite the aforementioned language and conclude it is unclear what type of unambiguous agreement the opinion refers to. However, we conclude that this language is inapplicable to this case since, as we have held, Libya did not expropriate property (the oil) from Hunt."[21] Based in part on this statement, the court ultimately concluded that the act of state doctrine barred consideration of Hunt's claim. This reasoning is particularly unfortunate because if there was no taking, there is a serious question as to whether the act of state doctrine as enunciated in *Sabbatino* is applicable at all, and, if there was a taking, the question of whether the concession was an "unambiguous agreement" should determine the applicability of the Doctrine.

Assuming that an offending governmental action does fall within the general scope of the act of state doctrine, a case may fall within existing exceptions. Congress has created one such exception, and the courts, perhaps, two others.[22]

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21. *Id.* at 510.

22. Divisions of opinion in the United States Supreme Court, caused in large measure by different views as to the theoretical underpinnings of the Doctrine, have clouded the validity of these exceptions. A multitude of scholarly articles have been written discussing and disputing the theoretical basis and legal genesis of the act of state doctrine and it is beyond the scope of this article to survey them. Some indications of the dispute, however, are obvious in the following quotations.

Opinion of Mr. Justice Harlan, joined by seven members of the Court, in *Sabbatino:*

> The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.
>
> The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

376 U.S. 398, 423 (1964).

Opinion of Mr. Justice Rehnquist, joined by Chief Justice Burger and Mr. Justice White in the *Citibank* case:

> The act of state doctrine . . . has its roots, not in the Constitution, but in the notion of comity between independent sovereigns . . . .
>
> The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by

The so-called "Bernstein exception" had its genesis in a series of related cases in the Second Circuit. Following World War II, Bernstein instituted suit against a Dutch company, alleging that, under duress imposed by Nazi officials, he had been required to transfer all of his shares in a ship line to a German who ultimately transferred those shares to the Defendant.[23] The court held that it was barred by the act of state doctrine from considering plaintiff's claims insofar as they involved duress applied by the Nazi government. The court indicated, however, that its decision might be different if the executive policy regarding the doctrine was clearer.

After further proceedings in the lower court, the case again reached the Second Circuit.[24] Again, the court returned the case to the lower court and ordered the plaintiff to refrain from alleging matters which would cause the court to pass upon the validity of acts of German officials.

The court subsequently amended its mandate when the State Department expressed a definite policy relieving United States courts from any inhibitions against passing upon German acts.[25] The State Department announced its policy in a letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the attorneys for the plaintiff. The letter declared:

> The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or com-

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the political branches of the government.

First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972).

Mr. Justice Douglas declared in *Citibank:* "*Sabbatino* held that the issue of who was the rightful claimant was a 'political question,' as its resolution would result in ideological and political clashes between nations which must be resolved by the other branches of government." 406 U.S. 759, 772 (1972) (Douglas, J. concurring in result).

Opinion of the 5th Circuit in Occidental of Umm al Qaywayn, Inc.:

> This is not an abstention doctrine, but rather resembles a conflicts of laws principle . . . . Although in one decision the Court stated both that the doctrine had constitutional underpinnings and the doctrine was not compelled by the Constitution, the better view would be that the doctrine is constitutionally compelled by the concept of separation of powers and placement of plenary foreign relations powers in the executive.

577 F.2d 1196, 1200-01 n.4 (5th Cir. 1978) (citations omitted).

23. Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir.), *cert. denied,* 332 U.S. 772 (1947).

24. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij, 173 F.2d 71 (2d Cir. 1949).

25. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).

> pensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.[26]

In response to the State Department's position, the Second Circuit declared: "in view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question."[27] Subsequently, in *Sabbatino,* the Department of State made no statement concerning its position on Cuban expropriations. Accordingly, the Supreme Court held that it was not required to pass upon the Bernstein exception.[28]

The question of the validity of the Bernstein exception came squarely before the Supreme Court in *First National City Bank v. Banco Nacional de Cuba.*[29] The decision was inconclusive with the Court splitting four ways in its treatment of the exception. Justices Rehnquist, Burger, and White held:

> We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that the application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called Bernstein exception to the act of state doctrine.[30]

Justice Douglas concurred in the result, relying upon a different theory to hold for First National City Bank.[31] Mr. Justice Powell also concurred, making up the majority, but he did not specifically uphold or deny the Bernstein exception. Although he expressed some doubts regarding the Bernstein exception, he considered *Sabbatino* was wrongly decided, and concluded "that federal courts have an obligation to hear cases such as this."[32] Four judges dissented, expressing disapproval of the Bernstein exception.[33]

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26. *Id.* at 376 (quoting letter from Jack B. Tate to Attorneys for plaintiff in C.A. No. 31-555 (S.D.N.Y.) (April 13, 1959)).
27. *Id.*
28. 376 U.S. at 420.
29. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).
30. *Id.* at 768.
31. *Id.* at 772 (Douglas, J. concurring in result).
32. *Id.* at 775-76 (Powell, J. concurring).
33. *Id.* at 776 (Brennan, J. dissenting).

The second judicial exception was the basis of Justice Douglas' concurring opinion in *First National City Bank v. Banco Nacional de Cuba.* This exception might be characterized as the "counterclaim" or "fair dealing" exception. Relying upon *National City Bank v. Republic of China,*[34] Justice Douglas stated that, when a claim was initially asserted in United States courts by the foreign sovereign, the party injured by the sovereign's act should be entitled to assert a counterclaim, notwithstanding the act of state doctrine, and to set off so much of his counterclaim as equals the sovereign's claim. Justice Douglas declared:

> I would allow the setoff to the extent of the claim asserted by Cuba because Cuba is the one who asks our judicial aid in collecting its debt from petitioner and, as the Republic of China case says, "fair dealing" requires recognition of any counterclaim or setoff that eliminates or reduces that claim.[35]

Justice Douglas' reasoning was rejected by five justices, thus the viability of the "fair dealing" exception is doubtful.

The legislative exception to the act of state doctrine was passed by Congress as an amendment to the Foreign Assistance Act of 1964,[36] and reflected congressional discontent with the Court's decision in *Sabbatino.* Known as the Hickenlooper Amendment, this amendment provides:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect

34. 348 U.S. 356 (1955).

35. 406 U.S. at 772.

36. Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d), 78 Stat. 1013 (1964) (codified at 22 U.S.C. § 2370(e)(2) (1976)).

> to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.[37]

Despite this broad language, the only reported case in which the Hickenlooper Amendment has been successfully invoked was *Sabbatino* on remand.[38] Although the statute was remedial in nature, the courts have tended to construe it very narrowly,[39] and beginning with *French v. Banco Nacional de Cuba,*[40] they have grafted a number of limitations upon the Amendment. *French* involved a Cuban currency restriction which was designed to stop the flow of foreign currency from that country. The plaintiff held certain "certificates of tax exemption" issued before the passage of the currency restriction. They purported to give the holder the right to exchange Cuban pesos for United States dollars upon surrender. The New York court held that the Hickenlooper Amendment was inapplicable since there was no taking or confiscation. It declared:

> The Government of Cuba, by its Decision No. 346, has actually done nothing more than enact an exchange control regulation similar to regulations enacted or promulgated by many other countries, including our own . . . . A currency regulation which alters [n]either the value or character of the money to be paid in satisfaction of contracts is not a "confiscation" or "taking."[41]

Although this holding disposed of the case, the court, responding to a strong dissent argument that the amendment applied, went on to state that the Amendment was inapplicable to claims for breach of contract. It should be noted, however, that the court was careful to limit its decision to the sort of contract with which it was confronted. Referring to plaintiff's assignor, the court said:

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37. *Id.*

38. Banco Nacional de Cuba v. Farr, 272 F. Supp. 836 (S.D.N.Y. 1965), *aff'd.*, 383 F.2d 166 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1968).

39. *See* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 33 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972); French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S. 2d 433; United Mexican States v. Ashley, 556 S.W.2d 784 (Tex. 1977).

40. French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968).

41. *Id.* at 55, 242 N.E.2d at 710, 295 N.Y.S.2d at 442.

> He did not, it must be emphasized, have any fund of dollars with which this action is concerned nor did he have rights to any specific fund of dollars in the possession of any party . . . .
>
> In the strictest sense, and within the terms of the statute we are construing, just as no one has "taken" the pesos from Ritter, so no one has "taken" the contract from him . . . . No other party claims to be possessed of the contract rights that Ritter had acquired. It is not as though the Cuban Government had assumed title to a contract right or other chose in action that belonged to Ritter and had then sought to enforce it against the obligor.[42]

Finally, the *French* court held that in any event the currency regulation in question did not violate international law.[43]

Whether contractual rights were intended to be included within the scope of "property" as used in the Hickenlooper Amendment was discussed in dicta in *Menendez v. Saks and Company.*[44] In that decision, the Second Circuit declared: "[W]e are persuaded by the legislative history, and particularly by Congress' insertion in 1965 of the words 'to property' immediately after the phrase 'claim of title or other right,' that the intent was to exclude all contract claims from the amendment."[45] The Supreme Court, however, in reversing the Second Circuit, did not reach the lower court's ruling regarding the Amendment. Indeed, it expressly noted: "The Court of Appeals rejected the importers' contention that the Hickenlooper Amendment . . . precluded intervenors from invoking the act of state doctrine. The correctness of that judgment is not before us in this litigation."[46]

The distinction between "contract" and "property" was also discussed by way of dicta in *Occidental of Umm al Qaywayn, Inc. v. Cities Service Oil Co.*[47] In 1969, Occidental obtained a concession from the ruler of Umm al Qaywayn, a sheikdom on the Persian Gulf, and Buttes Oil & Gas obtained a concession from the adjacent sheikdom of Sharjah. Because of a boundary dispute between Sharjah and Umm, these concessions overlapped in part. Iran sub-

42. *Id.* at 59, 242 N.E.2d at 713, 295 N.Y.S.2d at 445-46.

43. *Id.* at 63-64, 242 N.E.2d at 715-16, 295 N.Y.S.2d at 449-50.

44. Mendez v. Saks and Company, 485 F.2d 1355 (2d Cir. 1973), *rev'd on other grounds sub nom.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1975).

45. *Id.* at 1372.

46. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 689 n.4 (1975).

47. 396 F. Supp. 461 (W.D. La. 1975), *rev'd sub nom.*, Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, 577 F.2d 1196 (5th Cir. 1978).

sequently claimed the same area. Following the settlement of the dispute between Sharjah and Iran, Buttes commenced drilling operations in the disputed area. Before any oil had been extracted from the disputed area, however, Umm cancelled Occidental's concession rights, allegedly because Occidental had failed to pay monies required under the agreement.[48] When oil sold by Buttes arrived in the United States, Occidental instituted suit. The district court held that the actions of Sharjah and Iran did not amount to a "confiscation" within the language of the Hickenlooper Amendment. The court said that "[t]erritorial waters claims are subject to a body of international law, wholly different from that related to confiscations."[49] Although this holding disposed of the case, the district court went on to declare that Occidental's concession rights were merely contractual in nature and were not covered by the Hickenlooper Amendment. The court was careful to point out, however, that the concession had not been developed by Occidental and that no oil had been produced therefrom. The court said:

> Applying these principles to the instant case, what was allegedly confiscated? It was not the oil which was extracted from the disputed area by Buttes in 1974. It was not an oil well or an oil mine. The well from which the oil was extracted was owned by Buttes and developed and drilled by them, pursuant to their concession agreement with Sharjah. The property allegedly confiscated was the Occidental concession. It was not the confiscation of an oil well.[50]

On appeal, the Fifth Circuit dismissed in part and reversed in part.[51] The appellate court did not discuss the "contract" point. Rather, it held that it had no jurisdiction over the action because the question presented was a "political question" and, therefore, not a "case or controversy" as defined by Article III of the Constitution.[52]

The question of taking of a fully developed oil concession reached the courts in *Hunt v. Coastal States Gas Producing Company*.[53] The Texas Court of Civil Appeals citing *Occidental*

48. *Id.* at 465.
49. *Id.* at 471.
50. *Id.* at 472.
51. Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, 577 F.2d 1196, 1206 (5th Cir. 1978).
52. *Id.* at 1201-05.
53. 570 S.W.2d 503 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ granted).

and *French,* held that the act of state doctrine barred its consideration of Hunt's claim because Hunt had only a contractual right in the concession. Based on its reading of Libyan law, the court refused to classify Hunt's rights as being "property" notwithstanding the concession's grant of rights to extract, use, export, and dispose of the oil.

A second judicial limitation was engrafted on the Hickenlooper Amendment by the Second Circuit in the *Citibank* case discussed above.[54] In that case, the United States bank foreclosed on certain assets of the Cuban Government held by the bank as collateral for a loan following seizure of bank property in Cuba. The bank applied the proceeds to the amount owed on the loan and retained the excess as an offset to losses suffered when Cuba expropriated its facilities. Cuba subsequently sued to recover the excess, and Citibank counterclaimed. The Second Circuit held that the Hickenlooper Amendment was not applicable to Citibank's counterclaim, because neither the property expropriated by the Cubans nor proceeds derived therefrom had been brought by the Cubans into the United States. The court concluded from the Amendment's legislative history that the term "property" had reference only to property, or the proceeds or products of such property brought into the United States. The Supreme Court reversed on different grounds.[55] Subsequent decisions in *Citibank* did not discuss the Hickenlooper Amendment or the requirement that expropriated property be brought into the United States, except in a brief footnote.[56] Nevertheless, the Second Circuit's limitation has been adopted by other courts.[57]

There remain many unanswered questions concerning the doctrine. What is the theoretical or jurisprudential basis for the doctrine? Is it based on comity between nations? Does it arise from the relationship between branches of the United States Government? Is it a conflict of laws principle? Does the doctrine cover all actions taken by a foreign country or are a nation's commercial activities excluded? Can the expropriating nation protect itself simply by calling its action a nationalization rather than a breach? Does a private party protect himself against wrongful gov-

54. Banco Nacional de Cuba v. First National City Bank of New York, 442 F.2d 530 (2d Cir. 1971).

55. First Nat'l City Bank v. Banco Nacional de Cuba, 400 U.S. 1019 (1971).

56. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 780 n.5, (1971) (Brennan, J. dissenting).

57. United Mexican States v. Ashley, 556 S.W.2d 784 (Tex. 1977).

ernment action by a contract or concession with the government, or does such a contract or concession actually prevent him from asserting his rights in a United States court? Is the function of the Hickenlooper Amendment merely to prevent the sale in America of wrongfully taken goods or is it to protect American rights wherever the wrongdoer may choose to dispose of the expropriated property?

The law in this area remains in a state of flux. Recent judicial decisions have provided little clarification, and past legislative attempts to alter the conclusive nature of the act of state doctrine have not yet proven successful in the courts. There are cases presently pending which may provide some answers.[58] Additionally, proposed legislation, if passed, may profoundly affect this area of the law.

58. Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, 577 F.2d 1196 (5th Cir. 1978); Hunt v. Coastal States Gas Producing Company, 570 S.W.2d 503 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ granted).