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The Act of State Doctrine: Alfred Dunhill of London, Inc. v. Republic of Cuba

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THE ACT OF STATE DOCTRINE: ALFRED DUNHILL OF LONDON, INC. V. REPUBLIC OF CUBA

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I. INTRODUCTION

With its decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba,*[1] the Supreme Court has, for the third time in twelve years, rendered a significant if not landmark ruling on the act of state doctrine.[2] Before 1964 the Court had not decided a case involving that doctrine for more than twenty years.[3] During that intervening period many questions were raised in the learned writings on the subject,[4] and the controversial decision, *Bernstein v. N. V. Nederlandsche-Amerikaansche,* etc.,[5] was decided by the Second Circuit Court of Appeals in New York.

A. *The Doctrine*

Three Supreme Court decisions later, sharp controversy remains regarding the basis and the reach of the act of state doctrine, but some aspects of that doctrine are now certain. First, the act of state doctrine is not a limitation upon the court's jurisdiction, the

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1. 44 U.S.L.W. 4665 (U.S. May 24, 1976) [hereinafter cited as *Dunhill*].

2. The other two cases are: *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964) [hereinafter cited as *Sabbatino*]; *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759 (1972), *rehearing denied,* 409 U.S. 897 (1972) [hereinafter cited as *FNCB*].

3. The last case before *Sabbatino* decided by the Supreme Court which dealt with the act of state doctrine was *United States v. Pink,* 315 U.S. 203 (1942).

4. COMMITTEE ON INTERNATIONAL LAW, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, A RECONSIDERATION OF THE ACT OF STATE DOCTRINE IN UNITED STATES COURTS (1959); Domke, *Indonesian Nationalization Measures Before Foreign Courts,* 54 AM. J. INT'L L. 305 (1960); Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino,* 16 RUTGERS L. REV. 1 (1961); House, *Law Gone Awry—Bernstein v. Van Heyghen Freres,* 37 CALIF. L. REV. 38 (1949); Hyde, *Act of State Doctrine and the Rule of Law,* 53 AM. J. INT'L L. 635 (1959); Mann, *International Delinquencies Before Municipal Courts,* 70 L.Q. REV. 181 (1954); Metzger, *Act of State Doctrine and Foreign Relations,* 23 U. PITT. L. REV. 881 (1962); Reeves, *Act of State Doctrine and the Rule of Law—A Reply,* 54 AM. J. INT'L L. 141 (1960); Seidl-Hohenvelden, *Extraterritorial Effects of Confiscations and Expropriations,* 49 MICH. L. REV. 851 (1951); Zander, *The Act of State Doctrine,* 53 AM. J. INT'L L. 826 (1959).

5. 210 F.2d 375 (2d Cir. 1954).

court's power over the parties.[6] Rather, it is a doctrine of judicial restraint concerned with whether the subject matter before the court is appropriate for judicial review. When applicable, the doctrine mandates judicial abstention.[7] Secondly, the doctrine is a principle of federal law—federal common law—not state law.[8] Thus, it is uniformly applicable in state and federal courts. Thirdly, it is not required by, nor is it a rule of, international law.[9] Hence the arguments that the doctrine is subject to the rules of international law,[10] or that the doctrine represents an exception to the general rule that a court of the United States will decide cases before it by choosing the appropriate rules for decision including international law,[11] miss the point. Fourthly, the act of state doctrine is not a conflict of laws rule.[12] The act of state doctrine overrides normal conflict of laws analysis.[13] Lastly, as a corollary to the act of state doctrine, the courts in the United States will not undertake to pass upon the validity of the act of an official of a foreign state under the laws of that state, even if apparently invalid under that law.[14]

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6. *See* Justice Powell concurring in the *FNCB* case, 406 U.S. at 773-74; Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918); Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1966), *cert. denied*, 390 U.S. 956 (1968), *rehearing denied*, 390 U.S. 1037 (1968); Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826, 831 (1959).

7. *See* note 6 *supra*. *See also* Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 857 (2d Cir. 1962); Delson, *The Act of State Doctrine—Judicial Deference or Abstention?*, 66 AM. J. INT'L L. 82, 88 (1972).

8. *See Sabbatino* at 424-27.

9. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 974 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1966), *cert. denied*, 390 U.S. 956 (1968), *rehearing denied*, 390 U.S. 1037 (1968); RESTATEMENT (SECOND) FOREIGN RELATIONS LAW, pt. I, ch. 3, topic 1, tit. c, introductory note a, at 123 (1962).

10. *See* text accompanying notes 99-100 *infra*.

11. *See* Justice Rehnquist's opinion in *FNCB*, at 763. *Compare* The Paquete Habana, 175 U.S. 677 (1900).

12. *See* Comment, *The Act of State Doctrine—Its Relation to Private and Public International Law*, 62 COLUM. L. REV. 1278 (1962); *Compare* the Second Circuit decision in the *Sabbatino* case, 307 F.2d 845, 855 (2d Cir. 1962).

13. Compare the application of Article VIII, Section 2(b) of the International Monetary Fund Agreement, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 2332, 2 U.N.T.S. 185. *See* Williams, *Extraterritorial Enforcement of Exchange Control Regulations under the International Monetary Fund Agreement*, 15 VA. J. INT'L L. 319, 379-86 (1975).

14. In *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293, 294 (1808), Chief Justice Marshall declared: "The sovereign power possessing jurisdiction over the thing, must be presumed, by foreign tribunals, to have exercised that jurisdiction properly." This principle has been followed since. Jimenez v. Aristequieta, 311 F.2d

B. *The Exceptions to the Doctrine*

The Supreme Court and Congress have, however, made exceptions to the broad application of the act of state doctrine. First, the *Sabbatino* decision itself recognizes that the act of state doctrine does not apply in the face of a "treaty or other unambiguous agreement regarding controlling legal principles."[15] Article VIII, section 2(b) of the International Monetary Fund Agreement is an example of such a treaty provision.[16] The Hickenlooper amendment also carved out another exception:

> 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 . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law . . . [unless] the President determines that the application of the act of state doctrine is required in that particular case [and so informs the court].[17]

Following the decision in the *FNCB* case it seems clear that the Hickenlooper amendment exception is limited to actions related to specific property.[18] A possible third exception is the so-called

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547, 558 (5th Cir. 1962), *motion denied,* 314 F.2d 649 (5th Cir. 1963), *cert. denied,* 373 U.S. 914 (1963), *rehearing denied,* 374 U.S. 858 (1963); Pons v. Republic of Cuba, 294 F.2d 925 (D.C. Cir. 1961), *cert. denied,* 368 U.S. 960 (1962), *rehearing denied,* 368 U.S. 1005 (1962); Pasos v. Pan American Airways, Inc., 229 F.2d 271, 272 (2d Cir. 1956); Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 249 (2d Cir. 1947); United States ex rel. Von Heymann v. Watkins, 159 F.2d 650, 652, 653 (2d Cir. 1947); United States ex rel. Steinvorth v. Watkins, 159 F.2d 50, 51, 52 (2d Cir. 1947); Union Shipping & Trading Co. v. United States, 127 F.2d 771, 774 (2d Cir. 1942); Banco de Espana v. Federal Reserve Bank, 114 F.2d 438, 443 (2d Cir. 1940); The Cloveresk, 264 F.276 (2d Cir. 1920); Hewitt v. Speyer, 250 F. 367 (2d Cir. 1918); Vanity Fair Mills v. T. Eaton Co., 133 F. Supp. 522 (S.D.N.Y. 1955), *modified and aff'd,* 234 F.2d 633 (2d Cir. 1956), *cert. denied,* 352 U.S. 871 (1956), *rehearing denied,* 352 U.S. 913 (1956); Eastern States Petroleum Co. v. Asiatic Petroleum Corp., 28 F. Supp. 279, 280-81 (S.D.N.Y. 1939). In *Sabbatino* the Supreme Court endorsed this principle, 376 U.S. at 415, n.17, confirming a similar pronouncement by the court below, 307 F.2d 845, 859 (2d Cir. 1962).

15. 376 U.S. at 428.

16. Williams, *supra* note 13, at 387-94.

17. 22 U.S.C. § 2370(e)(2) (1970).

18. *See* Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394 (2d Cir. 1970) *vacated,* 400 U.S. 1019 (1971), *aff'd,* 442 F.2d 530 (1971); Lowenfeld, *Act of State and Department of State: First National City Bank v. Banco*

"Bernstein exception," thoroughly critiqued in *FNCB* and discussed hereinafter.[19] A possible fourth exception, suggested in *Sabbatino* and elaborated in *Dunhill*, may exist when a clear rule of international law applies.[20] *Sabbatino* does not give an example of such a rule,[21] but *Dunhill* suggests the international rules governing commercial dealings.[22]

With its decision in *Dunhill* the Supreme Court did not reexamine in depth the theoretical basis for the act of state doctrine. Rather, the Court determined that the act involved was not an "act of state,"[23] and four Justices went on to contend that the doctrine "should not be extended to include the repudiation of a purely commercial obligation."[24] This contention may amount to another exception to the act of state doctrine.

II. BACKGROUND FOR THE SUPREME COURT'S DECISION IN THE *Dunhill* CASE

Alfred Dunhill of London, Inc. v. Republic of Cuba presents a three-cornered dispute in which pre-Castro owners of five leading manufacturers of Havana cigars brought an action against three United States cigar importers, Saks, Faber and Dunhill, to recover the price for pre-takeover cigar shipments and for other relief.[25] The Cuban Government, which had nationalized or "intervented"[26] the manufacturers' businesses in September 1960, was permitted to intervene in the action. The Government interventors

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Nacional de Cuba, 66 AM. J. INT'L L. 795, 801, 803 (1972). *But cf.* Judge Keating's dissent in *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 76-93, 242 N.E.2d 704, 723-34, 295 N.Y.S.2d 433, 460-74 (1968), where he argued that the term "property" in the Hickenlooper amendment included ascertainable contractual rights.

19. *See* text accompanying notes 101-10, 134-47 *infra*.

20. 376 U.S. at 428: "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it." 44 U.S.L.W. at 4672.

21. Compare the curious case, *New York Times Co. v. Commission on Human Rights*, 79 Misc.2d 1046, 362 N.Y.S.2d 321 (Sup. Ct. N.Y. Co. 1974), *noted*, 16 HARV. INT'L L. J. 456 (1975).

22. 44 U.S.L.W. at 4672. See text accompanying notes 167-68 *infra*.

23. 44 U.S.L.W. at 4668-69. *See also* text accompanying notes 86-88 *infra*.

24. 44 U.S.L.W. at 4669-73.

25. The owners also sought relief for trademark infringement and unfair competition.

26. "Intervention" is the term used by the Cuban Government to describe its seizure of businesses. "Interventors" are those installed by the Government to operate the business.

asserted claims against the importers for the proceeds of post-intervention cigar shipments. The importers counterclaimed against the interventors for amounts paid to the interventors after intervention but for shipments made before intervention.

A. *The District Court*

The District Court made the following dispositions: (a) granted judgment to the owners against the importers for the price of pre-intervention shipments of cigars;[27] (b) held the importers liable to the interventors for cigars shipped after intervention;[28] and (c) held that the importers were entitled to a setoff and "on Dunhill's claim" to an affirmative judgment against the interventors for amounts mistakenly paid to them for pre-intervention shipments. Two of the importers, Saks and Faber, were entitled to setoffs and Dunhill was entitled to an affirmative judgment of approximately $55,650.[29] All parties appealed.

B. *The Second Circuit Court of Appeals*

The Second Circuit affirmed the judgment of the owners against the importers for the price of pre-intervention shipments of cigars mistakenly paid to the interventors. The court, *per* Mansfield, J., stated that the Cuban Government's purported seizure of the owners' accounts receivable "is contrary to our own domestic policy" and the act of state doctrine does not apply.[30] The court reasoned that the situs of a debt is where the debtor may be found, and "for purposes of the act of state doctrine, a debt is not 'located' within a foreign state unless that state has the power to enforce or collect it."[31] Thus, the intervention did not deprive the owners of their right to collect the accounts receivable that the importers owed

27. The sums due from the importers to the owners for the preintervention shipment of cigars were approximately: Saks, $6,600; Faber, $322,000; and Dunhill, $148,600.

28. The sums due from the importers to the interventors were approximately: Saks, $24,250; Faber, $582,588; and Dunhill, $92,949.

29. The District Court further held that both the importers and interventors had infringed the owner's trademark rights under the Lanham Act, 15 U.S.C. §§ 1114(1)(a) and 1125(a), and the importers were found guilty of unfair competition, but injunctive relief, damages or an accounting for profits were denied.

30. 485 F.2d 1355, 1364 (2d Cir. 1973). In the Second Circuit, the *Dunhill* case was styled *Menendez v. Saks & Co.* [references to the Second Circuit opinion hereinafter cited as *Menendez*].

31. The situs of a debt for purposes of the act of state doctrine is discussed in part III *infra*.

them. Further, the court rejected the argument that the district court erred in failing to apply Cuban currency regulations which would limit the owners to the ultimate receipt of pesos rather than dollars. The mode of payment made the contracts performable both in Cuba and in New York, and the "law governing the agreement is that of the place of performance actually chosen," which was New York. Even assuming that Cuban law governed, its currency regulations applied only after the dollars were received by the owners. The court also refused to give Cuban currency regulations extraterritorial effect under article VIII, section 2(b) of the Articles of Agreement of the International Monetary Fund, since Cuba was no longer a party to the Fund Agreement or a member of the Fund.[32] On appeal, none of the parties further disputed that the importers were liable to the interventors for the price of cigars shipped after the intervention.

Finally, the Second Circuit affirmed the allowance of the importers' counterclaim against the interventors, but only up to the amount of the interventors' claims.[33] The interventors had argued that the act of state doctrine precluded the importers from any recovery on their counterclaims. The court, however, stated that: (1) the quasi-contractual obligations on which the counterclaims were based had their situs in Cuba; (2) the quasi-contractual obligations were subject to the act of state doctrine; (3) an informal act may constitute an act of state;[34] (4) the Hickenlooper amendment did not apply; but (5) the Supreme Court decision in *First National City Bank v. Banco Nacional de Cuba*[35] did apply and

32. Cuba withdrew from the Fund on April 2, 1964. Pan American Life Ins. Co. v. Blanco, 362 F.2d 167 (5th Cir. 1966); Confederation Life Association v. Vega Y Arminan, 207 So.2d 33 (3d Fla. D.C. App. 1968), *aff'd mem.*, 211 So.2d 169 (Fla. 1968), *cert. denied*, 393 U.S. 980 (1968); Williams, *supra* note 13, at 351-52. Also, it can be argued that the interventors, as alter ego for for the Cuban Government, should not have been permitted to use the courts of a foreign country in attempting to enforce its own public laws. *See* Banco do Brazil S.A. v. A.C. Israel Commodity Co. Inc., 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964); Williams, *supra* note 13, at 372-73. But this argument was rejected by the court in *Sabbatino*, 376 U.S. at 437. *See* part IV *infra*.

33. 485 F.2d at 1373-74.

34. The District Court deemed a formal act of state essential. 345 F. Supp. at 545. The Court of Appeals, 485 F.2d at 1371, held that the test is not whether the act was formal or informal but whether it was within the scope of authority of the representative of the foreign government, citing *Underhill v. Hernandez*, 168 U.S. 250 (1897). What constitutes an "act of state" is discussed in part V *infra*.

35. 406 U.S. 759 (1972).

upheld the importers' counterclaims in the present case up to the limits of the respective claims asserted against them by the interventors. This result is mandated, the Court of Appeals stated, by application of the *Bernstein v. N.V. Nederlandsche-Amerikaansche*[36] and *National City Bank v. Republic of China*[37] cases.[38]

C. *The Issues Before the Supreme Court*

Three petitions for certiorari were filed with the Supreme Court, and on May 13, 1974, the Court granted the petition of the importer, Dunhill,[39] and directed counsel to brief and argue two questions:

> 1. Can statements by counsel for the Republic of Cuba, that petitioner's unjust enrichment counterclaim would not be honored, constitute an act of state?
> 2. If so, is an exception to the act of state doctrine created under *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759 (1972), where petitioner's counterclaim does not exceed the net balance owed to Cuba on its claims by petitioner's codefendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?

The case was argued orally in December 1974,[40] but was thereafter restored to the calendar for reargument with the further question: "Should this Court's holding in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 298 (1964), be reconsidered?"[41] Reargued on January 19, 1976,[42] the case was decided on May 24, 1976.[43] Justice

36. 210 F.2d 375 (2d Cir. 1954).

37. 348 U.S. 356 (1955).

38. The Court of Appeals also affirmed the District Court's disposition of the trademark infringement and unfair competition issues. Review of those issues was not sought in the Supreme Court.

39. No. 73-1288, 416 U.S. 981 (1974). The issue raised by the *Dunhill* petition and addressed by the Court is whether the failure of the interventors to return to Dunhill funds paid by Dunhill after intervention for cigars sold prior to intervention was an "act of state" by Cuba, thus precluding an affirmative judgment for Dunhill.

The Court held the petitions Nos. 73-1287 and 73-1289 until its decision in the *Dunhill* case and then denied those petitions. 44 U.S.L.W. 4668 n.6.

40. 43 U.S.L.W. 3341 (1974).

41. 422 U.S. 1005 (1975). Of the nine Justices who sat on the *Sabbatino* bench only three, Justices Brennan, Stewart and White, are on the Court today.

42. 44 U.S.L.W. 3427.

43. 44 U.S.L.W. 4665.

White delivered the opinion of the Court and was joined by Chief Justice Burger and Justices Powell, Rehnquist, and by Justice Stevens, in part. Justice Marshall wrote the dissent joined by Justices Brennan, Stewart, and Blackmun. The remarkable feature of the Supreme Court's opinion is that after the case was twice extensively briefed and twice argued, the Court took up and settled so few of the outstanding issues of the act of state doctrine.

The Supreme Court reversed the Second Circuit and granted an affirmative judgment for Dunhill on its counterclaim. In reversing, the majority agreed only that the interventors' refusal to return to Dunhill payments for the pre-intervention shipments of cigars was not an "act of state" entitled to respect in our courts.[44] Without Justice Stevens, Justice White and the three remaining Justices argued that, in any event, the "concept of an act of 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," reasoning that to do so would not be "consistent with" the "restrictive approach to sovereign immunity."[45] The dissent argued that the repudiation was a part of a course of conduct initiated by the intervention decree and that course of conduct was the "act of state" which barred Dunhill's affirmative claim. Further, the dissent said that this case was not an appropriate one in which to lay down a broad "commercial act" exception to the doctrine. Nor should the restrictive theory of sovereign immunity be marshalled in support of such an exception.[46] The following sections of this article deal with a number of the issues regarding the act of state doctrine raised in the course of the litigation of this case.

III. For Purposes of the Act of State Doctrine the Situs of a Debt is Where the Debtor Can Be Found

A fundamental qualification to the act of state doctrine limits its application to acts of a sovereign done within its own territory.[47]

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44. *Id.* at 4669.

45. *Id.* at 4669-73.

46. *Id.* at 4676-82.

47. *Sabbatino*, 376 U.S. at 428, 432. *See also* Oetjen v. Central Leather Co., 246 U.S. 297 (1918); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Underhill v. Hernandez, 168 U.S. 250 (1897); Laane & Baltser v. Estonian State Cargo & Passenger S.S. Line [1949] Can. S.Ct. 530, 546-51; *In re* Amand (No. 2), [1942] 1 K.B. 445; Aksionairnoye Obschestro A.M. Luther v. James Sagor & Co., [1921] 3 K.B. 532 (C.A.); Government of the Republic of Spain v. National Bank of Scotland Ltd. [1939] Sess. Cas. 413, 426 (Inner House);

The *Dunhill* Court said, "United States courts will not give effect to foreign government confiscations without compensation of property located in the United States."[48] Thus, the courts of one state are not bound by the act of state doctrine to give effect, as a matter of course, to the acts of a second state which purport or are alleged to affect property or rights in some other state. An act of state may be given extraterritorial effect, however, if the act is consistent with the laws and policy of the forum state.[49] A fortiori, an act of state which purports to affect property or rights in another state and which is repugnant to the policy or laws of that other state will be wholly disregarded in the other state.[50] Thus, the situs of a bank account or other tangible property, or accounts receivable or other intangible property, is of critical importance.[51] The *Dunhill* Court, citing with apparent approval *Republic of Iraq v. First National City Bank*,[52] stated that the situs of the accounts receivable for the pre-intervention cigar shipments was with the importer-debtors in New York rather than with the interventors in Cuba.[53]

EHRENZWEIG, CONFLICT OF LAWS, § 48, at 172 (1962).

This qualification obtains despite the Supreme Court's shift in *Sabbatino* from the traditional bases for this doctrine, sovereignty, comity and international law, to the "constitutional underpinnings" basis. *See* discussion in part VI *infra;* Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino,* 64 COLUM. L.R. 805, 826-30 (1964).

48. 44 U.S.L.W. at 4667.

49. Republic of Iraq v. First National City Bank, 353 F.2d 47, 51-52 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966); *Menendez,* 485 F.2d at 1364. *See also* Tabacalera Severiano Jorge v. Standard Cigar Company, 392 F.2d 706 (5th Cir. 1968), *cert. denied,* 393 U.S. 924 (1968).

The basis for granting extraterritorial effect to an act of state which is consistent with the laws and policy of the forum state is "comity." *See* Hilton v. Guyot, 159 U.S. 113 (1895); State of Netherlands v. Federal Reserve Bank, 201 F.2d 455 (2d Cir. 1953); Anderson v. N.V. Transandine, 289 N.Y. 9, 43 N.E.2d 502 (1942); State of Netherlands v. Federal Reserve Bank, 79 F. Supp. 966 (S.D.N.Y. 1948). *See also,* Vladikavkazsky Ry. v. Trust Co., 263 N.Y. 369, 378, 189 N.E. 456, 460 (1934); Cowans v. Ticonderoga Pulp & Paper Co., 219 App. Div. 120, 219 N.Y.S. 284, *aff'd mem.* 246 N.Y. 603, 159 N.E. 669 (1927).

50. In *Republic of Iraq v. First National City Bank,* because shares in a Canadian investment trust were involved, the court raised but did not decide whether a court sitting in the United States ought to consider whether a Canadian court would regard the confiscation decree as consistent with Canadian policy. 353 F.2d 47, 51 & n.3.

51. In *Menendez,* the Second Circuit rejected interventor's argument attempting to distinguish the *Republic of Iraq* case on the ground that it involved tangible property—a bank account. 485 F.2d at 1356.

52. 353 F.2d 47.

53. 44 U.S.L.W. at 4667. The dissent reserved opinion on this point: "[I]t is

Generally, under United States law, the situs of a debt or intangible property "is about as intangible a concept as is known to the law."[54] Various rules have been developed.[55] For purposes of the act of state doctrine, which is a rule of federal common law, federal common law principles must be applied.[56] Both the Second and Fifth Circuit Courts of Appeal have stated that for purposes of applying the act of state doctrine the situs of the debt is within the state whose courts can compel payment, *i.e.*, the state where the debtor can be found. In the *Republic of Iraq* case[57] the Second Circuit affirmed the District Court dismissal of Iraq's complaint where Iraq, based upon an "ordinance" purporting to confiscate without compensation all of King Faisal II's property, sought to recover a bank account and certain shares of stock held in a New York bank. The situs of the debt was a principal issue. The court decided that the test for determining the situs of the debt is the place where courts can compel the bank to pay the balance or to deliver the certificates, saying: "So far as appears on this record, only a court in the United States could compel the bank to pay the balance in the account or to deliver the certificates it held in custody. The property here at issue was thus within the United States."[58] Similarly, in *Tabacalera Severiano Jorge v. Standard Cigar Company*[59] the Fifth Circuit Court reversed the District

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not necessary for us to consider the [interventors' contention that the initial taking reached the accounts receivable] here." *Id.* at 4676.

54. Tabacalera Severiano Jorge v. Standard Cigar Company, 392 F.2d 706, 714 (5th Cir. 1968) (*per* Judge Tuttle), *discussed at* note 59 *infra.*

55. The situs may be in one place for tax and escheat purposes (*Farmers Loan & Trust Co. v. Minnesota,* 280 U.S. 204 (1929); *Texas v. New Jersey,* 379 U.S. 674 (1963)) or in more than one place for tax purposes (*Curry v. McCanless,* 307 U.S. 357 (1939)). The RESTATEMENT (SECOND) CONFLICT OF LAWS, §§ 65 and 68 (1971), rather than assign a situs to a debt, attempts to resolve disputes in terms of the power of the court to exercise judicial jurisdiction. *See also,* Atkinson v. Superior Court, 49 Cal.2d 338, 348, 316 P.2d 960, 964 (1958), *cert. denied,* 357 U.S. 569 (1958); Harris v. Balk, 198 U.S. 215 (1904); EHRENZWEIG, CONFLICT OF LAWS, §§ 100-103 (1962); GOODRICH, CONFLICT OF LAWS, §§ 109-112 (Scoles, 4th ed. 1964).

56. Republic of Iraq v. First National City Bank, 353 F.2d 47, 50 (2d Cir. 1965), *citing Sabbatino,* 376 U.S. at 423-27. *See also* RESTATEMENT (SECOND) Foreign Relations Laws § 43 Comment (d).

57. The case is noted: 1966 Duke L.J. 828 (1966); 1 INT'L LAW. 146 (1966); 28 OHIO ST. L.J. 149 (1967); 6 VA. J. INT'L L. 341 (1966); 2 TEXAS INT'L L.J. 285 (1966). The District Court decision in this case, 241 F. Supp. 567 (S.D.N.Y. 1965) is noted in 60 AM. J. INT'L L. 120 (1966); 7 HARV. INT'L L. CLUB J. 316 (1966).

58. 353 F.2d at 51.

59. 392 F.2d 706 (5th Cir. 1968), *cert. denied,* 393 U.S. 924 (1968), *noted in* 62 AM. J. INT'L L. 978 (1968); 3 INT'L LAW. 176 (1968); 9 VA. J. INT'L L. 184 (1969).

Court and held the act of state of the Cuban Government in taking over a Cuban corporation did not bar a suit by the Cuban corporation and its sole stockholder for a debt owed to the Cuban corporation by a Florida company because the situs of the debt was in Florida, not Cuba. The Court explicitly rejected the fiction that the situs is irrevocably at the domicile of the creditor.[60] The rule laid down in these cases is based upon the territorial authority of the court, not upon the nationality of the person from whom the property was confiscated.

The views and the rationale set forth in the *Republic of Iraq* and *Tabacalera* cases were adopted and followed by the Second Circuit in the *Dunhill* case, where the court said: "For purposes of the act of state doctrine, a debt [the accounts receivable owed by the importers, Dunhill] is not 'located' within a foreign state unless that state has the power to enforce or collect it." That is, the state must have power to enforce payment of the debt.[61] The Supreme Court has now, apparently, approved this analysis as to the situs of a debt for act of state purposes.

IV. The Conflict of Laws and the Quasi-Contractual Obligation

In order to reach the act of state issue in *Dunhill*, the entire Supreme Court accepted without discussion or analysis, the Second Circuit's determination that the interventors had a quasi-contractual obligation to repay Dunhill and the other importers, and that the obligation arose in Cuba.[62] The District Court had ruled that the quasi-contractual obligation arose in the United States and was thus not repudiated by a Cuban act of state.[63] The Second Circuit, however, ruled that the quasi-contractual obligation arose only after the funds had been received or used by the interventors and a demand had been made by the importers for their return. The obligation did not grow out of the importers' mistaken payments, which were due and payable in New York, or

60. 392 F.2d at 716.

61. 485 F.2d at 1364-65. *Accord,* United Bank, Ltd. v. Cosmic Int'l, Inc., 392 F. Supp. 266, 269 (S.D.N.Y. 1975); Rupali Bank v. Provident National Bank, 403 F. Supp. 1285, 1289-90 (E.D. Pa. 1975); Zeevi v. Grindlays Bank, 37 N.Y.2d 220, 228-29, 331 N.E.2d 502, 370 N.Y.S.2d 534 (1975), *cert. denied,* 423 U.S. 866 (1975).

62. 44 U.S.L.W. at 4667, 4676.

63. Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527, 545 (S.D.N.Y. 1972).

because the mistaken payments had been made by checks drawn on New York banks.[64]

Applicable conflict of laws principles require that the local law of Cuba, the place where the claim arose, should govern the rights and liabilities of the parties.[65] Curiously, neither the Second Circuit nor the Supreme Court in *Dunhill* pursued this line of analysis. Apparently, it was not pressed by the interventors. On this foundation the Court went on to decide the act of state issues.

V. Act of State—The Exercise of Sovereign Power

On the essential criteria by which to determine whether an act is an "act of state" the Justices of the Supreme Court in *Dunhill* were virtually unanimous: the actor must be invested with sovereign or governmental authority, as distinguished from mere commercial or other authority. Furthermore, he must exercise that sovereign authority by acting or refraining from acting for an "act of state" to exist.[66] Or, as the dissent stated: "If the foreign state has exercised a sovereign power either to act or to refrain from acting, there is an act of state."[67] While the Court does not describe all other facets of an "act of state," and consequently does not allay all doubts, the dissent notes that an "act of state" can be an affirmative act[68] as well as an intentional refusal to act.[69] It can be a formal act, as the Court notes, such as enactment of a statute or adoption of a decree, order, or resolution.[70] An act of state can also be an informal act such as a taking of lead bullion or hides in wartime.[71] In any event, the dissent stated:

> I do not understand the Court to suggest . . . that the act of state doctrine can be triggered only by a "statute, decree, order or resolution" of a foreign government, or that the presence of an act of state can only be demonstrated by some affirmative action by the foreign sovereign.[72]

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64. 485 F.2d at 1370.

65. Industrial Export & Import Corp. v. Hong Kong & Shanghai Banking Corp., 302 N.Y. 342, 98 N.E.2d 466 (1951); Restatement (Second) Conflict of Laws § 221.

66. 44 U.S.L.W. at 4668, 4669.

67. *Id.* at 4677.

68. *Id.*

69. *Id.*

70. *Id.* at 4669.

71. *Id.* at 4677.

72. *Id.* at 4676-77.

Further, majority and dissent in *Dunhill* agree that an oral or a written statement by legal counsel in the case does not constitute an act of state.[73] Indeed, counsel for Cuba and the interventors frequently stated that he, as an attorney, could not commit an "act of state."[74]

Again, an act is an act of state, according to the *Restatement,* if it is done by or for a sovereign state within its own territory, or territory over which it has *de facto* or *de jure* jurisdiction, and is done to give effect to its public interest. It may be either formal or informal in nature, and it may be the act of the executive, legislative or judicial branch. But a court judgment is not usually considered an act of state because it does not ordinarily reflect high state policy.[75] A typical act of state is the taking by a state of property of its own nationals within its own territory. Illustrative of the acts found to be acts of state by the courts are: an expropriation by Cuba of branch banks within Cuba;[76] a decision aimed at halting the flow of foreign reserves from Cuba;[77] a seizure of a cargo of sugar while it was in Cuba;[78] a decree nationalizing insurance businesses in Russia;[79] a decree expropriating assets of a Russian corpo-

73. *Id.* at 4669, 4678.

74. 43 U.S.L.W. 3341 (1974). He went on to assert that the act of state in the *Dunhill* case is the refusal of Cuba to return the money that it received based upon the decree nationalizing the relevant accounts receivable. *See,* Respondents' Brief, at 16.

75. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW, § 41, Comment (d), illustrations 4-8 (1962). *See also Sabbatino,* 304 F.2d 845, 855 (2d Cir. 1962).

76. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), *rehearing denied,* 409 U.S. 897 (1972). *See also* Maltina Corp. v. Cany Bottling Co., 462 F.2d 1021 (5th Cir. 1972), *cert. denied,* 409 U.S. 1060 (1972) (law dissolving Cuban corporation); Pons v. Republic of Cuba, 294 F.2d 925 (D.C. Cir. 1961), *cert. denied,* 368 U.S. 960 (1962), *rehearing denied,* 368 U.S. 1005 (1962) (Cuban seizure of its own national's property within its own territory); National Institute of Agrarian Reform v. Kane, 153 So.2d 40 (Fla. Dist. Ct. App. 1963) (decree expropriating property of Cuban corporation in Cuba); Mann v. Compania Petrolera Trans-Cuba, S.A., 32 Misc.2d 790, 223 N.Y.S.2d 900 (Sup. Ct. 1962) (law confiscating Cuban company); Luther v. James Sagor & Co., L.R. [1921] 3 K.B. 532 (decree confiscating a quantity of plywood in Russia by Russian Government).

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

78. *See also* The Navemar, 303 U.S. 68 (1938) (Spanish Government allegedly confiscated ship by decree); Bernstein v. Van Heyghen Freres, 163 F.2d 246 (2d Cir. 1947) (alleged compelled conveyance under physical duress of the shares of Arnold Bernstein Lines); The Claveresk, 264 F. 276 (2d Cir. 1920) (British requisition of merchant ship in World War I).

79. United States v. Pink, 315 U.S. 203 (1942). *See also* Guaranty Trust Co.

ration including a deposit account with a bank in New York;[80] a decree expropriating real property located in Mexico;[81] a taking in Mexico of lead bullion by a general in the Carranza Army;[82] a confiscation of hides in Mexico to satisfy an assessment by order of General Villa;[83] a taking by the Costa Rican military of a banana plantation and railroad under *de facto* Costa Rican jurisdiction;[84] and a refusal to grant a passport, confinement to house, and physical assaults by soldiers.[85]

In *Dunhill* the Court examined the alleged act of state—the Cuban Government's refusal to return the funds mistakenly paid to it by Dunhill. The Court refrained from finding this act to be a part of a broad course of conduct. Further, the Court concluded that the interventors had not sustained their burden of proving

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v. United States, 304 U.S. 126 (1938) (assignment to the United States of all sums due the Russian Government); Dougherty v. Equitable Life Assurance Soc., 266 N.Y. 71, 193 N.E. 898 (1934) (decree declaring that thereafter the business of insurance should be an exclusive monopoly of the state).

80. United States v. Belmont, 301 U.S. 324 (1937). *See also* Pasos v. Pan American Airways Inc., 299 F.2d 271 (2d Cir. 1956) (formal and informal acts—turn over of lands to U.S. Marines, condemnation of lands and prohibition of buildings within a radius of 500 meters of any air field without governmental approval).

81. Shapleigh v. Mier, 299 U.S. 468 (1937). *See also* Eastern States Petroleum Co. v. Asiatic Petroleum Corp., 28 F. Supp. 279 (S.D.N.Y. 1939) (Mexican decree expropriating oil wells); Salinoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933) (Russian Government confiscated all oil lands in Russia).

82. Ricaud v. American Metal Co., 246 U.S. 304 (1918). *Cf.* Banco de Espana v. Federal Reserve Bank, 114 F.2d 438 (2d Cir. 1940) (law and decree conferring the right to transfer a quantity of silver).

83. Oetjen v. Central Leather Co., 246 U.S. 297 (1918). *See also* Hewitt v. Speyer, 250 F. 367 (2d Cir. 1918) (payment by Ecuador to defendant of money earmarked for payment to bondholders).

84. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). *See also* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Calif. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972) (alleged conspiracy among Trucial states and others to deny plaintiffs "richest" off-shore oil concessions); Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970) (Venezuelan regulatory authorities compelled defendants to deny plaintiffs Venezuelan crude oil). *See also* Hunt v. Mobil Oil Corp., 410 F. Supp. 10, 23-25 (S.D.N.Y. 1976); Occidental of Umm Al Qaywayn, Inc. v. Cities Service Oil Co., 396 F. Supp. 461 (W.D. La. 1975).

85. Underhill v. Hernandez, 168 U.S. 250 (1897). *See also* United States ex rel. Von Heymann v. Watkins, 159 F.2d 650 (2d Cir. 1947) (physical act of arrest, detention and delivery of person to U.S. authorities in Costa Rica); Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N.Y. 474 (1938) (plaintiff discharged from job in Germany on the ground that he was a Jew even though he had an employment contract).

that the claimed act was an act of state. The majority argued that the refusal to repay, by itself, is insufficient to prove an act of state, nor does it prove that the interventors were invested with sovereign authority to repudiate the debts of the cigar businesses.[86] And, as in *The Gul Djemal*,[87] where a duly commissioned officer of the Turkish navy was the master of a steamship owned and operated by the Turkish Government for commercial purposes, the only authority the master was shown to be invested with was commercial authority.[88] A similar commercial authority was possessed by the interventors in *Dunhill*. Thus, the Court limited the reach of the act of state doctrine. The dissent, on the other hand, argued that the interventors' course of conduct in taking the cigar businesses and in receiving and retaining Dunhill's money reflects an exercise of sovereign power and amounts to an act of state.[89] Justice White would go a step further: even when the actor is invested with sovereign authority and purports to exercise that authority, if the act is committed in the course of "purely commercial operations" that act is not an act of state.[90]

VI. The Evolution of the Rationale For the Act of State Doctrine and the "Bernstein Exception"

A. *Pre-Sabbatino Rationale: Sovereignty, Comity, International Law*

Prior to the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*[91] it was generally asserted that the bases for the act of state doctrine were notions of sovereignty, comity, and international law. In *The Schooner Exchange v. M'Faddon*,[92] Chief Justice Marshall alluded to the sovereign power of a nation as a basis for the doctrine.[93] Sovereignty clearly appears to be the foundation

86. 44 U.S.L.W. at 4668.

87. 264 U.S. 90, 95 (1924). *See also* The Anne, 16 U.S. (3 Wheat.) 434 (1818); The Sao Vicente, 260 U.S. 151 (1922).

88. 44 U.S.L.W. at 4668.

89. *Id.* at 4676-78.

90. *Id.* at 4673. Interestingly, the sole decisive issue in *Dunhill* was whether the repudiation of the quasi-contractual obligation was an act of state, yet the Court did not give the interventors an opportunity to clarify the nature of the act. It simply reversed, thereby ending the litigation. It did not remand the case for further proceedings. 44 U.S.L.W. at 4673.

91. 376 U.S. 398 (1964).

92. 11 U.S. (7 Cranch) 116, 146 (1812).

93. The act of state doctrine stems from the doctrine of sovereign immunity. *Sabbatino*, 307 F.2d 845, 855 (2d Cir. 1962); Note, *The Castro Government in*

of the Court's opinions in *Underhill v. Hernandez*[94] and *American Banana Company v. United Fruit Company.*[95] But in *Oetjen v. Central Leather Company*[96] the Supreme Court broadened the basis of the doctrine, asserting that it "rests at last upon the highest considerations of comity and expediency," concluding: "To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.' "[97] Also, considerations of international law have been urged as a basis for the doctrine.[98] No exceptions to the doctrine as stated in these cases were recognized by American courts, although it had been urged that the doctrine did not apply if the foreign act of state was contrary to the public policy of the forum, was in violation of the constitution of the country where it took place, or was in violation of the rules of international law.[99]

American Courts: Sovereign Immunity and the Act of State Doctrine, 75 HARV. L. REV. 1607, 1608 (1962). *But see,* Justice Rehnquist's statement in the *FNCB* case, 406 U.S. at 762. *See also,* Hudson v. Guestier, 8 U.S. (4 Cranch) 293, 294 (1808); Duke of Brunswick v. King of Hanover, 2 H.L. Cas. 1, 17, 21 (1848).

94. 168 U.S. 250, 252 (1897).

95. 213 U.S. 347, 357-58 (1909).

96. 246 U.S. 297 (1918).

97. *Id.* at 303-04. *See also,* Shapleigh v. Mier, 299 U.S. 468 (1937); Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918), and compare the leading British case, Luther v. James Sagor & Co., [1921] 3 K.B. 532 (C.A.).

Comity is the recognition extended by one nation within its own territory to the legislative, executive or judicial acts of another. It is not a rule of law but one of practice, convenience and expediency. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), *cert. denied,* 405 U.S. 1017 (1972).

98. Hatch v. Baez, 7 Hun. 596, 599 (N.Y. Sup. Ct. 1876); Kennedy v. Cossillis, 2 Swans 313, 326, 36 Eng. Rep. 635, 640 (Ch. 1818). *See,* Delson, *The Act of State Doctrine—Judicial Deference or Abstention?,* 66 AM. J. INT'L L. 82, 90 (1972); Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino,* 64 COLUM. L.R. 805, 826-30 (1964). But "the practice of nations" is evidence that "international law does not require application of the doctrine." Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 421-22 (1964); OPPENHEIM'S INTERNATIONAL LAW, § 115aa (Lauterpracht, 8th ed. 1955); *But see* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW, § 41 Comment (c).

99. COMM. ON INT'L LAW, BAR ASS'N CITY OF N.Y., A RECONSIDERATION OF THE ACT OF STATE DOCTRINE IN UNITED STATES COURTS (1959); Domke, *Indonesian Nationalization Measures Before Foreign Courts,* 54 AM. J. INT'L L. 305 (1960); Hyde, *The Act of State Doctrine and the Rules of Law,* 53 AM. J. INT'L L. 635 (1959); Mann, *International Delinquencies Before Municipal Courts,* 70 L.Q. REV. 181 (1954); Zander, *The Act of State Doctrine,* 53 AM. J. INT'L L. 826 (1959). *Contra,* Reeves, *Act of State Doctrine and the Rule of Law—A Reply,* 54 AM. J. INT'L L. 141 (1960).

There are also a number of British and European decisions to the effect that foreign acts of state that violate international law would not be recognized as enforceable by the forum.[100]

However, in *Sabbatino,* Justice Harlan argued that the plain implication of statements in *Oetjen,* 246 U.S. at 304, and *Shapleigh,* 299 U.S. at 471, is that "the act of state doctrine is applicable even if international law has been violated." 376 U.S. at 431. But it has been argued that if the *Sabbatino* court had found the act of Cuba in flagrant disregard of international law, it would not have applied the act of state doctrine. Mann, *The Legal Consequences of Sabbatino,* 51 VA. L. REV. 604, 607-8 (1965).

100. See the following cases:

Great Britain: Wolf v. Oxholm, 6 Maule & Selwyn 92 (1817); *In re* Fried Krupp [1917] 2 Ch. 188; Republic of Peru v. Dreyfuls Brothers and Co. [1883] 38 Ch. D. 348; Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140; The Anglo-Iranian Oil Co. v. Jaffrate [1953] 1 W.L.R. 246, [1953] Int'l L. Rep. 316 (Sup. Ct. Aden); N.V. de Bataafsche Petroleum Maatschappij v. The War Damage Commission [1956] Int'l L. Rep. 810 (Singapore Ct. App.); Re Helbert Wagg & Co., [1956] Ch. 323, 346; Buttes Gas and Oil Co. v. Hammer [1975] 2 W.L.R. 425, 433-35.

Austria: Obester Gerichtshof, 94 Clunet 941 (1967) S.Ct. 1965.

France: Ropit Case, [1929] S.Jr.I, 217, 55 Clunet 674 (1928), [1927-1928] Ann. Dig. 67, (No. 43); Volatron v. Moulin [1939] Dalloz I 329, [1938-1940] Ann. Dig. 24 (No. 10) (Cour d'Appel, Aix, 1939); Société Postasas Ibericas v. Nathan Bloeh [1938-1940] Ann. Dig. 150 (Cour de Cassation); Braden Copper Co. v. Le Groupement d'Importation des Metaux, 12 Int'l L. Materials 187 (Ct. of Extended Jurisdiction Paris, 1972); Compagnie Francaise de Credit et de Banque v. Consorts Atard (Cour d'Appel Amiens, 1970) 98 Clunet 86 (1971); Credit Foncier d'Algerie et de Tunisie v. Narbonne (Cour de Cassation, 1969) 96 Clunet 912 (1969); Volation v. Moulin [1938-1940] Ann. Dig. 24 (Cour d'Appel Aix).

Germany: In the Matter of Minera El Teniente, S.A., 12 INT'L L. MATERIALS 251 (Sup. Ct. Hamburg 1973); N.V. Verenigde Deli-Maatschapijen v. Deutsche-Indonesische Tabak-Handelgesellschaft m.b.H. (Bremen Ct. App.) (*See* Domke, *supra* note 99 at 313, 314); Confiscation of German Property in Czechoslovakia Case, [1953] Int'l L. Rep. 31-34; Graue, *Germany: Recognition of Foreign Expropriations,* 3 AM. J. COMP. L. 93 (1954); Confiscation of Property of Sudeten Germans Case, [1948] ANN. DIG. 24, 25 (No. 12) (Amtsgericht of Dingolfing); NEUE JURISTISCHE WOECHENSCHRIFT 628 (1947-1948); 15 RABELS ZEITSCHRIFT FUR ANSLANDISCHES UND INTERNATIONALES PRIVATRECHT (1949).

Greece: Massouridis, *The Effects of Confiscation, Expropriation, and Requisition by a Foreign Authority,* 3 REVUE HELLENIQUE DE DROIT INTERNATIONAL 62, 68 (1950).

Italy: Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., 78 Il Foro Italiano Part I, 719, [1955] Int'l L. Rep. 19 (Court of Venice 1953).

The Netherlands: Senembah Maatschappij N.V. v. Republiek Indonesie Bank Indonesia, Ned. Jr. 1959, No. 73, at 218 (Amsterdam Ct. App.); N.V. Assurantie Maatschappij de Nederlanded van 1845 v. P.T. Escomptobank, 33 Int'l L. Rep. 30 (Dist. Ct. The Hague 1962) *aff'd on other grounds* (Hoge Rood, 1964) 40 Int'l L. Rep. 7 (1964).

In the United States a different approach has taken hold. In 1947 the Second Circuit Court of Appeals, in *Bernstein v. Van Heyghen Freres S.A.*,[101] conceived an exception to the doctrine. That case stands for the principle that when the executive branch, "which is the authority to which we must look for the final word in such matters," declares that the doctrine does not apply, the courts may review an act of a foreign state.[102] In a subsequent case brought by the same plaintiff,[103] seeking recovery of damages for conversion of assets allegedly confiscated by the Nazi German Government in 1937-39, the Department of State explained that it was "the policy of the Executive" to "relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."[104] In line with this statement of executive policy, the Second Circuit permitted the district court to pass upon the validity of the acts of the German officials, thus

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See also Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Iaisha [1953] Int'l L. Rep. 305 (Dist. Ct. Tokyo), *aff'd*, [1953] Int'l L. Rep. 312 (High Ct. of Tokyo).

101. 163 F.2d 246, 249 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947). In this case Bernstein sought damages for conversion of his property allegedly confiscated by the Nazi German Government between 1937 and 1939. The court affirmed dismissal of the complaint holding that the act of state doctrine barred inquiry into the validity of the Nazi confiscations, but carved out the exception discussed in the text.

102. The court made this statement after discussing various authorities including the Declaration of June 5, 1945, which Bernstein asserted evidenced a positive intent to relax the doctrine in the courts. 163 F.2d at 251. See Bernstein's Brief on Appeal at 30-36; Brief of the American Jewish Congress as Amicus Curiae, at 21-37.

103. 210 F.2d 375 (2d Cir. 1954) which amended the mandate in *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 173 F.2d 71 (2d Cir. 1949). The case was ultimately settled following remand to the district court. Prior to the Supreme Court decision in *FNCB*, the "Bernstein exception" was relied upon twice—both were instances by lower courts whose decisions were subsequently reversed: *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 857-58 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964); *Kane v. Institute of Agrarian Reform*, 18 Fla. Supp. 116 (Fla. Cir. Ct. 1961), *rev'd*, 153 So.2d 40 (Fla. App. 1963).

104. *See* letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Bernstein's attorneys, April 13, 1949; State Department Press Release No. 296, (April 27, 1949) 20 DEP'T STATE BULL. 592, 593 (1949).

Interestingly, Jack B. Tate was also the author of the 1952 shift in United States policy to recognize, thereafter, only public acts, *jure imperii*, as distinguished from private acts, *jure gestionis*, as immune. 26 DEP'T STATE BULL. 985 (1952). *See also* discussion on Justice White's argument for a commercial act exception consistent with the restrictive theory of sovereign immunity, text accompanying notes 166-90 *infra*.

creating the "Bernstein exception" to the American version of the act of state doctrine.

Limited by the facts of the *Bernstein* cases, the "Bernstein exception" is applicable only where: (a) the foreign sovereign, whose acts are to be reviewed, no longer exists; (b) the executive branch advises the court that it is the policy of the government to enable the courts to pass upon the validity of the acts of such sovereign; and (c) the court decides it will not be restrained by that doctrine.[105] Interpreted in this way, the "Bernstein exception" is consistent with the rationale of pre-*Sabbatino* Supreme Court decisions on the act of state: judicial examination of the validity of the act of a foreign state that no longer exists cannot "imperil the amicable relations between governments and vex the peace of nations."[106] This interpretation of the "Bernstein exception" is also supported by the *Sabbatino* decision and is consistent with the new rationale for the act of state doctrine set forth in that decision. For in *Sabbatino* the Supreme Court indicated that the doctrine might not bar examination of the validity of a foreign expropriation where the government involved no longer existed,[107] even as the Court implicitly rejected a broad application of that exception.[108]

In sharp contrast with this restrictive interpretation of the "Bernstein exception" is the broad interpretation: once the executive branch states that its policy is to relieve the courts from the restraints of the act of state doctrine, the courts are *bound* to refrain from applying the doctrine whether or not the government involved still exists.[109] Thus, under this interpretation it is the Executive, not the courts, who invokes the "Bernstein exception."[110]

B. *The Rationale Set Forth in Sabbatino*

In his majority opinion (8-1) in *Sabbatino,* Justice Harlan discarded the notions of sovereignty, comity, and international law as

105. Delson, *supra* note 7, at 90.

106. Oetjen v. Central Leather Co., 246 U.S. 297, 304.

107. 376 U.S. at 428. The "Bernstein exception" may be valid "if the government which perpetrated the challenged act of state is no longer in existence." *Id.* Also, the Court stated: "This Court has never had occasion to pass upon the so-called *Bernstein* exception, nor need it do so now." *Id.* at 420.

108. *See* 376 U.S. at 432-33, 436. *See also* Justice Powell's opinion in *FNCB,* 406 U.S. at 773, and Justice Brennan's opinion in that case, 406 U.S. at 785-93.

109. *See* Justice Rehnquist's opinion in the *FNCB* case, 406 U.S. at 768, and Judge Hays dissenting from the Second Circuit decision in the *FNCB* case, 442 F.2d 530 (2d Cir. 1971).

110. *See* text accompanying notes 132-47 *infra.*

the bases for the doctrine.[111] Rather, the opinion goes on to state that the act of state doctrine, which is exclusively a rule of federal law,[112] "arises out of the basic relationships between branches of government in a system of separation of powers."[113] In other words, the doctrine arises from the "constitutional" or fundamental separation of the judicial from the political branches of government.[114] It is not, however, required by any specific article or section of the United States Constitution.[115] Furthermore, the doctrine's continuing vitality "depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters of foreign affairs."[116] Justice Harlan related the doctrine to a basic principle of political philosophy, the principle of separation of powers. As a corollary, where the political (foreign affairs) and judicial functions of government are separated and administered by independent institutions, the judicial branch must show restraint in dealing with issues relating to foreign relations lest the judiciary interfere with or disrupt the government's conduct of those relations. For this reason the act of state doctrine is not peculiarly an American rule of law, and precedents from other countries may be relevant and persuasive.[117]

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111. 376 U.S. at 411-12, 421-23. However, Justice Harlan stated that "historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine." *Id.* at 421.

112. Justice Harlan was emphatic on this point. The act of state doctrine is a rule of federal law applicable in diversity and federal question cases alike. Accordingly, the scope of the doctrine is determined by federal law. 376 U.S. at 424-27.

113. *Id.* at 423.

114. Clearly, this constitutional separation is common to the organization of the institutions of government in a great many contemporary states.

115. 376 U.S. at 423, 427. Conversely, the Constitution does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state. *Id.* at 428.

116. *Id.* at 427-28. However, Justice Harlan stated that the doctrine is not "an inflexible and all-encompassing rule," for the weaker the impact of an issue on our foreign relations, "the weaker the justification for exclusivity in the political branches." *Id.* at 428. Nor can it be thought that "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 423.

117. *See* note 100 *supra.*

Great Britain: F&K Jabbour v. Custodian of Israeli Absentee Property [1954] 1 W.L.R. 139 (Q.B.); Lorentzen v. Lydden & Co. [1942] 2 K.B. 202; Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140; Princess Paloy Olga v. Weisz [1929] 1 K.B. 718 (C.A.); Luther v. James Sager & Co. [1921] 3 K.B. 532 (C.A.); Lepage v. San Paulo Coffee Estates Co. [1917] W.N. 216 (High Ct. of Justice, Ch. Div.); Attorney-General for 1 Canada v. William Schulze & Co. [1901] 9 Scots L.T. Reps. 4 (Outer House); Don Alonso v. Cornero, Hob. 213, 80 Eng. Rep. 359 (K.B.); Blad v. Bamfield, 3 Swans 604, 36 Eng. Rep. 992 (Ch. 1674).

Justice Harlan further reasoned that international law does not forbid application of the doctrine, even if it is claimed that the act of state in question violated international law.[118] Nor can the public law of nations dictate to a country that is wronged how to treat that wrong within its borders.[119] Moreover, he contended that the plain implication of the *Oetjen* case[120] and *Shapleigh v. Mier*[121] is that the act of state doctrine is applicable even if international law has been violated.[122] In support of this view Justice Harlan reasoned that the judicial branch is, by contrast with the political branch, limited in what it can do following an expropriation of any significance.[123] Judicial determinations of invalidity of title would

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Austria: Hungarian Soviet Government Case, Supreme Court in Civil Matters of Austria, (ObI, 1055/22), [1922] E.O.G.Z. 274 (No. 110), [1919-1922] Ann. Dig. 56 (No. 31).

Belgium: Propetrol, Petroservice, et Petrolest v. Compania Mexicano de Petroleo, Civil Tribunal of Antwerp, [1939] Belgique Judiciaire II. 12, [1938-1940] Ann. Dig. 25 (No. 11).

France: Société Hardmuth, Court of Appeal of Paris, Dec. 2, 1950, 44 Rev. Cr. Dr. Int'l Priv. 501 (1955); De Keller v. Maison de la Pensee Francaise, Tribunal de la Seine, July 12, 1954, 44 Rev. Cr. Dr. Int'l Priv. 503 (1955), [1954] Int'l L. Rep. 21, 49 AM. J. INT'L L. 585 (1955); Martin v. Banque d'Espagne, Cour de Cassation, Nov. 3, 1952, 42 Rev. Cr. Dr. Int'l Priv. 425 (1953), [1952] Int'l L. Rep. 202 (No. 42); Lamasquitu et l'etat Espagnol v. Société Cemetos Rezola, Court of Appeal of Poitiers, Dec. 20, 1937, [1938] Sirey III. 68, [1935-1937] Ann. Dig. 196 (No. 71).

Germany: Prince Dabisita-Kotromaiez v. Société Lepke, Tribunal of Berlin, Nov. 1, 1928, 56 Clunet 184 (1929).

The Netherlands: N.V. Assurantie Maatschappij de Nederlanden van 1845 v. P.T. Escomptobank, 33 Int'l L. Rep. 30 (Dist. Ct. The Hague 1962), *aff'd on other grounds* (Hoge Rood, 1964) 40 Int'l L. Rep. 7 (1964); Petroservice S.A. & Credit Minier Franco-Roumain S.A. v. Compania Mexicana de Petroleo "El Aguila", [1940] Ned. Jur. No. 27, (Court of Appeal of the Hague, 1939), *aff'd on other grounds*, [1941] Ned. Jur. No. 923, [1919-1942 Supp.] Ann. Dig. 17 (No. ____); Davis en Cy. v. Compania Mexicana de Petroleo "El Aguila", [1939] Ned. Jur. No. 747, [1919-1942 Supp.] Ann. Dig. 19 (No. ____) (District Ct. of Rotterdam); United States of Mexico v. N.V. De Bataatsche Petroleum Maatschappij, [1938] Ned. Jur. No. 790, [1919-1942 Supp.] Ann. Dig. 16 (No. 7) (District Court of Middleburg).

118. 376 U.S. at 422. Compare cases cited in note 100 *supra.*

119. *Id.* at 423.

120. 246 U.S. at 304.

121. 299 U.S. at 471.

122. 376 U.S. at 431. Compare text accompanying notes 99-100 *supra.*

Dissenting in *Sabbatino,* Justice White argued that prior Supreme Court decisions do not support the assertion that "foreign acts of state must be enforced . . . in American courts when they violate the law of nations." 376 U.S. at 441.

123. *Id.* at 431. And the Court is powerless to implement a decision on a

be likely to give offense to the expropriating country, could "seriously interfere with negotiations" by the executive branch with such country, might affect an agreement that could otherwise be reached with that country, and would undoubtedly color relations with third countries engaged in similar expropriations.[124] Nor are such dangers removed if the State Department asserts that the relevant act violated international law, for the stamp of judicial disapproval of the State Department's views might strengthen the hand of the expropriating state in negotiations. Also, the courts might undermine policies of the executive branch as the organ of American foreign policy by contradicting views expressed by the State Department. Expression of judicial uncertainty might well embarrass the Executive or at least "render uncertain titles in foreign commerce."[125] The Court rejected the argument that if the doctrine is not applied where the act of state violates international law, the resulting economic pressure will materially add to the protection of United States investors. Instead, the Court noted that the United States possesses a variety of means far more effective than judicial invalidation of acts of expropriation for securing investments in foreign nations; that foreign aid given to states in need of continuing foreign investment "provides a powerful lever in the hands of the political branches to ensure fair treatment" of American investment; that the sanctions of economic embargo and freezing of assets may be employed; and that if the political branches are unwilling to exercise their powers to effect compensation, this reflects a judgment which the judiciary should not undermine.[126] Finally, the Court said without elaboration that maintaining the act of state doctrine serves to promote the "goal of establishing the rule of law among nations."[127]

C. *FNCB Case: Divergent Rationales*

In the most recent Supreme Court case before *Dunhill, First National City Bank v. Banco Nacional de Cuba,*[128] the *Sabbatino*

political issue. *Contra* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

124. 376 U.S. at 431-32.

125. *Id.* at 433.

126. *Id.* at 435-36. This argument was again asserted by the Solicitor General in the *FNCB* case. *See,* Lowenfeld, *supra* note 18, at 807.

127. 376 U.S. at 437. The International Court of Justice has refused to be drawn into the issue. Barcelona Traction Case, [1970] I.C.J. 3.

128. 406 U.S. 759, *rehearing denied,* 409 U.S. 897 (1972), *aff'd on remand,* 478 F.2d 191 (2d Cir. 1973). For previous opinions in the case see: 270 F. Supp. 1004

rationale for the act of state doctrine was torn asunder. In his opinion in the *FNCB* case Justice Rehnquist, speaking for himself, the Chief Justice and Justice White, reverted in part to the pre-*Sabbatino* rationale. He pointed out that the act of state doctrine, like the sovereign immunity doctrine, is judicially created. It has its roots in the notion of comity among independent sovereigns and among the respective branches of the federal government. Furthermore, it is buttressed by judicial deference to the primary and exclusive power of the Executive over the conduct of relations with other sovereign powers.[129] Justice Rehnquist emphatically asserted that the 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 political branches of the

(S.D.N.Y. 1967) (granting summary judgment for FNCB), *rev'd,* 431 F.2d 394 (2d Cir. 1970). The decision of the Second Circuit was vacated and remanded for reconsideration based upon the *Bernstein* letter dated November 7, 1970, from John R. Stevenson, State Department Legal Advisor to Hon. E. Robert Seaver, Clerk, United States Supreme Court. On remand from the Supreme Court, the Second Circuit affirmed its original decision (2 to 1) and rejected the "Bernstein exception," 442 F.2d 530 (2d Cir. 1972) and the Supreme Court again granted certiorari. The Supreme Court's opinions on this second review are the ones discussed in the text. See Delson, *supra* note 7; Leigh, *The Supreme Court and the Sabbatino Watchers: First National City Bank v. Banco Nacional de Cuba,* 13 VA. J. INT'L L. 33 (1972); Lowenfeld, *supra* note 18.

The Supreme Court again remanded the case to the Second Circuit Court of Appeals for "consideration of [Banco de Cuba's] alternative bases of attack on the judgment of the District Court" which were: (1) that FNCB's counterclaim did not lie against Banco de Cuba, because it was directed against the government of Cuba not against Banco de Cuba; and (2) the nationalization of FNCB's property in Cuba did not violate international law. The Second Circuit rejected both these contentions saying that the undisputed evidence shows that Banco de Cuba and Cuba "acted as one" in the nationalization, and that the court's decisions in *Sabbatino,* 307 F.2d 845 (2d Cir. 1962), *reversed,* 376 U.S. 398 (1964), and *Banco Nacional de Cuba v. Farr,* 383 F.2d 166 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1967), established that the actions of the government of Cuba and Banco Nacional "were violations of international law" in the instant case. 478 F.2d 191 (2d Cir. 1973).

That the Second Circuit decisions in *Sabbatino,* both before and after the Supreme Court decision, enunciate a rule of international law applicable in cases involving confiscations of the property of foreign nationals is uncertain, for, the Supreme Court ruling in *Sabbatino* rested in part upon the conclusion that "there are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." 376 U.S. at 428.

129. 406 U.S. at 762, 765. *Accord,* Judge Hays' dissent in *Banco Nactional de Cuba v. First National City Bank,* 442 F.2d 530, 538 (2d Cir. 1971).

government,"[130] and he agreed that it is grounded primarily on the basis that judicial review through the normal adjudicative process of the acts of a foreign power could frustate the conduct of foreign relations by the Executive.[131] In formulating this rationale for the act of state doctrine, Justice Rehnquist adopted and approved a broad view of the "Bernstein exception," saying:

> 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 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.[132]

Justice Douglas concurred in the result. In his view, however, the act of state doctrine, as set forth in *Sabbatino,* did not control the central issue in *FNCB.*[133] Rather, the case is governed by *National City Bank v. Republic of China,*[134] which established that a foreign government suing to recover money in the courts of the United States could not as a matter of "fair dealing" assert sovereign immunity to bar a counterclaim for an amount equal to the amount claimed by the government. Like China, the Government of Cuba invoked our law, and it would "offend our sensibilities if Cuba" could "have our law free from the claims of justice."[135] In effect, if a foreign sovereign seeks redress in the courts of the United States it may not effectively assert the act of state doctrine to bar any valid counterclaim or setoff which may be interposed.[136]

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130. 406 U.S. at 765.

131. *Id.* at 765, 767-68.

132. *Id.* at 768. Thus, reasons Justice Rehnquist, where the reason for the law —to assure the executive branch a free hand in the conduct of foreign relations— ceases, the law itself is no longer applicable. *Id.* Justice Rehnquist argues that "the result we reach is consonant with the principles of equity set forth by the Court" in *National City Bank v. Republic of China,* 348 U.S. 356 (1955) *discussed at* notes 134-37 *infra.*

133. 406 U.S. at 770-73 (Douglas, J.).

134. 348 U.S. 356 (1955).

135. 406 U.S. at 771-72.

136. *Sabbatino* implicitly rejected this line of argument and distinguished any asserted analogy to the *Republic of China* case. 376 U.S. at 437-38.

In both the *Republic of China* and *FNCB* cases, FNCB waived its right to an affirmative recovery in damages on its counterclaims over and above the amount of China's and Cuba's respective claims. Thus, the Supreme Court never passed upon the validity of an affirmative recovery, but Justice Douglas elevated FNCB's litigation tactic into an asserted rule of law on the theory that, while "fair

Finally, Justice Douglas rejected the broad view of the "Bernstein exception" endorsed in the Rehnquist opinion: "[O]therwise the Court becomes a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others."[137]

Justice Powell concurred in the judgment.[138] He stated that although *Sabbatino* "technically reserves the question of the validity of the 'Bernstein exception' "—the reasoning of "Sabbatino implicitly rejects that exception"—at least as interpreted by Justice Rehnquist. Moreover, *Republic of China* is not dispositive. Although attracted by the theory of Justice Douglas, he found little support for the proposition that the "counterclaim is justifiable up to, but no further than, the point of setoff."[139] Rather, his concurrence is based on the view that *Sabbatino* improperly applied the act of state doctrine: "I am not prepared to say that international law may never be determined and applied by the judiciary where there has been an 'act of state'."[140] Nor does the separation of powers dictate the abdiction of the judiciary's responsibility to resolve grievances by the judicial process. "To so argue," says Justice Powell, "is to assume that there is no such thing as international law but only international political disputes that can be resolved only by the exercise of power."[141] He concludes that only where there is a conflict in the rules of the political and judicial branches should the courts invoke the act of state doctrine and abstain from determining a dispute.

In his dissent in the *FNCB* case Justice Brennan, speaking for himself and three other Justices, took issue with Justice Rehnquist's statement of the rationale for the doctrine and adoption of a broad "Bernstein exception." Justice Brennan stressed that the rationale for the act of state doctrine is not primarily "to avoid embarrassment to the political branch," and he embraced Justice Harlan's statement in *Sabbatino* of the foundations of the doc-

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dealing" required the allowance of the counterclaim as a setoff, the act of state doctrine would bar recovery on the counterclaim above the amount claimed by Cuba. 406 U.S. at 772.

See also the Second Circuit opinion in the *Menendez* case, 485 F.2d at 1372-74 and the November 17, 1971, Dept. of State letter, 442 F.2d 530 at 536 *et seq.* (2d Cir. 1971).

137. 406 U.S. at 773.

138. 406 U.S. 773-76 (Powell, J.).

139. *Id.* at 774.

140. *Id.* at 775.

141. *Id.*

trine.[142] He argued that under standards of international law the Cuban expropriation of FNCB's branches is a political question and not cognizable in our courts.[143] But he stated that the task of "defining the contours of a political question" for purposes of the act of state doctrine "is exclusively the function of this Court;" and that the "Bernstein exception as engrafted on the act of state doctrine by Justice Rehnquist relinquishes this task to the Executive" by requiring blind adherence to the Executive's requests that foreign acts of state be reviewed, thus "politicizing the judiciary." Furthermore, Justice Brennan noted that under the "Bernstein exception" as adopted, equal treatment to litigants would be lost, for the "fate of the individual claimant would be subject to the political considerations of the Executive Branch." He criticized *Bernstein* because "the determination of international law is made to depend upon a prior political authorization," thus undermining the decisions of the courts as "dispassionate opinions of principle."[144] Moreover, as a result of the Court's decision, FNCB gained a preference at the expense of other claimants whose property had been nationalized by Cuba, contrary to the intent of the United States Foreign Claims Settlement laws.[145] Justice Brennan also

142. *See* text accompanying notes 111-27 *supra.*

143. 406 U.S. at 788, 789. The characterization of this question as a political question is based upon "the absence of consensus of applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed. . ." *Id.* at 788.

Justice Brennan pointed out that the executive branch, despite its powers in the area of foreign affairs, "cannot by simple stipulation change a political question into a cognizable claim." *Id.* at 789. Justice Douglas concurred in this view. *Id.* at 772. But, said Justice Brennan, the representations of the Department of State, although not determinative, are entitled to weight "for the light they shed on the permutation and combination of factors underlying the act of state doctrine." *Id.* at 790.

144. 406 U.S. at 793. *But see* Justice Frankfurter's dissent in *Baker v. Carr,* 369 U.S. 186 at 267 (1962).

145. In 1964 Congress enacted subchapter V of the International Claims Settlement Act of 1949, which relates to claims against Cuba. 22 U.S.C. §§ 1643-1643K (1970). Congress provided for "the determination of the amount and validity of claims against the Government of Cuba" arising out of "nationalization, expropriation, intervention or other takings" of property of United States nationals. Clearly the expropriation of FNCB's branches in Cuba gave rise to a claim of the sort which Congress intended to submit to the Foreign Claims Settlement Commission. 22 U.S.C. § 1643b(a) (1970). Moreover, Congress and the Executive Branch have acted, pursuant to the Trading with the Enemy Act, 50 U.S.C. app.

rejected as inapposite Justice Rehnquist's reliance on an analogy to the *Republic of China* case and Justice Douglas' sole reliance on that case.[146] He emphasized that his disagreement with Justice Rehnquist touched on the fundamental issue concerning the division of functions between the executive and judicial branches.[147] Significantly, six of the nine Justices in *FNCB* rejected the broad "Bernstein exception" with its required "Bernstein letter."[148] They agreed, rather, that the Supreme Court, not the executive branch, must define the role of the judiciary.

In *Dunhill* Justice White, speaking for himself and three others, reemphasized the rationale for the act of state doctrine set forth by Justice Rehnquist in *FNCB*. Justice White said: "The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations."[149] The *Dunhill* dissent adopted Justice Brennan's argument in *FNCB*, noting "that the validity of an act of a foreign sovereign is, under some circumstances, a 'political question' not cognizable in our courts."[150] Thus, the theoretical basis for the doctrine remains unsettled.

But the Court did not discuss the *Bernstein-Republic of China* analysis applied by the Second Circuit in *Dunhill*. Nor did they discuss the "Bernstein exception"[151] or the *Republic of China* case.[152] However, five Justices affirmed that it is the task of the judiciary, not the executive branch, to decide whether deference to the political branches of government requires application of the

§ 5 (1970), to block all Cuban assets present in the United States. Proc. 3447, 3 C.F.R. 1959-1963 Comp. at 157 (1962). Through its success in this litigation FNCB has circumvented this system of claims submission and blocking of assets.

146. 406 U.S. at 793-96.

147. Further, Justice Brennan notes that the "Bernstein exception" assigns the task of advocating an international standard on expropriations to the courts, thus countenancing an exchange of roles between the judiciary and the executive "contrary to the firm insistence in *Sabbatino* on the separation of powers." 406 U.S. at 791-92.

148. 406 U.S. at 770-73, 776-77.

149. 44 U.S.L.W. at 4670.

150. *Id.* at 4679.

151. The dissent refers to *Bernstein*, 44 U.S.L.W. at 4678.

152. The State Department argued that the doctrine of sovereign immunity does not prevent entry of an affirmative judgment. *See Id.* at 4670, n.12, 4673-74; note 136 *supra*.

act of state doctrine.[153] Nor did Justice White treat the State Department letter furnished in this case as controlling, but he did give it prominence in his decision.[154] Nevertheless, the potentially intractable issues which might be generated by the interaction of the Hickenlooper amendment and the "Bernstein exception" may never arise.[155] The Court's silence in *Dunhill* on *Bernstein* may signal the decline if not the demise of the broad "Bernstein exception," although courts and litigants may still wish to solicit the views of the State Department to ascertain whether the executive branch[156] will be embarrassed. The focus, however, has shifted away from the basis for the act of state doctrine to a possible commercial act exception to the doctrine.

VII. Assertion by a Sovereign of the Act of State Doctrine in Opposition to a Counterclaim

At the heart of the *Dunhill* case are the issues regarding the rights and obligations of the Cuban Government interventors who took possession of the businesses and assets of the cigar manufacturers. Especially at issue is the question whether Dunhill is entitled to an affirmative judgment on its counterclaim against the Cuban Government for amounts mistakenly paid to it for pre-intervention shipments of cigars, or whether Dunhill is barred from judgment on its counterclaim by the act of state doctrine. In *Dunhill* no claim was made that the interventors were an entity separate, distinct, and independent from the Cuban Government.[157] Moreover, Cuba had actively sought and been granted permission to intervene in the original litigation by the former

153. 44 U.S.L.W. at 4675 (Powell, J.), 4678.

154. *Id.* at 4673-74.

155. *See* Professor Lowenfeld's penetrating analysis, *Act of State and Department of State: First National City Bank v. Banco Nacional de Cuba, supra* note 18.

156. 44 U.S.L.W. at 4670. *See also* text accompanying notes 118-22 *supra.* In its letter to the Court the State Department stated: "In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy." 44 U.S.L.W. at 4674.

157. Compare the *FNCB* case. There Banco de Cuba argued that FNCB's counterclaim would not lie against it because that was a claim against the Cuban Government and Banco de Cuba was a separate and independent entity, not an instrumentality of the sovereign. The Second Circuit rejected this argument as not in accord with fact. Banco Nacional de Cuba v. First National City Bank, 478 F.2d 191, 193-94 (2d Cir. 1973).

owners against the importers, so that it could pursue claims for debts due from the importers for cigars shipped after intervention.[158] Thus, a sovereign, Cuba, had sued for affirmative relief in the courts of the United States, once again raising the question whether the act of state doctrine can be invoked against a counterclaim by a sovereign suing in American courts.

In the *Sabbatino* case the Supreme Court seemingly disposed of this issue. The Court's conclusions were as follows: (1) that Cuba's status as a plaintiff did not make the act of state doctrine inapplicable, for "the rebuke to a recognized power would be more pointed were it a suitor in our courts;"[159] (2) that if the doctrine were inapplicable it might "sanction self-help remedies, something hardly conducive to a peaceful international order;"[160] (3) that the forum should not "simply apply its own law to all the relevant transactions;"[161] and, (4) that the asserted analogy to the *Republic of China* case was inapposite because "The act of state doctrine . . . although it shares with the immunity doctrine a respect for sovereign states, concerns the limits for determining the validity of an otherwise applicable rule of law."[162]

This view of the issue was confirmed by Justice Brennan's dissent in the *FNCB* case.[163] However, Justice Douglas reopened the issue with his concurrence in the *FNCB* case by relying on the rationale in the *Republic of China* that "fair dealing" requires recognition of any counterclaim or setoff that eliminates or reduces the sovereign's claim.[164] The Second Circuit relied on Justice Douglas' argument in *Republic of China* to reach its decision in the *Dunhill* case, but the Supreme Court did not address this issue on appeal. Instead, both majority and dissent assumed that Cuba and the interventors could assert the act of state doctrine as a bar to the quasi-contractual claim.[165] Thus, final resolution of this issue must await another case.

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158. F. Palicio y Compania v. Brush, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F. 2d 1011 (2d Cir. 1967), *cert. denied*, Brush v. Republic of Cuba, 389 U.S. 830 (1967).

159. 376 U.S. at 437.

160. *Id.* at 438.

161. *Id.*

162. *Id.*

163. 406 U.S. at 795-96.

164. *Id.* at 770-73.

165. 44 U.S.L.W. at 4667-68, 4676.

VIII. An Exception to the Act of State Doctrine for "Purely Commercial Operations"

The most important new departure brought by the *Dunhill* decision is Justice White's articulation of a new limitation on the act of state doctrine: an exception for "purely commercial operations." Like the Court in *FNCB,* the Court in *Dunhill* was seeking a limitation on the broad sweep given the act of state doctrine in *Sabbatino.* The attempted engrafting of the "Bernstein exception" to the doctrine in *FNCB,* with its attendant subservience to the views of the executive branch, was apparently unsatisfactory to the *Dunhill* Court. While the *Dunhill* Court found that the act of repudiation was not an act of state, four Justices, led by Justice White, would have decided the case on the additional basis that the act was "purely commercial" in nature and not protected from review by the act of state doctrine.

Justice White argued that the concept of an act of state should not be extended to include the repudiation of a "purely commercial obligation" owed by a foreign sovereign or one of its commercial instrumentalities.[166] The dissent stated that a commercial act exception was not appropriate in the *Dunhill* case, but reserved its position on whether, and under what circumstances, such an exception might be appropriate. The dissent then commented on the proffered rationale for the exception.[167] Justice Stevens did not address the issue.[168] Whether the Court will eventually accept a commercial act exception is thus an open issue.

Justice White distinguished between the public or governmental acts of a sovereign state and its private or commercial acts.[169] He stated that the quasi-contractual obligation to repay Dunhill arose from the operation of the cigar businesses as a commercial business by Cuba's agents, the interventors. Hence, the case is no different from a case where the buyer overpays for goods sold by a commercial business operated by a foreign government—a commonplace occurrence in international commerce.[170] In order

166. *Id.* at 4669.

167. *Id.* at 4678. *See* text *infra* at note 174.

168. *Id.* at 4676.

169. *Id.* at 4669, quoting Chief Justice Marshall in *Bank of United States v. Planters' Bank of Georgia,* 22 U.S. (9 Wheat.) 904, 907 (1824). *See also* the State Department letter dated November 26, 1975, 44 U.S.L.W. 4673-74 (1976).

170. 44 U.S.L.W. at 4670 n.11. Justice Marshall for the dissent finds it difficult to accept Justice White's characterization of the course of conduct involved as "purely commercial." 44 U.S.L.W. at 4680 n.16.

to avoid embarrassing conflicts with the executive branch which would transgress the major underpinning of the act of state doctrine, the Court is in no sense "compelled to recognize the purely commercial conduct of foreign governments as an act of state in order to avoid embarrassing conflicts with the Executive Branch." On the contrary, ". . . we fear that embarrassment and conflict would more likely ensue if we were to require" recognition of the repudiation as an act of state.[171]

In arguing for the exception, Justice White placed primary emphasis on the consistency of the exception with the restrictive theory of sovereign immunity. The restrictive theory of sovereign immunity appears to be the generally accepted or prevailing law in the United States and has been the official policy of the United States Government since 1952.[172] Thus it follows that:

> Repudiation of a commercial debt cannot, consistent with this restrictive approach to sovereign immunity, be treated as an act of state; for if it were, foreign governments, by merely repudiating the debt before or after its adjudication, would enjoy an immunity which our government would not extend to them under prevailing sovereign immunity principles in this country. This would undermine the policy supporting the restrictive view of immunity . . . .[173]

The dissent issued a sharp reply. Justice Marshall pointed out that the two doctrines, while related, "differ fundamentally in their focus and in their operation." Whereas sovereign immunity accords a defendant an exemption from suit by virtue of its status, the act of state doctrine merely tells a court what law to apply to a case.[174] In rejoinder Justice White stated that the proper applica-

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171. 44 U.S.L.W. at 4670.

172. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 69 (1971); Tate letter, 44 U.S.L.W. at 4674-75 App. 2. *See* note 104 *supra.*

The Supreme Court as yet has not adopted the restrictive view of Marshall's dissent, 44 U.S.L.W. at 4679. Justice White labors to show that *Berizzi Bros. Co. v. The Pesaro,* 271 U.S. 562 (1926), is no longer the law. Recently the Departments of State and Justice have jointly proposed legislation to codify restrictive or limited sovereign immunity, H.R. 3493, S. 566, 93d Cong., 1st Sess. (1973). *See* Comm. Rep't, 30 [Record of N.Y.C.B.A.] 301-305 (1975); Atkeson, Perkins & Wyatt, *H.R. 11315—The Revised State—Justice Bill on Foreign Sovereign Immunity: Time for Action,* 70 AM. J. INT'L L. 298 (1976).

173. 44 U.S.L.W. at 4670. An increasing number of foreign states have adopted the restrictive view. *See* citations set forth in 44 U.S.L.W. at 4671 n.15. *See also European Convention on Sovereign Immunity,* 11 INT'L L. MAT. 470 (1972).

174. 44 U.S.L.W. at 4679. *Compare* Justice Douglas' views in *FNCB, with* text accompanying notes 133-37 *supra.*

tion of each involves a "balancing of the injury to our foreign policy."[175] Justice White also offered a more practical justification. He said that the participation of foreign sovereigns in international commerce has increased substantially in recent years, thus increasing the potential injury to international trade from a system in which some of the participants are not subject to the rule of law. In commercial matters foreign sovereigns do not exercise powers peculiar to sovereigns. They exercise powers exercised by private citizens. Accordingly, the more discernible rules of international law regarding commercial dealings[176] should be applied to the commercial transactions of sovereign states. Furthermore, subjecting states to these rules of law is "unlikely to touch very sharply on 'national nerves.' "[177] Justice White concluded by saying that because the act relied on by the interventors was an act in "the operation of cigar businesses for profit, the act was not an act of state."[178] "If the act is a commercial act whether the actor is invested with or exercising sovereign authority is immaterial; the act is not an act of state."[179]

The dissent questions, in a general criticism, the wisdom of attempting to articulate any broad exception to the act of state doctrine within the confines of a single case. It favors the case-by-case approach.[180] Certainly if a commercial act exception to or limita-

175. 44 U.S.L.W. at 4672 n.18.

176. Here Justice White comes close to the notion that acts of state in the commercial area are subject to review under international law standards.

See LOWENFELD, INTERNATIONAL PRIVATE TRADE 1-2 (1975); Gal, *The Commercial Law of Nations and the Law of International Trade,* 6 CORN. INT'L L.J. 55, 64 (1972); Pajski, *The Law of International Trade of Some European Socialist Countries and East-West Trade Relations,* 1967 WASH. U.L.Q. 125, 137; Schmithoff, *The Unification or Harmonization of Law by Means of Standard Contracts and General Conditions,* 17 INT'L & COMP. L.Q. 551, 563-64 (1968). *See also* Goldstein, *International Conventions and Standard Contracts as a Means of Escaping from the Application of Municipal Law;* Jonasco, *The Limits of Party Autonomy;* Knapp, *The Function, Organization and Activities of Foreign Trade Corporations in the European Socialist Countries;* Trammer, *The Law of Foreign Trade in the Legal Systems of the Countries of Planned Economy,* in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE (Schmitthoff, ed. 1964).

177. Justice White then states that: ". . . the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label 'Act of State' than if it is given the label 'sovereign immunity'." 44 U.S.L.W. at 4672.

178. 44 U.S.L.W. at 4673.

179. *See* text accompanying notes 66-90 *supra.*

180. 44 U.S.L.W. at 4679.

tion of the act of state doctrine is to be accepted, much litigation is ahead before the contours of such an exception will be known. Justice White leaves unanswered a number of key questions.

For example, if the commercial act exception is based upon the restrictive theory of sovereign immunity, are we then to look to the cases and practice on sovereign immunity to discern the scope of the commercial act exception? If so, we are thrust into yet another legal thicket. If we look solely to the cases, they offer guidelines that are far from clear.[181] On the other hand, under the Tate letter[182] procedure, a request is made to the State Department for its position on the immunity of a foreign sovereign power. After informal hearing, the State Department, through the Attorney General, communicates its opinion to the courts. This "suggestion of immunity" by the Department is generally deferred to by the court.[183] Thus, under the commercial act exception the courts may be no better off than they are under the "Bernstein exception"—subject to the political decisions of the executive branch.[184] There is some hope, however, that this dependence of the judiciary on the executive may be ended, for legislation is now pending in Congress to place determinations of immunity solely in the courts.[185] But enactment of that bill would then raise the further question of whether the commercial act exception proposed by Justice White will be construed as broadly as the restrictions on sovereign immunity in the bill or simply as broadly as the "commercial activity" restriction as defined in that bill.[186] If, on the other hand, the

181. *See* Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971), *cert. denied,* 404 U.S. 985 (1971); Victory Transport Inc. v. Comisaria General, 336 F.2d 354, 359-60 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965); Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va. 1961), *aff'd,* 295 F.2d 24 (4th Cir. 1961); Chemical Natural Resources, Inc. v. Venezuela, 420 Pa. 134, 215 A.2d 864 (1966), *cert. denied,* 385 U.S. 822 (1966); Falk, *The Immunity of Foreign Sovereigns in United States Courts,* 6 N.Y.U. J. INT'L L. & POL. 473 (1973); Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States—II,* 22 BUS. LAW. 3, 15-23 (1966).

182. *See* notes 104, 163 *supra.*

183. Atkeson, Perkins & Wyatt, *supra* note 163, at 301.

184. For criticism of judicial deference to the State Department *compare* Jessup, *Has the Supreme Court Abdicated One of Its Functions?,* 40 AM. J. INT'L L. 168 (1946) *with* Justice Brennan's dissent in *FNCB* at text accompanying notes 142-47 *supra and* Lowenfeld, *supra* note 18.

185. H.R. 11315 *in* 70 AM. J. INT'L L. 313-21 (1976).

186. The bill defines commercial activity in § 1603(d) as "either a regular course of commercial conduct or a particular commercial transaction or act." Section-by-Section Analysis, 15 INT'L L. MAT. 102 (1976), cites as examples of

commercial act exception is not meant to necessarily follow the contours of the restrictive theory of sovereign immunity, the scope of the proposed exception is even less discernible.

In either event, whether subject to the limits of the restrictive theory or not, the term "commercial" needs definition. Does commercial conduct or activity include the sale of oil, coal, bauxite, sugar cane, copper, or other commodity?[187] What if the commodity were still in the ground or growing in the field—would a purported expropriation reach it? What if the commodity were mined or harvested but in storage awaiting shipment? What if the commodity were loaded on a ship but within the territorial waters of the selling country—would an expropriation reach it?[188] What if the commodity were on board ship on the high seas in ships of the country of origin—would an expropriation reach it? Or, again, is the purchase of a commercial enterprise a commercial act? Apparently the expropriation of a commercial enterprise is not a commercial act.[189]

Moreover, the Court did not recognize or comment upon the *Bernstein-Republic of China* analysis made by the Second Circuit. It seems that Justice Douglas' argument, based upon the *Republic of China* case,[190] has been bypassed by Justice White's commercial act exception, based as it is on the restrictive theory of sovereign immunity. Furthermore, no member of the Court spoke out on behalf of the broad "Bernstein exception," but if "commercial act" does not include foreign expropriations, perhaps the "Bernstein exception" may only be in decline or disfavor and yet waiting for resurrection. For all the unanswered questions, pitfalls, and criticisms, a commercial act exception may be a practical and a judicially appropriate means of limiting the scope of the act of state doctrine as set forth in *Sabbatino*.

IX. CONCLUSION

The Supreme Court's decision in the *Dunhill* case has answered but a few of the act of state doctrine questions raised by the

"commercial activity" "a foreign government's sale of a service or a product, its leasing of property, its borrowing of money."

187. Justice White rules out expropriations, but without careful definition. 44 U.S.L.W. at 4672.

188. In *Sabbatino* the sugar was in process of being loaded onto a ship. 376 U.S. at 403. Thus, if the Court had recognized a commercial act exception, would it have decided the *Sabbatino* case differently?

189. 44 U.S.L.W. at 4672.

190. *See* text accompanying notes 134-37 *supra*.

Sabbatino and *FNCB* cases, and by the lower court decisions in the *Dunhill* case itself. Nevertheless, we know that the act of state doctrine is a doctrine of judicial restraint, not a limitation on the courts' jurisdiction; that it is a principle of federal common law; that it is not required by international law; that it overrides conflict of laws analysis; and that, as a corollary, courts will not undertake to pass upon the validity of an official act of a foreign state under the laws of that state. The following conclusions can be drawn:

1. The Supreme Court has, it seems, accepted that the situs of a debt is where the debtor can be found for purposes of the act of state doctrine.

2. The majority of the Supreme Court would like to limit the reach of the doctrine. In *Dunhill* the Court rejected the dissent's position that the "act" involved was a course of conduct beginning with the nationalization of the cigar businesses. Rather, the Court said the act in question was the discreet act of repudiating the interventors' quasi-contractual obligation.

3. In order to commit an act of state the actor must be invested with sovereign power and exercise that power by formal or informal affirmative action and, probably, also by intentional refusal to act.

4. While the Court cannot agree on the basis for the act of state doctrine, the White-Rehnquist view holds that the major underpinning is the policy not to review the legality of acts of states that might embarrass the executive branch of the Government in the conduct of foreign relations. The Marshall-Brennan-Harlan basis for the doctrine is more complex and in part reflects the notion that the validity of an act of state may be a "political question" not cognizable in our courts. In *Dunhill* the Court was split four-to-four with Justice Stevens not speaking to this issue.

5. In *FNCB* the majority of the Justices sought to limit the apparent broad reach of *Sabbatino* in various ways. One way proposed by three of the Justices was adoption of a broad "Bernstein exception" to the doctrine. The Court has, however, apparently drawn away from this approach and its total dependence on the views of the executive branch. Nevertheless, a State Department letter may be persuasive as to whether the executive branch has been embarrassed, and in a non-commercial act case such a letter may be controlling.

6. The Supreme Court has also stayed away from Justice Douglas' reliance on the *Republic of China* case analogy.

7. A country that seeks an affirmative judgment in the courts of the United States can assert the act of state defense to a counter-

claim in the same case even if the counterclaim arises out of the same transaction on which the main claim is based.

8. In *Dunhill* the main debate focused on Justice White's proposed commercial act exception to the act of state doctrine. The commercial act exception holds that even if an act is done by a person invested with sovereign power in the exercise of that power, if the act is purely commercial in nature it may be reviewed in our courts under applicable national and international rules of commercial law. Significantly, the dissent did not rule out the possible validity and future relevance of a commercial act exception. It merely said that *Dunhill* was not an appropriate case for its application. Also, Justice Stevens has not yet set forth his views of such an exception.

9. Justice White said that the commercial act exception is consistent with the restrictive theory of sovereign immunity, and without the commercial act exception, the restrictive theory would be a nullity. The dissent demurred to this argument.

The *Dunhill* decision is surprising in that it dealt with so few issues of the act of state doctrine; yet it may be the watershed of a most important commercial act exception to the act of state doctrine.