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Recent Developments

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RECENT DEVELOPMENTS

Doctrines of Sovereign Immunity and Act of State —Conflicting Consequences of State Department Intervention

I. INTRODUCTION

The doctrine of sovereign immunity[1] prohibits the courts from assuming jurisdiction of a foreign sovereign without that sovereign's voluntary acquiescence, and the act of state doctrine[2] prohibits the courts from assuming jurisdiction to judge the acts of a foreign sovereign performed within the geographical borders of its own country. In the United States, a judicial determination of self-restraint under either of these two doctrines effectively operates to bar further litigation on complaints brought against foreign governments or their instrumentalities and on complaints brought against private individuals, but based on the acts of their sovereigns. Despite the common policy foundations of each doctrine, two recent decisions of the Second Circuit Court of Appeals, *Isbrandtsen Tankers, Inc. v. President of India*[3] and *Banco Nacional de Cuba v. First National City Bank*,[4] indicate fundamental inconsistencies, first in the kind of presumption created by the executive's failure to submit a suggestion of restraint, and, secondly, in the degree of conclusiveness afforded State Department recommendations when they are submitted.

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1. "[A]ccording to the rule *par in parem non habet imperium*—no State can claim jurisdiction over another. Therefore, although States can sue in foreign courts, they cannot as a rule be sued here, unless they voluntarily submit to the jurisdiction of the court concerned." 1 L. OPPENHEIM, INTERNATIONAL LAW § 115(a), at 264-65 (8th ed. 1955).

2. "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

3. 446 F.2d 1198 (2d Cir. 1971).

4. 442 F.2d 530 (2d Cir.), *cert. granted*, 404 U.S. 820 (1971).

II. THE DOCTRINE OF SOVEREIGN IMMUNITY AND ISBRANDTSEN TANKERS

The doctrine of sovereign immunity was first applied by the Supreme Court in *Schooner Exchange v. McFaddon*.[5] Expressly avoiding the issue of the conclusiveness to be afforded an executive suggestion of immunity,[6] and desiring not to embarrass the executive branch in its formulation of United States foreign policy,[7] Chief Justice Marshall found immunity to be compelled by the international law of comity, which recognized the "perfect equality and absolute independence of sovereigns."[8] American decisions followed this rationale until 1943,[9] when the Supreme Court finally addressed the question of the conclusiveness of executive recommendations in *Ex parte Peru*.[10] Reiterating Marshall's concern that the executive be protected from embarrassment, Chief Justice Stone found a *duty* on the part of the judiciary to accept a State Department certification and suggestion of immunity as a conclusive determination that this immunity be granted, thus obviating any necessity for invoking the international law of comity.[11] This deference to State Department recommendations was later strengthened in *Republic of Mexico v. Hoffman*,[12] when the Court held that, in the absence of such expressions of executive preference, the courts were free to grant immunity only on grounds already recognized by the Department of State. In response to this opinion, the State Department published the Tate Letter,[13] which is an express promulgation of guidelines that the State Department indicated it would attempt to follow in determining whether to suggest immunity in future cases.[14] This communica-

5. 11 U.S. (7 Cranch) 116 (1812). For an earlier case involving this doctrine see Moitez v. The South Carolina, 17 F. Cas. 574 (No. 9697) (Pa. Adm. 1781).

6. 11 U.S. (7 Cranch) at 138.

7. *Id.* at 140.

8. *Id.* at 137.

9. *E.g.*, Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926) (immunity granted despite State Department suggestion to the contrary); Kawananakoa v. Polyblank, 205 U.S. 349 (1907) (immunity granted to Territory of Hawaii on property claim); The Maliakos, 41 F. Supp. 697 (S.D.N.Y. 1941) (immunity from attachment granted to a ship which had been certified by the State Department as belonging to Greek government); Sullivan v. Sao Paulo, 36 F. Supp. 503 (E.D.N.Y.), *aff'd*, 122 F.2d 355 (2d Cir. 1941) (immunity granted to separate state of Brazilian government).

10. 318 U.S. 578 (1943).

11. *Id.* at 588.

12. 324 U.S. 30 (1945).

13. Letter of Acting Legal Adviser, Jack B. Tate, to Dep't of Justice, May 19, 1952, in 26 DEP'T STATE BULL. 984 (1952).

14. Although Tate disclaimed any intention of establishing guidelines to be followed by the Supreme Court, that they would be followed could reasonably have been anticipated in light of the *Ex parte Peru* and *Republic of Mexico* decisions.

tion announced the State Department's decision to substitute a restrictive theory of sovereign immunity for the older, absolute doctrine. Traditionally, the assertion of court jurisdiction over a foreign government had been viewed as subordination of that government to the domination of the court, at variance with all accepted notions of international comity and the equality of nations.[15] Thus it developed that a foreign sovereign could only be subjected to suit when it willingly acquiesced to the court's jurisdiction. The increasing interdependence of nations in the twentieth century resulted in greater governmental participation in areas traditionally reserved to the private sectors, and emphasized the inequities of applying this absolute doctrine to restrain judicial redress of grievances arising from the increased economic and social intercourse between foreign governments and private individuals. These developments caused a number of nations to recognize a restrictive theory of immunity, authorizing immunity from suit for sovereign public acts—*jure imperii*—of foreign states, but not for acts of a private nature—*jure gestionis*.[16] Three of the factors fundamental to the State Department's decision to follow this newer theory were: (1) the growing number of other nations adopting the restrictive doctrine, (2) the willingness of the United States to subject itself to suit for its private acts in this country,[17] and (3) the increasing number of American citizens engaging in commercial transactions with or investing in the economies of foreign governments.[18] The Supreme Court, in *National City Bank v. Republic of China*,[19] relaxed the traditional sovereign immunity restraints, as suggested by the Tate Letter, and, despite the State Department's failure to express an opinion in the case,[20] denied immunity from a defensive counterclaim. The Court reasoned that because the Chinese government voluntarily subjected itself to the federal court's jurisdiction by initiating the action, to allow immunity from the counterclaim would

15. *See* text accompanying note 8 *supra*.

16. *Cf.* Lauterpacht, *The Problems of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 250-72 (1951).

17. *Cf.* Federal Tort Claims Act (codified in scattered sections of 28 U.S.C.).

18. 26 DEP'T STATE BULL. 984, 985 (1952).

19. 348 U.S. 356 (1955). The Republic of China initiated the action to recover certain funds deposited in defendant bank, and defendant interposed a counterclaim for the value of certain defaulted Chinese treasury notes. China asserted immunity from this counterclaim on the grounds that the activity complained of—the default—was a matter of fiscal management and, therefore, *jure imperii*. The Court agreed that the default constituted *jure imperii*, but allowed the set-off on other grounds.

20. No opinion was requested by the government of China, and the State Department did not volunteer one. 348 U.S. at 364.

be grossly inequitable.[21] A more affirmative application of the Tate Letter was made by the Second Circuit in *Victory Transport, Inc. v. Comisaria General*,[22] when it denied immunity in a suit to compel arbitration pursuant to a provision of a commercial charter party. Responding to the lack of any established, definitive guidelines by which the *jure imperii/jure gestionis* characterization could be made,[23] the court restricted public acts warranting immunity to acts falling within five distinct categories.[24] In so doing, the court stated that it would not sacrifice the interest of private litigants to international comity in situatons other than those described in the announced five categories, and if foreign policy considerations required any deviation from the prescribed list, the State Department was still free to file a suggestion of immunity.[25] Such a suggestion was in fact filed and followed by the Fourth Circuit in *Rich v. Naviera Vacuba, S.A.*,[26] despite the clearly private nature of the activities involved. In that case, the plaintiffs libelled a Cuban commercial vessel, which had been hijacked by the Cuban crew and brought into Norfolk harbor, to satisfy a prior consent judgment for which immunity from execution had been waived by the Cuban government. The State Department, however, had entered into an agreement with the Cuban government two days after the actual hijacking and before the libel was

21. *Id.* at 362.

22. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

23. Legal scholars previously had recognized the inadequacies of this distinction when considering the restrictive theory as it operated in other countries. *See, e.g.*, Fitzmaurice, *State Immunity from Proceedings in Foreign Courts*, 14 BRIT. Y.B. INT'L L. 101, 123-24 (1933); Lauterpacht, *supra* note 16, at 225-26.

24. Acts that would be considered *jure imperii* were limited to the following: "(1) internal administrative acts, such as expulsion of an alien; (2) legislative acts, such as nationalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic activity; (5) public loans." 336 F.2d at 360.

25. "Should diplomacy require enlargement of these categories, the State Department can file a suggestion of immunity with the court. Should diplomacy require contraction of these categories, the State Department can issue a new or clarifying policy pronouncement." *Id. See also* Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir. 1966) (State Department refused to suggest immunity basing its decision on Tate Letter); Three Stars Trading Co. v. Republic of Cuba, 32 Misc. 2d 4, 222 N.Y.S.2d 675 (Sup. Ct. 1961) (action on contract for purchase of shrimp); Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960), *aff'd mem.*, 17 App. Div. 2d 927, 233 N.Y.S.2d 1013 (1962) (action on contract for sale of meat to Turkey to be used in supplying the army or for resale to general public).

26. 295 F.2d 24 (4th Cir. 1961). *See also* New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955) (action for damages to plaintiff's ship caused by defendant's lighter while delivering rice to defendant for free distribution to Korean military and civilian personnel during Korean War); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864, *cert. denied*, 385 U.S. 822 (1966) (action for breach of contract to erect power plant and to recover property confiscated by Venezuelan government).

commenced, promising to release the ship in return for reciprocal Cuban action concerning an Eastern Airlines plane that had been hijacked and taken to Cuba a month before.[27] Thus immunity had been suggested to enable full performance of the agreement.

This was the state of the law of sovereign immunity facing the Second Circuit in *Isbrandtsen Tankers, Inc. v. President of India.*[28] The State Department again suggested immunity despite the seemingly private nature of the commercial transaction in issue.[29] The court rejected plaintiff's argument that defendant had waived immunity both expressly in the charter party[30] and impliedly in serving and filing an answer to the complaint, and gave effect to the executive's suggestion. It was reasoned that the potential embarrassment or harm resulting to the federal government from a judicial finding of jurisdiction, in the presence of a contrary executive recommendation, is just as severe when the foreign sovereign initially had contracted to waive its claims of sovereign immunity as when it had not done so. As such, *Isbrandtsen Tankers* was both an application of the rationale of prior decisions granting conclusive effect to executive suggestions of immunity, and an extension of this reasoning to situations in which the sovereign's defense of immunity had been expressly waived.[31]

III. The Act of State Doctrine and Banco Nacional de Cuba

The Supreme Court first recognized the act of state doctrine[32] at the close of the last century in *Underhill v. Hernandez*,[33] recognizing that

27. Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 714-15 (E.D. Va. 1961). For a more detailed discussion of the circumstances underlying the State Department's considerations see 45 Dep't State Bull. 407 (1961); Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 Cornell L.Q. 461, 464-67 (1963).

28. 446 F.2d 1198 (2d Cir. 1971).

29. The parties had contracted for the delivery of grain to India as part of an Indian government campaign to relieve a food shortage. The Second Circuit mentioned that this activity might be classified as private on its face under the *Victory Transport* guidelines, but cautioned that such a characterization should not be made without reference to the purpose of the transaction. *Id.* at 1200 (dicta).

30. The Charter Party provided: "Any and all differences and disputes arising under this Charter Party are to be determined by the U.S. Courts for the Southern District of New York, but this does not preclude a party from pursuing any *in rem* proceedings in another jurisdiction or from submission by mutual agreement of any differences or disputes to arbitration." *Id.* at 1199 n.3.

31. An earlier decision by the Fourth Circuit had indicated that it would follow a State Department suggestion of immunity even though the sovereign had impliedly waived its immunity by making a general appearance before the court. Flota Maritima Browning de Cuba v. Motor Vessel Ciudad de La Habana, 335 F.2d 619, 625 (4th Cir. 1964) (dicta).

32. *See* note 2 *supra*.

33. 168 U.S. 250 (1897). *See also* Hatch v. Baez, 7 Hun. 596 (N.Y. App. Div. 1876).

acts performed by a Venezuelan revolutionary general, who later acquired power, were official acts of state and not subject to scrutiny by the United States courts. Not unlike the *Schooner Exchange Case*, the *Underhill* decision was grounded on the Court's construction of the international law of comity.[34] Implicit in the decision was the recognition that the act complained of was a matter to be resolved by the executive in its management of United States foreign affairs. The first instance of executive intervention in the application of this doctrine occurred following the Second World War in a series of suits brought by a German Jewish immigrant to recover the insurance proceeds of a sunken ship that the German government had coerced him into transferring to a Nazi sympathizer. In *Bernstein v. van Heyghan Freres Societe Anonyme*,[35] the court construed the coerced conveyance as a sovereign act of state and refused to adjudicate the merits. In a later action involving the same claim, the State Department communicated its opinion that the courts should not be encumbered by the act of state doctrine when asked to determine the validity of Nazi confiscations,[36] and the Second Circuit subsequently remanded the case for consideration on its merits,[37] thus creating the "*Bernstein* exception" to the act of state doctrine.[38] The doctrine also was applied in the 1960's to bar judicial examination of Cuban confiscations in *Banco Nacional de Cuba v. Sabbatino*.[39] In that

34. 168 U.S. at 252. That the act of state doctrine was based on a concept of international comity was repeated by the Court 2 decades later: "[The act of state doctrine] rests at last upon the highest consideration of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918). *See also* Ricaud v. American Metal Co. Ltd., 246 U.S. 304 (1918).

35. 163 F.2d 246 (2d Cir. 1947).

36. "This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or people subject to their controls. . . . The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." Letter of Acting Legal Adviser, Jack B. Tate, to the Attorneys for the Plaintiff, April 13, 1949, in 210 F.2d at 376.

37. Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (per curiam). The claim was later settled out of court.

38. The *Bernstein* exception became the subject of extensive legal commentary. *See, e.g.*, Hyde, *The Act of State Doctrine and the Rule of Law*, 53 AM. J. INT'L L. 635 (1959); Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959).

39. 376 U.S. 398 (1964), *rev'g* 307 F.2d 845 (2d Cir. 1962), *aff'g* 193 F. Supp. 375 (S.D.N.Y. 1961).

case, the district court rejected the argument that *Bernstein* created a presumption in favor of invoking the doctrine in all those cases in which the executive failed to suggest otherwise, and found itself unrestrained from adjudicating on the merits of the claim.[40] The court reasoned that the act of state doctrine was one of self-imposed judicial restraint, which need not be given effect when the act in question was in violation of international law.[41] The Supreme Court ultimately reversed, however, emphasizing the traditional rationale supporting the restraint of judicial examination of the acts of foreign sovereigns.[42] Attempting to negate the implications of *Sabbatino* and to reverse the presumption of nonjusticiability in the absence of a contrary executive suggestion, Congress quickly enacted the Hickenlooper amendment to the Foreign Assistance Act of 1961,[43] which removed all act of state restraints from the courts in uncompensated-for property seizure cases, except when the State Department expressly directed otherwise.[44]

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40. 193 F. Supp. at 381.

41. *Id.*

42. The Court declined to examine the validity of the *Bernstein* exception per se, but at least 2 authorities have concluded that "the rationale upon which [the Supreme Court's] decision [in *Sabbatino*] was based would clearly include the possibility of executive waiver of the doctrine where this was politically useful." Cheatham & Maier, *Private International Law and Its Sources*, 22 VAND. L. REV. 27, 91 (1968).

43. 78 Stat. 1012-13, *as amended*, 22 U.S.C. § 2370(e)(2) (1970). The amendment was in large part designed as a protection of American investors in foreign countries from the threat of seizure and as a means of retaliation against the Castro government in particular. *See Hearings on the Foreign Assistance Act of 1965 Before the House Comm. on Foreign Affairs*, 89th Cong., 1st Sess. 1069, 1304, 1315-16, 1318-19; *Hearings on the Foreign Assistance Program Before the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 731-34, 750-52, 759-60 (1965); Letter from Senator Hickenlooper to the Washington Post, July 27, 1964, in 110 CONG. REC. 19546 (1964). The State Department opposed adoption of the amendment, apparently supporting a codification of the *Bernstein* exception. *See* Letter from George W. Ball, Acting Secretary of State, to Senator William Fulbright, Chairman of the Senate Foreign Relations Comm., in *Hearings on the Foreign Assistance Program Before the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 728-29 (1965).

44. The original Hickenlooper amendment provided for the suspension of assistance to governments that had "nationalized or expropriated or seized ownership or control of property owned by any United States citizen. . . ." 22 U.S.C. § 2370(e)(1) (1970). The *Sabbatino* amendment to the original Hickenlooper amendment provided: "Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of principles of international law . . . *Provided*, That this subparagraph shall not be applicable . . . (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." 22 U.S.C. § 2370(e)(2) (1970). On remand to the district court,

In *Banco Nacional de Cuba v. First National City Bank*,[45] plaintiff, an instrumentality of the government of Cuba, having defaulted on a loan, brought an action to recover money held by defendant bank in excess of the proceeds of the collateral originally pledged by Cuba.[46] Defendant counterclaimed for a set-off in the amount of the value of its property that previously had been seized by the Cuban government. The district court held that the Hickenlooper amendment was applicable and allowed the set-off.[47] The Second Circuit reversed, holding that the Hickenlooper amendment was addressed solely to those situations in which the expropriator attempted to market the expropriated property in the United States.[48] The Supreme Court vacated and remanded for reconsideration in light of a State Department communication which stated that foreign relations between the United States and Cuba did not require the application of the act of state doctrine to restrain the courts from reaching the merits.[49] On remand, the Second Circuit adhered to its earlier decision and held that the State Department's letter did not constitute the requisite statement for relief under the *Bernstein* exception, emphasizing that in *Bernstein* the United States had gone to war with the nation whose acts were in question, and that the foreign government had been dissolved by the time of the litigation.[50]

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this amendment was applied in the *Sabbatino* case itself and held constitutional. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 957 (1968).

45. 442 F.2d 530 (2d Cir. 1971).

46. Prior to the Castro revolution, defendant had loaned the government of Cuba $15,000,000, secured by certain obligations of the United States Government and the International Bank for Reconstruction and Development. Following the revolution, Cuba confiscated, without compensation, a number of banks belonging to defendant. Defendant then sold the collateral to pay the balance of the loan that had since become due, retaining the excess of these proceeds over the amount needed to satisfy the defaulted loan as compensation for its seized property. It is this excess amount that formed the subject of the parties' claims in the instant case.

47. 270 F. Supp. 1004 (S.D.N.Y. 1967). The court denied the sovereign immunity claim, relying on National City Bank v. Republic of China, 348 U.S. 356 (1955). *See* notes 19-21 *supra* and accompanying text.

48. Banco Nacional de Cuba v. First Nat'l City Bank, 431 F.2d 394, 402 (2d Cir. 1970) ("We cannot believe that through the same language Congress intended to create a self-help seizure remedy for those few American firms fortunate enough to hold or have access to some assets of a foreign state at the time that that state nationalizes American property"). *See also* French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968).

49. First Nat'l City Bank v. Banco Nacional de Cuba, 400 U.S. 1019 (1970). The executive communication stated: "The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases." Letter from John R. Stevenson to E. Robert Seaver, Nov. 17, 1970, in Banco Nacional de Cuba v. First Nat'l City Bank, 442 F.2d 530, 536 (2d Cir. 1971).

50. Banco Nacional de Cuba v. First Nat'l City Bank, 442 F.2d 530 (2d Cir. 1971). *See also* note 37 *supra*.

IV. CONCLUSION

The Second Circuit's policy with respect to the application of the doctrine of sovereign immunity in *Isbrandtsen Tankers* and the act of state doctrine in *Banco Nacional de Cuba* presents an inconsistency that, when examined in light of the common policy bases of both doctrines,[51] appears to be irreconcilable. Both the Tate Letter and its judicial recognition by the Supreme Court in *National City Bank v. Republic of China*,[52] established a judicial presumption against sovereign immunity in cases involving *jure gestionis* when the State Department fails to recommend immunity.[53] A contrary presumption—a presumption of nonjusticiability—developed in the application of the act of state doctrine in cases involving uncompensated-for confiscations. This presumption required an affirmative *Bernstein* statement by the executive before the judicial restraint from considering the act of state would be removed. Manifest in the Hickenlooper amendment was a legislative effort to reverse this presumption to one of justiciability.[54] Thus, after the Hickenlooper amendment, the presumptions in both the doctrines of sovereign immunity and act of state should have been consistent. Through its decision in *Banco Nacional de Cuba*, however, the Second Circuit effectively destroyed this uniformity; by restricting the applicability of the Hickenlooper amendment to only those cases involving direct claims to the property actually expropriated, the court has rendered this amendment a practical nullity,[55] and has reinstated the former presumption of nonjusticiability by making the act of state doctrine applicable in almost every case involving expropriations without compensation. Therefore, while the doctrine of sovereign immunity recognizes a presumption of justiciability in cases in which the executive fails to intervene—concededly a situation not involved in the *Isbrandtsen Tanker* case—the act of state doctrine, as delineated by the Second Circuit in *Banco Nacional de Cuba*, creates a presumption of nonjusticiability when the executive fails to intervene.

An examination of this first aspect of inconsistency requires a bal-

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51. *See* materials cited notes 5-9, 33-34 *supra* and accompanying text.

52. 348 U.S. 356 (1955). *See* notes 19-21 *supra* and accompanying text.

53. Maier, *Sovereign Immunity and Act of State: Correlative or Conflicting Policies?* 35 U. CIN. L. REV. 556, 562 (1966).

54. *See* materials cited note 43 *supra*.

55. This is especially so with respect to Cuban expropriations, those with which Congress was primarily concerned in enacting the amendment, as a result of the federal embargo on the importation of all goods of Cuban origin. *See* Exec. Proclamation No. 3447, 3 C.F.R. 157-58 (1959-63).

ancing of the desire to effectuate the policy behind these two doctrines with the desire to protect American citizens in their claims against foreign nations or in their claims arising out of the acts of these nations. There appears to be no rational basis for changing the present presumption operating in sovereign immunity cases. By taking jurisdiction of a foreign government only in those areas outlined by the Tate Letter and *Victory Transport*,[56] the courts are in no way attacking the independent and equal sovereignty of these governments. Certainly, it can be argued, these governments are very much apprised of the developments in this area of United States law, and by deciding to participate in nonimmune activities—*jure gestionis*—they have acknowledged that they can be subject to the jurisdiction of United States courts. With the doctrine of sovereign immunity being applied satisfactorily, it is the act of state doctrine that must be modified to achieve the desired uniformity; this can be readily accomplished because the same elements of apprisal may be said to operate in both kinds of cases. Moreover, a necessary function of the courts is to protect the values of this society within the framework of the law; to ignore the illegality of these acts is repugnant to this function, especially in light of the judiciary's apparent willingness to promote societal ideals.[57] Furthermore, by signifying to the foreign sovereign that his illegal acts will not be given effect in this country, a greater premium would be placed on these values in international society.[58]

The second area of conflict—the degree of conclusiveness to be afforded by the courts to an executive suggestion regarding the application of these doctrines—creates a more difficult problem. By denying conclusive effect to the State Department's recommendation in *Banco Nacional de Cuba*, the Second Circuit has shown that in the absence of the exact factual situation existing in *Bernstein*, it will treat the suggestion merely as evidence. Thus, in sovereign immunity cases, the State Department, when it so desires, is the decision-making body, but in act of state cases, the court will always ultimately decide, regardless of executive assertions. Resolution of this problem necessitates an examination of the merits of continued State Department activity in this area. The practice of giving conclusory effect to executive suggestions in sover-

56. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); *see* note 24 *supra* and accompanying text.

57. Zander, *supra* note 38, at 833.

58. *See* Maier, *supra* note 53, at 576; Zander, *supra* note 38, at 839. *See also* Lauterpacht, *supra* note 16, at 229-31.

eign immunity cases is the result of the judiciary's deference to the expertise of the State Department in the area of foreign policy, and the judiciary's genuine desire to insure that the executive will be able to perform its constitutionally appointed power in the conduct of foreign affairs unembarrassed and unfettered by contradictory judicial determinations.[59] The importance of the Government's ability to conduct its foreign policy with a "single voice," has repeatedly resulted in courts' refusing to take jurisdiction of cases that would tend to affect the United States' foreign relations,[60] and it would appear that this attitude is equally warranted when the act of state doctrine is brought into issue. In applying the sovereign immunity doctrine, however, it has been suggested that the present policy, requiring affirmative action by the executive in *jure gestionis* cases when immunity is desired for foreign policy reasons, creates a source of embarrassment and potential explosiveness for the executive branch equal to, if not greater than that present in act of state cases. This is especially true in those cases in which it wishes to maintain a neutral position with respect to the parties.[61] Endeavoring to design a mechanism by which the executive would be insulated as much as possible from both domestic and foreign pressures in the exercise of its constitutionally ordained role, some authorities have recommended that the State Department be entirely removed from these determinations. They have proposed a statutory alternative by which the federal courts generally would be granted exclusive jurisdiction in all cases involving actions against foreign governments for breaches of contracts and for tortious injuries to persons and property within the United States.[62] The difficulty with this or any statutory formula that does not

59. *See* materials cited notes 5-9, 33-34 *supra* and accompanying text.

60. "[R]esolution of . . . issues [touching foreign relations] frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; . . . many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." Baker v. Carr, 369 U.S. 186, 211-12 (1962) (dictum).

61. *See, e.g.*, Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U.L. REV. 901, 913 (1969).

62. One proposed statute provides: "(a) The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action, regardless of the amount in controversy, against a foreign state, or an agency or instrumentality of a foreign state.

"(b) Action may be brought pursuant to subsection (a) against a foreign state, or an agency or instrumentality of a foreign state only upon

provide some vehicle for executive intervention when foreign policy considerations so dictate is that it would greatly reduce the effectiveness of the legislation as a means of alleviating conflict and embarrassment for the executive. The potentially inflammatory effect of divorcing the State Department from these determinations was evidenced in *Rich v. Naviera Vacuba, S.A.*[63] Had the court taken jurisdiction in that case, the efforts made by the Government to negotiate with the Castro regime would have been irreparably damaged and the credibility of the State Department's promises would have become suspect.[64] Thus, some means of providing for executive intervention in exceptional cases must be maintained. Once this exception is recognized and the precedent established, however, the executive will not be able to escape involvement to the extent that it will be expected to determine the substantiality of each assertion by a sovereign that its case also presents an "exceptional" situation. Therefore, the usefulness of the proposed statute will be diminished, and the State Department will be faced with the predicament of having to make determinations on a case-by-case basis, as is apparently the present practice. It appears, then, that stability in the conduct of the United States foreign affairs requires that the executive be afforded an opportunity to intervene in both sovereign immunity and act of state questions; and if this power of intervention is to be of any significance, it follows that the courts must treat the executive suggestion as conclusively determinative of the issue. Of course, this approach undoubtedly will result in instances

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(1) an express or implied contract entered into, to be performed, or arising out of transactions in the United States; or

(2) a claim for personal injury or death or damage to property caused by an act or omission of any officer, agent, or employee of such foreign state while acting within the scope of his office, agency, or employment within the United States, its territories or possessions,

under circumstances where the foreign state, agency, or instrumentality, if a private person, would be subject to suit in accordance with the law of the place where the action is brought.

. . . .

"(e) Nothing in this section shall authorize the maintenance of an action without consent against a foreign state, or an agency or instrumentality of that state

(1) based upon legislation, decrees, or orders of that state,

(2) calling into question the legislation, decrees, or orders of that state,

(3) based upon a claim arising out of an act or omission of an officer, agent, or employee of that state in the execution of a public law, regulation, decree, or order, or the exercise or performance of a discretionary function or duty,

(4) based upon a public debt of the foreign state.

"(f)(1) Nothing in this section shall prevent a foreign state, or any agency or instrumentality of a foreign state, from consenting to be sued in the United States upon claims in addition to those authorized herein." *Id.* at 937.

63. 295 F.2d 24 (4th Cir. 1961).

64. For the circumstances surrounding the *Rich* case see materials cited note 27 *supra*.

in which United States citizens are denied the opportunity to have their claims adjudicated. It has been argued that the individual is, to some extent, still afforded his "day in court" because the State Department's determinations are not arbitrarily made, but depend greatly on quasi-judicial proceedings that bring the disputants before the State Department.[65] This argument can be countered, however, by the realization that these hearings are no substitute for judicial proceedings in that the requirements of due process are noticeably absent[66]—especially since these administrative determinations are made in light of classified foreign policy considerations not available to the disputing parties.

Since there appears to be no uniform solution to the impasse in balancing foreign policy concerns with the rights of private citizens in specific cases, the present means of determining the jurisdiction of the courts as applied to cases involving claims of sovereign immunity, and as should be applied in cases involving acts of state, appears to be as workable and as just as any. Any efforts toward initiating legislative remedies for this delicate problem should focus instead on alleviating existent inequities sustained by the complainant's deprivation of his cause of action. This legislation could incorporate a mechanism by which the claimant would be reimbursed for his "lost" claims by the United States Government, which, in turn, would be subrogated to the rights of the injured party. By such a method, any loss would shift to the United States Government, which was primarily responsible for plaintiff's inability to litigate the merits, and which has both the means with which to recover these losses through diplomatic channels, and the knowledge to ascertain the desirability of exercising these means in light of the United States position in international affairs.

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65. Cardozo, *supra* note 27, at 463-64.

66. Lowenfeld, *supra* note 61, at 913. "State Department officers, without subpoena or oath taking powers, cannot effectively conduct hearings involving disputed questions of fact. . . . [I]f the issues determining whether immunity from suit is to be granted are indeed legal issues, the idea that they should be decided by the State Department, albeit by its legal officers, and without any opportunity for appeal, seems to run counter to the coneepts of separation of powers and judicial process." *Id.* at 912.