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ACT OF STATE DOCTRINE — First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

In July 1958, First National City Bank loaned $15 million to a predecessor of Banco Nacional de Cuba. United States Government bonds were pledged as collateral.[1] By 1960, $5 million had been repaid, and First National City had released a corresponding amount of collateral.

Meanwhile, Fidel Castro had come to power in Cuba.[2] Implementation of his policies resulted in substantial expropriation of foreign-owned properties, including First National City's Cuban banking branches on September 16, 1960.[3] A week later, the American bank sold the remaining collateral securing the loan and applied the proceeds to principal and unpaid interest. That sale realized an excess of approximately $1.8 million.

Banco Nacional de Cuba brought suit in Federal District Court to recover this excess. First National City, as setoff and counterclaim, asserted its right to damages from the expropriation of its Cuban properties.[4] The District Court granted summary judgment to First National City, holding that the Hickenlooper Amendment overruled *Banco Nacional de Cuba v. Sabbatino,* the Supreme Court's definitive application of the act of state doctrine to the Cuban expropriations, and that the expropriation of the banking facilities violated international law.[5]

Banco Nacional appealed.[6] Meanwhile, the parties stipulated

[1] The loan was initially extended to Banco de Desarrallo Economico y Social (Bandes), a corporate agency of the Republic of Cuba. The loan collateral was pledged by Banco Nacional and Fondo de Establizacion de la Moneda (Fondo). Subsequently, Bandes was dissolved by the Cuban government, and Banco Nacional succeeded to many of its rights and obligations, including the obligation to pay the loan. The Republic of Cuba also guaranteed the loan; for the purposes of this litigation, Banco Nacional was assumed by the courts to be the agent of the Cuban government.

[2] January 1, 1959. N.Y. Times, Jan. 2, 1959, § 1 at 1, col. 1.

[3] Under Executive Power Resolution No. 2 issued pursuant to Cuban Law No. 851, July 6, 1960; this resolution is set out in Banco Nacional de Cuba v. First National City Bank, 270 F. Supp. 1004, 1009 n.6 (S.D.N.Y. 1967).

[4] *Id.* at 1004 *et seq.*

[5] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); the Hickenlooper (Sabbatino) Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e) (2), *formerly* pt. III, ch. 1, § 301(d) (4), 78 Stat. 1013 (1964), was intended to limit the scope of the *Sabbatino* decision.

[6] 431 F.2d 394 (2d Cir. 1970).

that First National City's counterclaim was not in excess of the $1.8 million claim brought by Banco Nacional.[7] With this proviso, the Court of Appeals reversed the District Court's decision and ruled that the act of state doctrine barred the counterclaim. According to the Appeals Court, Congress intended the Hickenlooper Amendment to apply to expropriated property subsequently marketed in the United States, in order to prevent this country from becoming a "thieves' market."[8] The Court added that reading the Hickenlooper Amendment as an overruling of *Sabbatino* would vitiate the effectiveness of the Foreign Claims Settlement Commission by allowing First National City a windfall at the expense of other creditors.[9]

It was First National City's turn to appeal.[10] As it took its case to the Supreme Court, the Department of State issued a letter urging the Judiciary to ignore the act of state doctrine in "this or like cases."[11] The Supreme Court granted certiorari and vacated the Court of Appeals judgment for consideration of the State Department's views.[12] The Court of Appeals adhered to its original judgment in a split decision.[13] The Supreme Court again granted certiorari.[14]

A complex decision by the Supreme Court allowed First National City's counterclaim and reversed the ruling of the Court of Appeals.[15] Justice Rehnquist announced the judgment; the Chief Justice and Justice White joined in his opinion, which cited with approval the so-called *Bernstein* exception to the act of state doctrine. Justice Douglas and Justice Powell each

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[7] First National City Bank reduced its counterclaim from the alleged value of its Cuban properties to the amount sought by Banco Nacional, apparently to avoid a sovereign immunity argument based on a counterclaim exceeding the plaintiff's claim.

[8] 431 F.2d at 399-402.

[9] *Id.* at 403-04.

[10] In petitioning the Supreme Court for a writ of certiorari, First National City Bank argued that *Sabbatino* was inapplicable to a counterclaim offsetting Banco Nacional's claim; that the act of state doctrine did not control the case; that the Hickenlooper Amendment was a proper basis for finding against Banco Nacional; and that the International Claims Settlement Act of 1949 should not have barred the counterclaim. 10 INT'L LEGAL MATERIALS 56 (1971). After the issuance of the "Stevenson letter", First National City Bank added the *Bernstein* exception to its panoply of arguments in its brief before the Supreme Court, 11 INT'L LEGAL MATERIALS 30 (1972).

[11] The letter, issued by John R. Stevenson, Legal Advisor to the Department of State, is reproduced in the Court of Appeals' second opinion, 442 F.2d 530, 536 (2d Cir. 1971) and in 10 INT'L LEGAL MATERIALS 89 (1971).

[12] 400 U.S. 1019 (1971); vacating the judgment of the Court of Appeals, the Supreme Court expressed "no views on the merits of the case."

[13] 442 F.2d 530 (2d Cir. 1971).

[14] 404 U.S. 820 (1971).

[15] 406 U.S. 759 (1972).

concurred in separate opinions on distinct grounds. The four remaining Justices dissented in a lengthy opinion by Justice Brennan.

First National City Bank v. Banco Nacional de Cuba raises difficult questions, none of which the Court adequately answers. The case represents an incursion on the Court's prior ruling in *Sabbatino,* which articulated the status of the act of state doctrine. It is unclear whether the incursion is based on the *Bernstein* exception or on a dubious comparison with sovereign immunity. More fundamentally, *First National City Bank* is rich in controversy about the justiciability of "political questions" arising from acts of foreign countries. The following analysis considers these issues in light of the case's most evident characteristic: fundamental disagreement among the Justices over basic questions of jurisprudence.

I. First National City Bank as a Qualification of Sabbatino

Chief Justice Fuller's remarks in *Underhill v. Hernandez* constitute the traditional American expression of the act of state doctrine:

> Every soverign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[16]

The principle's apparent clarity obscures the often confusing history of its application. Although frequently invoked, the doctrine has rarely been essential to the holding of a case.[17] While it is generally assumed to be a rule of conflict of laws, it has been associated with substantive international law as well.[18]

In *Banco Nacional de Cuba v. Sabbatino,* the Supreme Court

[16] Underhill v. Hernandez, 168 U.S. 250, 252 (1897). *See generally,* Henkin, *Act of State Today: Recollections in Tranquility,* 6 Colum. J. Transnat'l L. 175 (1967); Zander, *The Act of State Doctrine,* 53 Am. J. Int'l L. 826 (1959); Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine,* 75 Harv. L. Rev. 1607 (1962).

[17] *See,* American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 304 (1918); Shapleigh v. Mier, 299 U.S. 468 (1937); United States v. Belmont, 201 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942). Although *Oetjen* and *Ricaud* reaffirmed *Underhill* in unequivocal terms, Justice White's dissent in *Sabbatino* persuasively argued that these cases only peripherally involved the act of state doctrine. 376 U.S. at 442, n.2.

[18] Jiminez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), *stay denied,* 314 F.2d 649 (5th Cir. 1963), *cert. denied,* 373 U.S. 914 (1963), *rehearing denied,* 374 U.S. 858 (1963).

finally met the act of state doctrine head on. Justice Harlan, writing for the Court in an 8-1 decision, adhered to the act of state doctrine in disallowing an original claim against Banco Nacional based upon Cuba's expropriation of sugar.[19]

At the heart of the *Sabbatino* decision is its discussion of the varied roles played by the act of state doctrine. The doctrine exercises a distributive function by allocating authority and control between the Executive and the Judiciary in the conduct of foreign policy; simultaneously, it assumes a regulative task as a principle of comity among sovereign states.[20] Despite its importance, the doctrine is less than a hard and fast legal rule:

> If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.[21]

The act of state doctrine, far from precluding judicial inquiry into the validity of a foreign state's conduct within its own borders, supervenes only in the absence of firm agreement between nations on controlling legal principles. To avoid application of the doctrine, agreement must constitute more than customary international law. The *Sabbatino* decision continued:

> . . . rather than laying down or reaffirming an inflexible and all-encompassing rule in this case we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in absence of a treaty or other ambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[22]

Sabbatino encourages flexible balancing of interests in light of current developments in international law. If international

[19] The facts of the *Sabbatino* case were rather peculiar. Farr, Whitlock & Co., an American commodity broker, contracted to purchase Cuban sugar ultimately bound for Morocco. The sugar was owned by the subsidiary of a Cuban corporation, principally owned by American shareholders. Before being shipped, the sugar was nationalized by Cuba. Farr, Whitlock then renegotiated the contract of sale this time promising to pay the Cuban government. Banco Nacional de Cuba subsequently presented the shipping documents and a sight draft for $175,000 to Farr, Whitlock for payment. Farr, Whitlock, however, had entered into an agreement with the former owner of the sugar not to turn the funds over to the Cuban government. The funds were later transferred to Sabbatino, the receiver for the former Cuban owner's assets. 376 U.S. at 401-07. In effect, the former owners had resorted to a self-help remedy, facilitated by the fortuitous appearance of the assets in cash form in New York. The Supreme Court sought to discourage such a remedy. *Id.* at 438.

[20] *Id.* at 427-37.

[21] *Id.* at 427-28.

[22] *Id.* at 428.

law has not developed to the point of firm agreement between the parties, the Court ought to apply the act of state doctrine rather than preempt the State Department in its conduct of foreign policy.

Justice White, the lone dissenter in *Sabbatino,* reached a conclusion similar to Justice Harlan's.[23] The dissent also decried inflexible operation of the act of state doctrine, but seemed convinced that the international law of expropriation is well-developed. Traditionally, international law imposes a triad of conditions to which any expropriation must conform: it must serve some public purpose, there must be nondiscrimination in the taking, and compensation must be fair and prompt.[24] Justice White relied on this traditional view; however, Justice Harlan relegated these requirements to the status of customary international law, which he contended was insufficient to preclude application of the act of state doctrine.[25] He noted that many countries, especially expropriating countries, might contend that an American court's application of these traditional requirements would actually constitute advancement of imperial interests of capital-exporting countries under the guise of international law. As Professor Falk has suggested, Justice White's dissent not only attacks the straw man of a supposedly inflexible act of state doctrine, but also fails to prove adequately that the Cuban expropriation was sufficiently within the ambit of international law to preclude application of the doctrine.[26]

Sabbatino challenges the Judiciary to consider in each case whether international law is sufficiently well-developed to justify departure from the act of state doctrine. *First National City Bank* fails to meet this challenge. Justice Rehnquist's opinion purports to distinguish the Court's position from *Sabbatino* because of the presence in *First National City Bank* of an expression of State Department policy.[27] This distinction is attempted by citing *Sabbatino* in which Justice Harlan noted, "[t]his Court has never had occasion to pass upon the so-called

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[23] *Id.* at 439-42.

[24] *See,* RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES, § 185 *et seq.* (1962). Traditional statements of these rules in older sources are cited at length in 10 INT'L LEGAL MATERIALS at 60, n.4.

[25] 376 U.S. at 457-61.

[26] FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 413-17 (1970). Falk's position has been criticized in Klein, *An Examination of the Competence of National Courts to Prescribe and Apply International Law: The Sabbatino Case Revisited,* 1 U. OF SAN FRAN. L. REV. 49 (1966).

[27] 406 U.S. at 768-70.

Bernstein exception, nor need it do so now."[28] In *First National City Bank* such an exception does appear in the form of the "Stevenson letter" (see II., *infra*).[29] Justice Rehnquist concluded that the function of the act of state doctrine is to lend judicial expression to the Executive's lead in the conduct of foreign affairs.[30] Where the act of state doctrine serves American policy, it should be applied; where the State Department makes clear that American policy is not benefitted by application of the doctrine, it should be cast aside. Whether the international law of expropriation is well-developed or not seemed irrelevant to the *First National City Bank* Court. In effect, *Sabbatino* urged adoption of the act of state doctrine where no clearly controlling, mutually agreed upon transnational legal principles existed. However, *First National City Bank* intimates that the criterion for discarding the act of state doctrine is benefit to American foreign policy as articulated by the Department of State, without regard to the presence or lack of controlling principles of international law.[31] Summing up his position, in which the Chief Justice and Justice White joined, Justice Rehnquist concluded:

> We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that the 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.[32]

To avoid casting the Judiciary in the role of handmaiden to the State Department, however, Justice Rehnquist further distinguished *First National City Bank* from *Sabbatino* on the basis of a dubious analogy between the act of state doctrine and sovereign immunity. He noted that, "[o]ur holding is in no sense an abdication of the judicial function to the Executive Branch."[33] Since he believed the only reason for the act of state doctrine to be avoidance of conflict with the State Department's conduct of foreign policy, he concluded that when the danger is absent, the case ought to be adjudicated on the merits. Therefore, First National City Bank was allowed to press its counterclaim without regard to either sovereign immunity or the act

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[28] 376 U.S. at 420.
[29] 442 F.2d at 536.
[30] 406 U.S. at 766-68.
[31] *Id.* at 782-84.
[32] *Id.* at 768.
[33] *Id.*

of state doctrine, relying on the principles of equity in *National City Bank v. Republic of China.*[34]

Out of this same concern, Justice Douglas, in his concurring opinion, formulated the theory that the act of state doctrine, like sovereign immunity, is inapplicable to counterclaims not in excess of the foreign state's original claim:

> If the amount of the setoff exceeds the asserted claim, then we would have a *Sabbatino* type of case. There the fund in controversy was the proceeds of sugar which Cuba had nationalized. *Sabbatino* held that the issue of who was the rightful claimant was a "political question", as its resolution would result in ideological and political clashes between nations which must be resolved by the other branches of government. We would have that type of controversy here, if and to the extent that the setoff asserted exceeds the amount of Cuba's claim. I would disallow the judicial resolution of that dispute for the reasons stated in *Sabbatino* and by MR. JUSTICE BRENNAN in the instant case. As he states, the Executive Branch "cannot by simple stipulation change a political question into a cognizable claim."[35]

Clearly, this theory distorts the rationale of Justice Rehnquist's opinion. Having at first established the paramount importance of the State Department's opinion on the applicability of the act of state doctrine, Justice Rehnquist then contended that where the doctrine is inapplicable, sovereign immunity is unavailable as a defense to a counterclaim not exceeding the plaintiff's claim. Justice Douglas, on the other hand, concluded that "fair dealing" ought to be the governing principle in the first instance:

> . . . "fair dealing" requires recognition of any counterclaim or setoff that eliminates or reduces that claim. It is that principle, not the *Bernstein* exception, which should govern here. Otherwise the Court becomes a mere errand boy for the Executive which may choose to pick some people's chestnuts from the fire, but not others.[36]

To Justice Douglas, then, the "Stevenson letter" cannot be relevant to the Court's reversal in favor of First National City Bank. (Justice Powell concurred on still other grounds, invoking Justice White's arguments in *Sabbatino* and refusing to narrowly adopt the *Bernstein* exception as the decisive factor. Discussion of his position is reserved for IV., *infra.*)

What is one to make of these conflicting opinions? May *First National City Bank* be distinguished from *Sabbatino* on the basis of the *Bernstein* exception, or rather because "fair dealing" requires recognition of counterclaims, even those based

[34] National City Bank v. Republic of China, 438 U.S. 456 (1955).

[35] 406 U.S. at 772.

[36] *Id.* at 772-73.

upon acts of state? Not only does *First National City Bank* fail to answer either question; it is also well off the mark of Justice Harlan's primary concern in *Sabbatino* — careful consideration of the status of international law and application of the act of state doctrine where a definitive international law of expropriation is lacking.

II. FIRST NATIONAL CITY BANK AND THE BERNSTEIN EXCEPTION

The so-called *Bernstein* exception to the act of state doctrine partially determined the result in *First National City Bank*.[37] Although given a lease on life in this instance, the exception's viability remains doubtful. Justice Rehnquist approved and adopted the *Bernstein* exception in his opinion; however, his analogy to sovereign immunity undermined it, and Justice Brennan's dissent maintained that six Justices explicitly rejected it.[38]

The *Bernstein* exception refers to the decision of the Court of Appeals for the Second Circuit in *Bernstein v. N. V. Nederlandsche-Amerikaansche*.[39] In that case, "a definitive expression of Executive policy", in the form of a letter from the Department of State, purported to release the Judiciary from act of state constraints in passing upon the legality of German official acts during the Nazi period. The Court reversed *per curiam* its previous application of the act of state doctrine and held that the *Bernstein* letter (from Jack B. Tate, Acting Legal Adviser of the Department of State) supervened the doctrine.[40]

The "Stevenson letter", *First National City Bank's* analogue to the *Bernstein* letter, attempted to apply State Department policy to the Cuban expropriations. To bring the *Bernstein* exception into play in the Federal courts, John R. Stevenson, the Department's legal advisor, wrote that:

> 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.[41]

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[37] It was improper for Justice Rehnquist to state that the holding of the Court was the adoption of the *Bernstein* exception, since only three Justices so held.

[38] 406 U.S. at 776-77.

[39] Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375 (2d Cir. 1954).

[40] That letter is reproduced *id.* at 376; the earlier case denying Bernstein relief, prior to the issuance of the Department of State letter, recites the facts of the taking of the property at 173 F.2d 71,75-76 n.8.

[41] 442 F.2d at 538. The impact of the letter was considered prior to the Supreme Court's decision at Note, *Executive Suggestion and the Act of State Cases: Implications of the Stevenson Letter in the Citibank Case*, 12 HARV. INT'L L. J. 557 (1971).

The letter was issued following the first decision of the Court of Appeals, which found in favor of Banco Nacional. The Supreme Court returned the case to the Appeals Court, urging consideration of the State Department position.

In its reconsideration of *First National City Bank,* the Second Circuit argued that the "Stevenson letter" failed to undermine the act of state doctrine:

> The *Bernstein* exception has been an exceedingly narrow one. Prior to the present case, a "Bernstein letter" has been issued only once — in the *Bernstein* case itself. Moreover, the case has never been followed successfully; it has been relied upon only twice, and in both of those instances, by lower courts whose decisions were subsequently reversed.[42]

Emphasizing *Bernstein's* unique facts, the Court noted that the letter applied to the acts of a German government no longer in existence; a government with which the United States had been at war; and finally, a government that had perpetrated atrocities arguably violating more than mere customary international law.[43] Moreover:

> In *Bernstein* . . . the balance of the equities was almost entirely on the side of the party opposing application of the act of state doctrine, plaintiff, whereas there, as we found in our prior decision in this case, the contrary is true, since First National City is seeking a windfall at the expense of other creditors.[44]

Therefore, the Court concluded:

> *Bernstein* arose out of a unique set of circumstances calling for a special treatment, and hence should be narrowly construed and, insofar as possible, limited to its facts.[45]

Thus, the Appeals Court forcefully argued that the "Stevenson letter" was insufficient to revive the so-called *Bernstein* exception.

The Supreme Court also rejected the *Bernstein* exception in *First National City Bank.* As noted above, Justice Rehnquist's opinion rather confused the status of the exception, at one point calling it the holding of the Court, but failing to come up with even four justices supporting it. Underlining this confusion, Justice Brennan stated in his dissent:

[42] 442 F.2d at 535, citing *Sabbatino,* 307 F.2d 845, 857-58 (2d Cir. 1962), *rev'd,* 376 U.S. 398 (1964), and Kane v. National Institute of Agrarian Reform, 18 Fla. Supp. 116 (Fla. Cir. Ct. 1961), *rev'd,* 153 So.2d 40 (Fla. App. 1963).

[43] 442 F.2d at 534. An interesting question remains whether the act of state doctrine should have applied in *Bernstein* even had there been no letter from the State Department. Did the Nuremberg proceedings raise the world's condemnation of Nazi genocide to the status of international law? *See generally,* KELSEN & TUCKER, PRINCIPLES OF INTERNATIONAL LAW 215-220 (2d ed. 1966).

[44] 442 F.2d at 534-35.

[45] *Id.* at 534.

> The Court today reverses the judgment of the Court of Appeals for the Second Circuit that declined to engraft the so-called *"Bernstein"* exception upon the act of state doctrine. . . . The Court, nevertheless, affirms the Court of Appeals rejection of the *"Bernstein"* exception. Four of us in this opinion unequivocally take that step, as do MR. JUSTICE DOUGLAS and MR. JUSTICE POWELL in their separate concurring opinions.[46]

Justice Brennan went on to assert that while *Sabbatino* technically reserved the *Bernstein* question, as Justice Rehnquist correctly observed, the decision in that case placed considerable doubt upon the propriety of the exception.[47] As explained above, *Sabbatino* essentially held that the act of state doctrine should apply where no rule of international law agreed upon by the parties may be applied by the courts; it did not hold that the act of state doctrine should apply where the Executive fails to invoke the *Bernstein* exception.

Prior to the Supreme Court's decision in *First National City Bank,* it was predicted in some quarters that the case would definitely resolve the proper balance between the Executive and the Judiciary in matters involving foreign relations.[48] This balance hinges upon whether the question before the Court is "political" or "legal".[49] Unfortunately, the confusion of Justice Rehnquist's opinion, combined with the specific rejection of the *Bernstein* exception by six justices, leaves the matter unresolved. Moreover, Justice Brennan noted the undesirable effect had the exception been adopted:

> The *"Bernstein"* exception relinquishes the function (of determining whether an issue is a political question) to the Executive by requiring blind adherence to its requests that foreign acts of state be reviewed. Conversely, it politicizes the Judiciary.[50]

The most plausible conclusions to be drawn from *First National City Bank* are that 1) the *Bernstein* exception to the act of state doctrine is not law; 2) due to the limited applicability of the *Bernstein* principle, the issuance of a letter from the State Department invoking it will remain an unlikely occurrence; and 3) the best guides to the relationship between the Executive and the Judiciary in foreign affairs are still *Baker v. Carr* and *Sabbatino,* with *First National City Bank* merely a confusing and unhelpful footnote.[51]

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[46] 406 U.S. at 776-77.
[47] *Id.* at 790.
[48] Comment, 40 FORDHAM L. REV. 409 (1971).
[49] *See,* IV., *infra.*
[50] 406 U.S. at 790.
[51] Baker v. Carr, 369 U.S. 186 (1962).

III. First National City Bank and Sovereign Immunity

The most patent instance of confusion in *First National City Bank* results from an inappropriate analogy to *National City Bank v. Republic of China*,[52] an earlier case establishing implied waiver of sovereign immunity for a foreign state bringing an action in this country's courts and subsequently subjected to a counterclaim based on American law.[53] The notion is one of "fair dealing": if a foreign nation invokes "our law", it is only fair that he expose himself to counterclaims based on that law.[54]

Justice Rehnquist's opinion noted first that the result reached in *First National City Bank* is "consonant with the principles of equity" set forth in *Republic of China*.[55] From constituting a mere analogy, however, the principle of "fair dealing" in counterclaims became for Justice Douglas, in his concurrence, the governing principle of the case, despite the fact that the counterclaim in *Republic of China* was based on sovereign immunity while the one in *First National City Bank* hinged upon an act of state.[56]

Justice Douglas maintained that the concept of "fair dealing" articulated in *Republic of China* by itself determined the *First National City Bank* holding; the act of state doctrine, he contended, is irrelevant to counterclaims.[57] Although based on an incorrect analysis, Justice Douglas' view possessed the virtue of consistency; Justice Rehnquist's, on the other hand, confused the *Bernstein* rationale with the "fair dealing" approach.

At issue is the relationship between "fair dealing" and the act of state doctrine. Should the doctrine bar assertion of a counterclaim, not otherwise barred by sovereign immunity,

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[52] 348 U.S. 356 (1955).

[53] *Id.* at 364-65.

[54] This notion is set out at length in Justice Douglas' concurrence, 406 U.S. at 770-73; general criticism of the sovereign immunity rule itself is found in Justice Brennan's dissent, *supra* at 789-90, n.13.

[55] *Id.* at 768.

[56] Justice Douglas argued that the essential issue was Cuba's desire "to have its cake and eat it too." Beyond this, he simply failed to analyze whether the distinction between the types of counterclaims asserted in the two cases was at all relevant.

[57] Curiously, Chief Justice Burger had himself employed this "fair dealing" argument while on the District of Columbia bench, in his dissent in Pons v. Republic of Cuba, 294 F.2d 925, 926 (D.C. Cir. 1961). In that case, a Cuban national, sued by Cuba in American courts, asserted a counterclaim based on the value of his expropriated property. The Court of Appeals affirmed dismissal of the counterclaim; then Judge Burger's dissent relied heavily on *National City Bank*. Yet, in *First National City Bank*, the Chief Justice found himself in agreement with Justice Rehnquist, supporting the *Bernstein* exception and only alluding to the "fair dealing" argument in passing.

when the counterclaim arises from an act of state? It seems that it should, even if the counterclaim does not exceed the amount of the foreign government's claim.

Determinative of the issue is the crucial difference between the types of counterclaims asserted in *Republic of China* and *First National City Bank*. In the former case, China's claim was for recovery of a deposit with National City Bank. The Bank sought setoff on defaulted Treasury notes in the amount of China's claim. It should be noted that no issue arose as to the applicable substantive law in determining the validity of the counterclaim; the only question was the availability of the sovereign immunity defense to the Republic of China.[58]

The problem is quite different in *First National City Bank*, where the counterclaim arose from an alleged act of state. The analytical first step in the two cases is similar: to decide that it is equally unfair to bar a counterclaim because of sovereign immunity as it is to bar one because of the act of state doctrine.

Next, a court must determine what law to apply in evaluating such counterclaims.[59] At this point the circumstances of the two cases differ markedly. In *Republic of China* the default upon which the counterclaim rested occurred within the United States; therefore, domestic law was clearly applicable. However, for the act of state counterclaim there exist no firmly agreed upon rules of international law that an American court can apply in determining the validity of Cuban expropriations. Justice Harlan found this distinction controlling in *Sabbatino*:

> . . . immunity relates to the prerogative right not to have sovereign property subject to suit; fairness has been thought to require that when the sovereign seeks recovery, it be subject to legitimate counterclaims against it. The act of state doctrine, however, 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.[60]

In summary, the essence of the act of state doctrine is its limitation upon the American Judiciary which prevents the

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[58] The Supreme Court, in an opinion by Justice Frankfurter, noted the essential problem: whether a counterclaim not "based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity." 348 U.S. at 364. He concluded that it is, but said nothing about the substantive rules a court should apply in assessing the counterclaim. Presumably, there was no doubt that straightforward breach of contract rules applied in the *National City Bank* case.

[59] In *Sabbatino*, it was urged that the forum simply apply its own law to "all relevant transactions." Justice Harlan rejected this solution. 376 U.S. at 438.

[60] *Id.*

application of American law or customary international law to acts occurring within Cuba. The "fair dealing" argument pales in light of the central problem which the act of state doctrine poses to the courts: are there rules of law that apply in assessing a counterclaim arising from a foreign state's conduct within its own territory? In *Republic of China* well-developed rules of domestic law clearly dealt with the default of an obligation incurred within the jurisdiction of American courts. In contrast, the act of expropriation which prompted First National City's counterclaim occurred within Cuba's own territory, and hence American law did not apply. Furthermore, there existed no internationally accepted law of expropriation under which the counterclaim might be adjudicated.

IV. "Political Questions" and International Law

"Political questions", De Tocqueville says, have a habit of eventually assuming a legal character as society changes.[61] Expropriation, a "political question" in *Sabbatino,* could therefore evolve into a legally cognizable issue.[62] "Political" acts of state gradually become justiciable as nations substitute law for parochial self-interest.

To preclude application of the act of state doctrine, international law must constitute more than notions of comity, customary international law, or a generalized concept of political morality grounded in sovereign states' respect for one another. As Justice Harlan put it in *Sabbatino*:

> . . . 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, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[63]

The desired development therefore requires rules of expropriation exerting authority and control over both capital exporting

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[61] A. de Tocqueville, Democracy in America, (Harper & Row ed. 1966). For a general discussion of his celebrated thesis distinguishing the political from the legal jurisdictions, *see,* pp. 89-93.

[62] Justice White, dissenting in *Sabbatino,* felt that the law of expropriation had already achieved the requisite status of binding international law so as to justify adjudication on the merits. 376 U.S. at 458-59. In *First National City Bank,* Justice Powell was of the opinion that even if the law of expropriation were not well developed, domestic courts had the duty of furthering its development by adjudicating the case on the substantive issues, despite the act of state doctrine. 406 U.S. at 775.

[63] 376 U.S. at 428.

and capital importing nations.[64]

Since expropriation constitutes a "political question", it is surprising that First National City Bank's counterclaim was held to be justiciable. The eight years intervening between *Sabbatino* and *First National City Bank* saw no lessening of political tensions attending expropriations.[65] Evidently three justices felt a combination of the "Stevenson letter" and "fair dealing" rendered the counterclaim justiciable. A fourth, Justice Douglas, thought the case did not involve the act of state doctrine because it arose from a counterclaim. And Justice Powell said the law of expropriation should have been a "legal question" in both cases.[66]

Such diverse opinions expressed by the majority justices, not to mention the contrary view of the dissenters, confuse the standards for determining justiciability in act of state cases. Those standards have never been entirely clear.[67] Advocating an *ad hoc* approach, *Baker v. Carr* noted that:

> 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.[68]

In that decision, Justice Brennan stated generally that determining whether an issue is "political" is a "delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."[69]

Justice Rehnquist's interpretation of Cuban expropriation is less than delicate. Assuming the *raison d'etre* of the act of state doctrine to be advancement of American foreign policy, he concluded that Executive disapproval of the doctrine should be

[64] These dual notions of authority and control as determinative components of the development of international law have been most fully analyzed by Myres S. McDougal; *see* McDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION AND INTERNATIONAL COERCION (1961).

[65] The unanswered question is how many of these expropriations or nationalizations will give rise to lawsuits in the United States. Sovereign immunity prevents direct claims against foreign states; however, foreign assets in the United States combined with collateral claims by the foreign state against the former American owner of the taken property may well yield more of these peculiar act of state litigations.

[66] 406 U.S. at 774-75.

[67] Justice Powell noted in his concurring opinion the distinction between jurisdiction and justiciability, the former concerning the Court's power over the parties, the latter concerning the appropriateness of the subject matter for judicial resolution. Thus, the sovereign immunity analogy provided a jurisdictional basis for allowing the counterclaim against Cuba, while justiciability was the issue presented by the act of state doctrine. *Id.* at 773-74.

[68] 369 U.S. at 211-12.

[69] *Id.* at 211.

heeded by the Court. As he expressed it, "the reason of the law ceasing, the law itself also ceases."[70]

Justice Brennan's dissent labeled this tidy argument "mechanical and fallacious."[71] Its fallacy stems from the incorrect view that the doctrine's function is to facilitate successful conduct of foreign affairs. The doctrine's purpose is the prevention of judicial bungling in the political arena.[72] Acts of state are generally "political" because no law exists with which to assess their validity. However, if law does exist, whether by treaty, mutual agreement, or multinational convention, the act of state may be justiciable.[73] In any case, the Department of State's view on the national interest should have little relationship to the Court's determination of the applicability of international legal standards.[74]

Curiously, Justice Powell's concurrence is consistent with both *Sabbatino* and Justice Brennan's dissent.[75] He would have joined in Justice White's dissent in *Sabbatino,* contending that precisely that balancing of considerations pondered by Justice Harlan and adverted to in *Baker v. Carr* should have required discarding the act of state doctrine in the Cuban expropriation cases. He contended that if no conflict with American foreign policy exists, the courts have "a duty to determine and apply the applicable international law."[76] He mistakenly assumed an international law of expropriation exists, apart from non-binding customary behavior. Justice Powell's concurrence fails to suggest any reliable method for ascertaining appropriate legal standards concerning expropriation.

To what extent may American courts apply international law to acts of state? According to *Sabbatino,* acts of expropriation are justiciable if international law is codified or unambiguous. However, claims based on a foreign nation's conduct are "political" insofar as that behavior is subject only to customary international law. *First National City Bank* adds that counterclaims arising from acts of state may be justiciable even in the absence of a dispositive law of expropriation. In effect, *First*

[70] 406 U.S. at 768.

[71] *Id.* at 778.

[72] *Id.* at 785,792-93.

[73] 376 U.S. at 428.

[74] 406 U.S. at 783-85; 376 U.S. at 432-33.

[75] Justice Powell believed that the viewpoint of the Department of State is only one of many factors determining justiciability of an act of state. Like Justice White in *Sabbatino,* he contended that the Cuban expropriations constituted an area where domestic courts should be instrumental in developing international law.

[76] *Id.* at 776.

National City Bank's consideration of the *Bernstein* exception and the "fair dealing" argument obscures the role of international law in determining justiciability of acts of state.

V. CONCLUSION

The internal contradictions of *First National City Bank* characterize a Supreme Court badly split over fundamental questions of judicial philosophy. Justice Rehnquist's opinion purports to adopt the *Bernstein* exception to the act of state doctrine. Read closely, the opinion merely suggests that the Court should proceed case by case to determine the applicability of the act of state doctrine. The dissent explicitly states that the four dissenters, as well as Justices Douglas and Powell in their concurrences, reject the *Bernstein* exception. Thus, the case offers a confusing and rather unreliable guide to future litigation in the act of state arena.

The important issue of justiciability raised by *First National City Bank* is still more confusing. It is safe to say that the Justices agree, as might be expected from *Baker v. Carr,* that some foreign relations problems are not "political questions" and are therefore cognizable in American courts. But what determining factors does the Court set forth? Justice Rehnquist argues that the Department of State's opinion on whether the act of state doctrine serves in a particular instance to advance American foreign policy controls justiciability of the issue. Justice Brennan, on the other hand, looks to a myriad of factors, among which the state of development of international law predominates. Justice Douglas says the existence of a counterclaim is the key to justiciability of acts of state; but Justice Powell adopts a middle position and says justiciability may only be determined case by case. Hence, the limits of justiciability of acts of state remain ill defined.

The *Sabbatino* decision satisfied many commentators that relative clarity had been achieved for the act of state doctrine. Dabbling with that doctrine in *First National City Bank,* the Supreme Court muddied the waters once again.

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