Denver Journal of International Law & Policy

Volume 14
Number 2 *Winter/Spring*

Article 8

January 1986

Proposed Amendments to the Foreign Sovereign Immunities Act of 1976 and the Act of State Doctrine

Manuel R. Angulo

Adrien K. Wing

Proposed Amendments to the Foreign Sovereign Immunities Act of 1976 and the Act of State Doctrine

Keywords

Government Liability, Sovereignty, International Law: History, Practice and Procedure, States, Jurisdiction, Legislation, Politics, Terrorism

CRITICAL ESSAYS

Proposed Amendments to the Foreign Sovereign Immunities Act of 1976 and the Act of State Doctrine

MANUEL R. ANGULO*
ADRIEN K. WING**

I. INTRODUCTION

On May 3, 1985, United States Senator Charles Mathias (R-Md.) introduced Senate bill 1071 to amend the Foreign Sovereign Immunities Act (FSIA) of 1976.[1] These amendments are based on proposals adopted

---

* B.A. Yale, J.D. Harvard Law School, Member of the Bar of the State of New York, Partner, Curtis, Mallet-Prevost, Colt & Mosle

** A.B. Princeton, J.D. Stanford Law School, Member of the Bar of the State of New York, Associate, Curtis, Mallet-Prevost, Colt & Mosle

1. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11 (1982).

For discussion of a previous attempt by Senator Mathias to eliminate the act of state doctrine through legislation, see Mathias, *Restructuring The Act of State Doctrine: A Blueprint for Legislative Reform*, 12 LAW & POL'Y INT'L BUS. 369 (1980).

It is beyond the scope of this article to provide extensive background information on the FSIA. The statute has four major purposes: (i) to codify the restrictive theory of sovereign immunity; (ii) to place the determination of immunity questions squarely within the judicial rather than the executive branch; (iii) to provide defined rules for service of process upon foreign states; and (iv) to rectify inconsistencies existing between rules of immunity from suit and from execution. H.R. REP. No. 1487, 94th Cong., 2d Sess. 1, 1-8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604 [hereinafter cited as HOUSE REPORT].

The rule of jurisdictional immunity applicable to foreign states appears in § 1604 of the FSIA which provides that subject to existing international agreements to which the United States was a party at the time of the enactment of this Act in 1976, a foreign state is immune from the jurisdiction of the U.S. courts, unless one of the exceptions applies. In any case where an exception does not apply, § 1330(a) and (b) gives federal district courts general personal and subject matter jurisdiction against foreign states, which are defined as including any political subdivision of a foreign state or any agency or instrumentality of the foreign state. *See* § 1603(a).

The exceptions to immunity are found in §§ 1605-1607. Under § 1605, exceptions to jurisdictional immunity are provided for in cases involving: (i) waivers of immunity; (ii) commercial activity of foreign states having a specified jurisdictional nexus with the United States; (iii) certain claims arising out of foreign expropriation; (iv) rights in property in the U.S. acquired by successor or gifts or rights in immovable property in the United States; (v) certain non-commercial tort claims; and (vi) certain claims in admiralty. Also, § 1607 provides an additional exception for counterclaims asserted in an action initiated in the United States by a foreign state.

by the House of Delegates of the American Bar Association in August, 1984.[2] The presumed purpose of bill S.1071 is to strengthen legal protections available to American business enterprises dealing with foreign governments and their agencies and instrumentalities.[3]

While bill S.1071 contains a number of proposals for amendments to the FSIA, this paper deals only with that amendment which affects the act of state doctrine and which, as will be demonstrated below, greatly restricts its applicability, and thereby undermines its basic rationale and purpose.[4] If enacted into law, this amendment will, in the opinion of the authors, truly "vex the peace of nations,"[5] and potentially endanger the harmony of our relations with friendly foreign states. In order to properly divine the intent and purpose of the proposed amendment, the history and current application of the act of state doctrine must be examined.

II. THE ACT OF STATE DOCTRINE

The classic formulation of the act of state doctrine was established by the United States Supreme Court in a case dismissing a suit for wrongful detention against the revolutionary government of Venezuela, *Underhill v. Hernandez.* In *Underhill* the Court stated:

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

---

For a general discussion of the statutory framework, see Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice,* 33 SW. L.J. 1009 (1979); De Laume, *Long Arm Jurisdiction under the Foreign Sovereign Immunities Act,* 74 AM. J. INT'L L. 640 (1980); Kahale & Vega, *Immunity & Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States,* 18 COLUM. J. TRANSNAT'L L. 211 (1979); Browen, Bistline & Loomis, *The Foreign Sovereign Immunities Act in Practice,* 73 AM. J. INT'L L. 200 (1979); Van Mehren, *The Foreign Sovereign Immunities Act of 1976,* 17 COLUM. J. TRANSNAT'L L. 33 (1978); Kane, *Suing Foreign Sovereigns, a Procedural Compass,* 34 STAN. L. REV. 385 (1982).

2. Copies of the ABA proposals and ABA actions are available from the ABA Section on International Law, 1800 M Street, N.W., Washington, D.C. 20036.

3. S.1071, 99th Cong., 1st Sess., 131 CONG. REC. S5363 (daily ed. May 3, 1985).

4. The proposals amend the FSIA in the following ways: (i) enhancing recognition of arbitration awards against defaulting foreign states (§ 1605(a)(6)); (ii) permitting *in rem* suits in admiralty against a ship rather than against the foreign government involved, as is presently required (§ 1610); (iii) authorizing prejudgment attachment of commercial property of a foreign state in certain situations (§ 1610); (iv) executing judgments against a broader range of commercial property owned by the foreign state itself (§ 1610); and (v) expanding the definition of commercial activity to include debt securities and other guaranties of the foreign sovereign. (§ 1603(f)). For a further discussion of the proposed amendments, see Atkeson & Ramsey, *Proposed Amendment of the Foreign Sovereign Immunities Act,* 79 AM. J. INT'L L. 770 (1985). For a short comment agreeing with the authors' views on act of state, see, A. Rubin, *ABA Proposals to Amend the Foreign Immunities Act of 1976: A Pointed Dissent,* INT'L PRAC. NOTEBOOK 17 (Oct. 85).

5. *See* United Bank, Ltd. v. Cosmic International, Inc., 542 F.2d 868, 876 (2d Cir. 1976).

> as between themselves.[6]

This is a simple and clear expression of the act of state doctrine, based upon the principle of sovereign immunity from adjudication by United States courts and the necessity of respecting the acts of foreign states performed within their territory — all in the common interest of comity and peaceful relations among nations.

In the seminal modern act of state case, *Banco Nacional de Cuba v. Sabbatino,* which involved the expropriation of the property of a sugar exporter within Cuba by the revolutionary Cuban government, the Supreme Court broadened the simple concept articulated in *Underhill* and stated that

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violated customary international law.[7]

Although the act of state doctrine is not mandated by the Constitution, the *Sabbatino* court found that it had "constitutional underpinnings."[8] The doctrine has its roots in the separation of powers between the judicial and executive branches and the allocation by the Constitution of the conduct of foreign affairs to the Executive. "The doctrine as formulated in past decisions expresses the strong sense of the judicial branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[9]

The Supreme Court recognized that judicial interference in this sensitive area might adversely affect relations between foreign sovereigns and the United States. It might embarrass either the judicial or executive branch or both, and it might impede the natural and beneficial development of international law.[10] The Court stated that, "its [act of state doctrine] 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."[11]

---

6. 168 U.S. 250, 252 (1897).

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

8. *Id.* at 423. ("The act of state doctrine does, however, have 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers.")

9. *Id.* For the earlier decisions referred to, see Oetjen v. Central Leather, 246 U.S. 297, 302 (1918); Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918).

10. *Sabbatino,* 376 U.S. at 433-34.

11. *Id.* at 427-28. For discussion of *Sabbatino* by the lawyer who represented the Cuban government, see Rabinowitz, *Viva Sabbatino,* 17 VA. J. INT'L L. 617 (1977). For the discussion of the various aspects of the act of state doctrine, see Cooper, *Act of State and Sover-*

Essentially, the effect of *Sabbatino* was to graft onto the *Underhill* formulation additional factors to be considered by American courts as to the applicability of the act of state doctrine. The *Underhill* formulation was simple and unqualified. The acts of a foreign state performed within its territory were sacrosanct and totally immune from scrutiny by courts of the United States.

Sabbatino, decided some forty years later, apparently rejected the unconditional immunity of an internal act of state from judicial scrutiny espoused in *Underhill* and propounded a separation of powers, i.e. "constitutional underpinnings" basis for the doctrine. The application of the act of state doctrine did not require "laying down or reaffirming an inflexible and all-encompassing rule," but rather a balance of relevant considerations,[12] and a careful case-by-case analysis of the extent to which the separation of powers concerns on which the doctrine is based are implicated by the action before the court.[13]

The act of state doctrine has been applied, since *Sabbatino,* to a variety of sovereign acts. Several cases involved nationalizations and expropriations.[14] In addition, United States courts have found that other sover-

---

eign Immunity: A Further Inquiry, 11 LOY. U. CHI. L.J. 193 (1980); Golbert & Bradford, *The Act of State Doctrine: Dunhill and other Sabbatino Progeny,* 9 SW. U. L. REV. (1977); Gordon, *The Origin and the Development of the Act of State Doctrine,* 8 RUT.-CAM. L. J. 595 (1977); Kleinman, *The Act of State Doctrine from Abstention to Activism,* 6 J. COMP. BUS. & CAP. MARKET L. 115 (1984); Lengel, *The Duty of the Federal Courts to Apply International Law. A Polemical Analysis of the Act of State Doctrine,* 8 B.Y.U.L. REV. 61 (1982); Note, *Adjudicating Acts of State in Suits Against Foreign Sovereigns: A Political Question Analysis,* 51 FORDHAM L. REV. 722 (1983); Note, *Rehabilitation and Exoneration of the Act of State Doctrine,* 12 N.Y.U. J. INT'L L. & POL. 599 (1980); Note, *Limiting the Act of State Doctrine: A Legislative Initiative,* 23 VA. J. INT'L L. 103 (1982); Note, *Foreign Expropriation Cases in the United States: Conflicting Legislation and Judicial Policies,* 17 U.S.F.L. REV. 117 (1982); Kahale, *Characterizing Nationalizations for Purposes of the Foreign Sovereign Immunities Act and Act of State Doctrine,* 6 FORDHAM INT'L L. J. 392 (1982); Lindskog, *Act of State or Act of Desperation,* INT'L FIN. L. REV. 4 (Dec. 1982); Mathias, *Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform,* 12 LAW & POL'Y INT'L BUS. 369 (1980); Zimmerman, *Applying an Amorphous Doctrine Wisely: The Viability of the Act of State Doctrine after the Foreign Sovereign Immunities Act,* 18 TEX. INT'L L. J. 547 (1983); Note, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine,* 35 STAN. L. REV. 327 (1982).

12. *Sabbatino,* 376 U.S. at 428.

13. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 316 n.38 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982). For discussion of problems arising out of the case by case analyses, see Halberstam, *Sabbatino Resurrected: The Act of State Doctrine and the Revised Restatement of U.S. Foreign Relations Law,* 79 AM. J. INT'L L. 68 (1985); Note, *The Resolution of Act of State Disputes Involving Indefinitely Situated Property,* 25 VA. J. INT'L L. 92 (1985).

14. Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977) (act of state doctrine rendered plaintiff's antitrust and contract claims against other Libyan oil producers nonjusticiable); D'Angelo v. Petroleos Mexicanos, 422 F. Supp. 1280 (D. Del. 1976), *aff'd,* 564 F.2d 89 (3d Cir. 1977), *cert. denied,* 434 U.S. 1035 (1978) (Mexican expropriation decree extinguishing corporation royalty and participation rights was valid act of state); Hunt v. Coastal States Gas Producing Co., 570 S.W.2d 503 (Tex. Civ. App. 1978), *aff'd,* 583 S.W.2d 322 (Tex.), *cert. denied,* 444 U.S. 992 (1979) (nationalization of plaintiff's

eign acts constitute unreviewable acts of state, including: denial of entry and involuntary rerouting of a tourist's flight;[15] extinguishing of a public debt by statute;[16] granting of authority to export offshore oil and gas resources;[17] denial of a request to emigrate;[18] revocation of a license to export monkeys for research;[19] denial of import license in order to control foreign trade;[20] and divesting of a former Director's authority to bring suit on behalf of the corporation.[21]

To illustrate application of the act of state doctrine, two contrasting cases deserve mention.

In *Hunt v. Mobil Oil Corp.*,[22] the Second Circuit, following the *Sabbatino* Court's rationale of the act of state doctrine as a "judicial articulation of the separation of powers doctrine,"[23] held that judicial inquiry into the nationalization of oil concessions by the Libyan government involved an examination of that government's motivations and was tantamount to an examination of the validity of such an act. Accordingly, judicial inquiry was foreclosed by the act of state doctrine.

In this case, plaintiff Hunt brought an action against defendant Mobil Oil and other oil producers alleging violation of the antitrust laws and breach of contract. The claim, which sought treble damages, asserted that the defendants had combined and conspired to preserve the competitive advantage of Persian Gulf crude oil over Libyan crude oil by preventing Hunt from reaching a settlement with the Libyan government. Failure to reach a settlement resulted in the nationalization of Hunt's Libyan properties.

Although the government of Libya was not named as a co-conspirator

---

Libyan oil interests was a valid act of state).

15. Arango v. Guzman Travel Advisor's Corp., 621 F.2d 1371 (5th Cir. 1980) (Dominican Republic immigration officials denial of entry to plaintiffs on vacation tour was foreclosed by act of state doctrine).

16. Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150, 1160 (2d Cir. 1982) (Grand Duchess of Saxony Weimar's claims for annuity payments from German government were barred by act of state).

17. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (granting of an oil concession by governmental officials of Umm Al Qaywayn entailed exercise of act of state).

18. Frolova v. USSR, 558 F. Supp. 358 (N.D. Ill. 1983), *aff'd*, 761 F.2d 370 (7th Cir. 1985) (action against Soviet Union for refusal to allow plaintiff's husband to emigrate was an act privileged under act of state doctrine).

19. MOL, Inc. v. Peoples Republic of Bangladesh, 572 F. Supp. 79 (D. Ore. 1983), *aff'd*, 736 F.2d 1326, *cert. denied*, 105 S. Ct. 513 (1984) (refusal of Bangladesh officials to renew plaintiff's license to capture and export rhesus monkeys was act of state).

20. Van Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977) (denial by Brazilian government of right to import farm type crop dusting plane was act of state).

21. Tchacosh Co. Ltd. v. Rockwell Intern. Corp., 766 F.2d 1333 (9th Cir. 1985) (Iranian decrees divesting former managing director of Iranian corporation of authority to bring suit on payment under subcontract was ruled act of state).

22. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

23. *Id.* at 77.

nor designated as a defendant, the court held that Libya's excision from the pleadings as a party did not eliminate a consideration of its actions. The Department of State described the Libyan government's actions as a political reprisal against the United States government and economic coercion against United States nationals in Libya.[24] Since the United States government had officially characterized the motivation of the Libyan government, the court "would not make an inquiry into the subtle and deliberate issue of the policy of a Serbonian bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far-reaching national concern".[25] The court held that even if the Department of State had not spoken, inquiry as to the motivation of the Libyan government in nationalizing plaintiff's property was foreclosed by the act of state doctrine.[26]

The *Hunt* decision can be contrasted with *Rasoulzadeh v. The Associated Press*.[27] In this case, an action was brought by Iranian nationals against the Associated Press, which had leased a house from plaintiffs in Iran, and thereafter allegedly breached the lease by permitting a Canadian press group to occupy the house without plaintiff owners' consent. Ultimately, the house was seized by the Iranian government since Canadians were in disfavor as a result of assisting American diplomats to escape to France. Defendants moved to dismiss for failure to state a claim upon which relief could be granted since the action was barred by the act of state doctrine and alternatively, on the ground of *forum non conveniens*.[28]

As to the act of state defense, the Court followed the case-by-case approach set forth in *Sabbatino*, and refused to adopt an inflexible *per se* application of the doctrine to determine the extent to which separation of powers concerns were implicated. Balancing the relevant considerations as required by *Sabbatino*,[29] the Court refused to apply the act of state doctrine primarily because, unlike the *Hunt* decision, "[r]esolution of plaintiffs' claims will not require sitting in judgment on the acts of a foreign government."[30] The court, following the reasoning of the Second Circuit in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,[31] found that the application of the act of state doctrine posed no threat of embarrassment to the executive branch in its conduct of foreign affairs and would not require assessment of the legitimacy of the Iranian government's actions.[32]

---

24. *Id.* at 73.

25. *Id.* at 77.

26. *Id.* at 78.

27. 574 F. Supp. 854 (S.D.N.Y. 1983) *aff'd without opinion*, 767 F.2d 908 (2d Cir. 1985).

28. The Court held *forum non conveniens* did not warrant dismissal of the action as the availability of an alternate forum was not demonstrated. *Id.* at 860-61.

29. *Sabbatino*, 376 U.S. at 428.

30. *Rasoulzadeh*, 574 F. Supp. at 860.

31. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

32. *Rasoulzadeh*, 574 F. Supp. at 860. The court found that the "executive branch has

Thus at this point in judicial history, the apparently inflexible act of state doctrine established in *Underhill* has been qualified by the balancing case-by-case formulation articulated in *Sabbatino*. Therefore, where circumstances require an inquiry into the motivation of a foreign government, further inquiry must be made as to whether such an inquiry or an adjudication as to a foreign sovereign's act would result in embarrassment to the executive branch. While this articulation of the act of state doctrine would seem a reasonable compromise, the *Hunt* and *Rasoulzadeh* decisions show that this formulation nevertheless encompasses the danger of differences of judicial opinion as to the degree of embarrassment to the executive branch. Consequently, confusing and contradictory judicial pronouncements have been made by various courts, which in and of themselves may cause embarrassment to the executive branch.[33] In the view of the authors, the FSIA amendments will not rectify these problems in applying the doctrine.

A. *The Hickenlooper Amendment*

The *Sabbatino* decision prompted an almost immediate reaction to modify the application of the act of state doctrine. In 1965, soon after *Sabbatino* was decided, United States Senator Hickenlooper proposed an amendment to the Foreign Assistance Act of 1961. The Hickenlooper Amendment requires United States courts to adjudicate any question involving "a claim of title or other right to property . . . based upon (or traced through) a confiscation . . . by an act of that state in violation of the principles of international law."[34]

Although the Hickenlooper Amendment was "intended to reverse in part" the *Sabbatino* decision,[35] it has only been applied in a few cases,

---

no interest in a tort claim by Iranian citizens against an American corporation arising out of the latter's breach of a lease agreement, the use of plaintiff's Iranian property by Canadians, and the subsequent confiscation of the property by Iran . . . . Iran's confiscation of plaintiff's property [cannot] fairly be compared to that 'integral governmental function' in *Hunt* which formed a part of a 'continued and broadened confrontation between East and West.' " *Id.*

33. "The importance of a unified national voice on foreign policy has been recognized since the founding of the republic." *Hunt*, 550 F.2d at 78 n.12. In the *OPEC* decision, the court stated that: "To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy. . . . When the courts engage in piecemeal adjudication of the legality of sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify those tools and embarrass the United States in the eyes of the world." International Association of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

34. 22 U.S.C. § 2370(e)(2) (1982).

35. S. REP. No. 1188, 88th Cong., 2d Sess. 24 (1964), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 3829, 3852.

such as *Sabbatino* on remand.[36] The Hickenlooper Amendment has been held not to apply unless the confiscated property has been brought into the United States.[37] It has not applied to the taking of property of non-United States citizens.[38] It has also been held inapplicable to cases involving contract rights.[39]

In addition to the Hickenlooper Amendment, which is a legislative attempt to restrict application of the act of state doctrine, courts have developed additional "exceptions" to the act of state doctrine. This article will now briefly discuss the so-called commercial activity and extraterritorial exceptions, both of which will be impacted by the proposed FSIA amendments.

B. *Commercial Activity Exception*

The plurality opinion of the Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[40] has been interpreted as creating an exception to the act of state doctrine when the act of a foreign sovereign is "commercial". In *Dunhill*, the Cuban revolutionary government "inter-

---

36. Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

37. Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc., 686 F.2d 322 (5th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983) (Act of state doctrine precluded consideration of a tort claim brought by a Mexican natural gas purchaser against American natural gas exporter. Hickenlooper exception was inapplicable where neither the nationalized property of plaintiff nor its proceeds were located in the United States). *See* Banco Nacional de Cuba v. First National City Bank of New York, 431 F.2d 394 (2d Cir. 1970), *rev'd on other grounds*, 406 U.S. 759 (1972).

38. *Compania*, 686 F.2d at 327.

39. *See* Occidental of Umm al Qaywayn, Inc. v. Cities Services Oil Co., 396 F. Supp. 461 (W.D. La. 1975) (Hickenlooper exception was not applicable to a claim for breach of contract in case where plaintiffs sought to recover crude oil seized on board three tankers in area where offshore concession agreements had been granted by the adjacent sheikdoms); Hunt v. Coastal States Gas Producing Co., 583 S.W.2d 322 (Tex. 1979), *cert. denied*, 444 U.S. 992 (1979); French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968).

This article will not discuss two other purported exceptions to the Act of State doctrine. One is the "Bernstein exception," supported by three justices in First National City Bank v. Banco Nacional de Cuba [hereinafter cited as *Bancec*], 406 U.S. 759 (1972). This exception, which has never been applied in an actual case, states that the judiciary can refuse to give recognition to an act of state if the executive branch so advises. *Id.* at 764. *See* Bernstein v. N.V. Nederlandsche-Amerikaansch, 210 F.2d 375 (2d Cir. 1954) for further discussion of the exception. *See also* McCormick, *The Commercial Activity Exception to Foreign Sovereign Immunity and the Act of State Doctrine*, 16 LAW & POL'Y INT'L BUS. 477, 500-502 (1984).

The plurality opinion in *Bancec* also articulated a "counterclaim exception," stating that a foreign state *plaintiff* cannot raise act of state as a defense to a defendant's counterclaim up to the amount of the plaintiff's claim. *Id.* at 768-69; *See* Alberti v. Empresa Nicaraguense de Carne, 705 F.2d 250 (7th Cir. 1983) for discussion of the limited nature of exception, which was held not applicable there. For further commentary on exceptions, see Conant, *The Act of State Doctrine & Its Exceptions: An Introduction*, 12 VAND. TRANSNAT'L J. L. 259 (1979).

40. 425 U.S. 682 (1976).

vened", i.e. nationalized the business and assets of five leading cigar manufacturers. The Intervention Decree did not by its terms repudiate any debt or outstanding obligations of the supplier. It merely designated the "interventors" who were directed to operate the business. The former owners of the manufacturing companies brought an action against Dunhill and other importers for the purchase price of cigars that had been shipped to them prior to the intervention. Dunhill had mistakenly paid the interventors for these pre-intervention shipments. In due course, the interventors refused to return these funds to Dunhill.

The majority opinion of the Supreme Court held that there was nothing in the record of the case revealing an act of state with respect to the interventors obligation to return the sums mistakenly paid to them.[41] The interventors refusal to repay the mistakenly paid funds did not constitute an act of state since no statute, decree, order, or resolution of the Cuban government was offered into evidence indicating Cuban repudiation of its obligations.[42]

The plurality opinion stated that even if Cuba's repudiation of its obligation was an act of state, it would not be shielded from judicial scrutiny. The doctrine did not apply to "repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities."[43]

In the opinion of the authors, a commercial activity exception to the act of state doctrine as enunciated in the plurality opinion does not and should not exist. Indeed, it is hard to conceive of an "act of state" that is "commercial" in nature, since by hypothesis, it is a governmental act performed in the exercise of governmental authority. Of course such an act may involve commercial transactions, as for example, the repudiation of an existing contractual obligation — for which there would appear to be no defense of sovereign immunity under Section 1605(a)(2) of the FSIA.[44] But that is not the *Dunhill* case. *Dunhill* illustrates that there seems to be some confusion between interpretation of the FSIA and the act of state doctrine as to a foreign government's commercial activity. The FSIA codifies the so-called restrictive theory of sovereign immunity,[45] which does not permit a court to take subject matter or personal jurisdiction over a foreign state (as therein defined), unless such foreign state falls

41. *Id.* at 690.

42. *Id.* at 695.

43. *Id.*

44. *See* McCormick, *The Commercial Activity Exception to Foreign Sovereign Immunity and the Act of State Doctrine*, 16 LAW & POL'Y INT'L BUS. 477 (1984); Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflict Approach*, 83 COLUM. L. REV. 1441 (1983); Note, *The Foreign Sovereign Immunities Act of 1976: Direct Effects and Minimum Contacts*, 14 CORNELL INT'L L. J. 97 (1981); Note, *Effects Jurisdiction under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. REV. 474 (1980); Note, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act*, 13 INT'L L. & POL'Y 571 (1981); and *supra* note 1.

45. *See supra* note 1, HOUSE REPORT at 7, U.S. CODE CONG. & AD. NEWS at 6605.

within one of the exceptions provided for, one of which is the commercial activity exception.[46] The theory appears to be that if a foreign state enters the marketplace it must be treated for all purposes as any other merchant with respect to jurisdiction.

On the other hand, a foreign state performing an act under governmental authority within its territory has not entered the commercial marketplace, and thus the restrictive theory of immunity has no application in such a case. Whereas the FSIA is concerned with jurisdiction, the act of state doctrine is not a jurisdictional doctrine,[47] but a doctrine, assuming jurisdiction, which precludes our courts from the adjudication of the acts of foreign governments performed within their territory.

C. *Extraterritorial Exception*

Since the *Underhill* decision, the act of state doctrine requires that the act of the foreign sovereign in question must have been "done within its own territory."[48] If the foreign sovereign's act is not "done" (i.e. undertaken and completed entirely within its territorial boundaries), the act of state doctrine simply has no application.[49] Where the act of the foreign sovereign, by its terms, directly affects or impacts upon property located outside of its jurisdiction, other established legal principles come into play, e.g., the extent to which courts of the United States will recognize or give extraterritorial effect to the decrees of a foreign state. The applicable legal principle is that for reasons of comity, such foreign decrees will be recognized and given effect by our courts provided the decrees are not contrary to the laws and public policy of the United States.[50] Thus in the opinion of the authors, there is no extraterritorial exception.

It is interesting to note, however, the extent to which some United States courts have avoided the doctrine's application by embroidering upon the requirement that the act of state must have been performed within the territory of the foreign sovereign. For example, *Libra Bank Ltd. v. Banco Nacional de Costa Rica*,[51] involved the refusal to pay debts

---

46. *See supra* note 1, for discussion of other exceptions.

47. Some courts and commentators have forgotten that "[w]hile the effect of sovereign immunity is to shield the person of the foreign sovereign, and, by extension, his agents from jurisdiction, the act of state doctrine shields the foreign sovereign's internal laws from intrusive scrutiny." Braka v. Bancomer, S.A., 589 F. Supp. 1465, 1470 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985).

48. *Underhill*, 168 U.S. at 252.

49. *See, e.g.*, Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966) ("principle of judicial refusal of examination applies only to a taking by a foreign sovereign within its own territory").

50. United States v. Pink, 315 U.S. 203 (1942); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 43 (1965); *see Republic of Iraq*, 353 F.2d at 51 (U.S. courts will give effect to acts of state only if consistent with the policy and law of the U.S.). *See also* Banco Nacional de Cuba v. Chemical Bank, 658 F.2d 903, 908 (2d Cir. 1981); *United Bank* 542 F.2d at 872.

51. 570 F. Supp. 870, 878 (S.D.N.Y. 1983).

incurred by the government-owned Banco Nacional of Costa Rica, because of currency decrees enacted by that government. The United States District Court for the Southern District of New York adopted the formulation of the Second Circuit articulated in *Menendez v. Saks*,[52] that 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. . . . [T]he power to enforce payment of a debt . . . generally depends on jurisdiction over the person of the debtor." The general rule in most contexts is that the situs of a debt is the domicile of the debtor.[53]

Since the credit instruments expressly stated that they were payable in New York, Judge Motley rejected the act of state defense and held that the property "confiscated" by the government of Costa Rica was "plaintiffs' legal right to repayment of the debt owed by the defendant" in New York.[54] In a similar case, *Allied Bank International v. Banco Credito Agricola de Cartago*,[55] the Second Circuit held that no act of state was involved because the situs of the debt was New York, not Costa

---

52. 485 F.2d 1355, 1364-65 (2d Cir. 1973).

53. *See* Harris v. Balk, 198 U.S. 215 (1905); Shaffer v. Heitner, 433 U.S. 186 (1977). For discussion of debt situs issues, see Note, *Debt Situs and the Act of State Doctrine: a Proposal for a More Flexible Standard*, 49 ALB. L. REV. 647 (1985); Note, *The Resolution of Act of State Disputes Involving Indefinitely Situated Property*, 25 VA. J. INT'L L. 901 (1985).

54. *Libra Bank*, 570 F. Supp. at 878. The district court ignored the Hickenlooper requirement that a confiscation or taking in violation of international law must be tangible, not intangible property such as contract rights. The district court also made the extraordinary statement: "[I]n a strict legal sense all property is intangible." *Id. See infra* notes 58 and 59 for authority that the enactment of exchange controls is not a "taking" or "confiscation."

Another interesting example of act of state embroidery relating to the so-called "territorial limitation" was the articulation of the Second Circuit in *United Bank*, 542 F.2d at 874, relying on the Fifth Circuit decision in Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 715-16 (5th Cir. 1968), *cert. denied*, 393 U.S. 924 (1968), to the effect that where an act of state has not "come to complete fruition within the dominion of [a foreign] government, . . . no *fait accompli* has occurred." Consequently, the inability of a foreign state to complete an expropriation within its territorial borders reduces the foreign state's expectations of dominion over the property in question. The foreign state is less likely to be vexed by a judicial disposition of the property. *United Bank*, 542 F.2d at 875. This formulation is apparently an attempt to explain the underlying rationale of the territorial limitation of the act of state doctrine. *See also Tchacosh Co. Ltd.* 766 F.2d 1333, in which the court affirmed that Iranian decrees divesting former managing director of Iranian corporation of authority to bring suit on payment under a subcontract for construction of certain defense facilities in Iran was an act of State. At the time of divestment, general contractor held no property or assets of Iranian corporation within U.S. territory. Therefore Iran was in a position to perform a *fait accompli* over the acquisition of any money owed Tchacosh by Rockwell. *Id.* at 1338.

55. 757 F.2d 516 (2d Cir. 1985) *cert. dismissed*, 106 S. Ct. 30 (Sept. 20, 1985). This decision was a rehearing and overturned an earlier Second Circuit *Allied* decision which implicitly rejected *Libra* and held Costa Rica's debt rescheduling was consistent with principles of "comity", and thereby consistent with the law and policy of the United States. 733 F.2d 23 (2d Cir. 1984). For a discussion of this latter case, see Ebenroth & Teitz, *Winning (or Losing) By Default: The Act of State Doctrine, Sovereign Immunity and Comity in International Business Transactions*, 19 INT'L BUS. TRANS. 225 (1985).

Rica.

D. *Recent Applications*

There have been some recent cases demonstrating the present vitality and vigor of the act of state doctrine and recognizing its basic purpose and rationale. In the opinion of the authors, the FSIA amendments will severely affect the application of the doctrine in these cases.

In *Braka v. Bancomer, S.N.C.*,[56] plaintiffs were a number of United States citizens who purchased peso and dollar denominated certificates of deposit in 1981 from Bancomer, S.A., at the time, a privately owned bank. In 1982, in response to an economic crisis, the Mexican government nationalized the entire private banking system and issued exchange controls which decreed that all bank deposits must be repaid upon maturity in the national currency. As a result of these decrees, plaintiffs received pesos at the prescribed exchange rate of 70-80 pesos per dollar, instead of the then free market rate of 135-50 pesos per dollar.[57] Plaintiffs filed suit in the United States District Court for the Southern District of New York for breach of contract in the amount of $900,000 as well as violations of the federal securities laws. Bancomer moved to dismiss the complaint, arguing that the court lacked jurisdiction under the FSIA, and that even if jurisdiction did exist, the act of state doctrine precluded examination of Mexico's acts. The district court held that jurisdiction existed under the FSIA, but dismissed the suit under the act of state doctrine.[58] The plaintiffs appealed.

The Second Circuit affirmed the district court and held that the issuance of certificates of deposit was a commercial activity under Section 1605(a)(2) of the FSIA.[59] But the absence of immunity did not make plaintiffs' claims justiciable. Utilizing the situs analyses found in *Libra* and *Allied* discussed above, the court determined that because the situs of the plaintiffs' certificates was in Mexico, the act of state doctrine prevented judicial examination of the complaint. The court held that Mexico's enactment of exchange controls was not commercial activity, but sovereign governmental activity since only a sovereign could enact exchange controls.[60] "[T]he mechanisms used by Mexico were conventional devices of civilized nations faced with severe monetary crises."[61] The

56. 762 F.2d 222 (2d Cir. 1985).

57. For further discussion of the Mexican economic crisis, see Zamora, *Peso-Dollar Economics and the Imposition of Foreign Exchange Controls in Mexico*, 32 AM. J. COMPL. 99 (1984); Morgan, *Legal Issues Arising from the Mexican Economic Crisis*, 17 VAND. J. TRANSNAT'L L. 367 (1984); Gomez-Palacio, *Mexico's Foreign Exchange Controls, Two Administrations, Two Solutions, Thorough and Benign*, 16 U. MIAMI INT. AM. L. REV. 267 (1984).

58. Braka v. Bancomer, S.A., 589 F. Supp. 1465, 1472 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985).

59. *Braka*, 762 F.2d 222.

60. *Id.* at 225-26.

61. *Braka*, 589 F. Supp. at 1472.

Braka court refused to recognize the so-called commercial activity exception to the act of state doctrine enunciated in *Dunhill*, since the relevant acts taken "for the purpose of saving its national economy from the brink of monetary disaster, surely represents the exercise [of] powers peculiar to sovereigns."[62]

Eight other courts including two courts of appeal have also held, based on similar facts, that the important governmental act, imposition of exchange controls and regulation of the Mexican economy, mandated dismissal under the act of state doctrine.[63] Other courts have also held that the same sovereign act (i.e. refusal by a foreign government to pay an alleged debt owed in U.S. dollars based upon the urgent need to preserve scarce foreign exchange), is an unreviewable act of state.[64]

After having discussed the relevant historic background and exceptions to the act of state doctrine, it is now possible to focus on the impact that the proposed legislation would have on the doctrine.

III. PROPOSED LEGISLATION

The relevant proposed new Section 1606(b) of the FSIA provides as follows:

> The Federal act of state doctrine shall not be applied on behalf of a foreign state with respect to any claim or counterclaim asserted pursuant to the provisions of this chapter which is based upon an expropriation or other taking of property, including contract rights, without the payment of prompt, adequate and effective compensation or otherwise in violation of international law or which is based upon a breach of contract, nor shall such doctrine bar enforcement of an agreement to arbitrate or an arbitral award rendered against a foreign state.

---

62. *Braka*, 762 F.2d at 225 (quoting *Dunhill*, 425 U.S. at 704 (plurality opinion)). Plaintiffs can always seek their remedies in the courts of Mexico or via diplomatic claims, arbitration or treaty, not in the application of one state's version of international law to another state.

63. Callejo v. Bancomer, 764 F.2d 1101 (5th Cir. 1985); Frankel v. Banco Nacional de Mexico, No. 82, Civ. 6457 (S.D.N.Y. May 31, 1983), *appeal dismissed*, No. 83-7543 (2d Cir. July 12, 1983); Offshore Express v. Multibanco Comermex, S.A., N.Y.L.J., July 7, 1983 at 6, col. 1 (N.Y. Sup. Ct.); Braka v. Nacional Financiera, No. 83 Civ. 4161 (S.D.N.Y. July 9, 1984). Sanger v. Bancomer, No. 84-1223 (S.D.N.Y. Sept. 7, 1984); Reidel v. Bancomer, SA, No. C84-219-A (N.D. Ohio Sept 28, 1984), *appeal filed*, No. 85-3517 (6th Cir. 1985); West v. Multibanco Comermex, SA, No. 83-0174 (N.D. Ca. May 23, 1985), *appeal filed*, No. 85-2162 (9th Cir. 1985); Braka v. Multibanco Comermex, SA, 589 F. Supp. 802 (S.D.N.Y. 1984). (All cases filed by American plaintiffs who lost the dollar value of their deposits in Mexican banks after the 1982 exchange controls were implemented).

64. French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 55, 295 N.Y.S.2d 433, 442, 242 N.E.2d 704, 711 (1968) ("[T]he currency regulations of a foreign state . . . are not appropriate subjects for evaluation by state courts applying local conceptions of public policy."); DeSanchez v. Banco Central de Nicaragua, No. 79-4281 (E.D. La. Mar. 9, 1984), *aff'd on other grounds*, 770 F.2d 1385 (5th Cir. 1985).

What is this proposed amendment designed to accomplish? Since the amendment appears to restrict the application of the act of state doctrine, it follows that the intent of the amendment is to improve the remedies available to United States nationals, both individuals and enterprises, against foreign states. Clearly, restrictive application or total elimination of the doctrine would improve such remedies. But it would seem that the availability of unlimited remedies against foreign states in our courts would certainly "vex the peace of nations" and prove highly prejudicial to our foreign relations with friendly countries. Moreover, unlimited remedies might result in judgments that would not be enforced in other jurisdictions. The question then becomes, to what degree can the application of the act of state doctrine be restricted without undermining the United States in the conduct of its international relations?

It is submitted by the authors that the direct intention and purpose of the proposed amendment is to reverse the *Braka* decision and the other recently decided cases cited above, relating to the imposition of Mexican exchange controls and the resultant non-payment of United States dollar certificates of deposit.[65] Assuming that the language of the proposed amendment inhibits the application of the act of state doctrine in such cases, can anyone conceive of a more "vexing" result than a foreign state found subject to the judgment of a United States court requiring it to pay obligations, the payment of which is prohibited by its own laws? In the Mexican banking cases discussed above, Mexican law prohibited the payment in dollars of plaintiffs' accounts. Furthermore, by refusing to obey the United States judgment, that foreign state then becomes subject to possible orders of attachment or execution on its property located in the United States.[66] This might well lead to significant and severe economic problems for the foreign state.[67]

In this connection, note the casual statement of Judge Motley in *Libra Bank:*

> The court is not unmindful that the effect of its judgment is to reverse the Costa Rican decrees. The court believes, however, that in this situation, because its judgment is unlikely to "vex the peace of nations" . . . there is less need for judicial deference to the foreign affairs competence of the other branches of government.[68]

Other courts have disagreed with the statement of Judge Motley. Re-

---

65. The part of the amendment dealing with the recognition of arbitral agreements or awards is clearly designed to reverse the case of Libyan American Oil Co. v. Libya, 482 F. Supp. 1175 (D.D.C. 1980), *vacated mem.*, 684 F.2d 1032 (D.C. Cir. 1981) (recognition or enforcement of arbitration award granted to United States oil company declined based on act of state doctrine).

66. 28 U.S.C. § 1610.

67. A discussion of problems of lenders is beyond the scope of this article. *See Allied Bank*, 757 F.2d 516 and articles discussing the *Allied* decision.

68. 570 F. Supp. at 882.

cently, in *Callejo v. Bancomer*,[69] the Fifth Circuit rejected any commercial activity exception to the act of state doctrine and stated: "[W]hile we are doubtful of our ability to foresee what will vex the peace of nations, we have no doubt that disregarding the Mexican regulations would be very vexing indeed."[70] Hence, as this article has shown, the acts of a foreign state have been treated differently in various United States jurisdictions, with easily imagined negative consequences for our international relations.

Regrettably, the drafters of new Section 1606(b) of the FSIA have created confusion and doubt by not defining the scope and applications of the amendment with appropriate clarity. There are numerous examples.

There are several instances of undefined and imprecise use of language. First, since the amendment provides that the doctrine shall not be applied "on behalf of a foreign state" as to certain claims, there would appear to be no prohibition to the application of the doctrine in cases involving only private parties. Thus, a private party could assert an act of state defense involving a contract right or breach of contract, but the foreign state could not. It would be hard to justify such an inconsistent result. For example, in the *Hunt* case, the defendant Mobil could assert an act of state defense on its own behalf.[71] But if the Libyan government became a party, it could not assert the defense.

Second, as further evidence of the unclear use of language in the proposed amendment, it appears only to cover claims or counterclaims "based upon" direct acts of a foreign sovereign, which constitute expropriation or breach of contract in violation of international law. What about situations where the act of state, while relevant, is only indirectly implicated in the claim, such as in the *Hunt* and *Rasoulzadeh* cases?

Third, the term "breach of contract" does, in the opinion of the authors, require some elucidation. To what exactly, does any claim "based upon a breach of contract" refer? Is this limited to a voluntary repudiation by a foreign government of a contractual obligation? Must the contract be part of a commercial transaction? Does this refer only to an isolated international transaction? What about the total repudiation of obligations payable in a foreign currency resulting in a breach of contract? What about a claim based on breach of contract between private parties where the breach is the result of a nationally mandated sovereign fiscal policy such as the imposition of exchange controls? In this latter situation can it be argued that there has been no breach since the contract has been "reformed" by operation of law, rendering it legal and enforceable in the foreign jurisdiction?

Assuming that the thrust of the proposed amendment is to deal with exchange controls and similar fiscal enactments by a foreign state, a con-

---

69. 764 F.2d 1101 (5th Cir. 1985).

70. *Id.*, at 1116.

71. *See Hunt*, 550 F.2d 68 *cert. denied*, 434 U.S. 984.

flict arises with foreign policy objectives since the United States is a party to the 1944 Bretton Woods Agreement creating the International Monetary Fund (IMF).[72] The United States supports and promotes the policies of the IMF which has mandated that third world countries establish exchange controls and devalue national currencies in order to be eligible for international bank loans. A conflict may arise for U.S. foreign policy interests if the third world country complies with U.S.-backed IMF-imposed controls, which may cause that country to default on individual obligations to private U.S. lenders.

Fourth, the amendment purports to extend the application of the Hickenlooper Amendment to the expropriation or taking of intangible property (i.e. contract rights, in violation of international law). Assuming the amendment is directed to situations similar to those involved in *Libra* and in the Mexican exchange control cases, it fails to recognize that the imposition of exchange controls such as those imposed by Costa Rica and Mexico, have been expressly held not to be an "expropriation" or "taking."[73] Moreover, the Supreme Court has held that United States property is not "taken", as that term is used in the Fifth Amendment to the Constitution, by the enactment of legal tender and currency legislation by the United States.[74]

Fifth, if we return to the words of the *Sabbatino* case concerning expropriation:

> Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations which have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect 'imperialist' interests that are inappropriate to the circumstances of emergent states. . . .[75]
>
> . . . .
>
> The disagreement as to relevant international law standards reflects an ever more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the com-

72. Articles of Agreement of the International Monetary Fund, *as amended*, effective April 1, 1978, 29 U.S.T. 2203, T.I.A.S. no. 8937.

73. French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 55, 295 N.Y.S.2d 433, 442, 242 N.E.2d 704, 710 (1968); F.A. MANN, THE LEGAL ASPECT OF MONEY, 473-74 (4th ed. 1982).

74. Knox v. Lee, 79 U.S. (17 Wall.) 457 (1871) (Legal Tender cases); Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240 (1935) (Gold Clause Cases).

75. *See Sabbatino*, 376 U.S. at 429-430. (statement of Mr. Padilla Nervo (Mexico)).

munity of nations.[76]

. . . .

> [I]t rests upon the sanguine presupposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies.[77]

Thus, if under the new legislation United States courts revoke the use of the act of state doctrine in the major areas in which it is used, it will likely give great offense to the expropriating or breaching nations. It could result in retaliation on an economic or political level by that state. "Terrorist" actions against United States businesses, military, and civilians may increase "since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders."[78]

The United States Department of State has had reservations about the type of legislation represented by the proposed amendments. Concerning a similar Congressional bill, former Legal Adviser of the State Department, Davis Robinson, has stated, "[F]riction with foreign governments occurs with some frequency over alleged conflicts of jurisdiction and with regard to enforcement actions perceived to be inappropriate extraterritorial exercises of jurisdiction by the United States. Such controversies may be isolated events in our relations with particular countries. Or they may involve long-term and deep-rooted differences, sometimes with close friends and allies."[79]

Mr. Robinson recently expressed concern about the implications of S.1071. "What if the shoe were on the other foot?" Would the U.S. Government and its agencies resist in a case if comparable rules were applied in a foreign jurisdiction? Secondly, diplomatic relations could be adversely affected, and there may be an increase in nonappearances and default judgments in the U.S. courts by foreign sovereigns.[80] This may be followed by attempts in the United States to then undo the damage to foreign relations wrought by judicial decisions rendered without the benefit of adversary proceedings.[81]

---

76. *Id.* at 430.

77. *Id.* at 434-35.

78. *Id.* at 432.

79. ACT OF STATE & EXTRATERRITORIAL REACH 57 (J. Lacey ed. 1983) (remarks by Robinson in reference to S.1434, an unadopted bill limiting the act of state doctrine).

80. Summary of Remarks made at ABA Annual Convention Presidential Showcase: *Amendments to the Foreign Sovereign Immunities Act*, July 10, 1985, attended by author Wing.

81. An actual example of judicial interference with foreign policy objectives occurred in Jackson v. People's Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982). The United States Department of Justice advised the federal district court that failure to set aside a default judgment against the Government of China for the value of bearer bonds issued by the Imperial Chinese government in 1911, would exacerbate international tensions and harm

Mr. Robinson can probably answer his own questions since he was still Legal Adviser when the United States decided to withdraw from further proceedings on the merits after an unfavorable jurisdictional decision by the 16 member International Court of Justice in the *Nicaragua* case.[82] If the United States Government was not willing to accede to the jurisdiction at the at least arguably impartial Hague, would it be willing to accede to the jurisdiction of the state courts of Nicaragua, which are governed by socialist and civil code principles concerning international law? Imagine a suit brought against the United States by Nicaraguan private businessmen for interference with the Nicaraguan domestic economy as a result of the United States-imposed blockade. Would the United States permit prejudgment attachment of United States government assets or execution of a default judgment by the Nicaraguans? If not, would it accept nationalization or expropriation of one of the many United States owned private companies when Nicaragua desired to collect the default judgment? If suit was brought in Libya, would the United States government submit to jurisdiction or abide by the judgment?

IV. CONCLUSION

The proposed amendments affecting the act of state doctrine ignore the interdependent nature of the world economy. "We live in a world that daily grows more interdependent. In 1970, international trade accounted for only 6 percent of the United States' gross national product. Today, it is over 12 percent."[83] We live in a country with a trade deficit of over $123 billion.[84]

Therefore, it is more important than ever before that in order to encourage our export efforts, we acknowledge and be cognizant of the different economic and political systems that characterize our current and potential major trading partners. In order to peaceably co-exist with our fellow humanity, it is important to respect diversity. The amendment relating to the act of state doctrine is ambiguous and could cause major political, diplomatic, and economic repercussions with other foreign states. It should be abandoned. The act of state doctrine remains a positive and vitally important doctrine which should not be eliminated through the "back door" of the FSIA. It remains a viable and important doctrine as we head toward the year 2000.

---

bilateral relations with China. Nevertheless the court retained its jurisdiction, but later dismissed the bondholders' claim on the ground that the FSIA did not apply to transactions predating the statute's existence. 596 F. Supp. 386 (N.D. Ala. 1984).

82. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Judgment of Nov. 26), 24 I.L.M. 59 (1985).

83. 131 CONG. REC. S5370 (daily ed. May 3, 1985) (statement by Mr. Mathias).

84. *Id.*