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I. INTRODUCTION

The act of state doctrine is being referred to repeatedly in court decisions in the United States and is used in different ways by different courts. The U.S. Supreme Court tried to state the doctrine definitively in *Banco Nacional de Cuba v. Sabbatino*[1] in the following terms:

> 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 the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[2]

Congress immediately expressed its dislike for this case in the second Hickenlooper Amendment (Hickenlooper II) of the Foreign Assistance Act and has done so since by its amendments to the Foreign Sovereign Immunities Act (FSIA).[3] The courts responded by narrowing the application of this legislation. Reversals and dissents are common in these cases.[4] Lawyers attempting to advise clients on the operation of this doctrine and the available protections against its adverse impacts are confronted with the problem of deriving comprehensible guidance from conflicting cases.[5] There are drastic consequences for U.S. lenders and investors

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1. 376 U.S. 398 (1964).

2. *Id.* at 428.

3. 22 U.S.C. § 2370(2)(e)(2); 28 U.S.C. §§ 1330, 1602 *et seq.* (1976). At least two federal district courts considered the FSIA amendment to indicate an intention to substitute the courts for the executive in determining sovereign immunity questions, which should be persuasive as to Congress' attitude toward act of state cases. National Airmotive v. Gov't of Iran, 499 F. Supp. 401 (D.D.C. 1980); National Am. Corp. v. Federal Rep. of Nigeria, 448 F. Supp. 622 at 638 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

4. For example, no U.S. Supreme Court decision on this subject has been without a dissent; since the *Sabbatino* case, no U.S. Supreme Court opinion has attracted a majority of the Justices. In the *Allied Bank I* case, *see infra* note 6 and accompanying text, the trial court did not apply the doctrine; the court of appeals affirmed by applying the doctrine and then on reconsideration reversed itself in 1985, *see infra* note 7 (*Allied Bank II*).

5. The currency control cases described below illustrate the uncertainty—the state courts in New York will not require a New York bank to pay twice on a Cuban certificate of deposit, but the federal courts will. *Compare* Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 463 N.E.2d 5, 463 N.Y.S.2d 764 (1984) *with* Garcia v. Chase Manhattan Bank, 735 F.2d 645 (2d Cir. 1984). In Callejo v. Bancomer, 764 F.2d 1101 (5th Cir. 1985), the trial court made its decision on sovereign immunity grounds; the court of appeals rejected that

when foreign governmental financial obligations are declared to be unenforceable in U.S. courts, both for U.S. investors and for foreign governments seeking U.S. investment and when the availability of judicial remedies for future wrongs is so uncertain. It is timely and important, therefore, to examine these cases, to examine the act of state doctrine and to consider what the proper function of the doctrine is (if any). It will be my contention that we need not assume that the courts are unable to make judicious choices about which acts of foreign states they should respect without further inquiry, that the doctrine should be reconsidered by the Supreme Court at the first opportunity, and that the doctrine should be dispensed with in favor of reliance upon concepts of conflict of laws and comity. Three sets of cases are illustrative of the confusion and uncertainty being caused by the act of state doctrine.

II. RECENT EVIDENCE OF THE CONFUSION

A. *The Currency Control Cases*

The trial court in *Allied Bank International v. Banco Credito Agricola de Cartago*[6] held that Costa Rica's currency control regulations would not be scrutinized by a federal court sitting in New York because of the act of state doctrine. The Second Circuit affirmed, but not on the basis of the act of state doctrine, ruling instead on the basis of comity. Both decisions up to that point in the litigation barred payment in New York on a promissory note issued in Costa Rica notwithstanding the fact that the instrument provided for payment in U.S. dollars in New York. The Second Circuit then heard reargument in response to the request of the massed New York Clearing House banks and reversed itself in *Allied Bank II*[7] after the executive branch, in effect, gave the court permission to inquire into the Costa Rican action. The *Libra Bank* case,[8] in contrast to *Allied Bank I* and the *Allied Bank* trial court decision, held that these same Costa Rican currency controls may be scrutinized by a federal court sitting in New York, and that the act of state doctrine does not require

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analysis and reached the same result on act of state grounds. In both Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) and First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), the U.S. Supreme Court reversed the court of appeals, which in turn had reversed the respective trial courts partially or entirely. The Fifth Circuit Court of Appeals has expressed its appraisal of the architecture of the act of state doctrine in the *Callejo* opinion, by stating that ". . .if the Foreign Sovereign Immunities Act is a tangled web of statutory ambiguities, the act of state doctrine is an airy castle." *Callejo*, 764 F.2d at 1113.

6. 566 F. Supp. 1440, *aff'd* 733 F.2d 23 (2nd Cir. 1984) This first decision of the Second Circuit, which will be referred to as *Allied Bank I*, was withdrawn when the case was reconsidered, but will be cited in this article merely as an event in the history of the case. *See infra* note 7.

7. 757 F.2d 516 (2nd Cir. 1985). This second decision will be referred to as *Allied Bank II*.

8. 570 F. Supp. 870 (S.D.N.Y. 1983).

otherwise.[9]

In a contemporaneous case involving Mexico's currency controls, in *Callejo v. Bancomer*,[10] a different court found that, because the situs of the debt for act of state purposes was in the country issuing the obligation, it would ban inquiry into the validity of the Mexican currency controls. If a situs can indeed be found for an intangible, then its role in these cases should only be to contribute to a choice of laws conclusion, which should then be followed by a comity analysis if the applicable law is determined to be foreign—in this case, Mexican. This court did indeed—by an analysis which penetrated to the heart of the issues—try to balance the relevant policy considerations, but only succeeded in demonstrating the absence of a clear basis for decision in act of state cases. In analyzing the governmental character of the defendant, it was led to conclude that the actions of the defendant bank could not be insulated from U.S. jurisdiction by sovereign immunity, but that the governmental character of the actions complained of was sufficiently sensitive, given the finding of a situs in Mexico of the obligation in question, to require the application of the act of state doctrine. The situs conclusion could have been otherwise because of the U.S. contacts involved in the indirect method by which the instruments in question had in substance been payable in Texas, although the form of Mexican payment was observed. If the *Callejo* court had found Mexican law applicable, it could still have addressed the questions of foreign relations sensitivity under the framework of comity, rather than being required to refrain from considering such questions because of the act of state doctrine. The decision could then have turned on the court's evaluation of the severity of the exchange rate reduction, balanced against Mexico's financial predicament, the investor's assumption of risk, and the concern, if expressed, of the executive branch.

In *Perez v. Chase Manhattan Bank, N.A.*,[11] the New York Court of Appeals held that Chase Manhattan was not required to pay the Cuban holder of a certificate of deposit which had been issued by a Chase Manhattan branch in Cuba. The branch had been nationalized by the Cuban government, and the branch had paid the amount payable on the certificate to the Cuban government when asked to do so. The account was payable in Cuba, as well as in New York. The highest New York State

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9. The *Libra* opinion identified the subject matter of the sovereign's taking as plaintiff's legal right to repayment. *Id.* at 878. The opinion in *Allied Bank I* before *Allied Bank II* treated the debtor's location as the situs of the debt. *Allied Bank I*, 733 F.2d 23.

10. *Callejo*, 764 F.2d 1101. A question might also be raised as to whether the treatment by the *Callejo* court of the commercial exception possibility (*Id.* at 1115) is not inconsistent with Justice White's opinion in *Dunhill*, 425 U.S. at 706. Justice White would apply the commercial exception to the impact of governmental actions causing a commercial operation (here, a cigar business) to breach a contract; in *Callejo*, the court would clothe the commercial banking transaction with the governmental character of the act which caused it to breach its contract.

11. 61 N.Y.2d 460, 463 N.E.2d 5, 463 N.Y.S.2d 764 (1984).

court found the situs of the debt to be in Cuba, so that the right to collect the debt had been acquired by the Cuban confiscation. Since the thing taken was within the acting state's territory, this court concluded that it "could" not review the validity of the taking—because of the act of state doctrine—and that the Cuban holder of the certificate had no valid claim to collect on in New York. The second Hickenlooper Amendment was avoided by two conclusions which severely limit its application: (i) that uncompensated takings from the sovereign's own citizens do not violate international law, and (ii) that the Amendment does not apply to property that remains within the confiscating country and does not come within the territorial jurisdiction of the U.S. When you add to these conclusions the impact of *Hunt v. Coastal States Gas Producing Co.*,[12] which excluded contract rights from its coverage, there is not much left of Hickenlooper II.

On the other hand, in the *Garcia* case,[13] which dealt with a certificate of deposit also issued by a Cuban branch of a New York bank to a Cuban citizen, the federal Court of Appeals for the Second Circuit required Chase Manhattan to pay the certificate holder in New York even though it had already paid in Cuba as it had done in the *Perez* case. The *Garcia* rationale was that the seizure of the Cuban branch did not constitute acquisition of the plaintiff's certificate of deposit, so that the branch should not have paid when the Cuban government demanded payment. The court found the situs of the property taken to be outside Cuba, and held that the act of state doctrine did not require unquestioned acceptance of Cuba's effort to confiscate something situated outside of Cuba's territory. This reflects the extraterritoriality exception to the act of state doctrine which the *Sabbatino* opinion invited. Whether situs will be found in the acting state's territory or not is said to be decisive in many of these cases, but the basis for distinction is so unclear that it leaves both lenders and borrowers in a damaging state of uncertainty. The *Allied Bank II* decision stated that the act of state doctrine would not apply if the note was capable of being collected, among other places, anywhere outside of the issuing state. The *Perez* decision stated that the act of state doctrine would only be inapplicable if the debt "is not payable at all in the confiscating state." The confusion is obvious, but we should keep in mind that it will not be enough to achieve consistency in choice of law analysis. What is needed is a basis for decision-making that has a rational basis in principles of justice.

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12. 583 S.W.2d 322 (Tex. 1979); *see also* Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983).

13. *Garcia*, 735 F.2d 645. The *Sabbatino* quotation from the opinion set forth on page 321 above contains the limitation of the holding in the *Sabbatino* case to takings "within its own territory by a foreign sovereign." *Id.* at 428. Since all that can be "taken" is someone's rights in property, the precise impact of a territorial limitation of laws opens the question whether it addresses the location of the subject of the rights or of the holder of the rights.

B. *Anti-Trust Cases*

The *Clayco* case[14] held that the plaintiff was barred by the act of state doctrine from pursuing an antitrust claim which is based upon the alleged bribery by the defendant of the petroleum minister of the country in which both were trying to obtain a valuable oil concession, and which the defendant succeeded in obtaining. On the other hand, the *Sage International* case[15] holds that the act of state doctrine does not bar the pursuit of a plaintiff's antitrust claim even though the allegations of the complaint might call for a review of corruption charges or of the motivation of the foreign sovereign in making procurement decisions. The U.S. Supreme Court stated in *Sabbatino* that it was limiting its holding to expropriation cases,[16] but these courts considered that it might apply in antitrust cases and one of them actually applied it. What is evidenced in these cases is uncertainty about the application of the doctrine, or else the expedience of using it to forestall the trial of unwelcome issues of fact. The *Clayco* case would seem to have been disposable by finding the petroleum minister's unauthorized act not to have been an act of state. At some point, sovereign compulsion may become a defense to discovery or even liability in such cases, but the foreclosure of all proof of wrongdoing outside the expropriation area (which presumably is now open because of Hickenlooper II) does not serve the ends of justice. It could be avoided by merely permitting the executive branch to intervene in the unlikely event that it wished to try to persuade the court to abstain.

C. *The Treaty Cases*

The *Sabbatino* holding stated that its restraints on judicial action applied only "in the absence of a treaty. . .regarding controlling legal principles."[17] Since that case, two lower courts have reached opposite conclusions as to whether the terms "prompt, just and effective compensation" stated an unambiguous and usable principle of law so as to satisfy the treaty exception.[18] One court said these terms were unambiguous and usable, and the other (reversed on appeal) said they were not. Consequently, the doctrine would have been applied by one trial court and not the other. The irony is that the well-meaning *Kalamazoo* court, reversed on appeal, had evaluated these terms approximately the way Justice Harlan did in his *Sabbatino* opinion.[19]

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14. 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). Such cases have led writers to propose a bribery exception to the act of state doctrine. *See infra* note 75.

15. 534 F. Supp. 896 (S.D. Mich. 1981).

16. *Sabbatino*, 376 U.S. 398.

17. *Id.* at 428.

18. Kalamazoo Spice Extraction Co. v. Provisional Military Gov't. of Ethiopia, 729 F.2d 422 (6th Cir. 1984), and American Int'l. Group, Inc. v. Islamic Rep. of Iran, 493 F.Supp. 522 (D.D.C. 1980).

19. *Sabbatino*, 376 U.S. at 427-437.

III. GUIDANCE FROM THE U.S. SUPREME COURT

Faced with the welter of confusing decisions in the lower courts, it is necessary to look to the decisions of the U.S. Supreme Court to see whether adequate guidance can be found there. A substantial literature exists which examined the *Sabbatino* case as it worked its way through the courts after the Cuban expropriations began in 1959.[20] Eminent writers have since taken the position that the act of state doctrine is unsatisfactory.[21] A useful consideration of the sets of cases referred to above, which I believe add fuel to the fire started by previous writers, requires some review here of *Sabbatino* and the intervening decisions. The continuing flow of recent cases has done nothing to clarify, and only illustrates, the confused state of the law.[22]

A. *The Sabbatino Case*

Banco Nacional de Cuba v. Sabbatino[23] held that, in a dispute in New York over the proceeds of sale of Cuban sugar, the validity of the actions of the government of Cuba in expropriating the sugar from a U.S. owned Cuban company while the sugar was in Cuba cannot be examined by U.S. courts, in deference to the act of state doctrine. The majority opinion stated that the doctrine is not constitutional, although it has roots in the separation of powers; nor is it a rule of international law, although it has international consequences. The Court also said that it is not merely a conflict of laws rule to be applied variously by the several

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20. Representative examples include Zander, *The Act of State Doctrine*, 53 AM. J. INT'L. L. 826 (1959) and Association of the Bar of the City of New York, *A Reconsideration of the Act of State Doctrine in United States Courts* (1959).

21. *See, e.g.*, Lacey, ed. *Act of State and Extraterritorial Reach* (ABA publication, 1983) and an excellent article, Leigh and Sander, *Dunhill: Toward a Reconsideration of Sabbatino*, 16 VA. J. INT'L L. (1976). CF. Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967); 3 COLUM. J. TRANSNAT'L L. 107 (1964); and *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964). There is now a vast literature on this subject which it is not possible to acknowledge fully.

22. *See, e.g.*, Boland v. Bank Sepah-Iran, 614 F. Supp. 1166 (D.D.C. 1985) in which the courts found that the act of state doctrine did not apply unless all acts constituting the act of question had come to fruition within Iran; the *Perez* court, 61 N.Y.2d 460 concluded that the doctrine would apply if the acting sovereign had the power to change ownership within his territory, even though comparable action could have occurred outside his territory. The *Allied Bank* opinions offer three different legal analyses of the same facts, the latest in *Allied Bank II*, decided in 1985. *See supra* notes 6-7. In Tahacosh Co., Ltd. v. Rockwell Intn'l. Corp., 766 F.2d 1333 (9th Cir. 1985), the court approached the conflicting situs-based arguments by calling them "a quagmire of legal difficulties" (766 F.2d at 1337) and then decided that even though the defendant was a U.S. company, the claim of plaintiff had insufficient U.S. contact to permit avoidance of the act of state doctrine. In De Roburt v. Gannett Co., Inc., 733 F.2d 701 (9th Cir. 1984) a head of state was blocked from pursuing a libel claim by the defendant's assertion against him of the act of state doctrine. Surely, as Justice Douglas concluded with respect to counterclaims, a head of state waives the act of state doctrine by initiating litigation outside his own country.

23. *Sabbatino*, 376 U.S. 398.

states. Instead, it is a doctrine of federal law derived from the Supreme Court's deference to the role of the executive branch in dealing with sensitive international relations. The majority opinion limited its holding to expropriation cases.[24]

Unfortunately, unless the courts drastically limit or abandon the doctrine, or unless the executive branch will really pursue each of these situations and obtain a remedy for each victim, the effect of the decision is that many acts of confiscation, repudiation of obligations and other wrongful acts will be treated as valid and beyond question in U.S. courts, even in the face of allegations of illegality under international law principles. This is the galling result which is not adequately explained in the *Sabbatino* majority opinion, and not cured by Hickenlooper II.

B. *The White Dissent*

In a forceful dissent in the *Sabbatino* case, Mr. Justice White stated:

> I am dismayed that the court has, with one broad stroke, declared the ascertainment and application of international law beyond the competence of courts of the United States in a large and important category of cases.[25]

And the damage is even greater than that expressed in Justice White's dissent: under *Sabbatino*, our courts cannot consider whether an act of state offends the forum's public policy unless they can first find some exception to the doctrine—even if its policy is not reflective of some principle of international law and they cannot in the process make any contribution to the development of international legal principles.

Since the *Sabbatino* case, the Supreme Court has been unable to achieve a majority opinion in any case dealing with this doctrine. Congress, however, reacted quickly to the *Sabbatino* case. It agreed with Justice White's position and adopted Hickenlooper II,[26] which states in part:

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

24. *Id.* at 428.
25. *Id.* at 439.
26. 22 U.S.C. § 2370 (2)(e)(2) (1965).

> 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that the application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.[27]

It should be noted that in this legislation Congress not only instructed the courts to adjudicate allegations of takings in violation of international law, but it also instructed them to assume that the executive branch has no objection unless the President speaks up—thus inverting the exception which Judge Learned Hand felt obliged to observe in the *Bernstein* case[28] (that the courts could only act if the Executive Branch affirmatively released them to act).

C. *Subsequent Supreme Court Cases*

The act of state doctrine has returned to the Supreme Court twice since *Sabbatino*, and in neither of those cases did as many as five justices agree on the same opinion. The first was *First National City Bank v. Banco Nacional de Cuba*.[29] Cuba had expropriated branches of the First National City Bank (FNCB) located in Cuba. FNCB had previously made a secured loan to Banco Nacional and responded to the expropriation by selling the collateral it was holding in New York. It realized 1.8 million dollars' profit. Banco Nacional sued FNCB for the profit so realized, and FNCB counterclaimed for the value of its expropriated Cuban branch assets. Opinions by the Supreme Court Justices were split, but a majority held, for varying reasons, that the lower courts should deal with all aspects of the case and not abstain from inquiring into the validity of the Cuban government's actions on the grounds of the act of state doctrine. Three members of the Court reached this conclusion on the basis of the *Bernstein* exception (relying on a communication from the executive branch raising no objection to judicial action).[30] Justice Douglas voted with the majority on the equitable ground that a sovereign's claim can always be reduced by a counterclaim; if the sovereign chooses to come into our courts, then he must be prepared to have all related claims adjudicated, at least up to the amount of his claim. The fifth vote came from Justice Powell based on the broad proposition that the courts should take and deal with any case involving expropriation unless to do so would up-

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27. *Id.*

28. Bernstein v. Van Heyghen Frères Société Anonyme, 163 F.2d 246 (2nd Cir. 1947); but consider the reasonable dissent of Judge Clark in which he would have asked for proof from the executive branch of the necessity to abstain from acting, rather than to assume it from executive branch silence. *Id.* at 253.

29. 406 U.S. 759 (1972).

30. *Id.* In FNCB the Legal Adviser to the State Department informed the Supreme Court on November 17, 1970 that "[T]he 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." *Id.* at 764.

set the foreign relations of the United States. The result of these five votes was to permit the Court to act, and to avoid limiting its inquiry because of the act of state doctrine.[31]

The guidance provided by these three opinions in the *FNCB* case is obviously obscure, since it took three different routes to convey a majority to a common destination. They at least made it clear that the Court was quick to find reasons for avoiding use of the act of state doctrine.[32] What was also left unclear, and is still unclear, was whether the courts were to be the final judge of the need for abstention (on the grounds of potential embarrassment of our foreign relations) or whether the executive branch could signal for, and cause, judicial abstention without proof, and in no specified fashion.

The Supreme Court's next opportunity to address the act of state doctrine came in the *Dunhill* case.[33] Without attracting more than four Justices to its rationale, the plurality opinion written by Justice White would create a commercial exception to the act of state doctrine.[34] Pursuant to such an exception, a court would not be required to abstain from examining the validity of a sovereign action if the sovereign act drawn into question was by its nature a commercial activity rather than an activity in which only a sovereign could engage. As illustrated by the *Callejo* case, a decree barring the conversion of local currency into dollars would be in the nature of a sovereign act, but stopping payment on a dollar check as a result of such a decree could be regarded as a commercial action. The *Callejo* opinion analogized this approach to the "restrictive" theory of sovereign immunity, pursuant to which sovereign states are subject to the jurisdiction of U.S. courts in cases in which a party wishes to sue a sovereign directly because of its commercial activities.[35] A majority of the Justices voted in the *Dunhill* case to consider the validity

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31. The trial court had concluded that the *Sabbatino* case did not bar its inquiry because Hickenlooper II had overruled it. Banco Nacional de Cuba v. First National City Bank of New York, 270 F.Supp. 1004 (S.D.N.Y. 1967). The court of appeals reversed believing that was not the case and that the act of state doctrine barred the inquiry. Banco Nacional de Cuba v. First National City Bank of New York, 442 F.2d 530 (2d Cir. 1971). The Supreme Court reversed the court of appeals, thereby freeing the trial court to proceed with the case, although three reasons for barring inquiry were presented. *First National City Bank*, 406 U.S. at 759.

32. Justices Rehnquist and White and Chief Justice Berger relied on the *Bernstein* exception; Justice Douglas referred to the fact that the claim was a counterclaim and relied on National City Bank v. Republic of China, 348 U.S. 356 (1955), to the effect that a sovereign's claim can be cut down by a setoff. Justice Powell rejected both the Bernstein and the setoff escape routes, but found another method of overriding the doctrine by assuming the adjudicator's responsibility for determining whether this particular case presented a risk of damage to our international relations sufficient to justify judicial abdication, and concluding that it did not.

33. *Dunhill*, 425 U.S. 682.

34. Justice White referred to an opinion of Mr. Chief Justice Marshall, which stated that "when a government becomes a partner in any trading company, it divests itself. . .of its sovereign character and takes that of a private citizen." *Id.*

35. *Callejo*, 764 F.2d 1101.

of Cuba's action, although only four felt free to do so on the basis of a commercial exception.

As noted by Justice Marshall in his dissent in the *Dunhill* case,[36] the Supreme Court had up to that time never given its stamp of approval to the restrictive theory of sovereign immunity. However, Congress has remedied this condition by explicit legislation adopting the restrictive theory.[37] This action by Congress might be enough to allow us to predict a Supreme court majority in support of the commercial exception to the act of state doctrine if such a case were to arise now. (It should be noted that the distinction between "sovereign" and "commercial" activity is itself a likely breeder of disagreement, as in the *Callejo* case.)

In commenting upon the state of the law as a result of these three Supreme Court opinions, one lower court federal judge observed that

> [I]t is evident that there remains disagreement as to the origins and proper application of the [act of state] doctrine. It is however understood in theoretical terms and a practical application of the doctrine requires a balancing process which will lead to some variance in results depending on how the subject factors are weighted.[38]

IV. THE POLICY CONTENT OF ACT OF STATE DECISIONS

In order to become comfortable with the act of state doctrine, we must become comfortable with its consequences and its policy foundation. We know that its two principal consequences are: (1) certain actions of foreign governments will not be questioned even when alleged to be offensive to our public policy or to international law, and (2) the executive branch will be unencumbered in the conduct of foreign relations by the indelicate intrusions of the judiciary where acts of state are involved. Let us examine the possible sources of policy supporting the doctrine.

A. *Situs*

Act of state decisions often reach a result by manipulating the policy-neutral concept of "situs" in order to determine whether the subject matter of the action is (i) located within the territory of the acting sovereign and thus *within*, or (ii) located outside the territory of the acting sovereign and thus *beyond*, the territorial powers of the sovereign which are to be given exemption from inquiry under the act of state doctrine. These cases are tied to territoriality concepts which were strained to their limits in *American Banana Company v. United Fruit Co.*[39] Many courts have realistically identified the superficiality of act of state conclusions based on situs considerations—especially when the subject matter is an intangi-

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36. *Dunhill*, 425 U.S. at 715.
37. U.S.C. 28, §§ 1602-1611 (1976).
38. *Sage*, 534 F. Supp. at 900.
39. 213 U.S. 347 (1909).

ble. If all a decision does is to determine that an intangible has a situs abroad, as in the *Callejo* and *Perez* cases, and then conclude that U.S. courts must not intrude further, it is omitting a critical step. If the situs determination was used only to determine the applicable law, it would then be possible (if the act of state doctrine were abolished) to examine the effect to be given to the foreign law under comity standards. But when situs conclusions are used to determine the applicability of the act of state doctrine, then the essential policy level is omitted and the harm is done.

Of course there can be some policy underpinnings for respecting the implications of situs. Property which can clearly be located territorially can inspire some deference to a sovereign state's attempts to affect legal relationships within its own borders. U.S. courts could give offense to a nationalizing government, and look foolish at the same time, in denying the validity of a transfer of the real estate of a foreign citizen through nationalization in his own country. But acts of state can, and usually do, have some extraterritorial effects, however indirect or secondary, as occur when the owner is a foreigner or the assets taken (or their fruit or proceeds) are or become located outside the nationalizing state. When such acts of state have offensive content when viewed by reasonable standards of commercial or human decency, differences of result based entirely on the paper-thin concepts of situs of intangibles are not satisfactory. Did Mr. Callejo lose because the situs of his certificate was in Mexico, or was its situs in Mexico because he lost?

B. *Military Reality*

Underhill v. Hernandez[40] is often referred to as the classic U.S. statement of the act of state doctrine. The facts arose in Venezuela, where Mr. Underhill, a U.S. citizen, was detained in the country against his will by the revolutionary leader, General Hernandez, who was trying to coerce him to operate his waterworks for the revolutionaries during military operations. The revolution succeeded, but Underhill sued Hernandez for damages based on his detention in the country against his will. The court held that Underhill could not recover and made the unnecessary but often quoted statement that

> [E]very 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 as between themselves.[41]

The statement was overly broad for the case presented, and unnecessary because sovereign immunity should have disposed of the case. The

40. 168 U.S. 250 (1897).
41. *Id.* at 252.

opinion relies on cases such as *U.S. v. Rice*[42] as authority for the conclusion that ". . .acts of legitimate warfare cannot be made the basis of individual liability."[43] This consideration is a practical piece of bedrock worth retaining and could also have disposed of the *Underhill* case without using the broad act of state language as stated and quoted above. It must be recognized by all who venture into foreign sovereignties that in time of war, including civil war, personal assets and privileges may be unceremoniously seized without compensation. Unless the government of the venturesome citizen should espouse the claim and seek to satisfy it at the national state level, war damage is beyond private redress. This is as far as the *Underhill* analysis had to go and, confined to its own facts, it would appear to relate to a historic military reality rather than to the deference to the executive branch referred to in the *Sabbatino* decision.

The law has always recognized that there is a point at which the results and realities of acts of war and conquest are beyond the powers of courts to undo.[44] *Calvin's* case[45] is the classic example, stating that title based on conquest is irreversibly established. Acceptance of the results of conquest requires another type of judicial tolerance, which has history and practicality behind it. But it is a far cry from the delicate abstention of the *Sabbatino* case. Of course, the day may come when acts of war are not legitimized so readily, but that is a stage of the evolution of international law that we can only hope for and can never approach unless we overcome the lesser hurdle of the act of state doctrine.

C. *Reasonable Expectations of Sovereigns*

Judge Motley, in a thoughtful opinion in the *Libra Bank* case[46] groped for bedrock by proposing that the act of state doctrine be viewed as a requirement for courts to refrain from questioning actions which a foreign sovereign could reasonably expect to be respected by foreign courts. This approach is echoed in the *Callejo* opinion.[47] Using this approach, courts of other nations would not, for example, presume to challenge the effectiveness of a sovereign's act purporting to change title to a tangible asset located within the territorial reach of its undeniable sovereignty. But how would courts deal with intangible assets and invisibles such as insurance relationships that represent transactions having many points of contact with many sovereignties? Would the degree of a sovereign's annoyance when courts do act depend on such questions as

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42. 17 U.S. (4 Wheat.) 246 (1819).

43. *Underhill*, 168 U.S. at 253.

44. *Rice*, 17 U.S. (4 Wheat.) 246 (1819).

45. *Calvin's Case*, 7 Coke 2a (Trin., 6 Jac 1) (1609).

46. *Libra Bank*, 570 F. Supp. at 870.

47. *Compare Libra Bank*: ". . .a foreign state cannot be said to have reasonable expectations of dominion over property located in this nation." *Id.* at 884, *with Callejo*: ". . .disregarding the Mexican regulations would be very vexing indeed. Note that here the distinction between sovereign and commercial is not based on the nature of the activity, but the degree of sovereign sensitivity. 764 F.2d at 1116.

whether the situs of a debt is with the debtor or the creditor? To use the "reasonable expectations" rationale, the forum court would try to determine what expectations would be "reasonable" in the mind of the foreign sovereign who took the action in question, and would respect those expectations. There is a superficial rationality to this approach, but it is largely comity by another name and in effect evades the act of state doctrine without supplying any reason for doing so. "Reasonable expectations" would presumably contemplate the well-informed thought processes of a mature sovereign conscious of internationally acceptable standards of conduct. Such a search for reasonableness should open up all of the same questions of conformity to international legal standards which a U.S. court is told *not* to consider when the act of state doctrine applies. To a critic of the act of state doctrine, this approach is appealing because it does offer a workable technique for evading the doctrine. But if that is what we want to do, let us openly abandon it.

D. *Comity*

The Second Circuit's opinion in *Allied Bank I*[48] reasoned that constructive international relations require that courts of one state, even though they have jurisdiction, will as a matter of comity permit certain actions of another state to be respected and taken at face value. The term has been broadly defined to mean ". . .the courteous and friendly understanding by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and interests."[49] This exercise in pragmatic courtesy has the great benefit of being less conceptual and formalistic than debates over situs. Comity precipitates a valuable case-by-case process for evaluating the deference to be accorded to the executive's prerogatives in the field of foreign relations, the acceptability of the policy effects of the act of state in question and the rights of the parties—both procedurally, to a disposition of their dispute, and substantively, on the merits.

The flexible concept of comity contains qualifications and exceptions not contained in the act of state doctrine. In particular, comity does not require recognition of the acts of a foreign sovereign which are found to be in conflict with the public policy of the forum state.[50] Since the crux of the act of state doctrine lies in its refusal to permit an examination by the courts of the possible conflict between the act in question and the policies of the forum state, concepts of comity do not authorize or explain the policy of the act of state doctrine, but rather cast it in a "super-comity"

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48. *Allied Bank I*, 733 F.2d 23.

49. OXFORD ENGLISH DICTIONARY, (2d ed. 1936).

50. *See* Hilton v. Guyot, 159 U.S. 113, 163-164 (1894), stating: "Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens. . . ."

role, in which even more deference is offered to acts of state than the ancient doctrine of comity had previously thought necessary.

E. *Customary International Law*

Propositions about matters of international law which have been applied in the courts of most sovereign states should be given substantial weight in U.S. courts. If the act of state doctrine had been regularly applied in the courts of other states whose judicial system had stature in the international community, that fact alone might supply a policy reason for applying it in U.S. courts.

An act of state doctrine does exist by that name in other nations,[51] but when used, it is really a combined exercise in rules of comity and conflicts of laws. The courts of other countries have no hesitation in stating that an expropriation by a foreign sovereign would not be recognized in their courts if it violated significant principles and interests of the forum state.[52] Since the U.S. act of state doctrine is peculiarly derived from the constitutional framework of the U.S., the existence of references to a doctrine by that name in the jurisprudence of other nations is to that extent irrelevant. But the content of such cases illustrates the fact that the U.S. courts have deferred to the executive in such cases to an extent not found in the jurisprudence of other nations with governmental structures which differentiate among the principal branches of government.

Although the doctrine itself is not derivable from international law, it continues to be defended on the policy ground that it leaves the determination of the U.S. position on matters of evolving international law to the executive branch of government.[53] This approach implies a mistrust of the ability of the judiciary to find or develop usable international legal principles. For a nation intending to be governed by laws and not by men, this would be an anomalous view of the allocation of roles in our system of government.

F. *Separation of Powers*

In the context of a separation of powers, the U.S. act of state case offers the most identifiable policy base: deference by the judiciary toward the prerogatives of the executive in foreign policy matters. To the extent that the doctrine has a clear meaning, this is where its roots lie. Is there a special necessity in the U.S. constitutional framework to let the executive determine when the acts of other nations should go unchallenged in U.S.

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51. *See Sabbatino*, 376 U.S. 398, n.21 and the dissenting opinion for a collection of cases from other nations.

52. *See id. See also* 12 I.L.M. 187, 251 (1973) for translations of two of these decisions.

53. *E.g., Callejo*, 764 F.2d at 1116 (quoting French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E. 2d 704, 295 N.Y.S. 2d 433, (1968)) that "the currency regulations of a foreign state. . .are not appropriate subjects for evaluation by state courts applying local conceptions of public policy."

courts? As pointed out in Justice White's dissent in the *Sabbatino* case,

> [N]o other civilized country has found such a rigid rule necessary for the survival of the executive branch of its government; the executive of no other government seems to require such insulation from international law adjudications in its courts; and no other judiciary is apparently so incompetent to ascertain and apply international law.[54]

The Supreme Court in the *Sabbatino* case may have been persuaded by the eloquence of Mr. Katzenbach when he argued that the executive branch could do more to obtain compensation for U.S. citizens by negotiations with Cuba than the courts could achieve by adjudication.[55] It is late in the day to focus criticism on the *Sabbatino* case itself, and much has already been written about it, but, in fact, the *Sabbatino* plaintiff seems to have obtained his relief from the courts because Congress passed and applied to him Hickenlooper II, not because the executive branch took care of him.[56]

It might indeed be reasonable for the courts to abstain from taking actions which would truly threaten the conduct of foreign relations by the executive branch. But is that risk really credible? Isn't it, on the contrary, less abrasive for contract and property rights to be determined in the relatively non-political and detached courts, which are by definition *not* our chosen instruments for the conduct of foreign policy, than by the executive branch, which is? Could not the executive branch in such situations respond to an irritated sovereign that in its constitutional system it does not and cannot control the courts?

Can all citizens damaged by the questionable acts of foreign sovereigns realistically expect espousal and reimbursement through intervention by the executive branch? Perhaps so in the case of comprehensive programs of nationalization, but is this true of incidents of individualized and discriminatory takings? If the actions are egregiously wrong by rational standards of fair behavior, why not take advantage of the court system and let the matter be adjudicated? The executive branch cannot focus on each such incident, and by definition such individual cases are too isolated to be capable of upsetting international relations.

And by what kind of process should courts decide whether to abstain? Was a judicial process used to determine that Fidel Castro would have been offended by a U.S. court's conclusion that discriminatory and uncompensated seizures of U.S. property were illegal, after the U.S. State Department had already sent him a note saying just that?[57] And if it were found to be likely to offend him, should a U.S. court defer to his sensitiv-

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54. *Sabbatino*, 376 U.S. at 440.

55. Nicholas de B. Katzenbach, Esq. argued the *Sabbatino* case, amicus curiae, for the United States, and must have argued the point accepted in the majority opinion. *Id.* at 431.

56. *See* Banco Nacional de Cuba v. Farr, 243 F. Supp. 959 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967).

57. *See* State Dept. Note No. 397, July 16, 1960 (to Cuban Ministry of Foreign Relations).

ity? And if we are to invite the executive branch to be heard in such situations, should it be enough, as provided in the second Hickenlooper Amendment,[58] for the President merely to make a "suggestion" to the court that it defer to the executive in a given situation?

A preferable way to dispose of this concern would be to permit the executive branch to appear and submit proof on the issue, as Justice Powell appears to prefer in his opinion in the *Dunhill* case, subject to normal judicial processes and the protections of privilege and even closed hearings as required. The painful facts surrounding the *Bernstein* cases[59] gave the name to this kind of exception to the application of the act of state doctrine, but did not develop a proper process for the determination of whether the courts should render judgment on offensive acts of foreign states *even if the executive requested they not do so.* Courts which purport to evaluate the impact on the nation's foreign relations of proceeding with a case solely by soliciting the executive branch's *ex parte* advice may be abandoning their critical roles as adjudicators of complex issues and as the arbiters in the U.S. system of checks and balances.

In the cases in which they have purported to evaluate the risk of damage to the conduct of foreign relations, our courts have been without suitable evidentiary materials to work with, and have relied on speculation or taken the executive's word for it.[60] *Allied Bank I* and *Allied Bank II* should truly be an embarrassment to the judicial branch, since the court confessed in *Allied Bank II* that it had not understood the executive branch's position in *Allied Bank I*, and changed its decision after having obtained further advice from the executive branch.[61] One of the judicial speculations has been that the executive branch can negotiate better settlements with foreign sovereigns than the parties would obtain if the courts acted.[62] This was given substantial weight in the majority opinion in the *Sabbatino* case. Yet the State Department, which is responsible for negotiating settlements for American citizens with foreign sovereigns, did not object to the possibility that the courts might act and has indeed informed the Court that it is difficult to see how decisions in such cases could interfere with the conduct of foreign relations by the United States.

There is actually strong evidence that Congress would prefer to have the courts, and not the legislature, decide whether to challenge acts of foreign states.[63] The FSIA gave this role to the courts, and the legislation

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58. 22 U.S.C. § 2370(2)(e)(2).

59. *See supra* note 28. *Cf.* Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375 (2d Cir. 1954).

60. *Cf. Allied Bank II*, 757 F.2d 516.

61. *Id.* at 519.

62. *Sabbatino*, 376 U.S. at 431.

63. By passage of the FSIA, particularly U.S.C. 28 § 1605, which specifically vests jurisdiction in the courts to hear matters in which foreign sovereigns have acted commercially or even tortiously in certain respects.

indicates that Congress expressly preferred that channel over the executive channel, as a way of avoiding political actions.

Finally, by purporting to refrain from acting, the federal courts *have* nevertheless acted, with substantial consequences to the parties before them. By refusing to question the acts of a foreign sovereign, they have validated them. This is not abstention, it is ratification, and that is as much a judicial act as invalidation would be.

Closely akin to separation of powers considerations is the "political question" concept through which a court may refrain from acting in certain situations out of the sense that the political structure in which it operates does not contemplate that it should deal with such issues.[64] Although the executive is clearly vested with the power to conduct our foreign relations, our courts have concluded in act of state cases that this is not sufficiently explicit as guidance to create a constitutional barrier to the disposition of such cases by the federal courts. If they do abstain under the act of state doctrine, they recognize it as a judicially fashioned doctrine with constitutional roots but not compelled by controlling constitutional principles. To that extent, the act of state doctrine is analogous to the "political question" approach, since both are judicially-fashioned principles of federal law of less than constitutional dignity, both involving judicial abstention. The primary operational distinction is that, in political question cases, the other mechanisms of American political action are available in our governmental system to dispose of the problem—all interested parties are situated under the umbrella of U.S. governmental and political institutions. In act of state cases, one principal protagonist is foreign, and there can be no similar assurance that the executive branch will have the interest or the capacity to pursue the needs of the U.S. parties to a successful conclusion.

V. EXCEPTIONS TO THE APPLICATION OF THE ACT OF STATE DOCTRINE

There are now at least five identifiable exceptions—so many exceptions that one wonders whether the basic doctrine has much integrity left. Writers are advocating ever more exceptions.[65] It should shed considerable light on the utility and strength of the doctrine to examine the exceptions which the courts now recognize. They include the treaty exception, the agreement exception, the commercial exception, the extraterritorial exception and the *Bernstein* exception.

A. *The Treaty Exception*

The decision in the *Sabbatino* case expressly stated that the act of state doctrine need not apply if controlling legal principles were found in

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64. *See* Sharon v. Time, Inc., 599 F. Supp. 538 (S.D.N.Y. 1984), and *cf.* Justice Brennan's concurring opinion in the *First National City Bank* case. *See supra* note 29, which stated that the validity of a foreign act of state is a "political question."

65. *See supra* notes 75-76.

a treaty binding on the state whose acts were in question. The Supreme Court stated reasonably that it should not upset the relations between the United States and a sovereign for the courts to apply the very principles which the sovereign had expressly accepted in a treaty.

The *Kalamazoo* case hinged upon this exception. The district court declined to act and applied the act of state doctrine because it concluded that the bilateral Treaty of Amity and Economic Relations between Ethiopia and the United States failed to provide a usable standard of international law principles. The treaty language, which the district court found to be excessively general and doubtful, required that there be "prompt payment of just and effective compensation" in the case of an expropriation. The trial court was reversed on appeal, and its decision exemplifies the problems courts are having with these cases. The *Sabbatino* decision itself had questioned whether the kind of treaty language the *Kalamazoo* court was dealing with was clear enough to offer an internationally-accepted standard.[66] The *Kalamazoo* court accordingly declined to accept the treaty language and applied the act of state doctrine, yet was reversed by an appellate court which concluded that this was ". . .a controlling legal standard in the area of international law."[67]

The *Sabbatino* case itself nullified most of the potential usefulness of the treaty exception it created. The case involved an expropriation; the disputes involved in expropriation cases generally have to do with the adequacy of compensation; the provisions of the U.S. treaties brought into question in such cases in U.S. courts are, therefore, the provisions which virtually all U.S. treaties have contained, providing in substance for prompt, just and effective compensation. But the *Sabbatino* opinion asserts that nothing is more unclear in the field of international dispute resolution than the meaning and acceptability of the standard requiring ". . .prompt, just and effective compensation." As a result, the very terms of the *Sabbatino* opinion undermine the utility of the treaty exception in those cases in which it is most likely to be called in question.

The adherence of a sovereign government to a relevant treaty does offer evidence of its predictable attitude toward a challenge to the legality of its actions, and would be useful in evaluating the respect to be given to its position. But changes of government do not automatically abrogate all treaties then in force. The sensitivities of revolutionary (or even evolutionary) governments may be (and predictably are) different from those of their predecessors. Accordingly, the existence of a treaty is really not conclusive of the attitude of later governments of the same country. If comity were the applicable rationale, a court could take the existence of such a treaty into consideration and test the acts of a foreign sovereign in question against the standards of the treaty. There is nothing impolite about holding a foreign sovereign to the terms of his own treaty; but there

66. *Sabbatino*, 376 U.S. at 429.
67. *Kalamazoo*, 729 F.2d at 426.

will be times when the treaty is not representative of the thinking of the current government, and courts should be free to regard the treaty as one element of its analysis, but not a conclusive element. Treaties are either controlling in U.S. courts as the supreme law, if applicable, or are merely evidentiary materials suitable for courts to use in balancing the elements of a comity decision—they should not be independently conclusive as proposed in the *Sabbatino* formulation.

B. *The Agreement Exception*

The agreement exception is very similar to the treaty exception. The rationale is essentially the same: if a government agrees to a principle of law, it should not be offended if that principle is applied in U.S. litigation involving the legal consequences of its related acts of state.[68] The expropriation subject matter is dealt with, for example, in the bilateral agreements entered into pursuant to the political risk insurance program of the United States, presently administered by the Overseas Private Investment Corporation (OPIC). These are not treaties; yet they are relevant bilateral agreements. All of the shortcomings of the treaty exception apply to the agreement exception, and the existence of such agreements should be viewed in the full factual context to determine the proper respect to be given to foreign acts of state.

C. *The Commercial Exception*

The *Dunhill* case[69] produced an opinion, supported by only four justices, that the act of state doctrine need not be applied to shield inquiry into acts of state which are of a commercial nature. This is perhaps the strongest of the exceptions to the act of state doctrine and follows logically from the basis for the restrictive theory of sovereign immunity: if sovereigns can be required to appear and defend their actions in the commercial area, it follows logically, and as a lesser intrusion, that they should be prepared to see the validity and effect of such actions adjudicated in our courts. Because Congress has since enacted the same exception in the statute dealing with sovereign immunity, it is likely that the commercial exception would now be applied by a majority of the Supreme Court to the act of state doctrine. The exception narrows the theoretical policy basis for the act of state doctrine to those actions of a foreign sovereign which only a sovereign can perform. This in turn necessarily means that the judicial branch need not fear the disruption of U.S. foreign relations if it only inquires into the kinds of activity which (in other cultures) persons other than the sovereign customarily conduct. Again, the very existence of this exception indicates the weakness of the act of state doctrine—courts continue to create exceptions to it.

But we cannot rest easily with the act of state doctrine just because

68. *Sabbatino*, 376 U.S. at 429.
69. *Dunhill*, 425 U.S. 682.

there are such exceptions to it. This one could become unworkable when faced with the actions of largely state-controlled economies. If we were to use a commercial exception, by what standard are we to classify acts as "commercial"? If we look to the allocation of functions found in the U.S., we find a substantial area of private sector activity which a commercial exception would liberate from the act of state doctrine. We have a vast private sector, and we assign many functions to it. But what is "commercial" activity in a state in which it is unlawful for anyone but the state to own the means of production? If what we seek to avoid is the presumptively clumsy offense by a U.S. court to a sovereign's sensitivity about the finality of his actions in his sovereign capacity, it would be illogical to use any but the sovereign's definition of his own sovereign capacity in estimating the probability that he will be offended. In a centrally controlled socialist economy, the processes of owning and earning are all within the sovereign's sphere. If the U.S. system of government truly intends to limit dispute resolution within the sovereign's sphere of activity to the executive branch, there is no room for a commercial exception in dealing with such countries because it recognizes no commercial activities separate from the acts of the central government. If applied with fidelity to its presumed purpose, it would be useless in dealing with comprehensively socialized economies. If applied without reference to its purpose, it is a fiction.

Congress appears to want the federal courts to recognize a commercial exception to the invulnerability of sovereigns, and such an exception has indeed become a very large source of avoidance of the act of state doctrine. But how many amputations need we tolerate before deciding that the host carcass has lost its viability?

Further evidence of the accumulating discomfort with the act of state doctrine is found in certain proposed amendments dealing with commercial activity in the FSIA.[70] These amendments include two provisions relevant to this discussion:

> § 1603(f). A 'commercial activity' includes any promise to pay made by a foreign state, any debt security issued by a foreign state, and any guaranty by a foreign state of a promise to pay made by another party,

and

> § 1606(b). 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 of 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 enforce-

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70. *See* Atkeson & Ramsey, *Proposed Amendment of the Foreign Sovereign Immunities Act*, 79 AM. J. INT'L L. 770 (1985).

> ment of an agreement to arbitrate or an arbitral award rendered against a foreign state.

These sections would not only eliminate the ct of state defense in any of the certificates of deposit and exchange control cases in which the foreign state or any of its instrumentalities can be characterized as the promisor, but would also eliminate the act of state doctrine as a justification for a sovereign if the act in question is a taking of property or contract rights without compensation (as defined) or, for example, in a discriminatory fashion, or a breach of contract. This would repair one of the gaps in the Hickenlooper II, by nullifying the decision in the *Hunt*[71] case which held that contract rights were not protected against the act of state defense by the Hickenlooper II. The proposed amendment to § 1606(b) would indeed weaken the act of state doctrine, and for good reason. Surely it would be an abuse of our judicial system for a foreign state to be allowed to elect to file a claim here, and take it to judgment in our courts, while at the same time denying our courts the right to consider whether the foundation for the claim was offensive to our fundamental views of fairness and equity. If an American citizen had been lucky enough to escape from Cuba with assets which the Castro government had declared confiscated without compensation, do we really want to offer a forum in our federal courts for Cuba to demand the return of those assets without having to justify its actions against a legal standard? Do we really believe that the executive branch will pursue the rights of all U.S. citizens holding broken contracts with an obstreperous foreign sovereign, so that the courts need not take any action to protect them? I think not.

Those amendments illustrate the demands for a firmer position by the U.S. courts on these subjects, but they do not go far enough. It would be far simpler, and more effective, to abandon the act of state doctrine.

D. *The Extraterritorial Exception*

Some courts are avoiding the doctrine by finding some manifestation of the action in question which did not take place, or take place exclusively, or come to fruition, within the territory of the sovereign state in question. The holding of the *Sabbatino* case can be read to be limited to expropriations within the territory of the acting state or can be read to invite other applications determined on a case-by-case basis. It does not explicitly endorse the devotion to the situs of intangibles evidenced by the conceptual logic of the *Allied Bank* and *Perez* decisions. Whether a state's action is within its own territory depends in part on whether one seeks indirect effects, or foreseeable subsequent effects, or multiple simultaneous effects. In today's complex financial world, no state action affecting international commercial or financial relationships can be said to have only domestic effects; and if we mean to exclude from the scope of the doctrine any actions having any external effects, then again we should

71. *See supra* note 12.

face the fact that the doctrine would have almost no application. Convenient though this would be as a way of narrowing its use, the extraterritorial exception approach is only another conceptual device expressing the same policy purpose, namely to avoid the act of state doctrine. The probability of diplomatic abrasion is not reduced by the availability of such fine distinctions. The fact that a certificate of deposit allegedly frozen and seized by a confiscating sovereign might be collectible, not only in the sovereign's issuing banks but also in some foreign location, is not likely to placate the sovereign when required by a U.S. court to pay it in the U.S. Nevertheless, the extraterritorial exception must purport to rest on that principle and permit that result.

E. *The Bernstein Exception*

In the first of the *Bernstein* cases,[72] a great judge, Judge Learned Hand, assumed that he was unable to look behind the Nazi seizure of a Jewish-owned vessel without the affirmative encouragement of the executive branch. Since that time, executive branch letters have been tendered to federal courts consistently refraining from asking the courts to abstain from adjudicating the matter before them. A majority of the Supreme Court has yet to adopt the *Bernstein* exception, but as recently as *Allied Bank II*, a federal court of appeals has considered that a signal from the executive branch would liberate it to consider matters from which it would otherwise have been obliged to abstain pursuant to the act of state doctrine.[73] *Allied Bank II* illustrates the continuing vitality of such an approach, even without the endorsement of a Supreme Court majority; but for the reasons referred to above, it should only be applied in modified form, giving the executive branch standing to appear and assert its views on the need for judicial abstention—in secret, or in private, as the court may find necessary in its discretion.

VI. THE ACT OF STATE DOCTRINE SHOULD BE ABANDONED

Serious consideration should be given to abandoning the entire doctrine. Sophisticated opinions such as those in the *Callejo* and *Libra* cases come close to doing that, by penetrating the conceptual level of situs considerations enough to permit a weighing of the risk of sovereign irritation. But they do not yet consider themselves free to weigh the offensiveness of the act of state against any standard of acceptable sovereign behavior, as they should be. The many exceptions developed by the courts—the treaty and agreement exceptions, the commercial exception, the extraterritoriality exception, the "reasonable expectation" approach, the *Bernstein* exception—all in the aggregate evidence the courts' efforts to reduce the doctrine to the minimum. Recent writers have proposed ever more excep-

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72. *See supra* note 37.
73. *See supra* note 28.

tions: a corrupt practices exception,[74] and a waiver exception.[75] And yet how many situations can there be in which the decision of a court can be expected to do more damage to the conduct of foreign relations by the U.S. government than the executive branch would have inflicted on the same issue? It seemed unnecessary for the Supreme Court to be so delicate as to withhold its judgment on the legality of Cuban acts of expropriation when those very acts have been the subject of complaints by the U.S. State Department which assert in explicit terms that they are in fact unlawful. What can the courts do that would be so destructive as to upset the conduct of foreign relations? Foreign governments would always know that the courts are not the executive branch and that the courts are not conducting foreign policy when they reach decisions based upon the customary judicial function of seeking to develop and apply legal principles. Where did this skittishness come from? What do we have courts for if not to decide disputes between private individuals, granting for the present the necessity for sovereign immunity in noncommercial situations, when foreign governments are directly involved as parties—or sought to be made parties? Congress has clearly signalled, in its restrictions on the doctrine of sovereign immunity, that it wishes the courts to be more assertive in such cases.

How will international law develop if our highest courts will not function in these crucial areas? It is no answer to refer to classical concepts of situs and territoriality, and to state that it *is* an exercise in principles of international law to apply the foreign state's own law and thus validate the offensive actions of foreign sovereigns. We should not seek the preservation of "international law" as a museum to shelter ancient policy-neutral concepts—if we seek to develop an international community governed by humane and decent standards of conduct, we must free our legal system to play a part in achieving that purpose.[76] We will not reach that goal using the act of state doctrine. The best resolution of this subject would be for the courts to reject the act of state doctrine entirely.

The concepts of comity and conflict of laws are sufficient for this purpose. The excellent preliminary analysis in the *Callejo* opinion successfully penetrated to the true elements of decision in such cases, but felt obliged to apply the act of state doctrine rather than seek what might have been the same result through application of principles of comity after deciding to apply Mexican law. Comity would permit a consideration of the possible conflict between the acts of state in question and the pol-

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74. Comments, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U. L. REV. 203 (1984).

75. Recent Development, *Act of State Doctrine—Waiver as an Exception—Private Defendants May Assert the Act of State Defense Against a Resisting Sovereign*, 25 VA. J. INT'L L. 775 (1985).

76. Of course we must be alert to the risk of imposing the views of the United States on parts of the world where different views are held, but there must be some areas of general agreement beyond Nuremberg which U.S. courts could join in developing and applying.

icy interests of the forum state. The *Callejo* court could have considered whether the assumption of risk by the U.S. investors outweighed the drastic reduction in exchange rate forced upon them by the Mexican government's exchange control action. The executive could have been given standing to contend that the foreign relations of the U.S. would be damaged by a judicial inquiry into the act of state in question, and the court could have considered the merits of that contention on the basis of live evidence and informed analysis. If the courts can require the executive branch to produce documents otherwise classified as secret or claimed to be privileged, it can develop procedures to provide suitable protections for an adjudication of the necessity to abstain from inquiring into the actions of a foreign state or its agents. And, of course, the military reality of a given case would determine some outcomes—the courts would not purport to do a useless thing, if its orders could have no effect, and would recognize the legal consequences of legitimate acts of war. Yet even that formulation leaves room for challenge to illegitimate acts of war, to continue the desirable development of international standards of conduct even in a state of war. The act of state doctrine was not needed for a proper disposition of any of the cases since *Sabbatino*.

In the absence of an act of state doctrine, all of the recent cases could have been suitably disposed of. In each case, conflict of laws principles might have determined that the applicable law was the law of the foreign state. If so, comity could then have determined whether to give force and effect to the act in question. If not, U.S. law would be applied. In each case, the court could have determined under principles of comity whether the acts of the foreign sovereign should be given legal effect. Only the most egregious and offensive acts of state would be repudiated under this approach, such as discriminatory or uncompensated confiscations not covered by Hickenlooper II, but at least some standard could be applied. Nationalizations accompanied by plans for compensation which are something short of prompt might well earn judicial acceptance. Blatantly uncompensated and discriminatory takings would not be. Stringent currency controls would probably survive as long as they fall short of a repudiation of significant national obligations, as in the *Allied Bank II* case.

Of course, there would remain some issues to be resolved in new ways without the act of state doctrine. Some period of limitations would be needed if U.S. courts were to retain the right to question the validity of uncompensated seizures of the assets of a representative of an abused minority. Title acquired by a thief eventually becomes secure in the hands of a bona fide purchaser, and the same could be done for the innocent purchaser of unconscionably confiscated property. Some concept of sovereign compulsion might be needed in antitrust cases. *Erie v. Tompkins* would require the federal courts to look to state law if these cases were treated only as conflict of laws cases. But if the state law of the forum state determines that the law of the foreign state whose action was in question should be applied, then the second level of analysis (the application of principles of comity) could be declared to be preempted for the

federal courts just as easily as *Sabbatino* declared that the act of state doctrine was a rule of federal law. The difference, thereby, could be that the courts would evaluate the acts of the foreign state against evolving standards of decency and fairness, rather than abstaining when they find the acts in question to have come to "fruition" within a foreign sovereign's territory. No satisfactory explanation seems to exist for freezing one element of the flexible doctrine of comity into an impenetrable wall—the bar is being confused by it, it blocks the development of international standards of governmental conduct, and it should be abandoned.