Rationalizing the Federal Act of State Doctrine and Evolving Judicial Exceptions

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AND EVOLVING JUDICIAL EXCEPTIONS

I. INTRODUCTION

In the past century, plaintiffs in federal courts have repeatedly challenged the ability of a foreign government to confiscate property located within the foreign jurisdiction without rendering just compensation. Faced with this delicate issue, courts have weighed the principles of traditional Anglo-American property law against deference to the foreign sovereign and the need to preserve good diplomatic relations with expropriating states. The somewhat unsatisfactory result became known as the American act of state doctrine and received its classic formulation by the Supreme Court in Underhill v. Hernandez:1

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 as between themselves.2

Although the Court has since reaffirmed this principle, four exceptions to the traditional doctrine have been urged by litigants with varying degrees of success. One of these, the so-called Bernstein exception, holds that the judiciary should not accord conclusive validity to the act of a foreign state when the executive branch determines that an adjudication on the merits will not interfere with the conduct of foreign affairs by the political branches of the government.3 According to the international law exception, the act of a foreign state may be subjected to a judicial review based upon the principles of international law.4 A third exception to the act of state doctrine requires that the counterclaim of a defendant not be barred where an expropriating foreign government is itself a plaintiff in an American court.5 Finally, the commercial act exception provides that judicial deference is denied a foreign state insofar as that state behaves as a commercial, rather than a sovereign, entity.6 Over the past three decades these exceptions have been variously accepted and rejected by the Supreme Court in a perplexing welter of opinions, dissents, and concurrences.7 Thus, the present outlines of the act of state doctrine in the United States are unclear to legal scholars and practitioners alike. Of more importance perhaps, the direction which the development

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1. 168 U.S. 250 (1897).
2. Id. at 252.
3. See notes 14-18 infra and accompanying text.
4. See notes 19-32 infra and accompanying text.
5. See notes 33-50 infra and accompanying text.
6. See notes 72-74 infra and accompanying text.
7. See notes 78-87 infra and accompanying text.
of the doctrine should take remains uncertain. This Comment will examine the evolution of the federal act of state doctrine, analyze the proposed exceptions to the sweep of its classic statement, and suggest an interpretation of the doctrine which would best serve the ends of justice within the legal and practical circumstances which give it shape.

II. DEVELOPMENT OF THE ACT OF STATE DOCTRINE IN FEDERAL COURTS

While intimations of the doctrine are present in earlier decisions of British and American courts,8 Underhill v. Hernandez9 marks the starting point of any discussion of the doctrine as formulated by the Supreme Court.10 The plaintiff, an American citizen operating a water system in Venezuela, sought to leave the country during a revolution. The defendant, a general in the revolutionary army, refused his request for an exit pass and allegedly had him assaulted in an effort to coerce him to remain in Venezuela and continue to operate the water system.11 The Court refused to interfere, noting that the United States had subsequently recognized the revolutionaries as the legitimate government of Venezuela and that this recognition retroactively endowed all prior acts of the government with a presumed validity not open to question in American courts.12 In three more cases prior to 1920, the Supreme Court relied upon Underhill for the principle that the acts of foreign sovereigns are beyond question in American courts.13 All of these early cases were decided by the Supreme Court without dissent.

9. 168 U.S. 250 (1897); see note 1 supra and accompanying text.
10. Underhill is the first case which the Supreme Court clearly decided on act of state grounds, and provides the foundation for the Court's analysis in subsequent cases.
11. There is no indication in the opinion of how the American court secured jurisdiction of the case.
12. 168 U.S. at 253-54. The Supreme Court developed this reasoning further in Oetjen v. Central Leather Co., 246 U.S. 297, 302-03 (1918).
13. In American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), the defendant persuaded a Central American government to cause the financial ruin of plaintiff's banana plantation. The Court held that the laws of the United States did not reach the acts of the defendant in foreign states. Id. at 355-57. The Court also observed that the act of a foreign state could not be made the basis of liability in an American court: "The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law." Id. at 358.

The Mexican Revolution brought two more act of state cases before the Supreme Court. The Court held that the principles of comity between sovereigns expounded in Underhill precluded review of the transfer of title to property requisitioned by a general of the Mexican revolutionary army. The subsequent recognition of the revolutionary government by the United States barred relief for the former owner, regardless of his citizenship. Ricaud v. American Metal Co., 246 U.S. 304 (1918) (former owner was an American citizen); Oetjen v. Central Leather Co., 246 U.S. 297 (1918) (former owner was a Mexican citizen).
The first exception to the act of state doctrine was not asserted in the federal courts until after World War II. After the property of a German Jew was confiscated by Nazi decree and subsequently sold, the former owner brought suit against the purchasers. Upon appeal from a dismissal of the complaint, Judge Learned Hand felt constrained in *Bernstein v. Van Heyghen Frères Société Anonyme* to apply the act of state doctrine and recognize the validity of the Nazi government's dispossession and transfer of title, despite the elements of coercion and anti-Semitism present in the case. However, the opinion hinted at a different result if the executive branch were to advise the court that it should not apply the doctrine. Seven years later, in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, the State Department did in fact issue a press release in which the United States government advised that the American courts should not apply the act of state doctrine to render the acts of the National Socialist government valid. The court of appeals for the Second Circuit followed the executive suggestion and permitted plaintiff to prove his case against the Nazi action. Hence, the *Bernstein* exception to the act of state doctrine was formulated, and it became the rule, at least in the Second Circuit, that courts need not apply the doctrine if the executive so indicated in what came to be called a *Bernstein* letter.

Three more exceptions to the act of state doctrine were urged in three subsequent cases dealing with confiscatory acts of the Castro government in Cuba after January 1, 1959. In *Banco Nacional de Cuba v. Sabbatino*, title to a shipload of sugar had purportedly been nationalized. The district court recognized that the act of state doctrine would ordinarily prevent it from questioning the validity of the Cuban action. However, the court found that the nationalization violated international law in that it was retaliatory and not for a proper public purpose. Further, it discriminated by reaching only American property, and provided for illusory compensation. Hence, the court refused to adhere to the act of state doctrine, reasoning that American courts were obligated to respect and enforce international law.

The court of appeals modified the decision slightly by declining to hold that

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15. Id. at 248-50.
16. Judge Hand assumed that it was within the power of the executive branch to direct the courts in their application of the act of state doctrine, and asked whether the "Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine . . . does not apply." Id. at 249.
17. 210 F.2d 375 (2d Cir. 1954) (per curiam).
18. Id. at 376.
22. Id. at 384-85.
23. Id. at 385-86.
24. Id. at 380-82.
any one of the grounds advanced below would by itself be sufficient to constitute a violation of international law. However, the court found that all three were present in the instant case and together proved a violation of international law. The Supreme Court reversed. The majority discussed the reasons for the act of state doctrine, and examined the proposed international law exception. It found that the doctrine was justified by the primacy of the political branches in the conduct of foreign affairs. Accordingly, the judiciary was barred from interfering in this area even where a violation of customary international law was alleged. In a solitary dissent, Justice White disputed the weight given by the majority to the issue of executive primacy in foreign affairs and argued vigorously that litigants had a right to a determination on the merits. In addition, he reasoned that United States courts were obliged to enforce international law.

The second Cuban case was *First National City Bank v. Banco Nacional de Cuba*, which after a complex litigation history, generated the counterclaim exception to the act of state doctrine. Citibank had been holding a collateralized loan outstanding to Cuba when all of its Cuban branches were nationalized on September 10, 1960. The bank retaliated for the loss by selling the collateral it held, realizing about $2,000,000 more than the amount of its loan. When Cuba brought suit to recover the excess collateral, Citibank sought to set off the value of its nationalized branches against the recovery sought by Cuba. The district court permitted the setoff, holding that Congress had terminated the operation of the act of state doctrine by the second Hickenlooper amendment. This amendment gave property owners the protection of international law by directing the courts to ignore the act of state doctrine and decide the merits in certain cases. The court of appeals for the

25. 307 F.2d 845 (2d Cir. 1962).
26. *Id.* at 868.
28. *Id.*
29. *Id.* at 431-34.
30. *Id.* at 421-39. Writing for the majority, Justice Harlan implied that there might be an exception to the doctrine for *conventional* international law: "We decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in 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." *Id.* at 428.

Customary international law is the past and present practice of nations which becomes accepted as general law. It may be contrasted with conventional international law which is embodied in international treaties and agreements. See I.C.J. Stat. art. 38, para. 1.

32. *Id.* at 450-61.
35. 22 U.S.C. § 2370(e)(2) (1970). The second Hickenlooper amendment was passed by Congress in response to the Supreme Court's decision in the *Sabbatino* case. First passed
Second Circuit reversed, holding that the Hickenlooper amendment had been intended by Congress to reach only those situations where expropriated property was brought into the United States, a circumstance not present in the case.\textsuperscript{36}

The Supreme Court vacated and remanded to the court of appeals for reconsideration in light of a possible Bernstein letter from the State Department.\textsuperscript{37} In its letter, the State Department indicated that it would find no interference with the conduct of foreign affairs if the courts declined to apply the act of state doctrine and permitted a setoff in circumstances like those in the case at bar.\textsuperscript{38} Despite this letter, the Second Circuit persisted in its belief that the act of state doctrine ruled the case and again reached the same result, reasoning that the judiciary must make an independent determination.\textsuperscript{39}

On certiorari, the Supreme Court reversed the court of appeals and reinstated the district court judgment allowing the setoff.\textsuperscript{40} Justice Rehnquist, writing for a plurality of three justices, accepted the State Department's Bernstein letter as controlling.\textsuperscript{41} Justice Douglas concurred in the result, but rejected the Bernstein exception as an improper intrusion by the executive into judicial affairs.\textsuperscript{42} He reasoned that considerations of fairness required that a foreign state be subject to any counterclaim up to the amount it sought as plaintiff, without regard to the act of state doctrine.\textsuperscript{43} Justice Powell also concurred in the result, but he rejected the rationales of both Justice Rehn- temporarily, it was soon enacted permanently after minor changes. See the discussion, including a finding of the law's constitutionality, in Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), aff'd, 383 F.2d 166 (2d Cir.), cert. denied, 390 U.S. 956 (1968). The amendment reads in pertinent 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 rights 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 . . . ." 22 U.S.C \S 2370(e)(2) (1970).

37. First Nat'l City Bank v. Banco Nacional de Cuba, 400 U.S. 1019 (1971). In its remand, the Supreme Court expressed no opinion on the merits of the case. Nor did it offer an opinion on the weight to be given the State Department's letter. This issue loomed large in the subsequent deliberations of both the Second Circuit and the Supreme Court and added another dimension to the entanglement of the act of state doctrine with the concept of separation of powers. See notes 39-44 infra and accompanying text.
39. Id. at 532-36.
41. Id. at 767-70.
42. Id. at 772-73 (Douglas, J., concurring).
43. Id. at 770-73 (Douglas, J., concurring). Justice Douglas relied upon National City Bank v. Republic of China, 348 U.S. 356 (1955), a sovereign immunity case. There the Court held that a foreign sovereign, by entering an American court as a plaintiff, waived its immunity from suit as to all setoffs of the defendant, up to the amount of plaintiff's claim.
quist and Justice Douglas. He felt that the rejection of the international law exception in Sabbatino was in error and that Cuba's violation of international law in seizing Citibank's branches would justify the award on Citibank's counterclaim.\textsuperscript{45} The four dissenting justices rejected the Bernstein exception as an unwarranted interference by the executive in judicial affairs and indicated their support for the holding in Sabbatino.\textsuperscript{46} It should be noted that although much of the discussion in the case focused upon the Bernstein exception, that exception actually received the support of only the three Justices in the plurality.\textsuperscript{47} These three Justices also found that the equitable nature of the counterclaim exception was "consonant with" the Bernstein exception.\textsuperscript{48} As a result, when lower federal courts attempted to apply the holding in First National City Bank v. Banco Nacional de Cuba, they were limited to its facts and result, namely, that a foreign state appearing as a plaintiff may not offer the act of state doctrine as a bar to a defendant's counterclaim for a sum not exceeding plaintiff's claim.\textsuperscript{49} This is the apparent holding of the case even though the plurality opinion discussed the counterclaim exception only briefly.\textsuperscript{50}

The Court's most recent decision dealing with the act of state doctrine is Alfred Dunhill of London, Inc. v. Republic of Cuba.\textsuperscript{51} That case involved a dispute over payment for Cuban cigars which had been shipped to American importers for several months before and after the "intervention" or nationalization\textsuperscript{52} of the cigar manufacturing shops by the Cuban government. Both the former Cuban owners of the cigar factories and the Cuban government sought payment from the importers for all of the cigars shipped.\textsuperscript{53} The district court held that the former owners were entitled to payment for those cigars shipped prior to the nationalization and the Cuban government for those

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\textsuperscript{44} 406 U.S. at 773-74 (Powell, J., concurring).
\textsuperscript{45} Id. at 774-76 (Powell, J., concurring).
\textsuperscript{46} Id. at 776-96 (Brennan, J., dissenting). All of the opinions in the Supreme Court assumed sub silentio in their discussion of the case that the Second Circuit's opinion was correct in that the Hickenlooper Amendment did not lift the act of state bar on the facts of the case.
\textsuperscript{47} Id. at 760-70.
\textsuperscript{48} Id. at 768-69.
\textsuperscript{50} 406 U.S. at 768-69.
\textsuperscript{51} 425 U.S. 682 (1976).
\textsuperscript{52} The differences between intervention and nationalization seem slight to an American observer and are non-existent in terms of the effect on the former owners of intervened concerns. See United States Supreme Court Case Alfred Dunhill of London, Inc. v. Republic of Cuba: Summary and Excerpts from the Briefs Filed in the Supreme Court, in 15 International Legal Materials 146, 168 n.2 (1976).
shipped after the nationalization.\footnote{Menendez v. Faber, Coe & Gregg, 345 F. Supp. 527, 534-42, (S.D.N.Y. 1972), modified sub nom. Menendez v. Saks & Co., 485 F.2d 1355, 1373 (2d Cir. 1973), rev'd sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). The district court held that the act of state doctrine required accepting the validity of the transfer of title by the intervention decree. There was no question of international law involved since the cigar manufacturers were Cuban citizens. \textit{Id.} at 537. But the court refused to recognize the intervention insofar as it applied to money owed for the pre-intervention shipments. Because these debts were found to be located with the debtor importers in the United States, they were subject to American law and therefore protected from the effects of any purported extraterritorial expropriation \textit{Id.} at 537-38; see United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868 (2d Cir. 1976); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), \textit{cert. denied}, 382 U.S. 1027 (1966).} The situation was further complicated by the fact that the Cuban government refused to return funds mistakenly paid to them by the importers for pre-intervention cigars.\footnote{Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), rev'd sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).} The importers sought to set off that amount against their debt to Cuba for the post-intervention shipments. The district court permitted the setoff, and granted an affirmative judgment to Dunhill, an importer whose prior payments exceeded the amount held owing to Cuba.\footnote{Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), rev'd sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).}

The Court of Appeals for the Second Circuit agreed that the former owners were entitled to payment for the pre-intervention shipments.\footnote{Id. at 563-64.} The court, however, found that the Cuban government's refusal to repay the money received was an act of state and therefore not open to examination by American courts.\footnote{406 U.S. 759 (1972); see notes 33-44 supra and accompanying text.} Nevertheless, the Second Circuit held that, under the Supreme Court's decision in \textit{First National City Bank v. Banco Nacional de Cuba},\footnote{Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), rev'd sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).} the importers were entitled to a setoff limited by the amount of Cuba's judgment against them. Thus, the district court's decision was modified in that Dunhill lost its affirmative judgment against Cuba.\footnote{416 U.S. 981 (1974).}

The Supreme Court granted certiorari to consider whether the in-court statements of Cuba's counsel that Cuba would not return the mistakenly made payments were an act of state.\footnote{Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).} The Court also ordered argument on whether the counterclaim exception created in \textit{First National City Bank v. Banco Nacional de Cuba} and limited there to the amount of the plaintiff's claim could be extended to an affirmative judgment against a foreign sovereign.\footnote{416 U.S. 981 (1974).} It was observed that Dunhill's affirmative judgment did not exceed the balance owed to Cuba by the codefendants and that all claims and
counterclaims had arisen from the same matter. After the briefing and argument of these two questions, a reargument was ordered, which included the additional question of whether the rejection of the international law exception in *Sabbatino* should be reconsidered.

The Supreme Court finally decided *Dunhill* on a narrow ground. Five Justices adhered to an opinion by Justice White that the statements of counsel for Cuba, refusing to return the payments mistakenly made, did not constitute an act of state. Justice White observed that these statements could be construed as no more than a continued insistence on the mistaken position that Cuba was entitled to the accounts receivable of the expropriated manufacturers by virtue of the intervention decree. Justice White cited an analogous sovereign immunity case, *The "Gul Djemal"*, for the proposition that not every representative or official of a government is capable of invoking the sovereign rights and immunities of the government. Hence, the court of appeals decision was reversed and the affirmative judgment of the district court was reinstated.

Justice White and three other Justices further suggested that “the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.” The opinion drew attention to the restrictive theory of sovereign immunity, adopted by the State Department in 1952, which recognizes the immunity of a sovereign only for its public or governmental acts, and not for private acts. Several earlier decisions of the Court were

64. Id.
65. Alfred Dunhill of London, Inc. v. Republic of Cuba, 422 U.S. 1005 (1975). It may seem somewhat odd that the Court directed reargument on the international law question since the Cuban expropriation was the property of Cuban citizens. See note 54 supra. An attorney associated with the *Dunhill* litigation has suggested to the author that the Court, evenly divided on the merits of the commercial act exception to the act of state doctrine, ordered reargument in order to temporize until Justice Douglas rejoined the court and could resolve the tie. *Dunhill* was originally argued on December 10, 1974, and Justice Douglas suffered a stroke on December 31, 1974. Although he rejoined the Court briefly in March, Justice Douglas required continued hospitalization and was absent from the Court from late April until late September of 1975. Reargument was ordered on June 16, 1975. 422 U.S. at 1005. Justice Douglas retired from the bench on November 12, 1975. 423 U.S., Preliminary Print, Part 1, at i (1975). Justice Stevens replaced him on December 19, 1975. 423 U.S., Preliminary Print, Part 2, at i (1975). *Dunhill* was reargued on January 19, 1976, and decided on May 24, 1976. 425 U.S. 682 (1976).
67. Id. at 684-95.
68. Id. at 690-95.
69. 264 U.S. 90 (1924).
70. 425 U.S. at 693-94.
71. Id. at 684-95.
72. Id. at 695.
cited which had recognized the proposition that a government is subject to
ordinary commercial law when engaged in commercial activity.\textsuperscript{74}

Three Justices joined with Justice Marshall in dissent, reaching opposite
conclusions on both points.\textsuperscript{75} In their view, no particular form was necessary
for conduct to constitute an act of state, and the will and sovereign power of
the Cuban government had been clearly expressed in the case at bar.\textsuperscript{76} Since
judicial review of the commercial acts of a foreign state might well affront
that state and thereby interfere with the conduct of foreign relations, the
dissenting Justices felt that the act of state doctrine should compel the
dismissal of the counterclaim against Cuba.\textsuperscript{77}

In sum, the four exceptions proposed to the basic act of state doctrine have
not brought coherent development to the doctrine, but rather have blurred its
outline. The Bernstein exception has been considered and adopted by only the
Second Circuit Court of Appeals.\textsuperscript{78} When the issue reached the Supreme
Court in First National City Bank, a plurality of three Justices thought the
courts should follow the expressed opinion of the executive,\textsuperscript{79} but the two
concurring Justices and the four dissenters explicitly rejected the exception.\textsuperscript{80}
The international law exception was rejected by eight Justices in Sabbatino
despite its acceptance by both lower federal courts.\textsuperscript{81} That decision, however,
provoked Congress into mandating an international law exception in some
expropriation cases.\textsuperscript{82} Moreover, in 1975, the Court itself indicated some
uncertainty about its prior rejection of the international law exception by
ordering argument on whether Sabbatino should be reconsidered.\textsuperscript{83} The
counterclaim exception to the act of state doctrine has been poorly articulated.
The Supreme Court has never decided a case on the basis of the exception,
and only Justice Douglas, in First National City Bank, has considered it to be
controlling in an act of state context.\textsuperscript{84} However, the plurality opinion in First
National City Bank rested indirectly on the counterclaim exception, since it
relied on a State Department letter which utilized a counterclaim rationale for
not applying the act of state doctrine.\textsuperscript{85} Thus, the counterclaim exception is

\textsuperscript{74} 425 U.S. at 695-97 (citing New York v. United States, 326 U.S. 572, 579 (1946); Ohio v.
Helvering, 292 U.S. 360, 369 (1934); South Carolina v. United States, 199 U.S. 437 (1905); Bank

\textsuperscript{75} 425 U.S. at 715-37 (Marshall, J., dissenting).

\textsuperscript{76} Id. at 715-23 (Marshall, J., dissenting).

\textsuperscript{77} Id. at 715-37 (Marshall, J., dissenting).

\textsuperscript{78} See notes 14-18 supra and accompanying text.


\textsuperscript{80} Id. at 773 (Douglas, J., concurring); id. (Powell, J., concurring); id. at 776-78 (Brennan,
J., dissenting).

\textsuperscript{81} See notes 20-32 supra and accompanying text.

\textsuperscript{82} See notes 34-35 supra and accompanying text.

\textsuperscript{83} See note 65 supra and accompanying text.

\textsuperscript{84} 406 U.S. at 759, 770-73 (Douglas, J., concurring).

\textsuperscript{85} The text of the State Department letter is reproduced as an appendix to the court of
appeals opinion on remand in First Nat'l City Bank v. Banco Nacional de Cuba, 442 F.2d 530,
the holding which courts have synthesized from the diverse opinions in *First National City Bank*. The status of the commercial act exception is also uncertain. It was accepted by four Justices in *Dunhill*, but rejected by four others. Justice Stevens declined to express an opinion on the exception and if the other Justices adhere to their opinions, he will decide the question when he speaks on the issue.

III. THE FUNDAMENTAL ACT OF STATE DOCTRINE

Before conducting an in-depth analysis and evaluation of the four exceptions to the act of state doctrine, it is helpful to examine the historical context within which the doctrine developed. The act of state doctrine originated in the conception of sovereignty held by early jurists. The sovereign state was considered the source of all authority, and thus created law by its acts. Because each state possessed exclusive jurisdiction over events taking place within its own territory, no other state could predicate judicial action on such events, and the sole intercourse between sovereigns was through diplomatic rather than judicial channels. But these conceptions have not withstood the passage of time, and both the domestic and international immunity of sovereign states have been restricted by judicial, legislative, and executive acts. Consequently, the act of state doctrine today rests on different grounds than it did when early American courts considered the subject.

Cases prior to World War II discussed the act of state doctrine largely in terms of considerations of sovereign immunity. However, modern judicial analysis found that the doctrine stems from the constitutional separation of powers, and reflects a fear that judicial pronouncements inconsistent with the views of the executive may embarrass the conduct of American foreign relations or affront a foreign government. “[T]he act of state doctrine[‘s] . . . continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.”

91. See note 2 supra and accompanying text.
Despite the attractive logic of the separation of powers rationale, however, there is no indication of any embarrassment to the executive branch when act of state cases are decided on their merits. In two recent cases, Sabbatino on remand and First National City Bank, the State Department informed the courts that application of the act of state doctrine was not required by American foreign policy interests. Moreover, in the only example of direct conflict, when the government of Britain refused to recognize the Franco government in Spain in 1939, the House of Lords did so in effect by a decision without apparent difficulties for the executive.

In the particular context of adjudications under international law, there is still less likelihood of interference with the conduct of foreign relations since international law is a more neutral and appropriate ground for invalidating an act of state than the law or policy of the forum. Many foreign nations examine acts of state under international law without apparent conflict with the conduct of foreign affairs. In fact, the State Department has informed the Supreme Court that "[i]n general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy." Further, in refusing extraterritorial effect to a foreign expropriation, enforcing judgments of foreign courts, and denying the validity of acts committed by belligerents in occupied territory, courts have long reviewed the validity of governmental acts with little apparent concern for possible affront to the acting state or detriment to foreign relations.

Moreover, there is an obvious competing interest to be weighed against any possible embarrassment to the executive or impairment of foreign relations, i.e., the duty of the courts to render justice to parties who seek to settle disputes through adjudication. In his dissent in Sabbatino, Mr. Justice White took issue with the majority's "disregard . . . of the rights of litigants to a full determination on the merits" and stated "that our courts are obliged to determine controversies on their merits, in accordance with the applicable law."
In addition to the separation of powers arguments, the Supreme Court has adduced two additional grounds in support of the act of state doctrine. First, the Court has questioned the "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." One solution to this dilemma would be for the State Department to agree to allow appeal of any claimed denial of justice to an international tribunal. Such an approach would also make domestic review of foreign acts of state an important source for the development of international law. Secondly, the Supreme Court has suggested that review of foreign acts of state would make title to goods flowing in international trade uncertain within the United States, and thus alter the flow of trade between nations. The validity of such a suggestion may be questioned, however, since it is not the possibility of judicial review that makes title uncertain, but rather the invalid taking itself, inasmuch as it undermines the fundamental stability provided by basic property and contract law.

Thus, the historical and legal bases for the act of state doctrine have been challenged and debated with the passage of time. Perhaps as a result, the four exceptions to the act of state doctrine are not as yet solidly based and have similarly been the subject of confused and uncertain treatment. The remainder of this Comment will analyze the exceptions within their legal and empirical context, evaluate the strengths and weaknesses of each, and identify those exceptions which rest on sound judicial reasoning while complementing the theory behind the act of state doctrine.

IV. THE INTERNATIONAL LAW EXCEPTION TO THE ACT OF STATE DOCTRINE

The proposed international law exception to the act of state doctrine was rejected by the Supreme Court in Sabbatino because it feared that "piecemeal dispositions" by the courts under international law would seriously inter-
fere with the conduct of diplomatic negotiations in that they "might prevent or render less favorable the terms of an agreement that could otherwise be reached."\textsuperscript{110} The Court regarded such negotiations as a more effective means than litigation for securing compensation for American claimants.\textsuperscript{111}

At least two recommendations, however, have disagreed with this appraisal. John R. Stevenson, former Chairman of the New York State Bar Association's Committee on International Law,\textsuperscript{112} has criticized the Court's reasoning and pointed to the long delays and poor recoveries which frequently attend diplomatic settlements.\textsuperscript{113} Similarly, Professor Richard B. Lillich, after six years of work on the law of international claims,\textsuperscript{114} has referred to the "[State Department's] shopworn argument about the efficacy of diplomatic remedies."\textsuperscript{115} Detailed examination of recent diplomatic settlements for expropriated American property\textsuperscript{116} does much to belie the superior efficacy of diplomatic channels. In most cases, the agreements were not reached until many years after the claims arose,\textsuperscript{117} and the delay coupled with the reduced amounts recovered in settlement, resulted in very low percentage rates of effective recovery.\textsuperscript{118} Further, the agreements often excluded many claimants altogether, and were inferior to those concluded by the expropriating state with other claimant nations.\textsuperscript{119}

Acceptance of poor recoveries and public admissions that low level goals are pursued\textsuperscript{120} may prevent the United States from insisting upon higher compensation in the future.\textsuperscript{121} Further, such precedents could prove to be particularly dangerous at a time when expropriations of American property throughout the world occur with increasing frequency.\textsuperscript{122} However, this

\begin{itemize}
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} See The Aftermath of Sabbatino x (L. Tondel, Jr. ed. 1965).
\item \textsuperscript{113} Stevenson Remarks, supra note 101, at 75.
\item \textsuperscript{114} R. Lillich, The Protection of Foreign Investment vii (1965) [hereinafter cited as Protection].
\item \textsuperscript{115} Id. at 103.
\item For a proposed agreement with Czechoslovakia, see Lillich, The Gravel Amendment to the Trade Reform Act of 1974; Congress Checkmates a Presidential Lump Sum Agreement, 69 Am. J. Int'l L. 837 (1975) [hereinafter cited as Czechoslovakia].
\item \textsuperscript{118} Hungary, supra note 117, at 555-56 & n.165 (four and one-half per cent); Czechoslovakia, supra note 116, at 839-41 & n.23 (when calculated on the same basis, perhaps lower than Hungary).
\item \textsuperscript{119} See Hungary, supra note 117, at 552-55.
\item \textsuperscript{120} A. Rovine, Digest of United States Practice in International Law 1974, at 427 (1975).
\item \textsuperscript{121} Hungary, supra note 117, at 557-58. Indeed, Czechoslovakia has asserted that she should pay no greater percentage compensation than did Hungary. Id. at 558.
\end{itemize}
system of recovery ultimately fails in that no body of law is built by the process. While the history of prior negotiations may significantly affect future results, it contributes little or nothing to an understanding of the legal rights of parties affected by the acts of foreign states. It is unlikely that the rights of a private person to property and freedom of activity, or those of a state to take action in order to solve public problems, can be determined by proceedings in which shrewd bargaining is more effective than compliance with the law.

In rejecting the proposed international law exception to the act of state doctrine, the Supreme Court also placed great weight on the unsettled nature of international law, particularly with respect to the expropriation of the property of aliens. The Court reasoned that the function of the judiciary is to apply principles of law to the facts of particular controversies, not to create or discover previously unknown principles which would govern foreign acts of state. The point is sound, but the Court gave only a cursory survey of the law in the area before stating that no consensus on governing principles exists. Commenting on this, Judge Philip C. Jessup of the International Court of Justice noted that in forty-five years neither the Permanent Court of International Justice nor its successor, the International Court of Justice, had ever declined to decide a case because it could not identify an applicable rule of international law. Moreover, the Supreme Court may have subtly misconceived the nature of customary international law by comparing it to the more settled nature of municipal law. Disagreement between nations with respect to the international law of expropriations should not be given undue weight.

[U]nilateral assertions about international law . . . if accepted and acted upon by a considerable number of other states, can create the expectations we call customary international law. Unanimity has never been a requirement for such law. The very purpose of customary law, in contrast with agreement, is to bind states who have not explicitly accepted—to give states a way of binding themselves without appearing to impair inflated notions of sovereignty.

123. See notes 120-21 supra and accompanying text.
124. Indeed, negotiators may have little sense that their claimants' right to compensation arises from a legal relationship between the parties. Czechoslovakia, supra note 116, at 846.
125. See notes 141-48 infra and accompanying text.
127. Id. at 428.
128. Id. at 428-30. See Justice White's criticism of the Court's treatment of this area. Id. at 455 (White, J., dissenting).
129. Remarks of Judge Philip C. Jessup, Seventh Hammarskjold Forum, Jan. 11, 1965, in The Aftermath of Sabbatino 102 (L. Tondel, Jr. ed. 1965). Judge Jessup suggested that it would be possible, through an amendment to the Statute of the International Court of Justice, for national courts to inquire of the court about a rule of international law which was at issue. Such a determination by the International Court of Justice might be controlling or merely advisory. Id. at 102-03.
The Supreme Court's concern over the unsettled nature of international law on the expropriation of the property of aliens lead them to ignore substantial evidence of settled customary international law on the question. There exist, for example, numerous agreements among capital importing and exporting nations with respect to the confiscation of the private property of aliens.\textsuperscript{131} The Court was aware, too, of a United Nations General Assembly resolution which accepted an international law standard of compensation for all expropriations.\textsuperscript{132} While such resolutions are not binding, one adopted by an overwhelming margin of both developing and industrialized states would certainly be indicative of customary international law.\textsuperscript{133} Finally, it may be noted that Congress has directed the Foreign Claims Settlement Commission, in adjudicating the entitlement of American claimants to the proceeds of settlements negotiated by the State Department, to apply, in order, "provisions of the applicable claims agreement . . . and . . . the applicable principles of international law, justice, and equity."

In refusing to recognize an international law exception to the act of state doctrine, the Supreme Court further ignored the basic proposition that international law is an integral part of American law of which American courts may not decline to remedy violations.\textsuperscript{135}

Indeed, in an earlier decision, \textit{Hilton v. Guyot},\textsuperscript{136} which concerned the effect of a foreign judgment in American courts, the Supreme Court stated:

\begin{quote}
International law, in its widest and most comprehensive sense—including . . . the
\end{quote}

\textsuperscript{131} Professor Robert Y. Jennings has collected fifty treaties concluded among thirty-two developing countries and various industrialized nations as of January 6, 1965, which provide for compensation according to international law for any confiscation of the private property of aliens. Remarks of Professor Robert Y. Jennings, Seventh Hammarskjold Forum, Jan. 11, 1965, in The Aftermath of Sabbatino 93-94, 96-97 (L. Tondel, Jr. ed. 1965) [hereinafter cited as Jennings Remarks].

\textsuperscript{132} The resolution states in pertinent part: "4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law." G. A. Res. 1803, 17 U.N. GAOR Supp. 17, at 15, U.N. Doc. A/5217 (1952), reprinted in 2 International Legal Materials 223, 225 (1963).

\textsuperscript{133} Protection, supra note 114, at 83; Seidl-Hohenveldern, \textit{Chilean Copper Nationalization Cases before German Courts}, 69 Am. J. Int'l L. 110, 111 (1975); Stevenson Remarks, supra note 101, at 78.


\textsuperscript{136} 159 U.S. 113 (1895).
rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

The most certain guide, no doubt, for the decision of such questions is a treaty or statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them.\textsuperscript{137}

A similar passage is found in \textit{The Paquete Habana},\textsuperscript{138} where it was decided that an act of the United States violated international law and therefore would not be upheld by American courts.\textsuperscript{139}

When domestic acts of state are involved, as in \textit{The Paquete Habana}, the possibility of affront to a foreign government does not exist to mandate judicial abstention. However, the fact that the United States government is subject to international law in American courts suggests that American courts have a reciprocal duty to review foreign acts of state under international law. \textit{The Paquete Habana} decision additionally implies a limit to the judiciary's fear of hampering the executive branch in its conduct of foreign affairs. While the judiciary must cooperate with the executive branch, which has primary responsibility in this area, that cooperation should extend only to what is possible under the law; it cannot be an excuse for failing to do justice in cases which come before the courts.\textsuperscript{140}

A compelling argument in favor of an international law exception is that resultant court decisions would contribute significantly to the development of international law. Since international judicial bodies have few cases before them due to the absence of compulsory jurisdiction, application of international law by domestic courts may make substantial contributions to the accretion of case law.\textsuperscript{141} Indeed, domestic courts are particularly well suited to the development of case law on acts of state. This is so because the International Court of Justice at present may act only when states are the parties to the controversy,\textsuperscript{142} and when the nations concerned have voluntarily submitted themselves to its jurisdiction.\textsuperscript{143} Although the immunity of the

\textsuperscript{137} Id. at 163.

\textsuperscript{138} 175 U.S. 677, 700 (1900).

\textsuperscript{139} The case involved two Cuban fishing vessels captured as prizes of war by United States Navy warships. Identifying a rule of customary international law that coastal fishing vessels, peaceably engaged in their pursuit, were not subject to capture as prizes during the time of war, the Supreme Court ordered that the United States pay the claimant all proceeds of the sale of the vessels and cargo, as well as damages and costs. Id. at 686-714.


\textsuperscript{142} I.C.J. Stat. art. 34, para. 1.

\textsuperscript{143} I.C.J. Stat. art. 36, para. 1, 2. While the International Court may also give advisory
sor timet procedures.

It must be acknowledged that an international law exception to the act of state doctrine poses several potential problems. As already noted, international law may be too uncertain for domestic courts to apply and the resultant opinions may not be accepted as sound law in other nations. However, these objections are basically inconsistent with the common law tradition. The fact that fifty states may pronounce different opinions on a question common to all of them has never prevented the highest court of a state from ruling on a particular issue. The accumulation of persuasive authority is obviously as important as that of mandatory authority to a decision-making system built upon case law and precedent.

There is, however, a more fundamental objection to an international law exception to the act of state doctrine. It is one of a jurisprudential nature, based upon the shape of the present world system. Since World War II, the appearance of many newly independent states has profoundly affected international relations and international law. As a group, these new states have views on many areas of international law significantly different from those of the more developed states. This stems from a belief on the part of the new states that much international law was created without their participation and solely to protect the interests of developed states. Because the international legal system has no supreme authority and depends upon consensus among member states in order to establish its rules, it has been suggested that the system must reflect the wide dispersion of sovereign state authority, as well as

opinions to United Nations organs in accordance with U.N. Charter art. 96, that power is not relevant to the discussion here.

144. Only states may be parties to cases before the International Court of Justice. See note supra; see, e.g., Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Bernstein v. Van Heyghen Frères Société Anonyme, 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947).


146. See notes 126-27 supra and accompanying text.

147. See notes 104-06 supra and accompanying text.

148. Jennings Remarks, supra note 131, at 89.


151. Castaneda, supra note 149, at 38-40. International law, which is several centuries old, necessarily reflects the views and attitudes of the Western European nations, which were the nation states that shaped its development. Id. at 39. It may be suggested that such law is unfairly slanted toward the position of expansive, industrialized states. Whether this argument is accurate may be less important than the perception of new states that international law somehow subverts their efforts to achieve equality of international position.
the diverse social and political values of member states. Professor Richard Falk has supported rules of judicial deference, such as the act of state doctrine, as a result of his careful jurisprudential analysis of the consensual roots of international law. Falk has proposed a view of international law based upon a horizontal order, where power is distributed among many equal centers, none of which may impose its legal authority on any of the others. In such a setting, Falk has suggested that domestic courts must defer to the acts of other sovereigns, since the judgments of a domestic court on the acts of a foreign state cannot expound an effective rule of international law, i.e., one which will be accepted and applied by other equal centers of power and authority. Such deference and mutual respect support the development of international law by creating an atmosphere in which consensus and additions to international law by agreement among states become possible. However, in accepting or rejecting Falk's model, a state should consider whether it will defer to contrary views, or strongly refute them, in order to best secure acceptance of its view of proper international law on a particular question.

Professor Falk has noted that domestic courts do not have formal international authority from either a constitutive document or a supranational institution. Nor do they command the coercive power necessary to give their pronouncements on foreign acts of state the full force of law in other nations. While this does not mean that such courts are without authority to rule on the validity of a foreign act of state, Professor Falk argues that they should refuse to do so because their decision will carry no authority in the courts of other nations and thus cannot be effective.

In response, it may be suggested that a court should nevertheless decide the controversy before it, and allow foreign courts to determine the weight of the decision. While the parochial or ill-considered holding will doubtless command little respect, the well-reasoned and disinterested decision may prove persuasive, if not compelling, in foreign courts. Further, there is another manner in which a domestic court's decision may ultimately affect the body of international law. While international law seeks to enforce its standards upon state behavior, it also strives to conform its prescriptions to a form where lawful behavior will be synonymous with ideal behavior. If American courts renounce their function as interpreters of international law simply because they may be unable to enforce their judgments, they lose the opportunity to make international law more comprehensive and closer to an ideal of just behavior between nations.

153. Id. at 9-12.
154. Id. at 21-27, 39-50.
155. Id. at 9-12.
156. Id. at 17-20.
157. Id. at 21-27.
159. See note 155 supra and accompanying text.
V. The Bernstein Exception to the Act of State Doctrine

The Bernstein exception to the act of state doctrine was first considered by the Supreme Court in First National City Bank v. Banco Nacional de Cuba,\textsuperscript{161} where it was adopted by a plurality.\textsuperscript{162} Those Justices found that the basis of the act of state doctrine rested in judicial recognition of "the primacy of the Executive in the conduct of foreign relations" as well as in judicial reluctance to pronounce opinions which "could embarrass the conduct of foreign relations by the political branches of the government."\textsuperscript{163} Further, the plurality asserted that the exception was "in no sense an abdication of the judicial function to the Executive Branch."\textsuperscript{164} The judiciary had created the doctrine to meet its own concerns about conflict with the executive.\textsuperscript{165} Therefore, when the executive dispelled those concerns by a communication to the court, the judiciary simply had no need to apply the doctrine.\textsuperscript{166}

In First National City Bank, six Justices rejected the Bernstein exception.\textsuperscript{167} They reasoned that the executive would encourage the judiciary to reach a judgment on the merits when it was indifferent to the outcome of a case or suspected that the court would reach the "right" result for American foreign policy interests.\textsuperscript{168} Under this analysis, if the State Department fears a "wrong" result it will leave the act of state doctrine undisturbed and the court will not reach the merits of the case at issue. Adoption of an exception which encourages such guessing and manipulation by the executive branch is of dubious wisdom.\textsuperscript{169} Moreover, the four dissenters in First National City Bank asserted that the act of state doctrine is grounded on more than a concern that the executive not be embarrassed in the conduct of foreign affairs.\textsuperscript{170} Even if a Bernstein letter is issued indicating that the executive can foresee no difficulty if judgment is reached on the merits, such a determination will not dispel judicial concern for the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the government in question, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed . . . .\textsuperscript{171}

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\textsuperscript{161} 406 U.S. 759 (1972).
\textsuperscript{162} Id. at 759-70.
\textsuperscript{163} Id. at 765-67.
\textsuperscript{164} Id. at 768.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} The four dissenting Justices rejected the exception. Justices Douglas and Powell also rejected the exception, while concurring in the result reached by the plurality.
\textsuperscript{168} First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring); id. at 773 (Powell, J., concurring); id. at 782-84 (Brennan, J., dissenting).
\textsuperscript{169} Id. at 782-84 (Brennan, J., dissenting).
\textsuperscript{170} Id. at 785-89 (Brennan, J., dissenting).
\textsuperscript{171} Id. at 788 (Brennan, J., dissenting).
Whatever doubts exist regarding the relative importance of these factors, it seems clear that the judiciary must in each case weigh the relevant factors and determine whether or not to apply the doctrine. "[A] doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction . . . in the name of the doctrine of separation of powers, seems . . . to conflict with that very doctrine." Those who reject the Bernstein exception have the better position. While the executive may advise a court not to worry, the judiciary should satisfy itself independently that judgment upon the merits will not raise the evils sought to be avoided by the act of state doctrine.

VI. THE COUNTERCLAIM EXCEPTION TO THE ACT OF STATE DOCTRINE

This exception to the doctrine arises from the Supreme Court's decision in First National City Bank v. Banco Nacional de Cuba. As a result of the varying analyses of the case by the courts which have construed it, the counterclaim exception is not as well defined as the other exceptions to the act of state doctrine. It was first articulated in a letter from the State Department to the Supreme Court, stating the department's views on the pending case. The letter advised the Court of the determination by the Department of State that the act of state doctrine need not be applied when it is raised to bar adjudication of a counterclaim or setoff when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine.

The plurality in First National City Bank reached its result by accepting this letter as activating the Bernstein exception. However, Justice Douglas, concurring in the result, felt that the counterclaim exception dictated the result in the case. To support this view, Justice Douglas drew upon the Court's treatment of the law of sovereign immunity in National City Bank v. Republic of China. In that case, National City Bank had responded to China's suit for the recovery of deposited funds by claiming as a setoff the money due on some Treasury notes on which China had defaulted. The Court held that "the ultimate thrust of the consideration of fair dealing which allows

172. See notes 96-148 supra and accompanying text.
173. 406 U.S. at 790-93 (Brennan, J., dissenting).
174. Id. at 773 (Powell, J., concurring).
175. Id. at 759.
176. See notes 33-50 supra and accompanying text.
178. See notes 161-66 supra and accompanying text.
a setoff or counterclaim" served to overcome the sovereign immunity of a state plaintiff. The Court felt that when a foreign state tries to use American courts to enforce its rights, fairness requires that all the rights of the parties be judicially determined. Applying the same reasoning in First National City Bank, Justice Douglas favored a setoff to the extent of Cuba's claim "because Cuba [was] the one who ask[ed] our judicial aid in collecting its debt from petitioner and, as the Republic of China case says, 'fair dealing' requires recognition of any counterclaim or setoff that eliminates or reduces that claim."

Although he concurred in the result, Justice Powell, along with the four dissenters, rejected the counterclaim exception. Both Justice Powell and the dissenters pointed to the different nature of the doctrines of sovereign immunity and act of state. Justice Powell observed that sovereign immunity was a bar to a court's jurisdiction over a party, while the act of state doctrine focused on particular issues and defined them as non-justiciable, whether or not a sovereign nation happened to be the defendant. The dissenters emphasized the different role of the executive vis-à-vis the two doctrines. Even where sovereign immunity does not bar an action, the executive branch must retain the authority to deal with act of state matters because these questions are poorly suited to judicial determination. It is not all that clear, however, that comparisons between sovereign immunity cases and those dealing with acts of state are inappropriate. Actually, the opinion of Chief Justice Marshall in Schooner Exchange v. M'Faddon, a sovereign immunity case, suggests that both doctrines stem from the same considerations, namely, "that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth, are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion . . . ." Furthermore, Justice Brennan's

181. Id. at 365.
182. Id. at 364-66.
183. Id. at 361-62.
184. 406 U.S. at 772 (Douglas, J., concurring) (footnote omitted).
185. Id. at 773-74 (Powell, J., concurring); id. at 793-96 (Brennan, J., dissenting).
186. Id. at 773-74 (Powell, J., concurring); id. at 793 (Brennan, J., dissenting).
187. Id. at 773-74 (Powell, J., concurring). While this argument is analytically correct, it is overcome by the recognition that both doctrines are similar in practical effect. They sacrifice the right of a private party to a judgment on the merits. The deficiencies of the doctrines are illustrated not by legal analysis but by a certainty that too many rights are being sacrificed to sovereign status and the doctrines must therefore be contracted.
188. Id. at 793-96 (Brennan, J., dissenting).
189. Id. (Brennan, J., dissenting).
190. 11 U.S. 74, 7 Cranch 116 (1812).
191. Id. at 91-92, 7 Cranch at 146. Compare this language to the statement of the act of state doctrine in Underhill v. Hernandez, 168 U.S. 250, 252 (1897). See note 2 supra and accompanying text. It may also be noted that Underhill presented facts that could have been decided on settled principles of the sovereign immunity of public officials for acts in the pursuance of their official duties. Instead, the Supreme Court chose to open its opinion with the broad statement which has come to be recognized as the act of state doctrine. Zander, supra note 8, at 415.
dissent in *First National City Bank*, arguing for the difference between the act of state and sovereign immunity doctrines may have been based on an inappropriate analysis. The list of concerns arguing for application of the act of state doctrine which are purportedly not involved in the doctrine of sovereign immunity is clearly derived from the Supreme Court's consideration of *Sabbatino*. However, the issue in that case was whether or not there should be an international law exception to the act of state doctrine, and the listed factors are those which the Supreme Court considered to militate against that particular exception. They do not apply to the basic act of state doctrine, the foundations of which rest upon principles of deference among nations and particularly among branches of the American government. Thus the two doctrines do have common historical and analytical roots and Justice Douglas' use of a case from one doctrine to shape the other is justified. The same considerations which demand an exception to the sovereign immunity doctrine weigh in favor of a similar exception in cases dealing with acts of state. Refusal to recognize a counterclaim exception to the right of sovereign immunity would permit a foreign state to avail itself of American law and yet evade just claims against it by the defendant. Unless a counterclaim exception to the act of state doctrine is adopted, a foreign state may similarly use American courts to collect its debts, while avoiding its own liabilities.

A further development in the counterclaim exception arose in *Alfred Dunhill of London, Inc. v. Republic of Cuba*. In that case, the Supreme Court directed the parties to brief and argue the question: "[I]s an exception to the act of state doctrine created, under [*First National City Bank*], where petitioner's counterclaim does not exceed the net balance owed to Cuba on its claims by petitioner's codefendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?" This factual setting will henceforth be termed a circumstantial counterclaim. The majority did not reach this issue because it found that no act of state had taken place. However, the dissenting Justices reached the opposite conclusion and went on to consider the circumstantial counterclaim. The dissent asserted that allowance of a counterclaim in excess of the foreign state's claim

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192. 406 U.S. at 785-89 (Brennan, J., dissenting).
193. See note 171 *supra* and accompanying text.
194. See 376 U.S. at 428-36.
195. See notes 19-30 *supra* and accompanying text
196. See 376 U.S. at 428-36.
198. See notes 179-84 *supra* and accompanying text.
203. 425 U.S. at 684-95.
204. 425 U.S. at 730-37 (Marshall, J., dissenting).
raised the same sharp issues of affront to a coequal sovereign and denial of international comity that would be raised by a naked suit against a foreign government, and should therefore be denied. The characterization of the counterclaim as excessive was not altered by the presence of codefendants who would ultimately pay the plaintiff state more than it was obliged to pay the defendant which won its individual excessive counterclaim. The dissent pointed out that consolidation for trial is ordered for convenience and efficiency, and does not alter the legal rights of the parties involved. While there is no reasoning by the majority in support of the circumstantial counterclaim raised by the facts in Dunhill, since the counterclaim was approved on a narrower ground, the arguments in support of this circumstantial counterclaim exception are essentially the same as those advanced in First National City Bank. All of these focus on the loss of special status by a sovereign who acts affirmatively in bringing about litigation. In this situation fairness requires that the courts do justice with respect to all the issues in dispute between the parties, and not just those selected by the plaintiff. It is not simplistic to observe that in an act of state situation, the foreign state is always an assertive actor. The sovereign has taken the action which is at issue. Further, it is within the power of the foreign state to determine the number of defendants and so limit its possible liability. The fundamental policy behind the counterclaim exception is that such an assertive actor, who practically controls the facts of a controversy, should not be enabled by the act of state doctrine to control the execution of justice by American courts. The history of the counterclaim exception has been one of the extension of this idea to more complex factual settings, and the essential justice of the principle should rule whenever the facts present a counterclaim against a sovereign plaintiff.

VII. THE COMMERCIAL ACT EXCEPTION TO THE ACT OF STATE DOCTRINE

The exception of commercial and proprietary acts from the rights and privileges of sovereignty has gained much support in the past. Chief Justice Marshall early recognized the distinction between commercial and governmental acts in the very case which was the source of the sovereign immunity (and perhaps the act of state) doctrine in the United States.
This distinction was given fuller expression a few years later in terms which are relevant to the facts in Dunhill: "It is . . . a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."214

This distinction has since been recognized by the Supreme Court in a variety of contexts.215 Furthermore, in Dunhill, the State Department recommended to the Court that it not consider defaults by a sovereign on its commercial obligations to be acts of state beyond review in American courts.216 The State Department also indicated to the Court that it had accepted, in 1952, the restrictive theory of sovereign immunity, which denied immunity to the sovereign's private or commercial acts.217 The plurality pointed out that the distinction between commercial and governmental acts with respect to sovereign immunity has been adopted by many foreign states.218 The plurality continued that the United States itself does not claim such immunity with respect to its own merchant vessels,219 and rapidly increasing involvement of governments in commercial transactions created a greater need for private persons dealing with them to secure adjudication of disputes.220 Finally, the plurality observed that many lower federal courts216 and the courts of many foreign states222 have adopted the distinction between commercial and governmental acts. While acknowledging that sovereign immunity was not identical with the act of state doctrine, the four-Justice plurality stated that all of these factors compelled the recognition of a commercial act exception to the act of state doctrine.223

Thus, there is widespread acceptance of the refusal to grant foreign sovereigns special consideration in their purely proprietary and commercial activities. Moreover, the distinction is in harmony with the rationale of the act of state doctrine.224 The risk of affront to foreign governments and consequent disruption of the executive's conduct of foreign affairs is greatly

216. Id. at 696-97.
218. See, e.g., Letter of the Acting Legal Adviser, 26 Dep't State Bull. 984-85 (1952), reprinted in 425 U.S. at 711, 712-14 app.2.
219. 425 U.S. at 702, 714.
220. Id.
222. Id. at 702 & n.15.
223. Id. at 705-06.
224. See note 94 supra and accompanying text.
diminished where only commercial interests are involved, rather than those which are possessed only by governments. Even act of state cases in which the facts did not present this distinction recognized that not every act of the sovereign engages its authority in such fashion as to require treatment as an act of state. Justice Powell in his concurrence in the adoption of the commercial act exception reiterated his opinion that the courts should decide act of state cases unless their independent examination made it appear that to do so would interfere with the conduct of foreign relations. He indicated that such cases were rare and that no such interference would result in international law exception or commercial act circumstances.

The considerations raised in opposition to a commercial act exception to the act of state doctrine do not seem persuasive. Chief among them is the argument that sovereign immunity and the act of state doctrine are distinct legal entities whose features may not be freely interchanged. Besides the arguments already marshalled against this position in the discussion above, it must be pointed out that the act of state and sovereign immunity doctrines are particularly interdependent with regard to commercial activities of sovereigns. Where the restrictive theory of sovereign immunity is accepted, the sovereign will be subject to adjudication for any default on his commercial obligations. But if the act of state doctrine does not also recognize a commercial act exception, the sovereign may repudiate these same commercial obligations and thereby regain, through the act of state doctrine, an immunity previously denied by law.

VIII. Conclusion

This Comment has discussed both the judicial history and the analytical bases of the act of state doctrine and the asserted exceptions to it. The hope has been to reach conclusions on both the current and desirable state of the law in this area. The viability of the Bernstein exception in federal law at present is doubtful. While accepted by the plurality in First National City Bank, the majority of the Justices rejected it. It is submitted that the exception is not consistent with the nature of the act of state doctrine, which involves a balancing of political considerations against the right of the parties to a judgment on the merits. The judiciary should determine whether a case presents an exception to the general rule that courts judge the merits of cases before them. To permit a political branch, without statutory or constitutional sanction, to determine the outcome of a case violates judicial independence

226. Id. at 706.
227. Id. at 715 (Powell, J., concurring).
228. Id. (Powell, J., concurring).
229. See notes 176-83 supra and accompanying text.
230. Id.
232. See notes 78-80 supra and accompanying text.
233. See notes 94, 102-03 supra and accompanying text.
and the separation of powers.\(^\text{234}\) Further, considerable uncertainty in litigation inevitably attends the Bernstein exception since it substitutes political analysis for the relative stability and objectivity of judicial determination.

The international law exception has received little support in the Supreme Court. Only Justices White and Powell have expressed support for adherence to international law in act of state cases.\(^\text{235}\) It is submitted that international law should rule the facts of any act of state case to which it applies. The notion that the actions of nations may be judged only from a political, rather than legal, viewpoint is a primitive one. The developing position is that state conduct, whether toward other states or private persons, is amenable to the rule of international law as applied by judicial institutions. The United States courts have long enforced international law as part of American law and failure to do so in act of state cases is a regrettable anomaly.\(^\text{236}\) Private litigants should generally favor the international law exception since their ability to dispute justice with sovereign states is greater than their ability to dispute power.

The counterclaim exception to the act of state doctrine has been judicially accepted.\(^\text{237}\) However, it is not as significant doctrinally as the international law or commercial act exceptions, since it has a relatively narrow procedural application and is not analytically complex. However, it recognizes the inherent unfairness in the position of a state which resorts to self-help and then seeks an additional legal recovery while avoiding accountability for its prior resort to power. In both First National City Bank, where the counterclaim was limited to the extent of the sovereign's claim,\(^\text{238}\) and in Dunhill, where the circumstantial counterclaim was suggested by the grant of certiorari,\(^\text{239}\) the state had control over the factual setting of the litigation. The pervasive duplicity and legal fiction so involved in this kind of proceeding override the considerations supporting the act of state doctrine and require recognition of the counterclaim exception in both situations. While the counterclaim exception cannot prevent a state from employing its power against a private party, it prevents a state from further infringing the rights of that party through the procedural strategy of a pious lawsuit.

The commercial act exception is the most recent exception asserted to the act of state doctrine. While four Justices accepted and four rejected the exception,\(^\text{240}\) the Second Circuit has read the Dunhill decision as announcing a commercial act exception.\(^\text{241}\) When the sovereign enters a course of dealing as a commercial actor, its claim to sovereign prerogatives is considerably

\(^{234}\) See notes 168-69, 174 supra and accompanying text.

\(^{235}\) See notes 31-32, 45 supra and accompanying text.

\(^{236}\) See notes 135-40 supra and accompanying text.

\(^{237}\) See notes 175-211 supra and accompanying text.

\(^{238}\) See note 177 supra and accompanying text.

\(^{239}\) See note 202 supra and accompanying text.

\(^{240}\) See notes 72-75, 77 supra and accompanying text.

Further, the executive branch of the United States government is no better suited than the judiciary to resolve disputes arising from commercial activity. When sovereign stature is lessened, the right of the parties to judgment on the merits becomes more compelling. This exception is probably most important to private litigants, who are given some assurance that they may enter commercial dealings with a foreign state in a position of legal equality. Such commercial dealings are probably the most common source of act of state litigation, and the area in which economic consequences will flow most immediately from developments in the law.

There is an important core of reason within the act of state doctrine. The doctrine recognizes that national governments, in their task of organizing and advancing the interests of their populace, are impelled and restrained by forces which set them apart from other suitors in federal courts. For this reason, resolution of some disputes should perhaps be left to the political branches of the American government, which are likewise subject to the same forces. However, it is important to recognize the competing rights of private parties to hold property and to just resolution of disputes. One-sided analysis of the doctrine obstructs the development of international law and ignores the long-term necessity for interaction between foreign states and private persons. The pedantic approach of the Supreme Court in the early act of state cases, present still in Sabbathino's consideration of the international law exception, should be replaced by reasoning which empirically examines the factual ramifications of the act of state doctrine. The need is for an approach which gives broad attention to all the facts of a case, as has been advocated by Justice Powell, and which frankly recognizes and strikes a rational balance between competing values. The international law exception and the commercial act exception serve to illustrate this broad approach. In each, time-honored legal doctrine is opposed by an empirical recognition of the effects of the law upon the parties, and a fresh sense of fairness. It may be hoped that both exceptions will soon be firmly recognized as limits upon the traditional act of state doctrine.

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242. See note 214 supra and accompanying text.
243. See notes 220, 225 supra and accompanying text.