

1983

## Adjudication Acts of State in Suits Against Foreign Sovereigns: A Political Question Analysis

Brian S. Fraser

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Brian S. Fraser, *Adjudication Acts of State in Suits Against Foreign Sovereigns: A Political Question Analysis*, 51 Fordham L. Rev. 722 (1983).

Available at: <https://ir.lawnet.fordham.edu/flr/vol51/iss4/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# ADJUDICATING ACTS OF STATE IN SUITS AGAINST FOREIGN SOVEREIGNS: A POLITICAL QUESTION ANALYSIS

## INTRODUCTION

The power of a nation to attach legal consequences to conduct that occurs outside of its territory is theoretically limited by recognized principles of international law.<sup>1</sup> As a practical matter, however, each nation has the ultimate power to determine the limitations it will place on the extraterritorial reach of its own law.<sup>2</sup> In addition to being subject to the limitations on the sovereign power of the United States,<sup>3</sup> the federal judiciary is further constrained by the Constitution and congressional enactment.<sup>4</sup> Assuming that subject matter jurisdiction as conferred by Congress is consistent with the judicial power as defined by article III,<sup>5</sup> federal courts are indisputably competent to resolve controversies between American nationals and foreign states. Despite this unequivocal grant of jurisdiction, courts have crafted the act of state doctrine, a superfluous limitation on the exercise of that jurisdiction.

The act of state doctrine precludes American courts from inquiring into the validity or legality of acts done by a foreign sovereign within its own territory.<sup>6</sup> Based on the constitutional separation of powers,<sup>7</sup>

---

1. See Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 Colum. L. Rev. 1247, 1249 & n.11 (1977) (discussing scope of extraterritorial jurisdiction under the Sherman Act) [hereinafter cited as *Sherman Act Jurisdiction*].

2. See *The Schooner Exchange v. McFaddon*, 11 U.S. 74, 85, 7 Cranch 116, 136 (1812); R. Falk, *The Role of Domestic Courts in the International Legal Order* 27-28 (1964).

3. The issue of congressional authority to attach legal consequences to conduct occurring outside of the United States was first raised in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). Justice Holmes indicated that Congress did not have the power to prescribe rules to govern such conduct. See *id.* at 355. Since that time, however, the emphasis has shifted to the applicability of a particular statute. Furthermore, the strict territorial approach of *American Banana* has been liberalized to include acts that have an effect in the United States. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1291-92 (3d Cir. 1979). However, the absence of an applicable statute may still destroy the subject matter jurisdiction of the court. See *id.* at 1292.

4. See *Baker v. Carr*, 369 U.S. 186, 198 (1962).

5. A congressional grant of subject matter jurisdiction is ultimately limited by the requirements of article III. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Verlinden B.V. v. Central Bank of Nig.*, 647 F.2d 320, 325-30 (2d Cir. 1981), cert. granted, 454 U.S. 1140 (1982) (81-920); see *Powell v. McCormack*, 395 U.S. 486, 512-16 (1969); *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

6. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976) (plurality opinion); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.*, 658 F.2d 903, 908 (2d Cir. 1981); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287,

the doctrine is a product of juridical reluctance to interfere with the conduct of foreign affairs.<sup>8</sup> Its application places certain issues beyond judicial scrutiny but does not affect the jurisdiction of a court.<sup>9</sup>

The act of state doctrine developed as a corollary to the doctrine of sovereign immunity<sup>10</sup> and then assumed an existence of its own.<sup>11</sup> While sovereign immunity protected sovereign states from the exercise of jurisdiction by American courts,<sup>12</sup> the act of state doctrine precluded inquiry into the acts of those states and thus shielded private defendants<sup>13</sup> who either motivated the sovereigns' acts or benefited from them.<sup>14</sup> Developments during the last decade, however, have

---

1292 (3d Cir. 1979); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 72-73 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

7. Although the text of the Constitution is not interpreted to require the act of state doctrine, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 605 (9th Cir. 1976), the doctrine does, however, have " 'constitutional' underpinnings." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

8. The doctrine is compelled by neither the nature of sovereignty nor international law, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 605 (9th Cir. 1976), despite some assertions to the contrary. *See Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884 & n.7 (5th Cir. 1982). To the extent that courts have developed a conflict of laws approach to the issue, the basic concern still lies in the potential affront to a foreign government and the resulting difficulties in formulating and effecting foreign policy presented to the executive branch. *See Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 609 (9th Cir. 1976).

9. *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972) (plurality opinion); *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

10. *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972) (plurality opinion).

11. *See id.*

12. *See Republic of Mex. v. Hoffman*, 324 U.S. 30, 34-35 (1945); *Ex parte Peru*, 318 U.S. 578, 588 (1943); *Berizzi Bros. v. Steamship Pesaro*, 271 U.S. 562, 576 (1926); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 851 (S.D.N.Y. 1978) (applying the Foreign Sovereign Immunities Act).

13. *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 1036 (1982).

14. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964); *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 359 (1909); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302-03 (3d Cir. 1982); *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 325-27 (5th Cir. 1982); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 79 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). *Hunt* is probably the high water mark for application of the act of state doctrine in antitrust cases against private defendants. The Second Circuit held that the doctrine foreclosed inquiry into the motivation behind a Libyan expropriation, thus removing the causal connection between the alleged conspiracy to diminish competition among oil producing companies in Libya and the injury suffered by the

precipitated a conflict between the two doctrines,<sup>15</sup> so that it has become difficult to predict whether judicial resolution of a dispute will be available to those who trade with foreign states.

In 1976, a plurality of the Supreme Court rendered a decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba*<sup>16</sup> that created a commercial activities exception to the act of state doctrine.<sup>17</sup> That same year, Congress enacted the Foreign Sovereign Immunities Act of 1976 (Act or FSIA),<sup>18</sup> which codified the American rule on sovereign immunity<sup>19</sup> and defined the subject matter jurisdiction of federal courts in cases against foreign states.<sup>20</sup> Despite historical and theoretical differences, the two doctrines can operate to effect the same result—dismissal of suit.<sup>21</sup>

plaintiff. See *id.* at 72-73. *Hunt* has subsequently been criticized for being unduly broad. *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 325 (5th Cir. 1982); see *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 304 n.5 (3d Cir. 1982); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 55 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). Other circuits have refrained from applying the act of state doctrine in such cases and have applied jurisdictional tests for the extraterritorial reach of American antitrust laws. See *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 883-86 (5th Cir. 1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294, 1297-98 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 608-15 (9th Cir. 1976); see also *Sherman Act Jurisdiction*, *supra* note 1, at 1248. The doctrine might also be available in actions brought under other statutory prohibitions, such as the antiboycott provision of the Export Administration Amendments Act of 1979, 50 U.S.C. app. § 2407 (Supp. IV 1980); see *United States v. Bechtel Corp.*, 648 F.2d 660 (9th Cir.) (act of state doctrine raised as a defense in antitrust suit for boycott conspiracy prior to enactment of the antiboycott statute), *cert. denied*, 454 U.S. 1083 (1981), and the Foreign Corrupt Practices Act of 1978, 15 U.S.C. §§ 78a, 78m, 78dd-1 to -2, 78ff (1976 & Supp. V 1981); see McLaughlin, *The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis*, 46 *Fordham L. Rev.* 1071, 1104-05 (1978) (discussing use of act of state doctrine in antitrust prosecutions "predicated on the paying of foreign bribes"). The act of state doctrine is distinct from the sovereign compulsion defense, which arises when a private defendant's conduct has been mandated by a foreign state. *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 303 (3d Cir. 1982); McLaughlin, *supra*, at 1107; see *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1296-99 (D. Del. 1970). The defense is not available to the foreign state. McLaughlin, *supra*, at 1107.

15. See *infra* notes 107-08.

16. 425 U.S. 682 (1976).

17. *Id.* at 706 (plurality opinion).

18. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330(a)-(c), 1332(a)(4), 1391(f), 1441(d), 1602-1611 (1976)).

19. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7 [hereinafter cited as House Report], reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6605; Note, *The Foreign Sovereign Immunities Act Of 1976: Giving The Plaintiff His Day In Court*, 46 *Fordham L. Rev.* 543, 543 (1977).

20. House Report, *supra* note 19, at 12, reprinted in 1976 U.S. Code Cong. & Ad. News at 6610.

21. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705 n.18 (1976) (plurality opinion). The commercial exception has not adequately prevented

This Note argues that courts should not use the act of state doctrine to limit the exercise of their judicial power in cases against foreign states when sovereign immunity is not available. Given subject matter jurisdiction under the FSIA, courts should restrict their inquiry to whether the exercise of that jurisdiction in a particular case is consistent with the requirements of article III. This Note suggests that the political question doctrine provides a standard for making that determination and assures that adjudication will not unconstitutionally infringe on powers that are reserved to the political branches.

### I. THE ACT OF STATE DOCTRINE: HISTORY AND RATIONALE

The act of state doctrine developed out of the protean concepts of international comity and sovereignty and was applied in American courts chiefly out of respect for the separation of powers. As it matured, its rationale solidified in judicial deference to the executive in the area of international relations. In the modern era, the doctrine was reaffirmed and was recognized as having its roots in the Constitution, rather than in international law.

#### A. The Schooner Exchange *and its Progeny*

The act of state doctrine and the American doctrine of foreign sovereign immunity have a common origin in *The Schooner Exchange v. McFaddon*,<sup>22</sup> in which American plaintiffs alleged that the Exchange had been "forcibly taken" on the high seas and converted for military use by the French.<sup>23</sup> The Supreme Court affirmed the dismissal of the action,<sup>24</sup> holding that foreign sovereigns are immune from the jurisdiction of American courts.<sup>25</sup>

In *The Schooner Exchange*, Chief Justice Marshall reasoned that jurisdiction within national boundaries is "exclusive and absolute," that its surrender or limitation can occur only with consent of the sovereign of the forum,<sup>26</sup> and that consent in this area was implied in the practice of nations.<sup>27</sup> The rule of *The Schooner Exchange* is that the power to rescind consent does not lie in the judiciary, but is vested

---

the act of state doctrine from substituting for sovereign immunity. See *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

22. 11 U.S. 74, 7 Cranch 116 (1812).

23. *Id.* at 74, 7 Cranch at 117.

24. *Id.* at 92, 7 Cranch at 147.

25. *Id.*

26. *Id.* at 85, 7 Cranch at 136.

27. *Id.* at 85-86, 7 Cranch at 136-37.

in the two political branches of government.<sup>28</sup> Although the principle of sovereign immunity is now recognized as a principle of international law,<sup>29</sup> its application by the judiciary was mandated by the domestic concern of separation of powers.<sup>30</sup>

*The Schooner Exchange* also indicated that even when the power to resolve certain issues might properly lie in the judiciary, the nature of those issues suggests that they are better suited for diplomatic resolution.<sup>31</sup> Thus, the cases that follow *The Schooner Exchange* diverge into two lines. In one line of cases, sovereign immunity was afforded certain defendants and suit was barred for lack of jurisdiction;<sup>32</sup> in the other, courts applied the act of state doctrine and refused to adjudicate issues, resulting in dismissal of the suits.<sup>33</sup> This second line developed in cases in which the defendants were private parties but resolution of the dispute required adjudication of a sovereign act.<sup>34</sup> Rather

---

28. See *Republic of Mex. v. Hoffman*, 324 U.S. 30, 34 (1945); *Ex parte Peru*, 318 U.S. 578, 588-89 (1943); *The Schooner Exchange v. McFaddon*, 11 U.S. 74, 85-86, 7 Cranch 116, 136-37 (1812).

29. See Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 *Fordham L. Rev.* 155, 162-63 (1981).

30. See *National City Bank v. Republic of China*, 348 U.S. 356, 360-61 (1955); *The Schooner Exchange v. McFaddon*, 11 U.S. 74, 91, 7 Cranch 116, 146 (1812).

31. 11 U.S. at 91-92, 7 Cranch at 146. The inability of the judiciary to enforce its decisions against foreign sovereigns, according to Chief Justice Marshall, also supported the argument that such cases should not be adjudicated. *Id.* The absence of an effective remedy has more recently been characterized as an element of the political question doctrine. See *Baker v. Carr*, 369 U.S. 186, 198 (1962).

This concern is diminished, however, by the provisions of the FSIA, under which the execution of a money judgment against a foreign sovereign is made possible. See 28 U.S.C. §§ 1609-1611 (1976); see also House Report, *supra* note 19, at 26-31, reprinted in 1976 U.S. Code Cong. & Ad. News at 6625-30. When appropriate, a court may order an injunction or specific performance. *Id.* at 22, reprinted in 1976 U.S. Code Cong. & Ad. News at 6621. However, enforcement of such an order may not be possible if diplomatic immunity is available to shield foreign officials from imprisonment for contempt. *Id.*

32. See *Republic of Mex. v. Hoffman*, 324 U.S. 30, 34-35 (1945); *Ex parte Peru*, 318 U.S. 578, 588 (1943); *Berizzi Bros. v. Steamship Pesaro*, 271 U.S. 562, 576 (1926); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978) (applying FSIA).

33. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964); *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 359 (1909); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302 (3d Cir. 1982); *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 325-27, 329 (5th Cir. 1982); *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 79 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

34. See, e.g., *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 79 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

After the demise of the absolute theory of sovereign immunity, see *infra* note 96, the doctrine was raised in cases against foreign sovereigns. See, e.g., *Alfred Dunhill*

than affect the jurisdiction of the court, the doctrine renders certain issues nonjusticiable.<sup>35</sup>

The "classic American statement" of the act of state doctrine<sup>36</sup> is found in *Underhill v. Hernandez*:<sup>37</sup>

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.<sup>38</sup>

Although the doctrine as articulated in *Underhill* seems to rely on concepts of sovereignty and comity among nations,<sup>39</sup> subsequent early cases found the basis for the doctrine in other concepts.

In *American Banana Co. v. United Fruit Co.*,<sup>40</sup> the Court applied the rule of *Underhill* in an antitrust suit against a private defendant.<sup>41</sup> By holding that a foreign sovereign acting within its own territory "must be assumed to be acting lawfully," the Court suggested that American law could not be applied to such acts.<sup>42</sup> This reasoning, in

of London, Inc. v. Republic of Cuba, 425 U.S. 682, 697 n.12 (1976); International Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya, 482 F. Supp. 1175, 1178-79 (D.D.C. 1980).

35. International Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); Hunt v. Mobil Oil Corp., 550 F.2d 68, 78 n.12 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). See *infra* notes 129-30 and accompanying text.

36. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972) (plurality opinion); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964). This has also been referred to as the "traditional formulation" of the doctrine. See Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 691 n.7 (1976).

37. 168 U.S. 250 (1897). The plaintiff was an American citizen who brought an action against the general of a revolutionary army in Venezuela. Underhill alleged that Hernandez had refused to allow him to leave the country and had confined him in his house. Underhill was eventually released, the revolution was successful, and the United States recognized the rebels as the legal government of Venezuela. *Id.* at 251, 253. Given the fact that the revolution was ultimately successful, it has been argued that sovereign immunity provided an independent ground for the decision. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 430 (1964).

38. 168 U.S. at 252.

39. See *Sherman Act Jurisdiction*, *supra* note 1, at 1255-56.

40. 213 U.S. 347 (1909).

41. *Id.* at 357-58.

42. *Id.* at 358; see also Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 726 (1976) (Marshall, J., dissenting); Shapleigh v. Mier, 299 U.S. 468, 471 (1937). This approach has been characterized as a choice of law question. See Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3d Cir. 1979); DeRobert v. Gannett Co., 548 F. Supp. 1370, 1373-74 (D. Hawaii 1982). In general, however, courts have not relied on a choice of law theory. See, e.g., Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48, 51 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); National Am. Corp. v. Federal Repub. of Nig., 448 F. Supp. 622, 640 &

conjunction with the holding that the Sherman Act<sup>43</sup> does not apply to acts committed outside the United States,<sup>44</sup> required the conclusion that no "case" was presented to the Court.<sup>45</sup>

Another rationale for the act of state doctrine was developed in *Oetjen v. Central Leather Co.*<sup>46</sup> There the Court relied on *Underhill* and *American Banana* in support of "[t]he principle that the conduct of one independent government cannot be successfully questioned in the courts of another."<sup>47</sup> Thus, the issue of the validity of a foreign expropriation was nonjusticiable. Also raised, however, was the issue of whether the expropriating party was the legal sovereign of the foreign state.<sup>48</sup> The Court held that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."<sup>49</sup> Certain issues are therefore nonjusticiable because the separation of powers in the constitutional system would be violated.

While both issues in *Oetjen* raised separation of powers problems, the determination of the legal government of a foreign state is more clearly a pure political question<sup>50</sup> than is the examination of the

n.30 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979). Further, a choice of law theory raises troubling questions about "federal common law" after *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423-27 (1964); cf. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740, 742-43 (1939) (discussing effects of *Erie* on ability of federal courts to choose applicable law in cases involving extraterritorial conduct).

43. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976).

44. 213 U.S. at 357, 359; see Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 Fordham L. Rev. 201, 202 (1982).

The holding in *American Banana* that the Sherman Act does not apply to acts done outside of the United States has not been strictly adhered to. Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. Indus. & Com. L. Rev. 199, 207-19 (1977); see *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 52 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 74 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 609 (9th Cir. 1976); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

45. 213 U.S. at 359; cf. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979) (inapplicability of statute to conduct in question would result in lack of subject matter jurisdiction).

46. 246 U.S. 297 (1918).

47. *Id.* at 303.

48. *Id.* at 302-03.

49. *Id.* at 302.

50. See *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938). *Oetjen* has been cited by the Supreme Court as a "political question" case. See *Baker v.*

governmental expropriation. While adjudication of either could "affect" foreign relations, the question of recognition is more clearly within the orbit of powers of the political branches. *Oetjen* marks a step in the transition from a doctrine based solely on the concept of sovereignty and reflects judicial concern about infringing political powers.<sup>51</sup>

### B. Sabbatino and the Modern Doctrine

In *Banco Nacional de Cuba v. Sabbatino*<sup>52</sup> the Court reiterated the traditional formula for the act of state doctrine as one which "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."<sup>53</sup> The Court rejected the proposition that such cases should be decided under standards of international law<sup>54</sup> and reaffirmed the applicability of the doctrine in expropriation cases.<sup>55</sup>

In a discussion of the foundation of the doctrine, the Court challenged the idea that the doctrine is compelled by the "inherent nature of sovereign authority"<sup>56</sup> or by international law.<sup>57</sup> Moreover, the Court determined that the Constitution neither mandates the act of state doctrine nor "irrevocably remove[s] from the judiciary the capacity to review the validity of foreign acts of state."<sup>58</sup> Instead, the doctrine reflects the basic distribution of power within the federal government and it rests on "'constitutional' underpinnings."<sup>59</sup>

---

Carr, 369 U.S. 186, 211 & n.31 (1962). The Court, however, referred to its language as a "sweeping statement" because not all cases that touch on foreign affairs violate the separation of powers. *Id.* at 211; see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 Harv. L. Rev. 221, 229 (1925); Weston, *Political Questions*, 38 Harv. L. Rev. 296, 315-16 (1925).

51. See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766-67 (1972) (plurality opinion) (citing *Oetjen* for the proposition that the act of state doctrine is based on the separation of powers rather than sovereignty).

52. 376 U.S. 398 (1964).

53. *Id.* at 401.

54. *Id.* at 428. The nature of the international law violation may, however, affect a court's analysis when determining whether the act of state doctrine applies. In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), Judge Kaufman indicated that the doctrine would not be a shield from liability in civil suits arising from the torture of political prisoners in violation of international law. See *id.* at 889-90. In a later case, Judge Kaufman commented on *Filartiga* and distinguished physical torture from commercial violations in determining whether subject matter jurisdiction has been conferred by a breach of international law. See *Verlinden B.V. v. Central Bank of Nig.*, 647 F.2d 320, 325 n.16 (2d Cir. 1981), *cert. granted*, 454 U.S. 1140 (1982) (No. 81-920).

55. 376 U.S. at 428, 434-37.

56. *Id.* at 421.

57. *Id.*

58. *Id.* at 423.

59. *Id.*

The rationale enunciated in *Sabbatino* echoes a chord first struck in *The Schooner Exchange*:<sup>60</sup> The judiciary has limited powers to act in foreign affairs.

The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.<sup>61</sup>

The doctrine is loosely based on the separation of powers, but is not mandated in the same sense that the political question doctrine is mandated.<sup>62</sup> Adjudication of an act of a foreign state is not a usurpation of the power to conduct foreign affairs. Yet a particular issue in a particular case may be of such a nature that a judicial decision may have repercussions in the conduct of foreign policy. It is in this grey area, in which courts still have the power to act but hesitate to employ that power, that the act of state doctrine is applied.<sup>63</sup>

The separation of powers rationale was reaffirmed in 1972 in *First National City Bank v. Banco Nacional de Cuba*.<sup>64</sup> A sharply divided Court held that the act of state doctrine did not bar a counterclaim against a foreign sovereign because the claim was merely a set-off to the sovereign's recovery.<sup>65</sup> Justice Rehnquist issued the judgment of the Court and wrote the plurality opinion in which Chief Justice Burger and Justice White joined in adopting the "Bernstein Excep-

60. *The Schooner Exchange v. McFaddon*, 11 U.S. 74, 78, 7 Cranch 116, 123-24 (1812).

61. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

62. Although it has been suggested that a political question "doctrine" is not required, see Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597, 600 (1976), it is generally recognized that certain issues are to be resolved by the political branches of government, see *id.* at 601, and represent a limitation on the power of the judiciary. See Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 45 (1961); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265 (1961); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 9 (1959).

63. See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768-69 (1972) (plurality opinion); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 577 (1966).

64. 406 U.S. 759 (1972) (plurality opinion).

65. See *id.* at 762, 768-69 (plurality opinion); *id.* at 771-72 (Douglas, J., concurring). Subsequent opinions have agreed that this is the holding in *City Bank*. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 732-34 (1976) (Marshall, J., dissenting); *Menendez v. Saks & Co.*, 485 F.2d 1355, 1373 (2d Cir. 1973), *rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

The plurality, however, limited its holding to the case before it, see 406 U.S. at 770, and Justice Powell, who concurred in the result, rejected this reasoning. See *id.* at 773-76 (Powell, J., concurring in the result).

tion.”<sup>66</sup> This exception allows courts to adjudicate act of state issues if the State Department renders an opinion that the adjudication will not hinder American foreign policy.<sup>67</sup>

A majority of the Court, however, expressly rejected the Bernstein Exception.<sup>68</sup> Justice Douglas, concurring in the result, believed that the exception would reduce the Court to a “mere errand boy for the Executive Branch which may choose to pick some people’s chestnuts from the fire, but not others’.”<sup>69</sup> Justice Powell also rejected the exception on the ground that it would conflict with, rather than preserve, the separation of powers.<sup>70</sup>

The dissenters—Justices Brennan, Stewart, Marshall, and Blackmun—rejected the Bernstein Exception on the ground that even with acquiescence by the executive, adjudication of act of state cases vio-

66. 406 U.S. at 768 (plurality opinion).

67. The exception takes its name from *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (per curiam), in which the Second Circuit declined to apply the act of state doctrine in an action to recover property that had been expropriated by the German government. The court reversed the position it had taken in an earlier decision in the same case on the basis of a letter published by the State Department. The Department expressed the policy of the executive branch as relieving “American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.” Press Release No. 296, Apr. 27, 1949, titled “Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers,” reprinted in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (per curiam).

Although *Bernstein* had been decided at the time of the *Sabbatino* decision, the Court did not then rule on the validity of the exception because the executive branch did not “make any statement bearing on this litigation.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 420 (1964).

68. *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 884 (2d Cir. 1981); Cooper, *Act of State and Sovereign Immunity: A Further Inquiry*, 11 Loy. U. Chi. L.J. 193, 224 n.142 (1980); see *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 772-73 (1972) (Douglas, J., concurring); *id.* at 773 (Powell, J., concurring); *id.* at 790 (Brennan, J., dissenting). Nevertheless, courts continue to seek the view of the executive branch on the applicability of the act of state doctrine in particular cases. See *Banco Nacional de Cuba v. Chemical Bank*, 658 F.2d 903, 912 (2d Cir. 1981).

69. 406 U.S. at 773 (Douglas, J., concurring). In Justice Douglas’ view, an affirmative remedy would transform the controversy into a “political question.” *Id.* at 772 (Douglas, J., concurring).

70. *Id.* at 773 (Powell, J., concurring). Justice Powell indicated that, had he been on the Court, he would have joined Justice White’s dissent in *Sabbatino*. *Id.* at 774 (Powell, J., concurring). Further, he disagreed with the concept

that balancing the functions of the judiciary and those of the political branches compels the judiciary to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law. Such a result would be an abdication of the judiciary’s responsibility to persons who seek to resolve their grievances by the judicial process.

*Id.* at 774-75 (Powell, J., concurring).

lates the separation of powers.<sup>71</sup> Under this view, the breach in the separation of powers wall allows infringement in two directions: The judiciary becomes involved in foreign policy and the executive exercises discretion that determines the fate of individual claimants.<sup>72</sup>

*City Bank* is noteworthy for demonstrating the division of the Court on this issue as well as for the unanimous reaffirmation that the foundation of the doctrine is the separation of powers. Although Justice Rehnquist wrote that "[t]he act of state doctrine, like the doctrine of immunity for foreign sovereigns, has its roots, not in the Constitution, but in the notion of comity between independent sovereigns,"<sup>73</sup> his analysis reveals that comity and sovereignty are not the cornerstones of the doctrine. By adopting the Bernstein Exception, the plurality made clear that the true problem is one of separation of powers.

Two common elements are found in the cases following *The Schooner Exchange*: a concern over the relationships among sovereign nations in the international order and a concern over the allocation of constitutional power within the American government. The relative importance of these concerns shifted toward the separation of powers rationale as the act of state doctrine evolved. *Sabbatino* and its progeny ultimately accept the latter as a basis for the doctrine, while displaying continued disagreement over its application. The question raised and left unanswered in *Sabbatino* and *City Bank* is the degree to which the judiciary can "affect" foreign affairs while carrying out its article III duties.<sup>74</sup>

## II. DUNHILL, THE FOREIGN SOVEREIGN IMMUNITIES ACT, AND THE VIABILITY OF A COMMERCIAL EXCEPTION

Two developments that occurred almost simultaneously in the mid-1970's necessitated a reappraisal of the act of state doctrine. In 1976, the Supreme Court decided *Alfred Dunhill of London, Inc. v. Republic of Cuba*<sup>75</sup> and Congress passed the Foreign Sovereign Immunities

71. *Id.* at 790-92 (Brennan, J., dissenting). "The Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim." *Id.* at 788-89 (Brennan, J., dissenting).

72. *Id.* at 791-93 (Brennan, J., dissenting).

73. *Id.* at 765 (plurality opinion).

74. The power of the three branches of the federal government, taken together, represents the total sovereign power of the United States in international affairs. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317-18 (1936); cf. *Zschernig v. Miller*, 389 U.S. 429, 436, 443 (1968) (discussing limitation on states' power to act in international affairs). The Court has recognized that the judiciary has the power to affect foreign affairs. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (not "every case or controversy which touches foreign relations lies beyond judicial cognizance") (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

75. 425 U.S. 682 (1976).

Act.<sup>76</sup> These two developments have led to a discussion of whether a commercial exception to the act of state doctrine exists or should exist.<sup>77</sup>

### A. Dunhill and the FSIA

The Supreme Court followed *City Bank* with another decision in which the application of the act of state doctrine was rejected. In *Alfred Dunhill of London, Inc. v. Republic of Cuba*,<sup>78</sup> the Court held that a government's mere refusal to honor an obligation, without anything more, did not rise to the level of an "act of state."<sup>79</sup> Justice White authored the opinion in which a majority<sup>80</sup> joined this limited holding. His opinion went further, however, and created a commercial exception to the act of state doctrine in a section that attracted only plurality support.<sup>81</sup> This exception requires that the doctrine not be applied in any way that is inconsistent with the restrictive approach to sovereign immunity,<sup>82</sup> since codified by the Foreign Sovereign Immunities Act of 1976.<sup>83</sup>

Under the restrictive theory, the grant of immunity for foreign states depends upon the type of act that is the subject of the suit.<sup>84</sup> Two categories of acts are recognized by this doctrine: *acta jure imperii*, or public acts, and *acta jure gestionis*, or private and commercial acts.<sup>85</sup> In 1952, the Department of State issued the Tate Letter,<sup>86</sup> which formally adopted the policy of recognizing immunity

---

76. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330(a)-(c), 1332(a)(4), 1391(f), 1441(d), 1602-1611 (1976)).

77. The commercial exception has drawn a generally favorable response from the commentators. See, e.g., Cooper, *supra* note 68, at 205-06; Friedman & Blau, *Formulating a Commercial Exception to the Act of State Doctrine: Alfred Dunhill of London, Inc. v. Republic of Cuba*, 50 St. John's L. Rev. 666, 678-79 (1976); Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 Tex. L. Rev. 1, 33 (1976); Note, *Rehabilitation and Exoneration of the Act of State Doctrine*, 12 N.Y.U. J. Int'l L. & Pol. 599, 634 (1980); Note, *The Act of State Doctrine: The Need for a Commercial Exception in Antitrust Litigation*, 18 San Diego L. Rev. 813, 823-27 (1981).

78. 425 U.S. 682 (1976).

79. *Id.* at 689-90.

80. *Id.* at 684.

81. *Id.* at 695.

82. See *id.* at 705.

83. 28 U.S.C. §§ 1330(a)-(c), 1332(a)(4), 1391(f), 1441(d), 1602-1611 (1976).

84. Hill, *supra* note 29, at 168.

85. *Id.*

86. Letter from Jack B. Tate, Acting Legal Adviser of the Department of State, to the Acting Attorney General (May 19, 1952), 26 Dep't St. Bull. 984 (1952) [hereinafter cited as Tate Letter], reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 app. 2 (1976).

only for public acts.<sup>87</sup> This action is consistent with the rule of *The Schooner Exchange* that only the political branches have the power to expand or restrict jurisdictional immunity.<sup>88</sup> Shortly after *Dunhill* was decided, Congress enacted the FSIA,<sup>89</sup> which codified the restrictive approach to sovereign immunity and removed determinations of immunity from the executive and placed them with the judiciary.<sup>90</sup>

Under the FSIA, foreign states are immune from the jurisdiction<sup>91</sup> of American courts except as provided by international agreements and by sections 1605 to 1607 of the Act.<sup>92</sup> Pursuant to section 1605(a)(2), foreign states are subject to suit in the United States based upon their commercial activity, with the minimum requirement that the activity have a direct effect in the United States.<sup>93</sup> Congress specifically required that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."<sup>94</sup> The fact that a public purpose underlies the commercial act is irrelevant.<sup>95</sup>

A principal intent of Congress was to remove the determination of immunity from the executive branch and place it with the judiciary.<sup>96</sup>

87. Hill, *supra* note 29, at 175-76; see Tate Letter, *supra* note 86, reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-15 app. 2 (1976).

88. *The Schooner Exchange v. McFaddon*, 11 U.S. 74, 91, 7 Cranch 116, 146 (1812).

89. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330(a)-(c), 1332(a)(4), 1391(f), 1441(d), 1602-1611 (1976)).

90. House Report, *supra* note 19, at 7, reprinted in 1976 U.S. Code Cong. & Ad. News at 6605-06.

91. Under the FSIA, immunity, subject matter jurisdiction and personal jurisdiction are "intricately coordinated." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 306 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

92. 28 U.S.C. § 1604 (1976).

93. *Id.* § 1605(a)(2). Section 1605(a)(2) provides that a foreign sovereign is not immune from jurisdiction in any case

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

94. *Id.* § 1603(d). The section also provides: "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act."

95. See House Report, *supra* note 19, at 16, reprinted in 1976 U.S. Code Cong. & Ad. News at 6615.

96. *Id.* at 7, reprinted in 1976 U.S. Code Cong. & Ad. News at 6606. In *The Schooner Exchange v. McFaddon*, 11 U.S. 74, 7 Cranch 116 (1812), the Court indicated that the decision to revoke or limit the immunity of foreign states lay with the political branches. See *id.* at 90-91, 7 Cranch at 143-44. Thus, the cases that

This would depoliticize determinations of immunity by allowing the judiciary to apply objectively the criteria set forth in the Act and arrive at a predictable result.<sup>97</sup> Litigants are thereby assured "that these often crucial decisions are made on purely legal grounds and under procedures that insure due process."<sup>98</sup> Moreover, this transfer of responsibility defuses the political ramifications of the determination and lessens the impact on foreign relations.<sup>99</sup>

Congress did not address the issue of the act of state doctrine in the FSIA because it believed, as do some courts,<sup>100</sup> that *Dunhill* requires a commercial exception to that doctrine.<sup>101</sup> While Congress did not specifically prohibit application of the act of state doctrine in cases that can be adjudicated under the FSIA, it indicated its belief that the doctrine should not be applied when sovereign immunity is unavail-

followed *The Schooner Exchange* follow the theory of absolute immunity. See *Berizzi Bros. v. Steamship Pesaro*, 271 U.S. 562, 574 (1926).

The Supreme Court developed a policy of leaving the determination of immunity in particular cases to the State Department, in reliance on the concept of separation of powers and basing its result on a political question rationale. See *Republic of Mex. v. Hoffman*, 324 U.S. 30, 38 (1945); *Ex parte Peru*, 318 U.S. 578, 587-88 (1943); *Compania Espanola de Navegacion Maritima v. The Navemar*, 303 U.S. 68, 74 (1938). The Department subsequently adopted a formal policy of recognizing the restrictive approach to immunity. See *Tate Letter*, *supra* note 86, at 985.

The role that the executive was granted in judicial proceedings came under heavy fire. See Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 Am. J. Int'l L. 168, 169 (1946). The dissatisfaction with the procedure centered on the absence of a rule of law that could be applied with consistency. See House Report, *supra* note 19, at 8-9, reprinted in 1976 U.S. Code Cong. & Ad. News at 6607; President's Statement on Signing the Foreign Sovereign Immunities Act of 1976, 3 Pub. Papers, Gerald R. Ford 2609-10 (1979); Hill, *supra* note 29, at 175; Note, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 Yale L.J. 1167, 1175 (1982).

97. House Report, *supra* note 19, at 7, reprinted in 1976 U.S. Code Cong. & Ad. News at 6606. For a discussion of the way in which the FSIA has been applied, see Dellapenna, *Suing Foreign Governments and Their Corporations: Sovereign Immunity, Part II*, 85 Com. L.J. 228 (1980).

98. House Report, *supra* note 19, at 7, reprinted in 1976 U.S. Code Cong. & Ad. News at 6606.

99. *Id.*

100. See *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 79 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396, 401 (D.N.J. 1979); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 398 & n.28 (D. Del. 1978); *National Am. Corp. v. Federal Repub. of Nig.*, 448 F. Supp. 622, 640-41 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979). *But see Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 905 (E.D. Mich. 1981); *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977). The Department of Justice has taken the position that the act of state doctrine does not apply to commercial activity. See U.S. Dept. of Justice Antitrust Guide for Int'l Operations 54-55 (1977).

101. *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 906 (E.D. Mich. 1981); see *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695

able.<sup>102</sup> It is clear that the Act must at least alter the doctrine for the intended effect of the legislation to be realized.<sup>103</sup>

---

(1976); House Report, *supra* note 19, at 20 n.1, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6619.

102. Although it indicated that the Act "is not intended to affect the substantive law of liability," House Report, *supra* note 19, at 12, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6610, the Judiciary Committee touched upon its view of the applicability of the act of state doctrine in two areas and hinted at its position in a third.

In the area of commercial activity, the Committee adopted the view taken by the Solicitor General in an *amicus* brief to the Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) that application of the doctrine in cases involving commercial obligations would permit "sovereign immunity to reenter through the back door, under the guise of the act of state doctrine." House Report, *supra* note 19, at 20 n.1, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6619; *see* *Letelier v. Republic of Chile*, 488 F. Supp. 665, 674 (D.D.C. 1980). The Ninth Circuit, however, by looking to the purpose of a commercial act rather than its nature, *see* *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982), allowed the act of state doctrine to bar adjudication where the FSIA denied immunity.

In cases involving expropriations, the Act denies immunity when "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3) (1976). This includes the "nationalization or expropriation of property without payment of . . . prompt adequate and effective compensation" and "takings which are arbitrary or discriminatory." House Report, *supra* note 19, at 19-20, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6618. On the issue of expropriations, the Committee stressed that the section does not affect the applicability of the act of state doctrine; instead, it cited the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1976), which prohibits the application of the act of state doctrine in expropriation cases. *See* House Report, *supra* note 19, at 20, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6618. Although the Committee did not address the issue, courts have narrowed the Amendment's application to expropriations of tangible property situated outside of the territory of the expropriating sovereign. *See* *Empressa Cubana Exportadora de Azucar y sus Derivados v. Lamborn & Co.*, 652 F.2d 231, 237 (2d Cir. 1981); *United Bank Ltd. v. Cosmic Int'l*, 542 F.2d 868, 872 (2d Cir. 1976); *Menendez v. Saks & Co.*, 485 F.2d 1355, 1372 (2d Cir. 1973), *rev'd on other grounds sub nom.* *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *Banco Nacional de Cuba v. First Nat'l City Bank*, 431 F.2d 394, 399-402 (2d Cir. 1970), *rev'd on other grounds*, 406 U.S. 759 (1972); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *see also* Restatement (Second) of Foreign Relations Law § 43 (1965); Crockett, *Extra-territorial Expropriations*, 13 Ind. L. Rev. 655, 657 (1980). Section 1605(a)(3) has recently been interpreted to correspond to the meaning given to the language of the Hickenlooper Amendment. *See* *Canadian Overseas Ores Ltd. v. Compania de Acero Del Pacifico S.A.*, 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982). If this interpretation stands, the act of state doctrine, sovereign immunity, and federal court jurisdiction will have merged in the area of expropriations.

Finally, the Committee hinted at its position on the applicability of the act of state doctrine in antitrust cases. The legislative history reveals that § 1603 is not intended "to alter the application of the Sherman Antitrust Act." House Report, *supra* note 19, at 19, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6618. The Committee then cited two cases that upheld the applicability of the Sherman Act to acts committed

### B. Problems with a Commercial Exception

The commercial exception in *Dunhill* was designed to parallel the restrictive approach to sovereign immunity<sup>104</sup> as it was outlined in the Tate Letter.<sup>105</sup> The provisions of the FSIA, subsequently enacted, disturbed this symbiotic relationship. The FSIA bars a grant of immunity to sovereign states for commercial conduct under certain circumstances.<sup>106</sup> A foreign state's immunity, however, is further circumscribed by other provisions in the Act. For example, under section 1605(a)(1), a sovereign may waive the right to immunity.<sup>107</sup> Under

outside of the United States. *See id.* (citing *United States v. Pacific & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 106 (1913); *Pacific Seafarers, Inc. v. Pacific Far E. Line, Inc.*, 404 F.2d 804, 817 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969)). Suits against foreign sovereigns or their instrumentalities that were decided subsequent to the enactment of the FSIA have not been uniform in their interpretation of whether the commercial exception to immunity applies to anticompetitive behavior. *See Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 907 & n.21 (E.D. Mich. 1981) (some antitrust conspiracies are not commercial); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 394-96 (D. Del. 1978) (commercial exception applies). Assuming that a commercial exception to the act of state doctrine is viable, however, there is at least some agreement that it is coextensive with the immunity exception in the antitrust area. *See Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 907 (E.D. Mich. 1981); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 398 & n.28 (D. Del. 1978); *cf. National Am. Corp. v. Federal Repub. of Nig.*, 448 F. Supp. 622, 640 (S.D.N.Y. 1978) (Congress intended FSIA and act of state doctrine to be interpreted "in tandem"), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

103. The Ninth Circuit has held that the FSIA does not affect application of the act of state doctrine. *See International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

104. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705 (1976) (plurality opinion).

105. *See Tate Letter, supra* note 86.

106. *See supra* note 93 and accompanying text.

107. 28 U.S.C. § 1605(a)(1) (1976). A foreign state may waive immunity explicitly in either a treaty or a contract with a private party. House Report, *supra* note 19, at 18, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6617. The right to immunity may be implicitly waived when a foreign sovereign has agreed that the law of another country should govern a contract. The filing of a responsive pleading without raising immunity as a defense may also result in a waiver. *Id.*; *see Libyan Am. Oil Co. v. Socialist People's Libyan Jamahirya*, 482 F. Supp. 1175, 1178-79 (D.D.C. 1980) (act of state doctrine applied where sovereign had waived immunity). Section 1607 of the Act denies immunity to foreign sovereigns for counterclaims that arise out of "the transaction or occurrence that is the subject matter of the claim of the foreign state," 28 U.S.C. § 1607(b) (1976), and, in any case, the sovereign is not immune from a set-off. *See id.* § 1607(c). Courts have not been uniform in determining whether the act of state doctrine is coextensive with the FSIA in this area. *See Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2d Cir. 1982) (both FSIA and the act of state doctrine bar a cross-claim against a foreign sovereign); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 884 (2d Cir. 1981) (act of state doctrine does not bar a set-off to a sovereign's claim); *Empresa Cubana Exportadora De Azucar y Sus Derivados v. Lamborn & Co.*, 652 F.2d 231,

section 1605(a)(3), grants of immunity are proscribed in actions over the expropriation of property.<sup>108</sup> Although the Hickenlooper Amendment<sup>109</sup> similarly prohibits the application of the act of state doctrine in expropriation cases, subsequent court decisions have sapped the Amendment's vitality and the doctrine is still available in many cases.<sup>110</sup> Therefore, even a modified doctrine frustrates the purposes of the FSIA.

The very existence of the exception is put in doubt because it was recognized by only a plurality of the Court.<sup>111</sup> The majority based its holding on the narrower ground that no act of state occurred sufficient to invoke the act of state doctrine.<sup>112</sup> Although some courts have read *Dunhill* to create such an exception,<sup>113</sup> it has not gained universal acceptance.<sup>114</sup> Furthermore, there is a serious question as to the soundness of such an exception given the fundamental reasons for the existence of the doctrine.

The *Dunhill* plurality returned to the concept that both sovereign immunity and the act of state doctrine are rooted in respect for sovereignty as well as concern for maintaining the separation of powers.<sup>115</sup> The soundness of a commercial exception rests on the assumption that some acts of foreign sovereigns are less "sovereign"<sup>116</sup> than others, that adjudication of these acts is less likely to touch on "national nerves,"<sup>117</sup> and that the separation of powers is preserved because judicial action will not affect foreign relations.<sup>118</sup>

---

238-39 (2d Cir. 1981) (FSIA and act of state doctrine are not coextensive and the act of state doctrine bars a counterclaim even where FSIA denies immunity); *In re Oil Spill by the Amoco Cadiz Off the Coast of Fr. on Mar. 16, 1978*, 491 F. Supp. 161, 169 (N.D. Ill. 1979) (act of state doctrine is not applicable to counterclaim arising under § 1607).

108. 28 U.S.C. § 1605(a)(3) (1976). See *supra* note 102. In *First Nat'l Bank v. Banco Nacional de Cuba*, 658 F.2d 895 (2d Cir. 1981), *cert. denied*, 51 U.S.L.W. 3460 (U.S. Dec. 13, 1982), the Second Circuit held that a commercial exception to the act of state doctrine would not bar application of the doctrine in a case arising out of a foreign expropriation. *Id.* at 902. The court did not analyze the problem, however, under the FSIA because it did not reach the issue of sovereign immunity. See *id.* at 900 n.6.

109. 22 U.S.C. § 2370(e)(2) (1976).

110. See *supra* note 102.

111. Three members of the Court joined in Part III of Justice White's opinion, which contains the commercial exception. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976) (plurality opinion).

112. *Id.* at 692 n.8, 694.

113. See, e.g., *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 79 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *National Am. Corp. v. Federal Repub. of Nig.*, 448 F. Supp. 622, 640-41 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

114. *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 905 (E.D. Mich. 1981); *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 332-33 (E.D.N.Y. 1977).

115. See 425 U.S. at 694, 697, 703-04 & n.16 (plurality opinion).

116. *Id.* at 695-97 (plurality opinion).

117. *Id.* at 703-04 & n.16 (plurality opinion).

118. *Id.* at 697-98 (plurality opinion).

While the creation of such an exception prevents the act of state doctrine from substituting for sovereign immunity in some instances, a consideration that gains importance after the enactment of the FSIA, it is fundamentally unsound in light of the stated purposes of the doctrine. Two concerns must be addressed in determining the efficacy of a commercial exception: the likelihood that adjudication will in fact affront a foreign sovereign and adversely affect foreign relations, and the extent to which the exception undermines the structural constitutional allocation of discretion among the branches of the federal government.

Judicial classification of an act as "commercial" does not automatically dissipate foreign policy implications. First, the assumption that commercial acts can be adjudicated without affronting foreign states is viable only under American concepts of the role of government. *Dunhill* analogizes to the distinction drawn between American states acting in their governmental capacity and acting as commercial entities.<sup>119</sup> This distinction, however, does not translate well to some foreign economic systems, in which the line between the private sector and government is blurred or nonexistent. Thus, the basic premise that commercial acts are less sovereign may itself be an affront to the sovereignty of foreign governments that will have their conduct judged.

Another problem in the foreign relations context arises from the fact that the foundation of the act of state doctrine requires an analysis of the commercial character of a sovereign act that is irreconcilable with the analysis prescribed by the FSIA. The FSIA dictates an analysis that considers only the nature of governmental acts and not their purpose.<sup>120</sup> The act of state doctrine, on the other hand, may require an examination of the sovereign's purpose.<sup>121</sup> The adjudication of some commercial acts may be as likely to strike upon "national nerves" as the adjudication of most public acts. For example, a sovereign state that contracts to provide for its own defense may object to judicial scrutiny of the agreement. Even seemingly innocuous commercial acts may represent sensitive national policies or may be crucial to the maintenance of a state-run economy.<sup>122</sup>

---

119. See *id.* at 696 (plurality opinion).

120. See 28 U.S.C. § 1603(d) (1976).

121. See *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1982) (commercial exception does not apply when the sovereign is acting in the public interest), *cert. denied*, 454 U.S. 1163 (1982). Such an examination would apparently violate the basic tenet of the doctrine by requiring judicial inquiry into the sovereign's purpose before it had even been determined that the commercial exception applies.

122. See *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 907 & n.21 (E.D. Mich. 1981).

Thus, excepting commercial acts from the application of the act of state doctrine is not consistent with the foreign policy goals of the doctrine. At the same time, such an exception does not assuage the domestic concern for maintaining the separation of powers for three reasons. First, if adjudication of commercial acts is as likely to affect foreign affairs as is the adjudication of other controversies, then the line between the executive and the judiciary is blurred rather than clarified. Second, the determination of which acts are commercial is as much a policy decision as is the determination of the "validity" of an act. Finally, the FSIA enlarges and clarifies the jurisdiction of federal courts and depoliticizes the fact of adjudication. Thus, the exercise of judicial power in cases that arise under the FSIA should not be limited by the act of state doctrine, even with a commercial exception. The rationale of the doctrine focuses on the effect of the decision rather than on the act of decision-making. Armed with an unequivocal grant of jurisdiction, courts should restrict their inquiry to whether the exercise of that jurisdiction is consistent with its article III powers.

A commercial exception, then, is unsatisfactory because it is inconsistent with the goals and rationale of the act of state doctrine. At the same time, it does not satisfactorily integrate the changes wrought by the FSIA. On the other hand, application of the act of state doctrine in undiluted form is also unacceptable because it frustrates the intent of the FSIA, is unnecessarily broad and rigid, and deprives American plaintiffs of recourse to American courts. Other doctrines of justiciability, generally grouped under the heading of political questions, have stronger ties to the Constitution. Moreover, they function as a sufficient restraint on the judiciary to avoid the infringement of political power.

### III. AN ALTERNATIVE TO THE ACT OF STATE DOCTRINE

The act of state doctrine is not required by the text of the Constitution, nor would its demise disturb the balance of powers in the federal government. By contrast, the political question doctrine is inextricably bound to the Constitution, and its application preserves this balance. Although the political question doctrine has long been a source of controversy,<sup>123</sup> its various principles provide a sturdier basis for determining justiciability than does the act of state doctrine.

---

123. For representative examples of the commentary and divergent viewpoints in this enduring debate, see, in chronological order, Weston, *supra* note 50 (1925); Finkelstein, *supra* note 50 (1926); Jaffe, *supra* note 62 (1958); Wechsler, *supra* note 62 (1959); Bickel, *supra* note 62 (1961); Scharpf, *supra* note 63 (1976); and Henkin, *supra* note 62 (same).

### A. *Expendability of the Act of State Doctrine*

The act of state doctrine is a product of juristic concern for maintaining the separation of powers in American government. International law defines the jurisdiction of the United States and not the power of its courts;<sup>124</sup> to the contrary, international conventions encourage the courts of nations to exercise jurisdiction for the purpose of creating a body of judicially cognizable international law.<sup>125</sup> The absence of a doctrine analogous to act of state in most other countries<sup>126</sup> further demonstrates that the doctrine is not required by the relationship among nations but instead is peculiarly American. Therefore, all jurisdictional limitations on the judiciary are imposed by the Constitution<sup>127</sup> and by Congress pursuant to its power to create or destroy the jurisdiction of the lower federal courts.<sup>128</sup> In an exercise of this power, Congress has granted jurisdiction to the courts in cases against foreign states within the limitations of the FSIA.

124. See R. Falk, *supra* note 2, at 27-52.

125. See Statute of the International Court of Justice § 38(1)(d) (1945), *reprinted in* W. Friedmann, *International Law* 1183, 1191 (1969); see also *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 775-76 (1972) (Powell, J., concurring); *New Jersey v. Delaware*, 291 U.S. 361, 383 (1934), *quoted in* Jessup, *supra* note 96, at 172; R. Falk, *supra* note 2, at 12.

126. See Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826, 844 (1959) (act of state only applied in the United States, Great Britain and Holland).

127. See *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969); *Flast v. Cohen*, 392 U.S. 83, 94 (1968). Article III, § 2, cl.1 provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Eleventh Amendment also delimits the power of the judiciary: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

128. U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). For example, 28 U.S.C. § 2283 (1976) provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." See also *The Norris-LaGuardia Act*, 29 U.S.C. §§ 101-115 (1976) (limiting power of federal courts to grant injunctions in labor disputes).

The act of state doctrine does not affect jurisdiction but rather renders certain issues nonjusticiable.<sup>129</sup> Nonjusticiability rests on the " 'constitutional' underpinnings"<sup>130</sup> of the separation of powers doctrine. It is reasoned that judicial intervention in foreign affairs is prohibited because the Constitution grants the executive branch exclusive power in this area. Therefore, adjudication of the acts of foreign sovereigns conducted within their own territory complicates the executive's exercise of its constitutionally assigned power.<sup>131</sup>

The act of state doctrine limits the exercise of judicial power when jurisdiction is admittedly present, with the intent of restricting the secondary effects of judicial decisions.<sup>132</sup> The political question doctrine, by contrast, is designed to prevent the substitution of judicial discretion for that of the legislative or executive branches. While its purpose has been to preclude judicial review of actions by domestic

---

129. *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380-81 (5th Cir. 1980); *National Am. Corp. v. Federal Repub. of Nig.*, 448 F. Supp. 622, 640 n.30 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979); *see First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972) (plurality opinion).

A federal court lacks jurisdiction when "the cause either does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute." *Baker v. Carr*, 369 U.S. 186, 198 (1962).

The jurisdiction of a court is not to be confused with the jurisdiction of the nation in which the court sits. A federal court may have personal jurisdiction over the defendant and yet the United States may not have jurisdiction over the extraterritorial acts in question. However, the FSIA provides for this contingency in cases that arise under the commercial activity exception to immunity by requiring that such activity have a direct effect in the United States. *See* 28 U.S.C. § 1605(a)(2) (1976). The Restatement (Second) of Foreign Relations Law (1965) provides that "[a] state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory." *Id.* § 18. The Judiciary Committee believed that the provisions of § 1605(a)(2) are consistent with this principle. *See* House Report, *supra* note 19, at 19, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6618. This is known as the doctrine of objective territorial jurisdiction. *See* Note, *Sherman Act Litigation: A Modern Generic Approach To Objective Territorial Jurisdiction and the Act of State Doctrine*, 84 Dick. L. Rev. 645 (1980).

130. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

131. *See International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 51-52 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). Yet not "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

132. *See Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 180 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

governmental branches,<sup>133</sup> not the actions of foreign governments,<sup>134</sup> the political question doctrine would also function as a sufficient restraint on the judiciary in cases against foreign states.

### B. *The Political Question Alternative*

The political question doctrine defines the scope of the judiciary's power to review executive and legislative actions.<sup>135</sup> Applied in its pure form, it prohibits judicial review unless constitutional violations have occurred.<sup>136</sup> It has been suggested that the doctrine merely requires that the judiciary give effect to the actions of the political branches when they have the "political authority under the Constitution to do it."<sup>137</sup> For example, the executive has the power to make executive agreements or, with the consent of the legislature, treaties to resolve international disputes.<sup>138</sup> To the extent that these essentially political products are constitutionally promulgated and do not by their terms violate the Constitution, they are not subject to an imposition of judicial wisdom.<sup>139</sup>

The political question doctrine also defines what the judiciary can do in the absence of the exercise of political power. Two of the "prominent"<sup>140</sup> principles of the political question doctrine, which have developed in separate lines of cases, preclude the exercise of judicial discretion when that discretion is "textually committed"<sup>141</sup> to a coordinate branch and when "judicially discoverable and manageable standards" for the resolution of a dispute do not exist.<sup>142</sup>

---

133. See *Colegrove v. Green*, 328 U.S. 549, 554 (1946) (plurality opinion); *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939). The political question doctrine, however, is not a blanket prohibition of judicial review of the actions of the political branches. See *United States v. Nixon*, 418 U.S. 683, 692-93 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952).

134. The "political question" cases in the area of foreign relations involve only the actions of the domestic political branches of government. See *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

135. See *Baker v. Carr*, 369 U.S. 186, 210-11 (1962).

136. Henkin, *supra* note 62, at 601.

137. *Id.*

138. See *Dames & Moore v. Regan*, 453 U.S. 654, 679 & n.8, 680 (1981); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

139. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (the Chinese Exclusion Case).

140. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

141. Henkin, *supra* note 62, at 603-05; see *Baker v. Carr*, 369 U.S. 186, 217 (1962) ("textually demonstrable constitutional commitment").

142. *Baker v. Carr*, 369 U.S. 186, 217 (1962). There is disagreement over the existence of a third element to the political question doctrine: a "prudential" concern for respect among the three branches and the need to avoid multiple pronouncements on a single issue. The "strict-constructionist" view holds that courts have a duty to hear cases where the power to do so exists. See *Cohens v. Virginia*, 19 U.S. 264, 404,

Applied to the act of state cases,<sup>143</sup> the first principle would proscribe judicial action in certain instances because the power to exercise jurisdiction over the subject matter lies solely in another branch. For example, a determination of which nation is the sovereign of a disputed territory is a power that the Constitution has been interpreted to grant to the executive branch.<sup>144</sup> A court deciding the issue of territorial sovereignty would be acting beyond its powers even if the FSIA purported to grant jurisdiction.<sup>145</sup>

---

6 Wheaton 120, 181 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."); *Marbury v. Madison*, 1 Cranch 137, 177-78 (1803); Henkin, *supra* note 62, at 610-13; Wechsler, *supra* note 62, at 1-8; *see also* *Goldwater v. Carter*, 444 U.S. 996, 1006-07 (1979) (Brennan, J., dissenting) (the political question doctrine precludes review of questions "constitutionally committed" to another branch) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). *Gilligan v. Morgan*, 413 U.S. 1, 9-10 (1973) (certain questions are to be resolved by the elected branches); *cf.* *Elrod v. Burns*, 427 U.S. 347, 352 (1976) (plurality opinion) (the political question doctrine does not apply to the federal judiciary's relationship to the states). The contrary view assumes that the judicial power encompasses the ability to decline to hear cases where jurisdiction and article III power exist. *See Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring); *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Bickel, supra* note 62, at 46; *Scharpf, supra* note 63, at 573. The Court's opinions that espoused this view, however, did not rely on it for the result in the case that was presented. *See* Henkin, *supra* note 62, at 617. The same division appears in the act of state cases. If such abstention is not required by the Constitution, then the prudential power must exist for the act of state doctrine to be viable. *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972) (plurality opinion); *id.* at 788 (Brennan, J., dissenting); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 433 (1964). A strict constructionist view would hold that there is no power that is vested in the judiciary that would allow the application of the act of state doctrine. *See id.* at 450-53 (White, J., dissenting); *cf.* *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 774-75 (1972) (Powell, J., concurring) (broad holding of *Sabbatino* represents an "abdication of the judiciary's responsibility"). Indeed, it can be argued that application of the act of state doctrine is a usurpation of legislative power. *Cf.* Henkin, *supra* note 62, at 598 n.3. The doctrine has also been considered a product of federal common law. *See id.*; Note, *The Applicability of the Antitrust Laws to International Cartels Involving Foreign Governments*, 91 Yale L.J. 765, 780 (1982).

143. Although the words "political question" have appeared in act of state opinions, *see First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 772 (1972) (Douglas, J., concurring), the doctrine as enunciated in *Sabbatino* is not an element of the political question doctrine. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 180-81 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

144. *Baker v. Carr*, 369 U.S. 186, 212 (1962); *see also* *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis*, 577 F.2d 1196, 1203 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979).

145. *Cf. Verlinden B.V. v. Central Bank of Nig.*, 647 F.2d 320, 322 (2d Cir. 1981) (the FSIA cannot confer jurisdiction in cases between aliens where article III power does not exist), *cert. granted*, 454 U.S. 1140 (1982) (No. 81-920).

In the second line of political question cases, an issue is nonjusticiable because no standards exist that can be applied to arrive at a resolution.<sup>146</sup> Thus, if no controlling treaty,<sup>147</sup> executive agreement or recognized principle of international law<sup>148</sup> exists, or if a court determines that American law does not apply,<sup>149</sup> the issue is clearly nonjusticiable.

The political question approach is more flexible than the rigid and non-evolutionary act of state doctrine. It is responsive to developing principles of international law and would increase the classes of cases that can be adjudicated. It would preserve the separation of powers while promoting the full and efficient use of judicial power. With fewer plaintiffs turned away from the courthouse, disputes among those who trade in international markets can be resolved according to consistent and predictable rules of law, rather than go unresolved or precipitate tensions among nations.

### CONCLUSION

The act of state doctrine represents a singular abdication of judicial power. Invoking prudence, courts continue to apply a doctrine of tenuous origin, strained development and current uncertain bounda-

146. *Baker v. Carr*, 369 U.S. 186, 211 (1962); see *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939); *Luther v. Borden*, 48 U.S. 1, 43, 7 Howard 1, 40 (1849).

147. See *American Int'l Group, Inc. v. Islamic Repub. of Iran*, 493 F. Supp. 522, 525 (D.D.C. 1980) (act of state doctrine is not applicable if a treaty sets forth controlling principles of international law). But see *Ethiopian Spice Extraction Share Co. v. Kalamazoo Spice Extraction Co.*, 543 F. Supp. 1224, 1230-31 (W.D. Mich. 1982) (act of state doctrine applies where treaty is "susceptible of multiple interpretation" and interpretation by court may conflict with the executive branch). Article VI of the Constitution "provides that treaties shall be a part of the supreme law of the land." *Goldwater v. Carter*, 444 U.S. 996, 999 (1979) (Powell, J., concurring); see U.S. Const. art. VI, cl.2; see also *United States v. The Schooner Peggy*, 5 U.S. 64, 68-69, 1 Cranch 103, 109-10 (1801).

148. See *The Paquete Habana*, 175 U.S. 677, 686, 714 (1900); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895); R. Falk, *supra* note 2. The degree of consensus on international legal principles is a consideration in act of state cases. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). However, the analysis that is employed does not seek the standards to be applied but rather measures the effect on foreign relations by determining the degree of acceptance of the principles in question. See *id.* A case arises under either international law or American law, and the applicability of a statute should not be determined solely on the basis of its popularity. The Court in *Sabbatino* was addressing the question of whether a governmental expropriation violated international law and whether the existence of such a violation should allow an exception to the act of state doctrine. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428-37 (1962). The Court did not suggest that American laws must conform to international law to be applicable to foreign states.

149. See *supra* notes 3, 129.

ries. Although a commercial exception might destroy the efficacy of the act of state doctrine in the majority of cases, the confusion regarding its scope undermines the predictability and preeminence of rules of law. In cases that fall outside the exception, the doctrine still stands as an unjustified anachronism. In its stead, the judiciary should draw strength from the Constitution and subject itself to only its limitations. No! in thunder<sup>150</sup> to the act of state doctrine.

*Brian S. Fraser*

---

150. The Melville Log 410 (J. Leyda ed. 1951) (letter from Melville to Hawthorne, Apr. 16, 1851).