Deciphering the Act of State Doctrine

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DECIPHERING THE ACT OF STATE DOCTRINE

The classification of certain acts as "acts of state" with . . . their validity . . . beyond judicial review is a pragmatic device, not required by the nature of sovereign authority and inconsistently applied in international law. . . . The "continuing vitality" of the doctrine 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 relations." Consequently, there are "constitutional underpinnings" to the classification. A court that passes on the validity of an "act of state" intrudes into the domain of the political branches. . . . The act of state doctrine is supple, flexible, ad hoc. The doctrine is meant to facilitate the foreign relations of the United States, not to furnish the equivalent of sovereign immunity . . . .* [If] the Foreign Sovereign Immunities Act is a tangled web of statutory ambiguities, the act of state doctrine is an airy castle.**

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** Callejo v. Bancomer, S.A., 764 F.2d 1101, 1113 (5th Cir. 1985).
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This article grew out of my work in preparing J. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS (B.N.A. 1988), and reflects the approach found in chapter 8 of that work. The present article is not simply a reprint of that chapter, however; it incorporates new material, including decisions handed down after January 1, 1987 (the cut-off date for the book) and a new act of Congress modifying the act of state doctrine, and also further analysis of the material examined in the book.

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I. Introduction

The act of state doctrine, while deceptively easy to state, has proven extraordinarily difficult to interpret or apply. Although verbal expression of the doctrine is virtually unchanged from its classic formulation by Chief Justice Fuller in 1897, since then jurists and scholars have completely changed the policies underlying the doctrine, have ascribed numerous exceptions to it, and have disagreed over such fundamental questions as whether the doctrine is a jurisdiction-limiting rule, a choice of law rule or something else. They also dispute whether the doctrine (or something similar to it) is followed by the courts of other nations. As a consequence of this confusion and the resulting apparent injustices from the application of the doctrine, for thirteen years the Supreme Court consistently avoided opportunities to address the ever growing confusion in the lower courts, and legislators and scholars have recently called for the abolition of the doctrine.

In the most recent act of state case, W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. International, the Supreme Court was


2. Compare Annotation, Modern Status of the Act of State Doctrine, 12 A.L.R. FED. 707, 712-13 (1972) (act of state doctrine followed in Austria, Belgium, France, the Federal Republic of Germany, Greece, Italy, Japan, the Netherlands and the United Kingdom) with Wallace, Introductory Remarks, in ACT OF STATE AND EXTRATERRITORIAL REACH 3, 5 (J. Lacey ed. 1983) (only Australia, Canada and United Kingdom have act of state doctrines similar to that of United States).

3. In the one case during this period when the Supreme Court confronted the act of state doctrine, the Court dismissed the issue in a single, inconclusive footnote. First Nat’l City Bank v. Banco para el Comercio Exterior, 462 U.S. 611, 634 n.28 (1983). For calls for the abolition of the doctrine, see Bazyler, Abolishing the Act of State Doctrine, 134 U. PA. L. REV. 325 (1986); Mathias, Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform, 12 LAW & POL’Y IN INT’L BUS. 369 (1980); Wallace, Comments on Abolishing or Changing the Act of State Doctrine by Legislation, in ACT OF STATE AND EXTRATERRITORIAL REACH, supra note 2, at 25.

unanimous—unlike the Court's two preceding act of state cases in which it could not muster a majority for any theory of the doctrine, with the largest bloc of Justices (four) in dissent.\(^5\) \textit{Kirkpatrick} involved the application of the act of state doctrine to alleged bribery of foreign government officials in violation of the Racketeer Influenced and Corrupt Organizations Act.\(^6\) The Court, perhaps in order to sustain a majority, chose to find that \textit{Kirkpatrick} did not involve the validity of an act of a state without explaining how it decided that question. The decision therefore resolved none of the problems which have bedeviled courts, lawyers, and scholars.

The rampant confusion surrounding the act of state doctrine is well illustrated by two cases denominated \textit{Philippines v. Marcos}.\(^7\) In the first, \textit{Marcos I}, the Philippines sought a preliminary injunction against former President Marcos and his wife to prohibit their disposition of certain New York assets. The current government claimed that the defendants had obtained the assets through fraud on the Philippines. The Second Circuit concluded that an injunction was not barred by the act of state doctrine because the acts of the former president were not acts of the state, because the Marcos government was no longer in power, and because the foreign state itself had asked that the legality of the acts be determined by American courts.\(^8\) Therefore, Judge Oakes saw little chance that the court's action could embarrass the executive's conduct of foreign relations, and thus saw no reason to invoke the act of state doctrine to bar judicial action.

In the second case, \textit{Marcos II}, the current government sought a preliminary injunction against the defendants disposing of their assets anywhere in the world, grounded on the same claims of fraud and on a convoluted jurisdictional allegation which started with a claim under the Racketeer Influenced and Corrupt Organizations Act, but sought the injunction for a legion of state and foreign law claims brought in by pendent jurisdiction. A divided panel of the Ninth Circuit concluded that each argument on


\(^8\) \textit{Marcos I}, 806 F.2d at 357-60.
which Judge Oakes in the Second Circuit relied pointed instead to such intrusion into foreign relations that an injunction was barred by the act of state doctrine.9

Writing for the majority, Judge Kozinski considered the act of state doctrine to be a sort of political question rule designed to require dismissal of internationally sensitive cases.10 This decision was reversed in a rehearing en banc (Marcos III), on the grounds that the defendants had not demonstrated an act of the state, as well as hints of a “governmental extinction” exception and a “waiver” exception.11 Three judges dissented on the grounds that, because the doctrine does not address jurisdiction, questions about its application should be remanded for development at trial.12

These differing conclusions about the effect of the act of state doctrine on the claims against Ferdinand and Imelda Marcos cannot be founded on factual differences: the claims, and thus the assumed facts, were the same in all three decisions. The discordant opinions might be dismissed as simply a typical instance of juridical disagreement about the law to be applied, but such disagreement is hardly suggested by the similar language used to express the doctrine in the opinions. Rather the differences stand for a fundamental confusion over what the doctrine means and how it is to be applied.

Examples of such conceptual confusion abound. Consider the juridical dilemma posed in Liu v. Republic of China.13 Helen Liu alleged that agents of the Republic had killed her husband. The Republic, in fact, had convicted and imprisoned several of its officials for complicity in the murder of Henry Liu.14 District Judge Lynch concluded that dismissal based on the act of state doctrine was inappropriate because, according to the Republic's

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10. Id. at 1489-90.
11. Marcos III, 862 F.2d at 1360-61. This opinion is the source of the quote cited at supra note *.
12. Marcos III, 862 F.2d at 1368-71 (Schroeder, J., dissenting).
14. Id. at 299-300.
version of events, the acts were not acts of the state, even though Judge Lynch could not uphold liability against the Republic without finding that the acts were acts of the state.\textsuperscript{15}

Again, consider the variety of views of the act of state doctrine embraced in a single opinion by Circuit Judge Goldberg, writing for a unanimous panel in \textit{Callejo v. Bancomer, S.A.}.\textsuperscript{16} He described the doctrine as both an "issue preclusion device" and as a "super choice-of-law rule,"\textsuperscript{17} although his first mention of the doctrine had sounded as if it served to deprive a court of jurisdiction.\textsuperscript{18} Judge Goldberg also found that the act of the Mexican government in question was commercial regarding the Foreign Sovereign Immunities Act,\textsuperscript{19} and yet noncommercial for the act of state doctrine.\textsuperscript{20} No wonder he referred to the doctrine as "an airy castle."\textsuperscript{21}

Finally, one can easily cite series of decisions in which a single court, within a brief span of time, applied the act of state doctrine based on a view that the doctrine precludes a court from exercising jurisdiction,\textsuperscript{22} that it requires a court to exercise jurisdiction and apply a particular rule of law,\textsuperscript{23} or that it requires a court to exercise jurisdiction while precluding it from reexamining the merits of particular issues.\textsuperscript{24} One can multiply this with citations to rulings by different judges of the same court independently reaching inconsistent results through variant readings of

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\textsuperscript{16} 764 F.2d 1101 (5th Cir. 1985).

\textsuperscript{17} Id. at 1113-14.

\textsuperscript{18} "Because we are barred under the act of state doctrine from inquiring into the validity of acts of foreign states performed in their own territory[,] . . . we affirm the district court's dismissal of the present suit." Id. at 1105.

\textsuperscript{19} Id. at 1108-10. The relevant statutory language is found at 28 U.S.C. § 1605(a)(2) (1982).

\textsuperscript{20} 764 F.2d at 1114-16.

\textsuperscript{21} Id. at 1113. The passage is quoted at \textit{supra} note **.


\textsuperscript{24} See, e.g., Marcos II, 818 F.2d at 1482-85; Marcos I, 806 F.2d at 357-58.
\end{flushleft}
the act of state doctrine.\textsuperscript{25} Nor has the Legal Adviser to the State Department exhibited a steady grasp of the meaning or use of the doctrine.\textsuperscript{26}

As a result, the doctrine resembles the proverbial elephant described by a committee of the blind. Comparing almost any few randomly selected cases involving the act of state doctrine will quickly cause one to ask: is this a single theory, a related group of theories, or a disparate collection of theories that have nothing in common except that they happen, for reasons now beyond recall, to have been lumped under the label “act of state doctrine?” No one, including the Supreme Court, has recently attempted to describe, let alone explain, the doctrine as a whole. While each partial explanation of recent years might reveal a particular truth for a specific use of the doctrine, each partial explanation fails when one attempts to apply it to even closely related uses.

Thus, few doctrines in American law are in such a state of utter confusion as is the act of state doctrine. Confusion is so complete that the doctrine does not necessarily have anything to do with an act,\textsuperscript{27} it does not serve only state interests,\textsuperscript{28} nor would anyone but a Supreme Court Justice have the temerity to label it a doctrine. Consequently, the act of state doctrine continues as “the most written-about topic in international law journals in this


\textsuperscript{26} See Bazyle, supra note 3, at 362-65; Kirgis, Understanding the Act of State Doctrine's Effect, 82 AM. J. INT'L L. 58 (1988); see also Antolok v. United States, 873 F.2d 369, 384 n.11 (D.C. Cir. 1989) (Justice Department argued simultaneously that the act of state doctrine is an application of the political question doctrine and a choice of law rule).

\textsuperscript{27} Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 718-21 (1976) (Marshall, J., dissenting), and cases cited there; see also infra § III(A)(4).

\textsuperscript{28} Shapleigh v. Mier, 299 U.S. 468 (1937); Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918).
Former Senator Mathias has described the pervasive confusion as rooted in a failure of jurists, lawyers, and scholars to distinguish clearly between the act of state doctrine, foreign sovereign immunity, and the political question doctrine. His analysis was correct as far as it went, but it overlooked the further confusions of the act of state doctrine with doctrines of abstention, choice of law, justiciability, recognition of judgments, the role of international law in U.S. courts, and sovereign coercion.

The consistent failure of the legal profession to grapple with the act of state doctrine is exemplified by the recently completed *Restatement (Third) of the Foreign Relations Law of the United States* in the drafting of which the reporters simply ignored the confusion surrounding the doctrine. Section 443 of the *Restatement (Third)* merely recites the most traditional verbal formula for the doctrine without any attempt to deal with its many purported exceptions or limitations. Some of these possibilities appear in the comments or the reporters’ notes, but virtually without evaluation; the rest were ignored. Similarly, section 444 merely reports the text of what was then the only act of Congress to address the doctrine, with no attempt to analyze or evaluate its use by courts.

The reporters’ cautious approach in the *Restatement (Third)* served to minimize (but not eliminate) controversy over adoption


of its provisions on the act of state doctrine. This cautious approach also virtually guaranteed early obsolescence for the reporters' efforts. By accepting this approach, the American Law Institute abandoned any attempt to influence the further evolution of the doctrine. Some lawyers and scholars reacted to the confusion by arguing that the act of state doctrine applies only to foreign expropriations, but this is no more helpful—the doctrine originated in a nonexpropriation case, and it continues to be applied to a broad spectrum of disputes.

In sum, the act of state doctrine has become a cipher that even its authors can no longer decode. To decipher its many confusions, this article examines the full scope and effect of the doctrine. The article includes both the doctrine's history and its present scope. Beginning with the doctrine's core expressions from the Supreme Court, the article determines the function the doctrine serves, so one can then determine which interpretations of the doctrine ought to be continued, and which ought to be put to rest. Thereafter, the article examines the numerous permutations found originally in lower courts or scholarly writings, but which have increasingly infected the Supreme Court and acts of Congress as well. The article will close with a brief examination of the recent proposals for Congress to codify, and (perhaps) to clarify, this flawed legal doctrine.

II. IN THE SUPREME COURT

The act of state doctrine is a creature of the Supreme Court. Its decisions created the doctrine, they have reshaped it, and, with the exception of two recent statutes of limited effect, the Court has remained the ultimate source of law for this question. Thus any serious study of the doctrine must focus on case law generally, and on the Supreme Court precedents in particular.

Various expressions resembling the act of state doctrine can be traced in American cases at least as far back as *Hudson v. Gues-tier* in 1808. A plurality of the Supreme Court has argued for

34. See, e.g., Bazyler, supra note 3, at 337; Houck, supra note 33, at 1374-75.
35. Note that only the *Callejo* case, of those discussed in the text thus far, involved an expropriation, unless one stretches the concept considerably beyond its ordinary meaning.
36. 8 U.S. (4 Cranch) 293, 293-94 (1808); see also The Santissima Trinidad,
the well-known case of Schooner Exchange v. McFaddon\(^{37}\) as the source of the doctrine.\(^{38}\) Some scholars have traced the idea in English law back to 1674.\(^{39}\) Until 1897, however, these expressions were all in cases involving suits against foreign sovereigns, and thus could be taken as expressions of foreign sovereign immunity,\(^{40}\) rather than the modern act of state doctrine, as the doctrine does not depend on the suit being against the foreign state itself. Between 1897 and 1990, the Court decided eleven cases involving the modern doctrine.

A. Fuller’s Curse Arises from a Venezuelan Revolution

The first use of the phrase “act of state” in its modern sense by an American jurist is found in Underhill v. Hernandez.\(^{41}\) The case grew out of a revolution in Venezuela in which one of the revolutionary generals (Hernandez) seized the city where George Underhill then resided. Underhill was the head of the municipal waterworks. General Hernandez refused to allow Underhill to leave for several weeks. After Underhill returned to the United States, he sued Hernandez when Underhill learned that Hernandez was visiting here, bringing claims for wrongful confinement, assault, and battery.

The district court dismissed the suit against Hernandez on the basis of sovereign immunity; its decision was affirmed by the circuit court.\(^{42}\) The Supreme Court might also have decided the case on the basis that the suit in effect was against a foreign sovereign, of which Hernandez was still an official.\(^{43}\) Instead, Chief

\(^{20}\) U.S. (7 Wheat.) 283, 336 (1822); l’Invincible, 14 U.S. (1 Wheat.) 238, 253 (1816); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 230 (1796).

\(^{37}\) 11 U.S. (1 Cranch) 116, 146 (1812).


\(^{41}\) 168 U.S. 250 (1897).

\(^{42}\) Underhill v. Hernandez, 65 F. 577, 583 (2d Cir. 1895), aff’d, 168 U.S. 250 (1897).

\(^{43}\) Because of this possibility, several scholars have concluded that the act of state doctrine in Underhill was mere dictum. Bazyler, supra note 3, at 330-33; Chow, supra note 25, at 405; Zander, The Act of State Doctrine, 52 Am. J. Int’l L.
Justice Fuller, in a brief opinion for a unanimous court, expressed the grounds for dismissal differently, thereby creating the classic formulation of the act of state doctrine:

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. 44

Chief Justice Fuller did not say that a foreign sovereign cannot be sued before an American court. Had he done so, he would have based his opinion on sovereign immunity. Nor did he say that American courts cannot hear cases involving acts by a foreign state. By such a theory, he could have characterized the problem as one of judicial abstention or justiciability. Rather, he said that the validity of acts of a foreign state cannot be challenged in legal proceedings in the American courts. This has come to be seen as the act of state doctrine.

The short paragraph is remarkable, however, for the lack of clarity of its ideas. Chief Justice Fuller defined neither the terms used in the “rule” nor the policies behind it. Courts found the terms ambiguous and the policies amorphous. Problems arose as to: what is a “government;” 45 when does it “act;” 46 how does a court “sit in judgment;” 47 and even what constitutes the “terri-


44. 168 U.S. at 252.


47. Does this preclude an affirmative judgment either based on, or ignoring, the foreign state’s act? Does it preclude a judgment that the foreign state’s act violated U.S. public policy, international law, or some other standard? See generally Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), discussed
Perhaps most importantly, the paragraph left uncertain the functional nature of the act of state doctrine. Some construed the doctrine to be a "super choice-of-law rule." Others have seen it merely as a poorly stated version of foreign sovereign immunity, or at least as derived from the sovereign immunity concept. Yet others have considered it a jurisdiction-denying rule or a rule of judicial abstention akin to the political question doctrine. Finally, a few have seen it as a rule requiring res judicata effect to be given to decisions of a foreign government akin to the obligation of full faith and credit for judgments within the United States.
Chief Justice Fuller was not only unclear as to the nature of the rule he announced in Underhill, but he also managed to express several distinct policy bases for this new rule. His call "to respect the independence of every other sovereign" sounded like then current notions of "comity" between nations. Comity is the mutual deference to foreign public acts due between equal sovereigns out of respect for each other's independence, rather than out of obligation. Obligation, it was thought, would require the subordination of one sovereign to the other. The phrase "is bound," on the other hand, suggests an obligation—in this context apparently based on international law. The territorial limitation also suggests that comity or international obligation underlies the act of state doctrine, although which is not clear.

Chief Justice Fuller's reasoning in the first sentence of his formulation of the act of state doctrine did not suggest the modern rationale of avoiding interference with the executive's conduct of foreign relations: are not foreign relations just as embarrassed by judicial decisions as to the legality of acts by a foreign state outside its territory? Yet his suggestion that aggrieved parties seek redress through diplomatic means brings one back to deference to the executive in the conduct of foreign relations, and possibly to justiciability, abstention, and the avoidance of political questions.

The remainder of Fuller's short opinion did nothing to clarify its meaning. Most of the opinion dealt with whether the acts of General Hernandez, participating in an as yet unsuccessful

04; E. Mooney, supra note 1, at 25-26; Leigh & Sandler, supra note 30, at 702-05; Note, supra note 43, at 601-05.
55. See Hilton v. Guyot, 159 U.S. 113, 163-64 (1895); see also First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408-12 (1964); E. Mooney, supra note 1, at 10-17; Chow, supra note 25, at 410-11; Lengel, supra note 52, at 63, 80, 84.
57. But see Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 614 (9th Cir. 1976); Restatement (Third), supra note 32, § 403 reporters' note 2.
60. E. Mooney, supra note 1, at 31-36; Delson, supra note 53; Jones, supra note 1; Lengel, supra note 52, at 63-65.
revolution against a government still recognized by the United States when Underhill's confinement and assault occurred, were acts of the state. After the success of the revolution, the United States promptly recognized the new government—but not until five days after Underhill was released. Chief Justice Fuller gave retroactive effect to the recognition. He also concluded that Hernandez was not "actuated by malice or any personal or private motive." These two conclusions allowed him to attribute the acts to the state.

Chief Justice Fuller's Underhill opinion thus presaged virtually all of the modern confusions that have grown up around the act of state doctrine. In the ten cases the Supreme Court has since decided under the doctrine, the Court only succeeded in perpetuating the confusions intrinsic to the Chief Justice's opinion in Underhill, or as two student commentators put it, "Fuller's curse."

B. Judicial Consensus Confronts the Mexican Revolution

The first case after Underhill generally considered to involve the act of state doctrine was American Banana Co. v. United Fruit Co. The case grew out of competition among American corporations for the banana trade with several Central American republics. American Banana accused United Fruit of conspiring with local governments to establish a banana monopoly in violation of the Sherman Act. Plaintiff's reliance on acts of a foreign government prompted one commentator to see the case as a prototype of the foreign sovereign compulsion defense. Timberg, Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion, 55 Tex.
only that the acts must be judged by the law of the nation in whose territory the operative events occurred.\textsuperscript{67}

Justice Holmes' opinion in \textit{American Banana} reads like a classic statement of vested rights choice of law theory.\textsuperscript{68} As neither a foreign state nor a foreign official was a party to the suit, the case was even more removed from sovereign immunity than \textit{Underhill}, which Justice Holmes cited only regarding the retroactive effect of recognition.\textsuperscript{69} Holmes did not use any language directly suggesting the act of state doctrine. If \textit{American Banana} is seen as an act of state case, then it stands as a prime source of the belief that the act of state doctrine is a choice of law rule.\textsuperscript{70}

The next cases involving the act of state doctrine grew out of the Mexican Revolution of 1911. The Court considered and decided several cases together in 1918, producing two brief opinions by Justice Clarke.\textsuperscript{71} Both decisions involved title to property found in the United States—the first decisions to confront the increasingly prominent act of state problem of expropriation of property which has since figured in every Supreme Court act of state case. The property involved had been seized by revolutionary forces and sold to private parties who brought the property to the United States.

In \textit{Oetjen v. Central Leather Co.},\textsuperscript{72} Justice Clarke referred to the political nature of the problem and refused to permit the original owner to reclaim his property. He found the act of state doctrine to rest on "the highest considerations of international comity and expediency."\textsuperscript{73} In the second case, \textit{Ricaud v. American Metal Co.},\textsuperscript{74} Justice Clarke also referred to the political nature of the decision,

L. REV. 1, 22 (1976). In \textit{American Banana}, however, the alleged compulsion went the opposite way from the defense—from the private party to the foreign government (a "banana republic").

67. 213 U.S. at 355-57.

68. "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." \textit{Id.} at 356. This language was supported by citation to a single, choice of law decision, Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904). This view was recently endorsed by a unanimous Supreme Court. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l, 58 U.S.L.W. 4140, 4142 (1990).

69. 213 U.S. at 357-58.

70. See \textit{Chow}, supra note 25, at 405-09.


72. 246 U.S. 297, 302-03 (1918).


74. 246 U.S. 304, 310 (1918).
but drew from that observation quite a different conclusion. He wrote that the act of state doctrine required a decision on the merits of the dispute:

[T]hat the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory . . . does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it.75

This pair of opinions confirmed both retroactive application of the doctrine to acts taken on behalf of what, albeit briefly, emerged as an effective government, and the application of the doctrine to proceedings solely between private parties in which the private rights depended on the acts of a foreign state. Read separately, each of Justice Clarke's opinions might present a coherent view of the doctrine. Read together, they do little to clarify the uncertainties already attached to the doctrine.

The next decision after Oetjen and Ricaud arose from the aftermath of the Mexican Revolution. Shapleigh v. Mier76 entered the American legal system because of a sudden shift in the course of the Rio Grande that altered the international boundary between the United States and Mexico. Shortly before this shift, land belonging to the defendants had been expropriated by Mexico and conveyed to the plaintiffs as part of a general land reform.77 All agreed that the shift in the boundary did not affect the title between private parties.78 Furthermore, the original owners had already filed a claim for compensation before the United States-Mexico International Claims Commission, established to arbitrate claims between the two nations.79

The parties conceded that the Mexican land reform decree

75. Id. at 309 (citations omitted).
76. 299 U.S. 468, 469-70 (1937).
77. Id. at 470-71, 473 n.*.
78. Id. at 470.
79. Id. at 471.
would have to be applied if it were valid under Mexican law. 80 Justice Cardozo, writing for a unanimous Court, dressed this concession in language that sounded suspiciously like the act of state doctrine. He cited the act of state cases in support of the proposition that Mexican law had to be applied if the Mexican land reform decrees were valid in Mexico. Justice Cardozo went on to hold that the legality of those decrees could not be challenged in an American court, but he left unclear whether the challenges he ruled out were based on violation of American public policy, international law, or something else. 81 He also referred to the pending diplomatic and arbitral proceedings as more appropriate fora for presenting the claims.

While Justice Cardozo's reasons for applying Mexican law seemed to be a clear reference to the act of state doctrine, at several points the opinion seemed just as clearly not to be any such thing. 82 The bulk of the opinion actually addressed whether the Mexican land decree was valid under Mexican law. 83 It is now well-established that the validity of an act of a foreign state under its own law is irrelevant to application of the act of state doctrine. 84 Moreover, Justice Cardozo's reference to the law of the situs as controlling, 85 while rejecting application of international law, is more suggestive of the vested rights approach to choice of law than it is of the act of state doctrine. Even his phrasing of the choice as mandatory could be merely the traditional deference to the local sovereign regarding title to land—the so-called "land taboo." 86

80. Id. This concession alone arguably renders everything in the opinion dictum. E. Mooney, supra note 1, at 25.


82. The inclusion of this case in Justice Harlan's list of act of state cases in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416-17 (1964), perhaps settles the matter.

83. 299 U.S. at 472-75.


85. 299 U.S. at 471.

86. See generally Ehrenzweig I, supra note 31, at 209-13, 473-74, 478, 607-
C. Consensus Breaks Down Confronting the Russian Revolution

In the 1920s and 1930s, a series of cases arose out of the nationalizations of property by the Soviets after they seized power in Russia. The property was located in the United States at the time of the Revolution and continued to be held in favor of the original owners until 1933 (when the United States at last recognized the Soviet Government). In many cases, New York state courts had rendered final decisions holding the Soviet nationalizations void as to property within the United States at the time of the purported nationalization. These decisions, along with the unsettled claims of Americans for property in Russia that had been seized by the Soviets, were among the major impediments that delayed the American recognition for sixteen years after the Bolshevik coup.

It was no surprise then that the American recognition, when it finally came, included an agreement (the "Litvinov Agreement") settling these claims. According to the Litvinov Agreement, the United States retroactively recognized the validity of the Soviet nationalizations even as to property within the United States, with that property to be liquidated and the proceeds used initially to pay claims by U.S. citizens for property in Russia lost in the Revolution. The ensuing litigation produced the first divided opinions in the Supreme Court concerning the act of state doctrine.

The first of the Russian cases to reach the Supreme Court


88. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937). The emergence of divisions in the Supreme Court makes the overlooking of these cases by several serious students of the act of state doctrine, along with Shapleigh v. Mier, 299 U.S. 468 (1937), even more curious. All three cases were included in Justice Harlan's list of act of state precedents in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416-17 (1964). See, e.g., Bazylev, supra note 3, at 334-35; Chow, supra note 25, at 412, 420-21.
was United States v. Belmont. The defendant challenged the validity of the Litvinov assignment to the United States. In this case, there had been no final decision from a court prior to the Litvinov assignment. Justice Sutherland wrote a brief opinion for the majority holding that the act of state doctrine, as federal law, displaced any inconsistent state policy. Consistent with earlier act of state decisions, he went on to hold that the recognition of the Soviet Government retroactively validated the acts of that government for American courts, entitling all the acts of that government, from its effective creation, to the protection of the act of state doctrine.

Up to this point Justice Sutherland's opinion could hardly have been less controversial, but he then announced that the public policy of the United States could not be applied to a nationalization of property owned by nationals of the nationalizing state even when that property was within the United States. He made no explicit reference to the act of state doctrine in this part of his opinion, basing his conclusion on the supposition that "our Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens."

Justice Stone, joined by Justices Brandeis and Cardozo, dissenting from this refusal to apply our public policy to nationalizations when the property was located in the United States, reasoning that to invoke United States public policy would not involve extraterritorial application of the Constitution or laws of the United States. They concurred in the result on the grounds that this issue was irrelevant to the decision of the case. This separate opinion does, however, raise considerable doubt whether the actual decision really has anything much to do with

89. 301 U.S. 324 (1937).
90. Id. at 327, 331. This holding should have made clear that the act of state doctrine was not merely federal common law under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), as this "common law" did not bind states. Nonetheless, some still persist in seeing the status of the doctrine as unclear after Erie R.R. v. Tompkins, 304 U.S. 64 (1938), a status that purportedly was only settled by Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964). See, e.g., Chow, supra note 25, at 412-16; Henkin, supra note 30, at 810.
91. 301 U.S. at 327-30.
92. Id. at 332-33.
93. Id. at 332; cf. Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) (a foreign sovereign suing in American courts is subject to the local statute of limitations in order to protect U.S. citizens).
94. 301 U.S. at 333-37 (Stone, J., concurring).
95. Id. at 337 (Stone, J., concurring).
the act of state doctrine.96

In United States v. Pink,97 the Court's divisions were much more central to its decision. Factually, the Pink case is virtually indistinguishable from the Belmont case, except that in Pink there was a state court judgment which had become final through exhaustive appeals before the Litvinov Agreement.98 After concluding that the Soviet laws were intended to have extraterritorial effect,99 Justice Douglas wrote a lengthy opinion on behalf of a 5-2 majority.100

Justice Douglas' opinion in Pink essentially retraced the reasoning of the Belmont decision. He declared that state policy on nationalizations must give way before the federal policy embodied in the Litvinov Agreement.101 He also held that the Belmont case foreclosed the possibility of any relief in favor of the Russian corporation.102 As for the creditors whose rights were apparently decided in the 1931 state judgment, Justice Douglas held that, because they were foreigners, their rights were not protected from being subordinated to the claims of the United States on its own behalf and on behalf of Americans whose property in Russia had been confiscated.103

Justice Douglas had little to say about any case other than Belmont that might have been applying the act of state doctrine. He did cite Oetjen104 and Underhill105 for the retroactive effect of recognition.106 He also quoted Oetjen out of context to support the need for the supremacy of federal law in the field.107 Rather, Justice Douglas focused on the power of the President to make an agreement such as the Litvinov assignment overriding state laws, policies, and judgments, declaring the authority "certainly is a

96. A point not made by those who choose to ignore these cases. See supra note 87.
97. 315 U.S. 203 (1942).
98. The case was People v. Russian Reinsurance Co., 255 N.Y. 415, 175 N.E. 114 (1931).
100. Justices Jackson and Reed did not participate. Id. at 234. Justice Frankfurter concurred separately. Id. at 234-42. Harlan Fiske Stone (by then Chief Justice) dissented in an opinion joined by Justice Roberts. Id. at 242-56.
101. Id. at 221-26, 230-34.
102. Id. at 226.
103. Id. at 226-34; see also Guaranty Trust Co. v. United States, 304 U.S. 126 (1938).
104. See the text at supra notes 71-73.
105. See supra § II(A).
106. 315 U.S. at 233.
107. Id.
modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.' """108

Justice Frankfurter's concurring opinion simply adds emphasis to the main lines of Justice Douglas' majority opinion.109 Harlan Fiske Stone, who had become Chief Justice since his separate opinion in _Belmont_, vigorously dissented in an opinion joined by Justice Roberts. They relied on Chief Justice Stone's concurring opinion in _Belmont_ to conclude that the parts of the case relied on by the majority of the Court in _Pink_ were mere dicta, and set about to show that the dicta were wrong.110

The Chief Justice pointed out that the federal policy that displaced state law vis-a-vis foreign creditors and claimants must necessarily displace state law as to local creditors and claimants as well.111 He also noted that although recognition retroactively accepts the acts of the government in its own territory as acts of the state from the time it began to assert de facto authority,112 it did not put the newly recognized government on any better footing than any other recognized government whose laws would be enforced here only through comity, and not when those laws violate local public policy.113

Chief Justice Stone accepted only two possible exceptions to the conclusion that recognition did not vary the law to be applied in our courts: (1) if the agreement of recognition clearly indicated an agreement to change the laws applicable in our courts;114 and (2) as to acts of the government within its own territory (strictly speaking, the act of state doctrine).115 According to the Chief Justice, the transfer of Soviet claims to the U.S. government, and our assumption of a duty to report to the Soviets the outcome of any litigation, provided no basis to imply intent to change the law applicable to those claims. He considered it clear that the claims were to be governed by the same law that would have applied absent the assignment.116 Furthermore, because the property was located at all relevant times in the United States, not

108. _Id._ at 229 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).
109. _Id._ at 234-42 (Frankfurter, J., concurring).
110. _Id._ at 242-45 (Stone, C.J., dissenting).
111. _Id._ at 248-49 (Stone, C.J., dissenting).
112. _Id._ at 251 (Stone, C.J., dissenting).
113. _Id._ at 245-53 (Stone, C.J., dissenting).
114. _Id._ at 252-54 (Stone, C.J., dissenting); _accord_ Guaranty Trust Co. v. United States, 304 U.S. 126, 143 (1938).
115. 315 U.S. at 244-47, 251-52 (Stone, C.J., dissenting).
116. _Id._ at 253-56 (Stone, C.J., dissenting).
in the U.S.S.R., he pointed to the earlier act of state cases to show that the doctrine was not applicable.\(^\text{117}\)

In sum, the six cases decided by the Supreme Court during the first fifty years of the act of state doctrine produced a “doctrine” that was already a rather amorphous policy of deference to acts of a foreign state in its own territory, and perhaps outside that territory. The Court had left the proper theoretical basis of the doctrine unclear. Nor had the Court offered any attempt to define what acts qualified as “acts of state.” Finally, the Pink case threw into doubt the previously announced territorial limitation on the doctrine.

D. Confusion Becomes Chaos Confronting the Cuban Revolution

The next round of act of state decisions grew out of the nationalizations by Cuba’s revolutionary government of American assets in Cuba. Of the many lawsuits that ensued in the United States, three reached the Supreme Court presenting questions about the act of state doctrine. Each case merely left the doctrine in a state of greater confusion.

1. Sabbatino

The first of these cases, Banco Nacional de Cuba v. Sabbatino,\(^\text{118}\) is still, in the view of many, the leading case on the act of state doctrine.\(^\text{119}\) Sabbatino arose from Cuba’s nationalization of American-owned assets with only an illusory prospect for compensation, in retaliation for reductions in the quota for Cuban sugar exports to the United States.\(^\text{120}\) At the time, a ship being loaded with sugar was in a Cuban harbor under a contract for sale to Morocco.\(^\text{121}\) Cuban agencies arranged for the sale to Morocco to go through, making the arrangements through the same broker, Farr, Whitlock & Co. (Farr), as had arranged the original sale on behalf of the prior owners, Compania Azucarera Vertientes-Camaguey de Cuba (C.A.V.).\(^\text{122}\)

Upon receiving the money for the sugar, Farr confronted

\(^{117}\) Id. at 245 (Stone, C.J., dissenting).

\(^{118}\) 376 U.S. 398 (1964).


\(^{120}\) 376 U.S. at 401-03.

\(^{121}\) Id. at 401, 403-04.

\(^{122}\) Id. at 401, 404-05.
claims for payment both on behalf of the Cuban government and on behalf of C.A.V. State court maneuvers brought about the appointment of Peter Sabbatino as receiver for C.A.V. Banco Nacional, acting on behalf of the Cuban government, filed suit against Farr in federal court. Farr paid the funds into court, inviting Sabbatino to defend. The procedural complexities of the case continued to grow throughout its life, but the basic facts were not altered by such events as the termination of the receivership by the state court, the refusal of the federal courts to substitute C.A.V. for Sabbatino, and other complicating developments.

Sabbatino knew enough about the act of state doctrine that he did not challenge the Cuban takings as a violation of local public policy. Rather he argued that the takings were void because they violated international law. The lower courts agreed, holding that the Cuban takings were invalid because the takings were not for a public purpose, they were discriminatory, and Cuba had made no provision for prompt, adequate, and effective compensation. In a famous opinion by Justice Harlan, an eight Justice majority applied the act of state doctrine and determined that U.S. courts could not question the validity of the Cuban expropriations even if the taking had violated international law.

Justice Harlan quickly concluded that our government still recognized Cuba despite having broken off diplomatic relations, and that the takings had occurred in Cuba. He then reviewed the history of the act of state doctrine, concluding that the doctrine was neither a rule of international law, nor to be implied from the inherent nature of sovereign authority. He also concluded that the doctrine was not commanded by the Constitution.

Justice Harlan then concluded that the act of state doctrine

123. Id. at 405-06.
124. Id. at 406.
125. Id. at 406-07.
126. Id. at 407-08.
128. 376 U.S. at 409-12.
129. Id. at 413-15.
130. Id. at 416-23; see also E. Mooney, supra note 1, at 165-77. Louis Henkin, who later served as Reporter for the Restatement (Third), immediately objected that Justice Harlan was too hasty in rejecting international law as the basis for the doctrine. See Henkin, supra note 30, at 819.
131. 376 U.S. at 423.
had "constitutional underpinnings" arising out of the separation of powers in our system of government.\textsuperscript{132} The doctrine is necessary, he concluded, to permit the executive to conduct the foreign relations of the United States properly.\textsuperscript{133} Given the peculiarly federal nature of this interest, he easily concluded that the doctrine must be a matter of federal common law binding in both federal and state courts.\textsuperscript{134} Turning at last to the crux of the matter, Justice Harlan addressed the question of when the act of state doctrine should be applied to validate the acts of a foreign state:

If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act is no longer in existence, . . . for the political interest of this country may, as a result, be measurably altered. Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine... 

\textsuperscript{132} Id. At this point one might begin to nod in agreement with one student who described Justice Harlan's opinion as "somewhat cryptic." Comment, Foreign Sovereign Immunity and the Act of State Doctrine: The Need for a Commercial [sic] [Comity?] Exception to the Commercial Act Exception, 17 U.S.F. L. Rev. 763, 767 (1983).

\textsuperscript{133} 376 U.S. at 423-25.

\textsuperscript{134} Id. at 424-27. Why this should be an issue after \textit{Pink} and \textit{Belmont} is unclear. \textit{See supra} note 90.
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.\(^{135}\)

This paragraph lays down the *Sabbatino* balancing test. Justice Harlan never explained just how a court is to conduct this balancing process. In *Sabbatino* itself, he concluded that there was no clear rule as to the validity of expropriations under customary or other international law.\(^{136}\) In an attempt to avoid embarrassing the State Department, Justice Harlan simply announced that the act of state doctrine required the Supreme Court to treat the taking as valid regardless of whether it violated customary international law.\(^{137}\) Finally, Justice Harlan found irrelevant that the challenge to the validity of the Cuban taking arose as a counterclaim.\(^{138}\)

Justice White vigorously dissented from the refusal to apply international law to assess the validity of the Cuban acts.\(^{139}\) While he agreed that the act of state doctrine was not a direct rule of international law, he considered it a corollary of the customary international law setting forth jurisdiction to prescribe.\(^{140}\) If this premise is correct, it would seem appropriate that acts would not be entitled to the protection of the act of state doctrine if they violated other rules of international law.\(^{141}\) He concluded that there is a rule of international law that prohibits takings that are retaliatory, discriminatory, and without proper compensation.\(^{142}\)

Justice White argued that to refuse to decide the validity of the Cuban acts was to decide a case on a basis other than the

\(^{135}\) 376 U.S. at 427-28.


\(^{137}\) 376 U.S. at 431-37.

\(^{138}\) *Id.* at 437-39.

\(^{139}\) *Id.* at 439-72 (White, J., dissenting).

\(^{140}\) *Id.* at 445-47 (White, J., dissenting); see generally *Restatement (Third)*, supra note 32, §§ 401-416.

\(^{141}\) 376 U.S. at 447-50 (White, J., dissenting).

\(^{142}\) *Id.* at 457-61 (White, J., dissenting).
applicable law. He recognized that such a decision could embarrass the executive branch in the conduct of foreign affairs, but argued that the Court should apply the usual standards for treating an issue as a political question: while the conduct of foreign affairs is textually committed by the Constitution to the executive branch, the adjudication of claims under ascertainable legal standards is not. Furthermore, to decline to declare the Cuban takings void embarrassed the executive branch when that branch had consistently denounced the Cuban takings as being in violation of international law. Justice White would accommodate the interest in preventing embarrassment to the conduct of foreign relations by deferring to a direct request from the State Department that courts not pass on the validity of a foreign expropriation or other act of state—he admitted that it was unclear in the Sabbatino case whether there was any such request.

2. After Sabbatino

The Sabbatino decision became, and continues to be, the focus of considerable controversy. Congress reversed the precise holding of the case by adoption of the “Sabbatino” or “Hickenlooper” amendment. The amendment, and attempts of the executive branch to influence courts on the act of state doc-

143. Id. at 450-56 (White, J., dissenting).
144. Id. at 461-62 (White, J., dissenting).
145. Id. at 462-67 (White, J., dissenting).
146. Id. at 467-72 (White, J., dissenting). The majority concluded that there was no such request, although the lower courts had construed the State Department’s documents as requesting the courts not to refrain from judging the validity of the Cuban acts. Id. at 419-21.


Attorneys continued to raise the act of state doctrine in a variety of contexts. Two of these cases, both involving Cuban expropriations of American property, reached the Supreme Court, only to confirm the ever deepening confusion surrounding the doctrine.

The first, First National City Bank v. Banco Nacional de Cuba, involved the nationalization of American-owned banks in Cuba. City Bank set about to recoup its losses by liquidating bonds belonging to Banco Nacional and applying the proceeds to the amount City Bank claimed on loans to, and for its property in, Cuba. When Banco Nacional brought suit over the bonds, a State Department letter indicated that it would not be embarrassed if the courts were to judge the validity of the acts of the Cuban state.

The Court split hopelessly, producing four opinions, with the largest bloc being the four Justices in dissent. Based on the rationale that the act of state doctrine served to facilitate the executive’s conducting of foreign relations, a three Justice plurality, in which Chief Justice Burger and Justice White joined an opinion by Justice Rehnquist, concluded that the State Department’s letter advising against application of the doctrine removed any impediment to judging the validity of the foreign act of state. Failing to persuade a majority, they went on to suggest that the act of state doctrine did not apply to counterclaims against the foreign state. Justice Douglas, in a concurring opinion, thought the implied waiver of sovereign immunity from the foreign state’s filing of the suit should control. Justice Powell concurred, but took the view that the State Department’s letter and the counterclaim were both irrelevant; rather, he concluded that the potential embarrassment to the conduct of foreign relations was not enough to raise the problem to the level of a political question.

151. Id. at 764.
152. Id. at 764-70.
153. Id. at 768-69. Note that Sabbatino had involved a counterclaim, and the Court there had rejected any notion of a “counterclaim exception.” 376 U.S. at 437-39. This discrepancy was not discussed by the plurality.
155. Id. at 773-76 (Powell, J., concurring). Justice Powell’s view differs from the plurality in that he believed that courts should independently deter-
Justices Blackmun, Marshall, and Stewart joined a dissenting opinion by Justice Brennan. They argued vigorously that the balancing test that Justice Harlan had announced in *Sabbatino* applied to this case and determined all issues in favor of Cuba. They specifically rejected virtually every point asserted in each of the three opinions that together constituted the majority.

Four years later, the Supreme Court decided *Alfred Dunhill of London, Inc. v. Cuba*. *Dunhill* arose when the Cuban government nationalized cigar manufacturers in Cuba, appointing "intervenors" to manage the businesses. In order to maintain their sources of supply, American importers paid to the intervenors monies owed for pre-intervention shipments. When the former owners, having fled to the United States, sued the importers here for the monies due on cigars imported before intervention, the importers sought to set-off their liability to the present owners against the monies owed for post-intervention shipments. Cuba was allowed to join in the suits to claim the money; Dunhill and the other importers counterclaimed for their set-offs, which in Dunhill's case exceeded the amount it owed to Cuba.

*Dunhill* appeared to be the perfect case for the Supreme Court to re-examine and clarify the act of state doctrine. The Legal Adviser to the State Department took a strong, official, and public stand in favor of rethinking of the doctrine. Given that there was something of a tradition of deference to executive determinations regarding the doctrine, many expected the Supreme Court to follow this suggestion to develop a new concept of the act of state doctrine sensitive to the modern realities of large scale state trading.

The inability, however, of more than four Justices (and those who mine the answer to this question; he opposed relying on the judgment of the State Department.

156. *Id.* at 776-96 (Brennan, J., dissenting).
158. *Id.* at 684-86. Why this word was not translated as "intervenors" is not explained. Perhaps it was to avoid confusion with those who simply intervene in a law suit.
160. See, e.g., Bernstein v. N.V. Nederlandsche-Amerikaansche StoomvaartMaatschappij, 210 F.2d 375 (2d Cir. 1954) (the act of state doctrine will not be applied if the President certifies that the judging act will not embarrass the conduct of foreign relations); 22 U.S.C. § 2370(e)(2) (1982) (the act of state doctrine is not applicable in some cases unless the President requests it).
161. The Supreme Court specifically asked for argument in *Dunhill* on
four, as in City Bank, in dissent) to agree with any particular approach indicated the near total collapse of coherent understanding of the act of state doctrine. The Justices again produced four opinions largely reflecting the divisions in City Bank. This time the various opinions embraced no less than seven different theories, with both the plurality opinion (by Justice White, joined by Chief Justice Burger and Justice Rehnquist), and the dissent (by Justice Marshall, joined by Justices Blackmun, Brennan, and Stewart) embracing more than one theory in the elusive search for a majority.

The plurality's first theory was that an act of a foreign state would only be protected by the act of state doctrine if it took place within the territory of the foreign state. The second theory (which was also joined by Justice Stevens) was that these acts by foreign officials were not acts of the state, although the Justices did not specify which circumstances brought them to this conclusion. The plurality's final theory was that the act of state doctrine would not protect commercial acts by a state. In a separate opinion, Justice Powell reiterated his view that the doctrine really involved allocating responsibility among the branches of government which should properly be resolved through the political question doctrine. The dissenters put forth two theories: (1) that Cuba's acts were protected by what might be termed the "pure theory" of the act of state doctrine—

whether Sabbatino ought to be reconsidered. 422 U.S. 1005 (1975); see also Golbert & Bradford, supra note 30, at 1; Leigh & Sandler, supra note 30, at 686.


163. See the text at supra notes 150-56.

164. 425 U.S. at 687, 689 n.11 (plurality op. per White, J.), 716-18, 721-22, 729-30 (Marshall, J., dissenting); see also infra § IV(A)(2).

165. Dunhill, 425 U.S. at 690-95 (plurality op. per White, J.), 715 (Stevens, J., concurring), 718-23 (Marshall, J., dissenting); see also infra § IV(A)(1).

166. 425 U.S. at 695-706 (plurality op. per White, J.), 724-30 (Marshall, J., dissenting); see also infra § IV(B)(1).

167. 425 U.S. at 715 (Powell, J., concurring), 726-27 (Marshall, J., dissenting); see also infra § III(B).
which contemplates no exceptions as such to the doctrine, requiring a case-by-case balancing of the factors identified by Justice Harlan in the *Sabbatino* decision;\(^{168}\) and (2) that a "counterclaim exception," created by *City Bank*, had only limited application in *Dunhill*.\(^{169}\) And finally, lurking in several places in these opinions is the well-known *Bernstein* (executive suggestion) exception.\(^{170}\)

Given the consistent lack of clarity regarding the act of state doctrine from its inception,\(^{171}\) one should not be too critical of a decision like *Dunhill*. While doing nothing to improve the tradition, it usefully brought into focus the different approaches possible to the act of state doctrine. Struggling out of the morass was not made any easier by a Supreme Court that refused to consider the act of state doctrine for thirteen years after *Dunhill* was decided, perhaps because of the very confusion its earlier opinions have generated.

The consistent refusal by the Supreme Court to tackle seriously the act of state doctrine left the bench and the bar to grapple uncertainly with each theory, whether supported by one or another Supreme Court Justice, lower courts, or non-judicial opinion. In the Court's most recent act of state case, *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. International*,\(^{172}\) the Court evaded these problems by finding that the act of state doctrine was not even involved in the case. In so doing, the Court only assured that Fuller's doctrine will remain "Fuller's curse."\(^{173}\)

### III. What Purpose Does the Doctrine Serve?

Section II of this article reviewed the progressively growing confusion in the Supreme Court cases dealing directly with the act of state doctrine, including the *Dunhill*\(^{174}\) case in which the Court produced four opinions supporting no less than seven versions of the doctrine. This plethora of theories, however, produced an extraordinary result: six of the seven theories were rejected by a clear majority of the Court.\(^{175}\) With such a state of
near judicial anarchy at the top, it is no surprise to find cases from lower courts which support each of these theories and several more. Additionally, lawyers and scholars have proposed other exceptions that might yet catch on in the courts.

Some of these theories, whether supported by a faction of the Supreme Court or not, propound narrow exceptions or limitations to an otherwise absolute doctrine. Others attempt to provide a flexible and comprehensive approach to the doctrine as a whole. There is at present no way of predicting with certainty which theories ultimately will prevail. Only a complete reevaluation of the doctrine by the Court could possibly resolve these confusions and make the doctrine a workable tool for furthering its avowed purposes. Until the Court is ready or able to do so, we are left to struggle with a doctrine that changes shape with each change in emphasis on the multifarious functions it is said to perform, until one can scarcely recognize the numerous versions of the doctrine as having a real relation to each other.176

With so many exceptions, limitations, and theories competing for application under the act of state doctrine, anyone considering the doctrine must resort to some general theory to warrant a particular choice. These general theories purport to explain how the doctrine functions and what purposes it serves. This part of the article will consider the four major theories advanced to answer these questions, ranked roughly in their order of popularity with judges, lawyers, and scholars.

A. Is the Doctrine a Rule of Abstention?

Among judges, lawyers, and legal scholars, the most popular understanding of the function of the act of state doctrine is that it requires some form of abstention from the exercise of judicial competence.177 Proponents of the abstention theory relate it to limitation. See infra § IV(A)(2). On the problem of the authority of plurality opinions, see Note, The Precedential Value of Supreme Court Plurality Decisions, 80 COLUM. L. REV. 756 (1980).

176. These confusions are rooted in a grafting together of the inconsistent general policies said to underlie the act of state doctrine. See Bazyler, supra note 3, at 327-28; Chow, supra note 25, at 399-400, 446-47; Ebenroth & Teitz, supra note 25, at 251; Kirgis, supra note 26, at 60-61; see also Bandes v. Harlow & Jones, Inc., 852 F.2d 661, 666 (2d Cir. 1988).

177. “Judicial competence” is a synonym for “subject matter jurisdiction” in the sense of the classes of cases which may properly be brought before a court. See, e.g., Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 485 n.5 (1983); J. DELLAPENNA, supra note ***, § 2.1.
one or more of four specific grounds for barring a court's competence or for a court declining to exercise competence:

1. directly, as a rule of abstention;\(^{178}\)
2. as a special rule of foreign sovereign immunity;\(^{179}\)
3. for lack of justiciability;\(^{180}\) or
4. under the political question doctrine.\(^{181}\)

The notion that the act of state doctrine requires some form of abstention results from three features that are frequently found in cases under the doctrine. The first is the language in which the doctrine is expressed. Second is that the doctrine frequently requires the dismissal of a suit without regard to its merits. Finally, there is the peculiar perspective involved in applying the doctrine in antitrust cases.

The act of state doctrine has always been expressed in terms


\(^{179}\) See, e.g., International Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1361 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); Westinghouse Elec. Corp. v. Rio Algom Ltd., 617 F.2d 1248, 1254 n.21 (7th Cir. 1980); Pons v. Cuba, 294 F.2d 925, 926 (D.C. Cir. 1961), cert. denied, 368 U.S. 960 (1962); see also Bazyler, supra note 3, at 385; Ebenroth & Teitz, supra note 25, at 230-32.


\(^{181}\) See infra § III(B).
that sound as if courts will not exercise their competence. Chief Justice Fuller's classic statement of the doctrine included the phrase "the courts of one country will not sit in judgment on the acts of the government of another." This phrasing has been repeated over the years, sometimes more elaborately, but without significant change. Judges and lawyers naturally construe phrases like courts will "refrain from examining" or "refrain from sitting in judgment" as commands of judicial abstention or denials of competence. One need only explain why and how.

When a complaint can succeed only if a court determines that an act by a foreign state was invalid, the act of state doctrine requires the court to dismiss the suit. By itself, this dismissal no more suggests a lack of competence or abstention than any other for failure to state a cause of action. The frequency of such dismissals, however, when combined with the language of the doctrine and knowledge that the dismissal does not bar further proceedings in third countries to challenge the validity of the original act, reinforces the notion that application of the doctrine is not a decision on the merits, but rather is a refusal to exercise competence.

Finally, in federal courts judicial competence is often peculiarly interwoven with the substantive legal basis of the litigation—as when federal judicial competence depends on a federal question. The pattern is particularly pronounced for antitrust litigation in which the issue of the court's competence and the issue of choice of law are intertwined, and depend on whether the parties or transactions are within the prescriptive jurisdiction of

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183. See, e.g., Restatement (Third), supra note 32, § 443(1): In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its "own" territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.
185. See Halberstam, supra note 33, at 74.
186. Restatement (Third), supra note 32, § 443 comment f.
federal antitrust laws. Thus, any dismissal of an antitrust complaint based on the act of state doctrine is usually expressed as a dismissal for lack of a federal question—i.e., for lack of judicial competence.

The abstention theories of the act of state doctrine appear to have solid foundations. Yet, there are insuperable difficulties with these views. One cannot account for at least two significant classes of act of state cases by an abstention theory: the applicability of the doctrine to proceedings in state courts; and those cases in which the doctrine is held to require a court to enter affirmative relief. Moreover, the Supreme Court has repeatedly held that the doctrine is not a denial or refusal of competence, but a decision on the merits.


190. See infra § III(C).
questions, and these analyses have proven to be neither helpful nor easy to apply.

As a rule of federal law, the act of state doctrine has always been at least implicitly supreme over state law and applicable in state courts in any appropriate case. In 1937, the Supreme Court made this explicit.\textsuperscript{191} Today the supremacy of the act of state doctrine over state law is axiomatic.\textsuperscript{192} Yet, federal law normally determines the competence only of federal courts, leaving state law to determine the competence of state courts. If the doctrine is based upon limitations of competence peculiar to federal courts, as in antitrust cases, then it cannot be relevant to proceedings in state courts.

In some cases, including several prominent in the history of the act of state doctrine, the Court did not simply dismiss a suit based on the doctrine, but held the doctrine to require a judgment of affirmative relief in favor of the party claiming through the foreign state.\textsuperscript{193} Affirmative relief would be impossible if the doctrine's function was to preclude exercise of competence or even to permit a court to choose to decline to exercise its competence.

Application of the act of state doctrine in state courts, while suggesting problems with competence restricting views, is not conclusive as to those views. The problem of affirmative relief is. Furthermore, the abstention theories have not provided standards for application of the doctrine. Only for the political question form of these theories has any jurist attempted to develop analytical standards beyond merely repeating the formal language of the doctrine itself. This form of the abstention theories thus merits a closer look.


\textsuperscript{193} See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); Halberstam, supra note 33, at 74-75. In two of the most recent Supreme Court act of state cases, Dunhill and City Bank, all Justices recognized that, if the doctrine applied, affirmative relief would have to be ordered in favor of the foreign state.
B. Does the Doctrine Involve Political Questions?

The political question doctrine is a special instance of judicial abstention from the exercise of jurisdiction. The failure of the concept of the act of state doctrine as a rule of abstention then must ultimately doom the concept of the doctrine as a special application of the political question doctrine. Yet Justice Powell, in two recent Supreme Court decisions on the doctrine, insisted that the doctrine simply expresses the judicial abstention due political questions. Justice Powell's idea is not so esoteric as his isolation on the Supreme Court might seem to suggest. Some have seen the political question theory as embedded in the classic formulation of the doctrine in Underhill v. Hernandez; others have found the comity theory announced in Oetjen v. Central Leather Co. to be based on the political question notion.

Ultimately, viewing the act of state doctrine as an application of the political question doctrine is firmly rooted in what the Supreme Court in recent years has come to see as the function of the doctrine: avoidance of interference with ("embarrassment to") the conduct of foreign relations by the executive branch. Most pointed of the few recent critics of the embarrassment to
foreign relations rationale is Senator Mathias, who described that rationale as the "most confounding . . . advanced in support of the act of state doctrine." 200 He did not, however, specifically criticize the political question theory.

Not surprisingly, the political question theory is more popular with lower courts and legal authors than interpretations of the doctrine which had broader support in the Supreme Court. 201 While the political question theory charges courts to avoid interference with the functioning of the political branches of government, it vests responsibility in the courts to decide when to defer to the supposed interests of the executive branch, rather than, as under the executive suggestion (Bernstein) exception or the Hickenlooper Amendment, leaving that decision to suggestions by the executive branch. 202 On the other hand, Monroe Leigh and Michael Sandler argued that the political question theory reverses the usual presumption that courts are not to judge the validity of acts of foreign states. 203 Yet, in invoking the act of state doctrine, courts all too often have simply labeled the issue a political ques-

200. Mathias, supra note 3, at 400-01; see also Bazyler, supra note 3, at 337 (describing this theory as "broad ruminations"—i.e., dictum); Conant, supra note 162, at 264-65; Note, Adjudicating Acts of State in Suits Against Foreign Sovereigns: A Political Question Analysis, 51 Fordham L. Rev. 722, 742-43 (1983).


tion without bothering to explain how or why the label was applied.\textsuperscript{204}

Surprisingly, then, some commentators have concluded that the political question doctrine holds the promise of narrowing the application of the act of state doctrine, and also of making its application more certain.\textsuperscript{205} This could only happen if courts were to advance beyond the classic political question doctrine to devise more specific standards than are usually articulated when that doctrine is invoked. Those courts that have considered the point, however, have predictably adopted the standards announced in the classic political question cases—particularly \textit{Baker v. Carr}.\textsuperscript{206} The criteria for a nonjusticiable political question are that:

\begin{itemize}
  \item[(1)] the Constitution commits the issue to a "political" (non-judicial) branch of the government; or
  \item[(2)] a court could not decide the issue without a policy determination involving nonjudicial discretion; or
  \item[(3)] a court cannot resolve the issue without expressing disrespect for the coordinate branches of government; or
  \item[(4)] there is an unusual need for unquestioning adherence to a political decision already made; or
  \item[(5)] multiple pronouncements by various departments of government create potential embarrassment to the orderly processes of government.\textsuperscript{207}
\end{itemize}

Justice Powell's concurring opinion in \textit{Goldwater v. Carter},\textsuperscript{208} a
case not involving the act of state doctrine, defined similar standards. Justice Powell's shorter (and even more vague) questions are worth quoting both because he alone on the Supreme Court supports the political question theory of the act of state doctrine, and because he was writing in a case involving foreign relations. His questions were:

(1) Does the issue involve the resolution of questions committed by the text of the Constitution to a coordinate branch of Government?
(2) Would resolution of the question demand that a court move beyond areas of judicial expertise?
(3) Do prudential considerations counsel against judicial intervention?209

With criteria as vague as those set forth in Baker and Goldwater, even the most careful analysis usually could reasonably lead to several conclusions.210 Only a few issues, such as foreign political boundaries or the recognition of foreign governments, are easily classifiable as political questions under these criteria.211 Thus little is gained from conflating the two doctrines, but something is lost.

Abandoning the classic act of state doctrine in favor of a political question doctrine obscures the true role of the act of state doctrine, which, properly understood, is a special kind of rule of decision, not a rule of abstention.212 While one can argue that the political question doctrine is also misunderstood when

one should not further confuse the act of state doctrine with disputes on the true nature of the political question doctrine. Such obfuscation merely serves to hide a court’s evasion of its duty to decide, on the basis of law, the cases brought before it. Nor does conflating the act of state doctrine with the political question doctrine necessarily resolve the problem of possible embarrassment to the executive’s conduct of foreign relations.

The executive branch would be just as embarrassed by a court refusing to pass on the legality of an act the executive has declared a violation of international law as by a court declaring the act valid, because the court in the former case is declaring that there are no legal standards to be applied. Embarrassment can only be avoided if courts are bound by the position espoused by the executive branch, and not simply by a suggestion on whether to decide the case. For courts to determine, on a case-by-case basis, whether to decide a dispute involving acts of a foreign state condemns us to having the validity of an act of a foreign state turn on a frankly political decision that courts are ill-equipped to make. Such an approach politicizes the judiciary in precisely the way all Justices of the Supreme Court have insisted that the doctrine should prevent.

213. Champlin & Schwarz, supra note 194, at 231-39; Henkin, supra note 162.

214. Cf. Sharon v. Time, Inc., 599 F. Supp. 538, 553 (S.D.N.Y. 1984): Our national policy reflects, if anything, a reexamination of Sabbatino, rather than a political consensus for its transformation into a jurisdictional bar through its indiscriminate amalgamation with the analogous but similarly questionable device of judicial abstention. Absent some guidance to the contrary from the political branches, the present circumstances do not justify a refusal to perform the duty to adjudicate.


216. As is true for political boundaries or governmental recognition. See supra note 211.

217. See, e.g., Philippines v. Marcos, 818 F.2d 1473, 1486-88 (9th Cir. 1987), rev’d on other grounds in reh’g en banc, 862 F.2d 1355 (1988), cert. denied, 109 S. Ct. 1933 (1989); KMW Int’l v. Chase Manhattan Bank, N.A., 606 F.2d 10, 16-17 (2d Cir. 1979); Leigh & Sandler, supra note 30, at 697-700. But see Comment, supra note 132, at 788-96; Note, supra note 7, at 96-101; Note, supra note 200, at 740-46.

One can only avoid the difficulties of the abstention theories generally, and the political question theory in particular, by treating the act of state doctrine as a special rule of decision shaped by important concerns of national and international policy. To do so, one must not only eschew seeing the act of state doctrine as a rule of abstention, but also to treat the political question doctrine as a distinct, albeit related, theory, with its own task to perform: as a rule of abstention in favor of the political branches of government. Three courts have followed this approach. 219

C. Is the Doctrine a “Super Choice-of-Law” Rule?

The Supreme Court has repeatedly, recently, and nearly unanimously characterized the act of state doctrine as a rule of decision on the merits under what Louis Henkin has termed a “super choice-of-law rule.” 220 This view has proven almost as popular with lower courts and others as seeing the doctrine as involving a political question or judicial abstention on some other basis. 221 The Supreme Court’s apparent adoption of the choice

398, 423-24, 431-33 (1964); Comment, supra note 132, at 763-65, 767-68, 780, 793; Note, supra note 200, at 744-45.


221. See, e.g., Randall v. Arabian Am. Oil Co., 778 F.2d 1146, 1153 (5th Cir. 1985); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1114 (5th Cir. 1985); Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355, 360 n.16 (11th Cir. 1984); Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1200 n.4 (5th Cir. 1978), cert. denied, 442 U.S. 824 (1979); Timberline Lumber Co. v. Bank of Am., 549 F.2d 597, 602 (9th Cir. 1976); Perez Jimenez v. Aristeguicita, 311 F.2d 547, 557 n.6 (5th Cir. 1962), cert. denied, 375 U.S. 914 (1963); see also Bazyler, supra note 3, at 333-44 (confusingly expressing choice of law theory and abstention theory simultaneously); Chow, supra note 25; Crockett, Choice of Law Aspects of the Foreign Sovereign Immunities Act of 1976, 14 Law & Pol’y in Int’l Bus. 1041, 1053-54 (1983); Ebenroth & Teitz, supra note 25, at 228, 250; Golbert & Bradford, supra note 30, at 15-20; Halberstam, supra note 33, at 74-75; Kahale, Characterizing Nationalizations for Purposes of the Foreign Sovereign Immunities Act and the Act of State Doctrine, 6 FORDHAM INT’L L.J. 391, 394.
of law theory of the act of state doctrine would seem to settle the matter, permitting one to disregard cases in which a court described the doctrine as a rule of abstention as based on misconstruction of the relevant authorities.

The choice of law approach would explain why the doctrine displaces state law even in state courts, and why the doctrine sometimes requires a court to order affirmative relief for the party claiming through the foreign state. The approach does not contradict the frequent dismissals for failure to state a cause of action; and, given the intertwining of competence ("subject-matter jurisdiction") and substantive law issues in antitrust, it does not contradict dismissals for lack of competence under federal antitrust laws.

Viewing the act of state doctrine as a compulsory choice of law rule thus is superficially appealing. Such a view requires a court to exercise its competence within the familiar framework of ordinary choice of law rules, circumscribed only by certain special preclusions to challenges to the validity of the "acts" of a foreign state. In the context of territorially defined vested rights choice of law analysis, the doctrine simply precludes a court from applying such ordinary escape devices as reference to the whole law of the foreign state (renvoi), characterization of an issue as procedural, or (most importantly) reference to the forum's public policy. The view also fits neatly with the seldom used "neoterritorialist" approach to choice of law.

222. See the text at supra notes 190-93.
223. See supra notes 184-89.
1990] Deciphering the Act of State Doctrine 43

Viewing the act of state doctrine as a compulsory choice of law rule does not sit so well, however, with the interest analysis approach to choice of law.226 Renvoi, procedural characterization, and public policy play no role as escape devices in interest analysis properly understood.227 Nor can a court undertake an interest analysis without a searching examination and comparison of the policies and interests of the forum, the foreign state, and any other interested state.228 This is precisely the sort of inquiry that the act of state doctrine seeks to prevent.229


While Daniel Chow correctly concluded that the act of state doctrine does not work well with interest analysis choice of law, he completely misconceived what it means to describe the doctrine as a choice of law rule. He assumed that the doctrine could only function to preclude escape devices, and not to mandate directly the law to be chosen. He thus argued that the doctrine cannot even be applied unless the court first determines that, under relevant choice of law theories, the foreign state’s law is to be applied. Chow, supra note 25, at 431-35.


Careful analysis of the compulsory choice of law view thus reveals that the act of state doctrine so conceived simply does not relate meaningfully to modern approaches to choice of law. Thus, either the design of the doctrine has become obsolete as approaches to choice of law have changed, or the model of the doctrine as a compulsory choice of law rule is seriously flawed. That this choice of law theory is seriously flawed is also shown by other features of the doctrine, whose incompatibility with the choice of law theory antedates the revolution in choice of law theory.

First among the long-standing traditions of the act of state doctrine inconsistent with viewing it as a compulsory choice of law rule is the tradition that the doctrine does not apply to general laws. This conclusion might be implied from the title of the doctrine itself—which suggests that an act, and not a law, is the necessary prerequisite to invoking the doctrine. Some authorities carry this constraint further, holding that the doctrine does not apply to judgments from courts of foreign states that simply apply a state’s general laws to the interests of private parties, or to public laws that have not been implemented by acts of states. As the doctrine’s application to judgments involving public law questions is at least open to question, just what “laws” the doctrine compels a court to apply remains remarkably unclear.

Furthermore, the act of state doctrine precludes inquiry into the legality of the act under the law of the foreign state. Fear
of offending the foreign officials who form the state’s government, and deference to their greater capacity to determine the effect of their own laws, might be perfectly sound reasons for declining to examine the legality of the acts of those officials. This cannot, however, be a serious attempt to apply the law of their state: how can a rule compel a court to apply the law of a particular state, and then bar inquiry into what that law is? Only slightly less puzzling is the idea of a choice of law rule that compels a court to decline to apply international law when all agree that international law, although sometimes not entirely settled, is the proper law of the case.235

Finally, if the act of state doctrine is a compulsory choice of law rule, then a decision under the doctrine is a judgment on the merits. Such a judgment creates a claim to recognition in the courts of other countries which generally will be honored.236 Yet it is well-established that a judgment dismissing a claim because of the act of state doctrine is not conclusive on a proceeding brought elsewhere that involves the validity of the act which was the basis of the judgment in the United States.237

D. The Doctrine as a Rule of Repose

The analysis of the asserted purposes of the act of state doc-


Some courts recently evaded this stricture by concluding that the allegations that the acts in question were illegal under the state’s law amounted to challenging whether the acts were acts of the state. See Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987).


236. RESTATEMENT (THIRD), supra note 32, § 491 reporters’ notes 6 & 7. 237. Id. § 469 comment f.
trine thus far has demonstrated that the doctrine speaks neither to the jurisdiction of courts nor to the applicable law. What purpose does the doctrine serve? Justice Clarke provided a pointed answer on behalf of a unanimous Supreme Court when he wrote that the doctrine "requires . . . that, when . . . the foreign government has acted in a given way on the subject-matter of the litigation, the . . . merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." 238 Rather than requiring or permitting a court to refuse to hear a case, the doctrine actually functions as a rule of special deference to specific exertions of state power similar in effect to a judgment by a court in that the state decision (an "act" if you will) precludes fresh inquiry into issues decided by that decision. In short, the doctrine is a rule of repose. 239

The earliest English case generally cited as authority for the act of state doctrine involved the judgment of a foreign court. 240 And some have seen Underhill v. Hernandez 241 (the first act of state case in the United States) as Chief Justice Fuller's attempt to restore the traditional view that a judgment by a foreign court carried out within the territory of the foreign state was conclusive against the whole world. 242 By this view, the Chief Justice indirectly attained the point of his dissent two years earlier from a decision where the Supreme Court held that judgments from foreign courts were not entitled to conclusive effect except to the


239. Ehrenzweig I, supra note 31, at 170-73; 1 Ehrenzweig II, supra note 31, at 128-29, 157; 2 Ehrenzweig II, supra note 31, at 72-75; Leflar, supra note 31, at 204; E. Mooney, supra note 1, at 25-26; E. Scoles & P. Hay, supra note 86, at 982-87; Leigh & Sandler, supra note 30, at 702-05; Note, supra note 43, at 600-06; see also Restatement (Second) of Conflict of Laws, introductory note to Ch. 3, at 100 (1971).

240. Blad v. Bamfield, 36 Eng. Rep. 992 (Ch. 1673). The case that extended this principle to the acts of a foreign executive is still controversial in England. See Duke of Brunswick v. King of Hanover, 2 H.L. Cas. 1 (1848); Jones, supra note 1, at 437-40; Singer, supra note 1, at 284-85, 289-91. The cross-fertilization between the courts of England and the United States in developing the act of state doctrine seems clear, but curiously was usually not acknowledged by courts at the time. Jones, supra note 1, at 439-43; Singer, supra note 1, at 291.

241. 168 U.S. 250 (1897); see generally supra § II(A).

242. For this traditional view, see H. Herman, The Law of Estoppel and Res Judicata 576 (1886); The Mary, 13 U.S. (9 Cranch) 126, 144 (1815); Williams v. Armroyd, 11 U.S. (7 Cranch) 425 (1813); Rose v. Hinely, 8 U.S. (4 Cranch) 241, 269 (1808); Cammell v. Sewell, 5 Hurl. & N. 728 (Ex. Ch. 1860).
extent our courts chose to accord that effect out of comity—a basis riddled with exceptions and easily set aside.

Under this binding recognition view, the act of state doctrine functions as a sort of international full faith and credit clause. Like the Constitution's full faith and credit clause, the doctrine has little to do with the recognition or enforcement of laws. Rather, it is principally applicable to specific decisions applying law to situations within the decision-making authority of a foreign state—to "acts," whether executive, legislative, or judicial.

If the purpose of the doctrine is to make certain foreign governmental decisions binding on our courts, Chief Justice Fuller did not clearly enunciate that purpose, and, despite Justice Clarke's pointed statement, that purpose had been lost from sight at the latest by the time Sabbatino reached the Supreme Court. Neither Sabbatino nor later cases mentions this purpose. Yet this concept continues to be the only theory that adequately accounts for all well-established facets of the doctrine, including facets that compel the rejection of concepts of the doctrine as directed at the exercise of jurisdiction or the resolution of choice of law questions.

We need not undertake a full account of recognition of judgments from other jurisdictions. Here it is sufficient to know that when a judgment is recognized it is treated as precluding the rec-


gnizing court from reconsidering the merits of issues controlled
by the judgment.\textsuperscript{248} Courts in fact have occasionally identified is-

sue preclusion as the core of the act of state doctrine.\textsuperscript{249} In this
sense only does the doctrine mandate a particular rule of decision
or require a court "not [to] sit in judgment on the acts of [an-
other] government."\textsuperscript{250}

In other words, the act of state doctrine requires a U.S. court
to apply the "law of the case" (in a strong, \textit{res judicata}, sense) to
"acts" of a foreign state;\textsuperscript{251} it does not operate as a full-blown
choice of law principle applicable to every situation with signifi-
cant connections to a foreign state. This not only accounts for
the language used in the several versions of the doctrine; it also
makes clear that whatever advantages the choice of law analysis
has over the jurisdiction-restricting view of the doctrine apply as
well to the rule of repose theory.

The rule of repose theory of the act of state doctrine, more-
over, resolves the difficulties of the choice of law theory. One
need not be concerned about the increasingly poor fit between
the doctrine and the modern general choice of law theories; nor
that it does not apply to general laws as opposed to "acts." This
theory also eliminates any problem with the bar on inquiry into
the propriety of the act under the law of the foreign state: recog-
nition of a judgment always bars inquiry into errors of law or fact
in the judgment.\textsuperscript{252}

\textsuperscript{248.} Restatement (Second) of Conflict of Laws § 95 (1971); Resta-

tement (Second) of Judgments §§ 27-29 (1982); E. Scoles & P. Hay, supra note
86, at 916-25.


\textsuperscript{250.} This was Chief Justice Fuller's original formulation of the act of state doctrine in Underhill v. Hernandez, 168 U.S. 250, 252 (1897). For a complete quotation of this passage, see supra note 44. \textit{See also} the text at supra notes 190 & 193.


\textsuperscript{252.} \textit{See} Morris v. Jones, 329 U.S. 545 (1947); Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Fauntleroy v. Lum, 210 U.S. 230 (1908); Emery v. Hovey, 84 N.H. 499, 153 A. 322 (1931); Barnes v. Buck, 464 Pa. 357, 346 A.2d 778 (1975); Restatement (Second) of Conflict of Laws § 106 (1971); Resta-
One can also use the rule of repose theory to solve the remaining puzzle under the choice of law theory: that the judgment on act of state grounds is on the merits but does not preclude courts outside the United States from making independent inquiry into the claim already litigated in the American court.\footnote{253} A judgment enforcing a judgment from another jurisdiction is on the merits, but, unlike a final judgment on the original cause of action, a judgment based on a consistent judgment from another jurisdiction does not merge the two judgments or bar proceedings directly on the original judgment.\footnote{254} The act of state doctrine operates no differently.

Viewing the act of state doctrine as a rule of repose—a sort of rule for full faith and credit to specific decisions (judgments in a broad sense) by a foreign state—also accounts for all the other major features of the doctrine. The doctrine protects the interests of private parties who trace their interests through the act of a foreign state in the same fashion as a judgment binds parties in privity with the original parties to the judgment.\footnote{255} Even the territorial limitation is rooted in the notion that a judgment is valid only if it is the result of a proper exercise of jurisdiction.\footnote{256}
The prohibition of testing the validity of acts of state against the public policy of the forum resembles the similar prohibition of inquiry into the forum’s public policy in enforcing a sister state judgment under the full faith and credit clause. One even finds here the explanation for the notion that the act of state doctrine does not validate foreign judicial judgments involving public law questions. This is simply the old notion that there is no obligation to enforce foreign judgments based on penal or revenue laws. That repudiation of an act by a foreign state makes it reviewable in the United States finds obvious parallels in the notion that a judgment which has been vacated or reversed is no longer entitled to recognition in other courts.

The last question to be considered in identifying the act of state doctrine with a rule of repose is why one would want to accord special deference to decisions characterized as “acts of state” when that same deference is denied to laws or other deci-

66; E. Scoles & P. Hay, supra note 86, at 937-40; Luneburg, supra note 255, at 92-101.


258. See the text at supra note 233.


260. Compare Dominicus Americana Bohio v. Gulf & Western Indus., 473 F. Supp. 680, 690 (S.D.N.Y. 1979) with Ezagui v. Dow Chemical Corp., 598 F.2d 727 (2d Cir. 1979); see also Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980); Sharon v. Time, Inc., 599 F. Supp. 538, 545 (S.D.N.Y. 1984); see generally Restatement (Second) of Conflict of Laws §§ 112, 113, 118 (1971); Restatement (Second) of Judgments § 27 comment o (1982); Ehrenzweig I, supra note 31, at 196-98; Leflar, supra note 31, at 238, 247-48. A second judgment, entered before the first judgment is vacated, is still a valid judgment entitled to recognition elsewhere. Reed v. Allen, 286 U.S. 191, 199 (1932); Restatement (Second) of Conflict of Laws § 121 (1971); Restatement (Second) of Judgments § 16 (1982).
sions of foreign states. To understand why, one must examine the policies that underlie all rules of finality of decision (rules of repose) in multijurisdictional contexts, building upon the well-established policy differences between the recognition of laws and the recognition of judgments.

To disregard the law of a foreign state is to select which general laws or policies, among several that could reasonably be applied, are properly applicable to a specific fact situation; to disregard a judgment is to set aside a specific exercise of authority by a state, to affront the dignity and authority of that sovereign. This also wastes the decision-making resources of both sovereigns, not to mention wasting the resources committed by the parties to obtaining a resolution of the controversy. Finally, to reexamine the validity of a final judgment prevents the parties and the public generally from knowing with certainty what their rights or responsibilities are.

Today, only the policy of protecting individual reliance on prior decisions is pronounced in interstate recognition cases. This policy's prominence under the act of state doctrine is shown by the early cases in which the Supreme Court invoked the doctrine to protect reliance by third parties on prior decisions ("acts") by foreign states. The policies of avoiding affront to the dignity and authority of foreign states and of not wasting state

261. See the text at supra notes 230-32.


263. Although recognized by all three factions of the Supreme Court in its recent examination of these questions, this policy is not now strong in interstate conflict cases. See Thomas v. Washington Gas Light Co., 448 U.S. 261, 277, 280-81 (plurality op. per Stevens, J.), 289 (White, J., concurring), 292-93 (Rehnquist, J., dissenting) (1980).

264. Id. at 284-85 (plurality op. per Stevens, J.), 293-94 (Rehnquist, J., dissenting); see also Luneburg, supra note 255.

265. Thomas, 448 U.S. at 272, 282 (plurality op. per Stevens, J.), 288-89 (White, J., concurring).

266. See, e.g., Shapleigh v. Mier, 299 U.S. 468 (1937); Ricaud v. American
and private decision-making resources, while no longer prominent in interstate recognition cases, continue prominent in act of state cases.267

The prominence of the concern of avoiding affront to foreign states and preventing the waste of their decision-making resources in cases in which the foreign state has “acted” in a direct exercise of its sovereignty explains why these decisions are protected by the doctrine and simple judgments involving only private interests are not.268 As the involvement of the state’s resources (including prestige) are much less in judgments involving only private interests, the policy of recognition is lessened to the point that the act of state doctrine simply does not apply. Recognition of such private judgments involves only the balancing of ordinary concerns of respect for finality against the concern to assure that there has been a fair hearing and no offense to fundamental interests or policies of the enforcing forum.269

Thus virtually every feature of the act of state doctrine that proves troubling to the usually proffered explanations of the functioning of the doctrine are seen as simply normal aspects of a rule of repose. Even the recent uncertainties about the doctrine’s scope and effect might be seen as parallel to the stress currently felt for full faith and credit to judgments among sister states of the United States.270 Correctly resolving these uncertainties is more than just an academic question. If judges and lawyers do not understand how the doctrine functions, they will continue to misconceive its application, whether through formal analogy to

Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918).


268. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 608 (9th Cir. 1976); RESTATEMENT (SECOND) OF FOREIGN REL. LAw § 41 comment d (1965).


domestic law or otherwise. The next section will demonstrate in detail the consequences of these misconceptions.

IV. INTERPRETING THE ACT OF STATE DOCTRINE

If the act of state doctrine is to serve its purposes of preventing embarrassment to the executive's conduct of foreign relations and of assuring certainty of right of one who reasonably relies on an act of a foreign state, three steps are imperative to clarify the application of the doctrine. These steps must begin with a renewal of the legal focus on the doctrine's meaning, on how it functions, and on its underlying policies. Judges, lawyers, and scholars must also eschew the careless language so frequently found in cases involving the doctrine—language which has often been misleading, if not outright erroneous. Finally, the profession must rework the doctrine into a coherent rule of repose—a rule of binding recognition of decisions by foreign states consistent with modern theories of compulsory recognition of judgments.

To accomplish this ambitious program, jurists must evaluate whether each proposed theory, limitation, and exception to the act of state doctrine is consistent with a properly delineated rule of repose. They must begin with the most general theories to establish the true parameters of the doctrine. Thereafter, they must carefully evaluate each proposed specific limitation or exception to the doctrine, including those enacted by Congress as well as those created or proposed by judges.


272. The most notable instances of clearly wrong language involve the frequent assertion that the act of state doctrine requires abstention from the exercise of judicial jurisdiction. See supra § III(A), (B). The Supreme Court unanimously rejected this theory as early as 1918, in Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918), and reaffirmed this rejection in one of its most recent decisions under the doctrine, in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 705 n.18 (plurality op. per White, J.), 726-28 (Marshall, J., dissenting) (1976).

273. See supra § III(D).
A. General Interpretive Problems

The Justices of the Supreme Court have proposed various general theories about the functioning of the act of state doctrine. In so doing, they have identified several important general interpretive problems in understanding (and applying) the doctrine: identifying acts of state; the application and effect of the territorial limitation; and the more controversial claim that there is a "pure theory" of the doctrine which is currently ignored by the majority of the Court. Two other general interpretive problems have recently been raised by the Court of Appeals for the Second Circuit: the "phenomenological approach" and the relation of the doctrine to the notion of "comity." Each of these general interpretive problems will be discussed in this section in turn.

1. Identifying acts of state

Given that the designation plays a central role in the act of state doctrine, it is more than a little strange that courts have never developed meaningful criteria for deciding when an act qualifies as an act of a foreign state. Even the four Justices who concluded that no act of a foreign state was involved in Alfred Dunhill of London, Inc. v. Cuba274 disagreed among themselves on the fundamental question of what acts are acts of a sovereign. The plurality of Chief Justice Burger and Justices Rehnquist and White interpreted acts as sovereign only if they were "public" rather than "commercial."275 Justice Stevens disagreed; he apparently would answer the question purely in terms of whether

274. 425 U.S. 682, 690-95 (plurality op. per White, J.), 715 (Stevens, J., concurring) (1976).
275. Id. at 695-707 (plurality op. per White, J.). One might count Justice Powell as agreeing with this view, although he is ambiguous on the point. Id. at 715 (Powell, J., concurring). Many lower courts have consequently adopted this view. See, e.g., Philippines v. Marcos, 862 F.2d 1355, 1360-61 (9th Cir. 1988), cert. denied, 109 S. Ct. 1933 (1989); Philippines v. Marcos, 806 F.2d 344, 359 (9th Cir. 1986), cert. dismissed, 480 U.S. 942, cert. denied, 481 U.S. 1048 (1987); De Roburt v. Gannett Co., 733 F.2d 701, 703-04 (9th Cir. 1984), cert. denied, 469 U.S. 1159 (1985); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406-07 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984); Empresa Cubana v. Lamborn & Co., 652 F.2d 404, 237-38 (2d Cir. 1981); International Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1360 (9th Cir. 1981), cert. denied, 454 U.S. 1169 (1982); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1380 (5th Cir. 1980); Manning Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 606-08 (9th Cir. 1976); see also Perez Jimenez v. Aristeguieta, 311 F.2d 547, 557-58 (5th Cir. 1962), cert. denied, 375 U.S. 914 (1963); RESTATEMENT (SECOND) OF FOREIGN REL. LAW, § 41 (1965).
Justice White, in an apparent search for that elusive fifth vote to turn the plurality into a majority, also argued in *Dunhill* that a "sovereign act" must involve a "statute, decree, order, or resolution of the [foreign] Government itself."277 His assertion contradicts numerous earlier decisions, some of which he cited with approval.278 His remarks were ambiguous enough to permit one to conclude still that a "sovereign act" need not take any particular form.279

The confusion in *Dunhill* over what qualifies as an act of state—a "sovereign act," if you will—is a major change from the apparently wide prior consensus over the meaning of the concept. Before *Dunhill*, the phrase had been used to resolve three distinct, but related, questions:

(i) how to treat acts by unrecognized governments;
(ii) whether to attribute an act to the state; and
(iii) whether acts not involving a significant policy judgment are protected by the act of state doctrine.

These problems continue to arise today.

Whether to cloak acts by an unrecognized government with the dignity of an act of state was a question involved in nearly all the early act of state cases. Courts routinely gave retroactive effect to recognition of a (revolutionary) government, and therefore applied the doctrine to protect acts completed before recognition.280 Courts quickly took the small step of according

276. 425 U.S. at 715 (Stevens, J., concurring).
277. Id. at 695 (plurality op. per White, J.). Justice Stevens also joined this part of the plurality opinion, giving this dictum the support of four Justices. Some lower courts have seized on this statement to conclude that formal action is necessary before an act could be an "act of state." See *Philippines v. Marcos*, 806 F.2d 344, 359 (9th Cir. 1986), *cert. dismissed*, 480 U.S. 942, *cert. denied*, 481 U.S. 1048 (1987); *Empresa Cubana v. Lamborn & Co.*, 652 F.2d 231, 237 (2d Cir. 1981); *Timberlake Lumber Co. v. Bank of Am.*, 549 F.2d 597, 606-07 (9th Cir. 1976); *Mexico v. Ashley*, 556 S.W.2d 784, 786 (Tex. 1977).
the same protection to regimes that remained unrecognized at the time of the litigation, and even to regimes which were replaced without ever having been recognized. Courts do not seem troubled by these conclusions today.

Attributing a person's act to a state also seems unlikely to create the level of confusion reached in *Dunhill*. States, not being natural persons, necessarily act through agents (or agencies). Naturally, these agents sometimes act on behalf of themselves or others, and only sometimes on behalf of the state. Such agents could also act contrary to, or in excess of, their authority.

Certain confusions in *Dunhill* are rooted in the realities of agents' conduct, although properly understood these need not produce serious confusion in attributing an act to a state. In a number of cases where a court stressed the presence or absence of particular forms appropriate to state acts, the court was merely searching for a relatively certain badge of state authority. But

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286. *Dunhill*, 425 U.S. at 694-95 (plurality op. per White J.); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1380 (2d Cir. 1980); *see also* Abourezk v. Reagan, 785 F.2d 1043, 1070 n.4 (D.C. Cir. 1985) (Bork, J., dissent-
the cases in which a court stressed that state action need not take any particular form also involved situations where the court sought to determine whether an act was authorized by, or attributable to, a state. To always rely on formal authority would be self-defeating because foreign states could then bring an act within the act of state doctrine merely by ratifying the act formally.

Problems in analyzing the authority of an agent of a foreign state are no different than the usual problems in determining an agent's authority. The inquiry admittedly is complicated by its often politically sensitive nature, shown in part by the frequent assertion that U.S. courts will not inquire into the legality of acts of a foreign state under that state's own law. This does not, however, obviate the need to determine whether the act was in fact an act of the state. Thus, when an agent violated the express orders of his own government, courts easily concluded that the act was not an act of the state.


The final problem—whether acts not establishing significant state policy are protected by the act of state doctrine—is the one which appeared to trouble the Court in Dunhill, although one cannot be entirely certain given the vagueness of the plurality opinion. In Dunhill the acts were performed by “interventors”—relatively low level officials appointed to administer expropriated businesses. Were acts of such low level officials acts of the state? Significantly, the plurality had to refer to an old sovereign immunity case to reach the issue. The issue simply does not appear in any earlier act of state case, or even in earlier foreign sovereign immunity cases except those involving foreign-government-owned ships.

Looking at the early act of state cases, one finds it hard to believe that the issue could ever come up. The very first act of state case involved a suit against an agent of a government unrecognized when the agent acted, and not against the state itself. And after all, the acts of Pancho Villa, who at the time of his acts was little more than an extraordinarily successful bandit, acting on behalf of a government which was never recognized by the United States, were treated as acts of state. How then can one question the sovereign quality of acts by even low level officials exercising the actual authority of the state?

In Dunhill, the interventors not only exercised actual authority on behalf of the state, but they also made decisions—exercised discretion—affecting the interests of the state. Specifically, the interventors, as managers of state-owned businesses, decided to

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290. 425 U.S. at 691-95 (plurality op. per White, J.).


292. U.S. courts struggled with restricting immunity in cases involving foreign-government-owned ships decades before they became concerned about the restrictive theory in other cases. See, e.g., Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926); The Gul Djemal, 264 U.S. 90 (1924); The Sao Vincente, 260 U.S. 151 (1923); The Pesaro, 255 U.S. 216 (1920); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822); l’Invincible, 14 U.S. (1 Wheat.) 238 (1816); see generally J. Delapenna, supra note ***, at 1-5.


295. The notion that there should be an exercise of judgment involving effect on public interests is found in Restatement (Second) of Foreign Rel. Law § 41 comment c (1965). Such language does not appear in the Restatement (Third), supra note 32. See also Ramirez de Arellano v. Weinberger, 745
keep certain moneys to which the plaintiffs claimed to be entitled. To question the sovereign quality of these decisions raises the issue of whether the interventors were exercising governmental authority or mere business judgment, i.e., whether their’s was an act of the state. Either way, one need not see this as leading into a commercial act exception to the act of state doctrine.

To see how one can conclude that an act by a state official involving only business judgment is not an act of the state without reaching the question of whether the act would properly be characterized as “commercial” or “sovereign,” consider what the arguments in Dunhill would have been if the expropriated businesses had been sold to the interventors rather than merely administered by them. No one would then argue about a commercial act exception. Rather the argument would focus exclusively on whether acts of the new owners were acts of the state.

Now, a private party can exercise state authority, but only if that party is in a position to affect state (or public) interests. One might not want to carry this idea back to the actual situation of the interventors, who operate distinct and separate entities on behalf of the state. If one did so, however, one would not necessarily need even to consider whether their acts are properly characterized as “commercial” or “sovereign.” In fact, whether a separate entity, or even a private party, acts on behalf of a state is not easily resolved by reference to the “nature” or “purpose” of the act. A court must consider the actor’s claim to authority, the state’s delegation of authority, and the degree to which a U.S.

F.2d 1500, 1534-38 (D.C. Cir. 1984), vacated on other grounds, 471 U.S. 1113 (1985); see generally infra § IV(B)(8).


298. This apparently is the point of Justice Stevens’ concurring opinion in Dunhill, 425 U.S. at 715 (Stevens, J., concurring).

299. As happened, for example, in the Barcelona Traction Case (Belgium v. Spain), 1970 I.C.J. 3.


301. See generally J. Dellapenna, supra note ***, at 147-64; see also infra § IV(B)(1).

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court's inquiry into such matters will intrude into the affairs of the foreign state. 302

The several opinions in Dunhill divided primarily over whether the intervenors had authority to act on behalf of the Cuban state. 303 Unfortunately, the opinions confused this question with other, largely irrelevant matters, particularly the "nature" of the act. This confusion would not have been particularly problematic if the Court had been able to speak through a majority, articulating a new, coherent vision of the act of state doctrine. Justice White, however, could neither write on behalf of a majority, nor (perhaps because of his search for that elusive majority) write with sufficient clarity to prevent the now pervasive confusion surrounding the doctrine.

How a court determines whether an "act" (and its underlying decision) is that of a foreign state would be less important if the Supreme Court were to delineate clearly the limitations and exceptions to issue preclusion which properly apply to the act of state doctrine. In part, the failure to devise criteria for what is an "act of state" results from the pervasive confusion about just what purposes the doctrine is intended to achieve. Once one recognizes the function of the doctrine as a special rule of repose, an "act of state" should be recognized whenever there has been a decision under the authority of a foreign state to create or change specific legal rights or duties if this decision expresses policies central to the political sovereignty of that state. 304

No one has quite described an "act of state" in this fashion, but the criteria offered here seem to capture the essential features of the fact situations to which the act of state doctrine has been applied. While no complete definition of the second criterion—decisions expressing central political concerns of the foreign state—could be easily developed, a paradigm is apparent from ex-


303. Thus from Justice White's plurality opinion: "Neither does it demonstrate that in addition to authority to operate commercial businesses, to pay their bills and to collect their accounts receivable, intervenors had been invested with sovereign authority to repudiate all or any part of the debts incurred in the businesses." 425 U.S. at 691-93; see also id. at 722-23 (Marshall, J., dissenting).

amining the facts of the cases involving the act of state doctrine. Examples have included a complete change of the political structure of a state (i.e., revolution), fundamental changes in the economic structure of a state (e.g., expropriations), or basic policy decisions about the managing of the society or economy of a state. The paradigm does not include decisions taken in the day-to-day management of government.

Drawing the line suggested here will not always be easy. Yet the paradigm does provide a model with which courts can compare specific fact situations with a prospect of relatively clear answers in most cases. If the appropriate criteria of authority and centrality are met, the particular form of the “act” should be irrelevant. An “act” could even be a decision that produces complete nonaction. Whether the “act” emanates from a foreign state’s executive, legislature, or judiciary, makes no difference.


309. Thus, I would have decided some of the cases cited in support of the foregoing paragraph differently than the court did. See, e.g., infra § IV(B)(4).

310. See the text at supra notes 277-79 & 294-96.

311. See supra note 279.

312. For cases involving foreign executive decisions, see Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297
Nor does the level of government that makes the decision matter if the actors involved have authority to act on behalf of the state. A court in the United States might have to inquire circumspectly into the actor's authority in order to avoid embarrassing the executive's conduct of foreign relations, but even this circumspection is similar to the usual rule of repose for judgments—only a complete want of competence or jurisdiction renders the decision invalid. 314

2. The territorial limitation

Chief Justice Fuller, in his original statement of the act of state doctrine, indicated that the doctrine protects only acts of a foreign state within that state's territory. While the proposition has never been questioned in the Supreme Court, neither has it ever actually been applied there—it remains mere dictum. Yet the territorial limitation remains one of the few aspects of the doctrine that has been accepted by every Supreme Court Justice, at least in dictum, and followed in numerous lower court decisions. Localizing an "act" of state will remain troublesome,

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but, compared to the rest of the doctrine, the problem is refreshingly commonplace and manageable without great difficulty.

The extensive literature on the territorial limitation includes only four weak criticisms of the limitation as such. Nonetheless, one might conclude that the limitation is a notion that, while unremarkable when first announced, was carried forward without further analysis long after it outlived its usefulness. Created during the era of Pennoyer v. Neff, the territorial limitation does not seem so self-evident in an era accustomed to long-arm jurisdiction producing, even in international contexts, reliance on the finality of decisions, potential waste of decision-making resources, and probable affront to a foreign state's sovereignty nearly as much for extraterritorial assertions of authority as for territorially focused assertions.

The argument is not likely to persuade a court. The Supreme Court, if only in dictum, has always insisted that there can be no affront to the sovereignty of a foreign state when it acts

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318. Ehrenzweig I, supra note 31, at 172-73; Bazyler, supra note 8, at 372-73; Henkin, supra note 30, at 328-30; Comment, Act of State Doctrine Held Inapplicable to Foreign Seizures when the Property at the Time of the Expropriation Is Located Within the United States, 9 N.Y.U. J. INT'L L. & POL. 515 (1977). This does not include criticisms of particular applications of the limitation.

319. 95 U.S. 714 (1878).

320. See, e.g., United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937). That these are the relevant policies, see the text at supra notes 261-69. For examples of governments (including the United States) feeling affront when they act extraterritorially, see the antitrust disputes discussed in supra note 188.
outside its borders. Moreover, the dependence internationally of both jurisdiction to adjudicate and jurisdiction to enforce on jurisdiction to prescribe makes the latter jurisdictionally dispositive for the act of state doctrine. The central, unchallengeable basis of international jurisdiction to prescribe remains the jurisdiction over persons, conduct, or property within the territory of the sovereign.

The territorial limitation might be seen as too deferential an approach to the authority of a foreign state, disregarding jurisdiction over the state's nationals and over activities affecting certain state or universal interests. The limitation does avoid the often obscure debates over whether these alternate bases of jurisdiction are being exercised reasonably. If certainty of finality of decision is the paramount policy underlying the act of state doctrine, then restricting the doctrine to the virtually unchallengeable territorial jurisdiction provides ample certainty about when the doctrine applies. The limitation also only slightly impairs reliance on "acts" based on more contentious bases of jurisdiction, as these other "acts" might still be recognized and enforced under more fluid concepts of ordinary rules concerning the recognition of judgments or the like.

Determining what "act" is in question, or what property is the object of the foreign state's action, thus is a critical step in determining whether and how to apply the act of state doctrine. This is most apparent in a dramatic situation like a murder in the United States ordered by a foreign state. Was the act of state the murder (in the United States) or the order (in the foreign state)? More ordinary, but just as troubling, is determining whether the "property" expropriated was the ownership of a cor-


322. RESTATEMENT (THIRD), supra note 32, §§ 423, 431(1); see generally J. DELLAPENNA, supra note 32, at 67-72.

323. RESTATEMENT (THIRD), supra note 32, § 402(1).

324. Id. §§ 402(2), (3), 404; see also Chow, supra note 25, at 458, 465-68.

325. RESTATEMENT (THIRD), supra note 32, § 403.

326. Id. §§ 491-498.

As with so many other difficulties in applying the act of state doctrine, the problem of determining the location of key acts arose in *Dunhill*. The District Court and the Court of Appeals both thought the location of the property at the time of the “taking” was dispositive of the controversy. They reached opposite conclusions on the location of the property, however, because the District Court thought the property taken was the debts (located in the United States), but the Court of Appeals thought the property was the monies (located in Cuba).

When *Dunhill* reached the Supreme Court, the majority simply avoided addressing which theory should be used to localize the property. Justice White’s plurality opinion did, however, implicitly decide what property was in issue by focusing on the refusal by the interventors to pay over the money in their possession. The four dissenters chose to address the property question directly, apparently managing to endorse the views of both lower courts! The dissenters would have upheld the confiscation of the monies while holding that the confiscations of the debts themselves were ineffective.

If the expropriated property is a debt or other intangible legal right, one confronts the problem of localizing “intangible property” or an “intangible event.” This has always been extremely uncertain. Most American courts have decided the location of intangible property according to the location of the

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331. *Id.* at 716-18, 721-22 (Marshall, J., dissenting).

332. *Id.* at 729 (Marshall, J., dissenting).

333. One might conclude that the question will support just about any answer a court wishes to reach. EHRENZWEIG I, *supra* note 31, at 172; *see also* Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 714 (5th Cir.), cert. denied, 393 U.S. 924 (1968).
obligor (the "debtor domicile test"). Other courts, responding to the traditional tie of the act of state doctrine to sovereignty, have framed the inquiry in terms of whether the nation in question had power to make its action effective, i.e., whether it had jurisdiction over the property (the "complete fruition" or "fait accompli test"). One court recently rejected both of these tests and adopted a test which balances various factors to determine whether the foreign state had "reasonable expectations of dominion" over the property in question (the "incidents of the debt test").

Each test has been criticized. In fact, when the property in issue is a right to collect a monetary debt, the outcomes under the three tests are not significantly different. When other intangible rights or events are involved, however, the tests can lead to very different results. The clearest instance is when a corporation is nationalized. Are the shares of the corporation located (fictionally) where the corporation is incorporated, or where its principal

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office is located? Which represents the place at which the nationalization can be made effective? Similar problems arise for copyrights, patents, or trademarks.

3. The balancing approach ("the pure theory")

The four dissenters in Dunhill and First National City Bank v. Banco Nacional de Cuba attempted to provide a complete and highly restrictive analysis of when courts in the United States might "sit in judgment" on the acts of a foreign state. They proposed that courts balance, on a case-by-case basis, the risks of embarrassment to the executive's conduct of foreign relations against the degree of codification of the relevant law and the importance of the issue to the "national nerves" of the foreign state. Although no one has yet explained how one is to balance these incommensurable factors in some comprehensive calculus, the dissenters would have resolved virtually all questions left open in Banco Nacional de Cuba v. Sabbatino through


344. Compare Justice Scalia's comment in Bendix Autolite Corp. v. Midwesco Enter., 486 U.S. 888 (1988) (Scalia, J., concurring) ("This process is ordinarily called balancing, but the scale analogy is not appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.") (citations omitted).

this case-by-case balancing. In Kirkpatrick, however, a unanimous Court indicated that balancing was appropriate only for restricting the act of state doctrine, not for expanding its scope.346

One might term the dissenters' position the "pure theory" of the act of state doctrine. They most closely followed Sabbatino — until Kirkpatrick, the last act of state case to command a majority in the Supreme Court. The dissenters formed the largest and most cohesive group in the intervening decisions. And rarely, if ever, would they not have applied the doctrine to an act arguably attributable to a foreign state.

Because of this "pure" stance, the dissenters opposed virtually every other theory put forth in Dunhill, except for a grudging acceptance of the counterclaim exception.347 They apparently concluded that the validity of any act colorably performed on behalf of a foreign state is not to be questioned in a U.S. court absent a clear consensus on relevant principles of international law.348 Their view that courts should consider the question on a case-by-case basis rings hollow given their demand for nearly complete certainty of international law before they would set aside the act of state doctrine. Their unwillingness to displace the doctrine even for the tortured facts of Dunhill makes one doubt their willingness to displace the doctrine under any circumstance.349 The factors the dissenters balance against the risk of embarrassment to the executive seem so unlikely to weigh heavily that the "pure theory" easily evolves into an unbreachable wall of protection for any controversial act of a foreign state.350

The best known attempt actually to balance these factors was in Timberlane Lumber Co. v. Bank of America.351 The Bank of America allegedly conspired with local interests to prevent

347. Dunhill, 425 U.S. at 733 (Marshall, J., dissenting); see also infra § IV(B)(2).
348. Dunhill, 425 U.S. at 718-23, 729-30 (Marshall, J., dissenting); City Bank, 406 U.S. at 786-87 (Brennan, J., dissenting); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-30 (1964). The dissenters might have added the possibility of the extinction of the government in question, although they did not mention this aspect of Justice Harlan's theory in Sabbatino. See 376 U.S. at 428.
349. See the text at supra notes 157-61.
350. Cf. McCormick, supra note 50, at 504 (the balancing test is "of minimal utility" because "the factors will always balance in favor of a court's application of the act of state doctrine due to the weight of the 'conflicting ideology' element"); see also Note, supra note 43, at 612.
351. 549 F.2d 597, 603-05 (9th Cir. 1976).
Timberlane from entering the Honduran lumber trade. Timberlane further alleged that in furtherance of this conspiracy the Bank corrupted an officer of a Honduran court and used Honduran police and soldiers to keep Timberlane’s people off disputed land.

The trial court dismissed the proceedings, but the reason was unclear.\textsuperscript{352} On appeal to the Ninth Circuit, Judge Choy’s opinion concentrated on the act of state doctrine and the proper extraterritorial reach of U.S. antitrust laws.\textsuperscript{353} In his discussion of the act of state doctrine Judge Choy appeared to rely on the Dunhill plurality to conclude that no public act was involved in the case.\textsuperscript{354} Turning to the extraterritorial application of the antitrust laws, however, he announced a balancing test that he admitted was derived from the act of state doctrine.\textsuperscript{355} On remand, the district court applied the balancing test and dismissed the complaint.\textsuperscript{356}

Judge Choy’s version of the balancing test was more detailed than either Justice Harlan’s in Sabbatino, the Dunhill dissenters or Justice Scalia’s in Kirkpatrick. Although Judge Choy included some factors that are more attuned to the special problems of the extraterritorial application of the antitrust laws than the usual concerns under the act of state doctrine, other jurists have recognized Judge Choy’s analysis as developing the balancing test from Sabbatino and Dunhill.\textsuperscript{357} Judge Choy wrote:

The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the location of principle places.

\textsuperscript{352} Id. at 601-03.
\textsuperscript{353} Id. at 605-08 (the act of state doctrine), 608-16 (extraterritorial reach).
\textsuperscript{354} Id. at 608.
\textsuperscript{355} Id. at 613; compare Judge Choy’s act-of-state analysis in International Ass’n of Machinists v. OPEC, 649 F.2d 1354, 1360 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).
of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.\textsuperscript{358}

Other courts have given us still more versions of the balancing test,\textsuperscript{359} which differ in details, but add little in either certainty or clarity to Judge Choy's version. Often the courts have said little other than that there should be a balancing.\textsuperscript{360} The cases in which the court attempted to develop the most elaborate balancing are the least helpful—these courts offered so many factors that one cannot determine which, if any, are important, nor precisely why the decision was made.\textsuperscript{361}

Although the balancing approach rests solidly on Sabatino,\textsuperscript{362} it might just rest too solidly there. To defer to sovereign acts as thoroughly as the "pure theory" requires abandons any pretense of contributing to the growth or maturation of interna-

\textsuperscript{358}. 549 F.2d at 614 (footnote omitted).


\textsuperscript{362}. 376 U.S. at 427-30.
tional law. Further, the “pure theory” or balancing approach requires judges, who are often unfamiliar with the foreign policy dimensions of a particular case, to balance these dimensions against other dimensions which are only somewhat less imponderable—all without any substantial guidance from the departments of government charged with responsibility for the dimensions to be balanced.

The Dunhill dissenters further unsettled their position by varying the basis they posited for it. At times they spoke of “political questions,” but ultimately they based their approach on the choice of law nature of the issue to be decided. They did not discuss why seeing the act of state doctrine as a choice of law rule should require courts, in the context of modern interest analysis choice of law approaches, to defer to rules of law from other countries which the courts found offensive.

With an insistent and cohesive bloc of four Justices, backed by widespread support in lower courts, and able to cite the last majority opinion in the Supreme Court in support of this view, one might have expected the “pure theory” to carry the day. One of the dissenters (Justice Stewart), however, is already gone from the Court, and others might leave soon. Support for other theories seems just as entrenched on the Court, and at least as widely supported in lower courts. Thus the prospects for the “pure theory” were uncertain at best.

Virtually all the comments addressed to the abstention and political question theories could be equally addressed to this “pure theory.” Nor does the dissenters’ choice of law characterization of the act of state doctrine strengthen the case for their approach. That characterization will no more stand up to close scrutiny than does the abstention or political question characterization. Moreover, a court cannot avoid these policy problems

363. Id. at 439-72 (White, J., dissenting); Cooper, supra note 30, at 228-33; Leigh & Sandler, supra note 30, at 700-09. Note that although Justice White was the lone dissenter in Sabbatino, he joined the plurality in City Bank, and wrote the plurality opinion in Dunhill. See also G. Barn & D. Westin, International Civil Litigation in United States Courts 461-65 (1989).

364. Dunhill, 425 U.S. at 724-25, 727 (Marshall, J., dissenting); City Bank, 406 U.S. at 782-93 (Brennan, J., dissenting); Leigh & Sandler, supra note 30, at 699; Note, supra note 343, at 333-41.


366. See supra § III(A), (B).

367. See supra § III(C).
by turning the balancing test into an absolute rule of repose that provides virtually unassailable protection for any controversial "act" that can be colorably attributed to a foreign state. While this does encourage third parties to rely on "acts" of foreign states, a court could provide this level of protection only by nourishing cynicism about the possibility that a rule of law governs the conduct of nations, and by embarrassing the executive's conduct of foreign relations.\footnote{368. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-37 (1964).}

The costs in international law terms might not relate directly to the functions and policies of the act of state doctrine, but these costs have had strong appeal and are the source of at least three proposed exceptions to the doctrine.\footnote{369. Filartiga v. Pena-Irala, 577 F. Supp. 860, 862 (E.D.N.Y. 1984); Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412, 429-35 (S.D.N.Y. 1980), modified, 514 F. Supp. 5 (2d Cir. 1981); \textit{Falk III}, supra note 147, at 410-11; Halberstam, supra note 33; Lengel, supra note 52, at 72-81, 91-102; see generally infra \S IV(B)(3), (7), (9).}

One could achieve consistency between international law and the doctrine by careful analysis. Resort to international law is justified by the familiar notion that judgments are not entitled to recognition if there is a strong reason to doubt the impartiality of the proceedings or of the laws applied. While one might argue that the purpose of the act of state doctrine is precisely to prevent inquiry into such matters, with the emergence of such limiting notions even regarding sister-state judgments under the full faith and credit clause,\footnote{370. See, e.g., McDonald v. City of West Branch, 466 U.S. 284 (1984); Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980); Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980); \textit{Montana v. United States}, 440 U.S. 147 (1979); \textit{Restatement (Second) of Conflict of Laws} \S 103 (1971).} one must expect such concerns to arise under the act of state doctrine as well.

Finally, the "pure theory" balancing approach can only work with reasonable certainty and evenhandedness if a single court—necessarily the Supreme Court—is willing and able to undertake review of a large number of cases to develop the appropriate contours of the balancing process. The "pure theory" would be better abandoned. Rather, the Court should adopt the approach of the four Justice plurality in \textit{Dunhill}: to apply the doctrine to any properly identified "act" of a foreign state subject to clearly announced limitations or exceptions consistent with the policies and...
functions of the doctrine. The recent announcement by a unanimous Supreme Court that balancing could be used to narrow, but not to widen, the scope of the act of state doctrine, at least significantly restricts the pure balancing theory. Whether the Court will go as far as I have argued, and eschew the balancing approach, remains to be seen.

4. The "phenomenological approach"

In three cases decided on the same day by the U.S. Court of Appeals for the Second Circuit, that court announced a so-called "phenomenological approach." The approach is an uncertain amalgam of the commercial act exception, the counterclaim exception, the executive suggestion (Bernstein) exception, and the "pure theory," without any attempt to analyze whether or how these mutually inconsistent theories can be blended together. The approach thus is more an expression of the utter confusion bedeviling the act of state doctrine than a reasoned attempt to develop a coherent theory of the doctrine. The theory has not been referred to since, even in the Second Circuit.

5. Comity

In an apparent attempt to develop a coherent basis for its approach to the act of state doctrine that other courts could understand and follow, a panel of the Second Circuit in 1984 rediscovered the old notion that the doctrine was based on "comity." The court's brief per curiam opinion concluded on this basis that the doctrine did not apply; this view was withdrawn and replaced after a rehearing before the same panel with the result that the doctrine was applied to bar the proceeding.

In this curious episode the court presented comity as an al-

371. 425 U.S. at 682-715 (plurality op. per White, J.), 715 (Stevens, J., concurring).
374. See infra § IV(A)(3), (B)(1), (2), (5). For an attempt to explain this blend, see RESTATEMENT (THIRD), supra note 32, § 443 reporter's note 9.
375. Allied Bank Int'l v. Banco Credito Agricola, 733 F.2d Adv. Sht. 23 (2d Cir. 1984), withdrawn & replaced on reh'g, 757 F.2d 516, 521-22 (2d Cir.), cert. dismissed, 473 U.S. 934 (1985). For the antecedents to this theory, see the text at supra notes 55-58, 72, & 73.
ternative to the act of state doctrine. Indeed, from early times comity has been the governing notion underlying both international choice of law and the recognition of foreign judgments. To the extent that the act of state doctrine functions as a rule of repose guaranteeing finality of decision to “acts” of foreign states, comity will be an alternative consideration when the doctrine is not applied. No court, however, has explained why comity should be relevant to the act of state doctrine itself.

The Second Circuit, however, has continued to flirt with the notion of comity as a relevant guide to application of the act of state doctrine, without attempting to develop how that inherently nebulous notion should affect the application of the doctrine. One is left to puzzle over the implications of such a development should the Second Circuit or other courts embark upon a serious effort to develop the idea. Given that an excellent case has been made that Chief Justice Fuller devised the act of state doctrine precisely to evade the uncertainties of the notion of comity, to now conclude that the doctrine merely expressed the notion of comity would be ironic indeed. Such an approach would seriously undermine all of the policies, including certainty of decision, that the act of state doctrine was meant to serve.

B. Proposed Exceptions to the Act of State Doctrine

When the Supreme Court took up the case of Alfred Dunhill of London, Inc. v. Cuba, many hoped that the Court would resolve the growing confusion around the act of state doctrine. Unfortunately, as no Justice was able to write on behalf of a majority, or (perhaps because of the very search for a majority) to write with sufficient clarity to prevent further confusion, Dunhill only compounded the problems surrounding the doctrine. As the Justices

381. See the text at supra notes 261-69.
did seem to embrace the notion that the doctrine should be applied unless some exception were found,383 lower courts, lawyers, and legal scholars have apparently taken the Court's lack of clarity as an invitation to devise their own exceptions to the doctrine, almost without regard for its functions or underlying policies.

The idea of an act of state doctrine limited by proposed exceptions antedates the Dunhill decision.384 Since Dunhill was decided, no less than eleven exceptions, including some that originated before Dunhill, have found support by jurists or others in a position to influence court decisions. Yet these proposed exceptions, unlike the territorial limitation, remain controversial. To determine which, if any, of these exceptions courts should accept, one must carefully evaluate them in light of the policies and purposes of the doctrine.385

1. Commercial acts

Justice White's plurality opinion in Dunhill386 posited an altogether new exception to the act of state doctrine for the commercial acts of foreign states. The newness of his theory was shown by his citation of only two act of state cases in this part of the opinion: Banco Nacional de Cuba v. Sabbatino, for the general policies underlying the doctrine;387 and Underhill v. Hernandez, for the statement that the doctrine protects "the exercise of governmental authority,"388 a statement that had never before been taken to suggest the exclusion of commercial acts from the doctrine.389

383. Even the four dissenters, who generally opposed such a rule-oriented approach in favor of a balancing approach, see supra § IV(A)(3), embraced—albeit reluctantly—a "counterclaim exception" to the act of state doctrine; see Dunhill, 425 U.S. at 793 (Marshall, J., dissenting); see also infra § IV(B)(2).
385. See the text at supra notes 261-69.
387. Id. at 697, 704 & n.16, 706 (citing Sabbatino, 376 U.S. 398 (1964)).
388. Id. at 706 (quoting Underhill, 168 U.S. 250, 252 (1897)).
389. Note that when Underhill was decided, foreign states were absolutely immune if they were sued in U.S. courts. See Berizzi Bros. v. The Pesaro, 271 U.S. 562 (1926); The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812). This makes it unlikely that Chief Justice Fuller had an exception for commercial acts in mind when he wrote Underhill: such an exception had appeared nowhere in the common law at that time, and was then only beginning to emerge (under a different name) in the civil law. See generally J. Dellapenna, supra note ***, at 3-8. Justice White did cite 29 recent sovereign immunity cases to bolster his contention: 7 involving foreign sovereigns before U.S. courts, Dunhill, 425 U.S. at 703; 8 involving domestic sovereigns before U.S. courts, id. at 695; and 14 involving foreign sovereigns before foreign courts, id. at 702 n.15.
Justice White’s suggestion did not come wholly out of the blue. The Legal Adviser to the State Department had issued a Bernstein letter for Dunhill in which he suggested an exception for commercial acts. The Solicitor General appeared as amicus curiae in the case and pressed the argument for a commercial act exception. With the history of deference to the executive branch in matters touching on foreign affairs, one might have expected a majority of the Court to adopt this position. Apparently Justice White thought so as well. His phrasing of this part of the plurality opinion in terms of “we hold” could suggest that the opinion commanded the support of a majority at one stage in its evolution from pen to published opinion. All such expectations were disappointed.

Despite strong support from within and without the Court, only three Justices, Justice White joined by Chief Justice Burger and Justice Rehnquist, unequivocally supported a commercial act exception. Justice Powell made an unsteady fourth. He stated in his separate opinion that he concurred in the entire plurality opinion, but only because he could not foresee that embarrassment to the conduct of foreign relations could arise from “cases involving only the commercial acts of foreign states.” The other five Justices refused to accept a commercial act exception. Only Justice Stevens left open the possibility of accepting such an exception at a later time.

Dunhill thus provides tenuous authority at best for a commercial act exception to the act of state doctrine. Still, a surprising number of lower courts and commentators have relied on Dunhill as establishing the exception. Congress apparently also read

390. 425 U.S. at 706-11; see also infra § IV(B)(4).
391. 425 U.S. at 696-97.
392. Cf. Mexico v. Hoffman, 324 U.S. 30 (1945); Ex parte Peru, 318 U.S. 578 (1943); United States v. Pink, 315 U.S. 203, 222-23, 229 (1942); United States v. Belmont, 301 U.S. 324, 328 (1937); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954); see generally Cooper, supra note 30, at 210-28; Comment, supra note 337, at 688-91; see also infra § IV(B)(4).
393. 425 U.S. at 705. The suspicion is shared by Monroe Leigh, the Legal Adviser who issued the Bernstein letter in Dunhill. Leigh & Sandler, supra note 30, at 693 n.26.
394. 425 U.S. at 684 n.* (plurality op. per White, J.).
395. Id. at 715 (Powell, J., concurring).
396. Id. at 715 (Stevens, J., concurring), 724-30 (Marshall, J., dissenting).
397. Philippines v. Marcos, 806 F.2d 344, 359 (2d Cir. 1986), cert. dismissed, 480 U.S. 942, cert. denied, 481 U.S. 1048 (1987); Empresa Cubana v. Lamborn & Co., 652 F.2d 231, 238 (2d Cir. 1981); Arango v. Guzman Travel Advisors...
Dunhill as establishing a commercial act exception. In other cases, courts avoided passing on the commercial act exception by finding the act in question was not commercial.

Supporters of the commercial act exception generally claim that it is only “natural” to limit the act of state doctrine to “public


acts” by excluding “commercial acts.” One might well be skeptical of how natural a corollary it is when it remained unseen for eighty years after the doctrine emerged. How one is to convince someone who does not immediately perceive the “naturalness” of the exception remains unclear.

Other supporters have argued that the commercial act exception will remove the act of state doctrine from litigation involving private parties, much as does a finding of bad faith on the part of a foreign official for the related foreign sovereign compulsion defense. The argument fails, however, because arguably a purpose of the act of state doctrine is precisely to prevent inquiry into the motives of foreign state officials. Nor will the exception remove the doctrine from litigation between private parties; many such cases will turn upon “public acts” rather than “commercial acts” by foreign states.

More recently, supporters of the exception have turned increasingly to a claim that it is absurd to distinguish between the act of state doctrine and foreign sovereign immunity. The ar-

400. Dunhill, 425 U.S. at 695-96; Cooper, supra note 30, at 204-07; Leigh & Sandler, supra note 30, at 693-95.

401. The only pre-Dunhill case that might possibly have discussed a commercial act exception is Victory Transport Inc. v. Comisaria General, 336 F.2d 354, 363 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965). The language in this decision is so obscure in this regard, however, that neither the plurality in Dunhill nor other courts or commentators have cited it in support of the supposed exception.


405. Chisholm & Co. v. Bank of Jamaica, 643 F. Supp. 1393, 1403 n.9 (S.D. Fla. 1986); Cooper, supra note 30, at 227-28; Golbert & Bradford, supra note 30, at 35-37; Leigh & Sandler, supra note 30, at 694-96; Comment, supra note 205;
argument merely displays failure to understand the very different roles the two concepts play. This argument views the act of state doctrine as simply another rule restricting the jurisdiction of courts. While some Supreme Court Justices have used language supportive of this view, even questioning the utility of distinguishing between the act of state doctrine and the immunity of foreign sovereigns, the Court as a whole has consistently recognized that the two doctrines are functionally different.

Foreign sovereign immunity is a rule of substantive law which sometimes provides the rule of decision in suits against foreign states. As such, it serves to regulate the conduct of foreign states towards private individuals in transactions or events significantly connected to the United States. The act of state doctrine, on the other hand, is neither a rule of jurisdictional immunity or abstention, nor a full-fledged rule of decision. Rather, it is a rule of repose requiring the recognition of certain decisions effectuated by a foreign state.

As a result, the possibility of a commercial act exception to the act of state doctrine has also encountered strong criticism. Surprisingly, given that at least five Justices voted against a commercial act exception in the case which first gave voice to it, only one lower court has unequivocally rejected the exception.

Comment, supra note 149; Note, supra note 43, at 681-37. But see Kahale, supra note 397.

406. See Dunhill, 425 U.S. at 697-99, 705-06 (plurality op. per White, J.); City Bank, 406 U.S. at 762-63 (plurality op. per Rehnquist, J.).


409. All Justices in Dunhill agreed on this point. 425 U.S. at 705 n.18 (plurality op. per White, J.), 715 (Powell, J., concurring), 726-28 (Marshall, J., dissenting); see also Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918); see generally infra § IV.

410. See Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918); see generally supra § III; see also Golbert & Bradford, supra note 30, at 8-27; Mathias, supra note 3, at 392-401.

411. Lengel, supra note 52, at 90; McCormick, supra note 50, at 511-14, 519-32; Comment, supra note 132, at 781-96; Comment, supra note 337, at 691-94; Comment, supra note 359, at 563-71; Note, International Association of Machinists v. OPEC: The Ninth Circuit Breaths New Life into the Act-of-State Doctrine in Commercial Settings, 16 Geo. Wash. J. Int'l L. & Econ. 427, 444-49 (1982); Note, supra note 200, at 737-40; Note, supra note 357, at 397-400.

Still, simply characterizing an act as commercial does not demonstrate that the policies underlying the act of state doctrine do not apply to the act.

Proponents of a commercial act exception contend that a foreign state cannot feel affront if the act in question does not involve a sovereign, or public policy judgment. The proponents do not disclose why this should be so. Reliance on the finality of the act, the waste of public and private decision-making resources, and the potential to affront the sovereign dignity of a foreign state are not lessened by pinning the label “commercial” on the act. Prudence, at least, could cause a court to accord the protection of the act of state doctrine to decisions of a foreign state affecting that state’s interests and made within its own territory regardless of whether the resulting “act” be characterized sovereign, commercial, public, or private.

Acceptance of an exception for commercial acts would introduce a new problem: what constitutes a “commercial act” for purposes of the act of state doctrine. While Justice White’s plurality opinion in *Dunhill* maintained that the standards developed for the immunity of foreign sovereigns would be appropriate to the act of state doctrine, the thirty-four sovereign immunity cases he cited were already deeply divided over the proper test to determine if an act is commercial or private. At that time, American courts usually looked to the purpose of an act to determine whether it was commercial, while courts abroad usually looked to its “nature.”

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415. Remember that only some decisions qualify as “acts” for purposes of the act of state doctrine. See supra § IV(A)(1).

416. 425 U.S. at 702-05 (plurality op. per White, J.). The Legal Adviser to the State Department also told the Court that the sovereign immunity standards would be a workable guide. Id. at 707; Leigh & Sandler, supra note 30, at 695-96.

ture" test in the Foreign Sovereign Immunities Act. Justice White gave no hint as to whether he expected courts to follow such changes. The four dissenters in Dunhill were content merely to decry the inherent uncertainty of a commercial act exception and thus gave no hint of their attitude towards such changes.

Commentators on the question are divided into two camps: those who believe that the Foreign Sovereign Immunities Act is utterly meaningless if the act of state doctrine provides a different test for commercial acts, and those who believe that the standards for the Immunities Act and the doctrine must necessarily be different because they serve different policies and seek different goals. Congress seems to have opted for the latter view if one takes as controlling the statement in the section-by-section analysis of the Immunities Act that it was to have no effect on the substantive law to be applied in cases under it. Congress also expressly approved the plurality opinion in Dunhill and the amicus brief of the United States in that case, both of which were based on the earlier, "purpose" test. Yet the remarks were sufficiently unfocused that some commentators have remained unconvinced.

Since Dunhill, the Supreme Court has not reconsidered or clarified whether there is a commercial act exception, or how it should be applied. Despite the great deal of ink consumed debating how to decide whether an act of state is commercial, which test is ultimately applied probably does not make much difference. Even under the purportedly more certain "nature" test adopted by the Foreign Sovereign Immunities Act, determining which acts are commercial and which are not has proven highly uncertain. The continuing uncertainty over how a supposed exception for commercial acts would be applied perhaps explains the paucity of cases actually relying on it despite the many cases

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420. See, e.g., Bazylar, supra note 3, at 377; Ebenroth & Teitz, supra note 25, at 252; Lengel, supra note 52; Comment, supra note 119, at 484 n.84; Comment, supra note 205, at 100-12, 114-15; Note, supra note 200, at 736-37 n.102, 741.
421. See, e.g., Ebenroth & Teitz, supra note 25, at 230-31; McCormick, supra note 50, at 519-24, 535-38; Comment, supra note 132, at 774-77, 781-96; Note, supra note 200, at 737-40, 742-46; Note, supra note 411, at 439-49.
424. See J. Dellapenna, supra note ***, at 147-64.
purportedly accepting it in principle.\footnote{See supra notes 397 & 399. Of the cases cited there, only three appear to have been actually decided on the basis of a commercial act exception, and one of those was vacated on other grounds, leaving only an unreported district court opinion as the strongest support for the exception. See Egyptian Nav. Co. v. Uitterwyk, No. 83-334 Civ-T-10 (M.D. Fla. Jan. 7, 1988) (WESTLAW, 1988 WL 70047); Behring Int'l, Inc. v. Iranian Air Force, 475 F. Supp. 396, 401 (D.N.J. 1979); Lucchino v. Foreign Countries, 82 Pa. Commw. 406, 476 A.2d 1369 (1984), vacated on other grounds after removal, 631 F. Supp. 821 (E.D. Pa. 1986); see also Callejo v. Bancomer, S.A., 764 F.2d 1101, 1115 n.17 (5th Cir. 1985).} This uncertainty reinforces the irrelevance of the label "commercial" to the policies underlying the act of state doctrine and underscores the reasons why courts should not incorporate a commercial act exception into the act of state doctrine.

2. Counterproceedings

Perhaps no proposed exception to the act of state doctrine better illustrates the difference between a rule of repose and a rule restricting competence or jurisdiction than the so-called counterclaim exception. In the cases in which the counterclaim exception was considered by the Supreme Court, Cuba sought to have American courts enforce Cuban decisions, not to judge their validity. The growing confusion over this posture produced a most peculiar history. Rejected in what many consider the last definitive statement of the act of state doctrine in the Supreme Court, the exception has since been adopted by a majority of the Justices—but not in a single case. Subsequently, several lower court opinions rejected the purported exception.

\textit{Banco Nacional de Cuba v. Sabbatino}\footnote{376 U.S. 398 (1964).} involved a counterclaim against the Cuban bank. Justice Harlan’s majority opinion rejected the possibility of an exception for counterproceedings. Justice White’s dissent did not dispute the point.

Justice Rehnquist’s plurality opinion in \textit{First National City Bank v. Banco Nacional de Cuba}\footnote{406 U.S. 759, 768 (1972) (plurality op. per Rehnquist, J.).} proposed an exception for counterproceedings as a secondary theory, apparently in a vain attempt to obtain a majority for the opinion. Justice Rehnquist succeeded in getting Justice Douglas’ support for this theory, although the latter’s concurring opinion was so obscurely worded that one cannot even be certain that it concerns the act of state doctrine rather than foreign sovereign immunity.\footnote{Id. at 770-73 (Douglas, J., concurring in result). Justice Douglas declared the act of state doctrine irrelevant, and based his entire opinion on a} The four dissenters, relying
on Sabbatino, strongly objected to an exception for counterproceedings, arguing that it confused the act of state doctrine with foreign sovereign immunity. Justice Powell adopted his own theory without commenting on the possibility of a counterproceeding exception.

Another act of state case decided by the Supreme Court, Alfred Dunhill of London, Inc. v. Cuba, also involved counterclaims against Cuban government agencies, with the majority producing three opinions with widely differing rationales. The plurality and concurring opinions held the act of state doctrine inapplicable and never reached the supposed exception for counterproceedings. The four dissenters, finding that the act of state doctrine applicable, felt obliged to apply the counterproceeding exception which they found to have been established in City Bank by a "bare majority." Noting that in City Bank the counterclaim was limited to recovery of the amount of the Cuban claim, the dissenters would have carried the limitation forward, applying the limitation separately to each of nine claims in the case rather than permitting the claims of the different parties to be aggregated. They argued that permitting aggregation would make the outcome of a particular claim turn on the accident of joinder or consolidation of proceedings.

After Dunhill, eight Justices had apparently approved an exception for counterproceedings. This would appear to put the exception on firmer ground than most other exceptions proposed for the act of state doctrine. When the Supreme Court was next presented with an opportunity to pass on the supposed exception, however, it chose to rest its decision on other grounds, dismissing the counterproceeding exception in a footnote.

The supposed exception for counterproceedings is on shakier ground than its champions believe. In City Bank, only Justice Douglas based his decision on anything that actually resembles
the theory. The four dissenters in *Dunhill* embraced the counterclaim exception only grudgingly and presumably would have rejected it if they had believed they could obtain the one additional vote necessary to prevail with their "pure theory." Only one lower court decision before *Dunhill* had applied the counterproceeding exception, and that case itself was reversed in *Dunhill* for limiting recovery to the amounts which the Cuban agents claimed against each party.

Since *Dunhill* was decided, courts have arguably applied the counterclaim exception on only three occasions. In 1981 a panel of the Court of Appeals for the Second Circuit decided four cases on one day. In two of them the court applied the counterproceeding exception, along with other theories, without clearly indicating which theory was controlling. The other two cases also involved counterclaims, but were resolved without resort to a counterproceeding exception. In the third case in which a court asserted the exception, the court also suggested that there was no act of state in the case, thus reducing its discussion of the counterproceeding exception to dictum.

More recent cases have uniformly retreated from the supposed counterproceeding exception. Judge Mansfield, whose opinion in the Second Circuit in what became the *Dunhill* case was the only lower court authority for the supposed exception, eight years afterwards (five years after *Dunhill* came down from the Supreme Court) wrote an opinion denying there was such an exception. Judge Kearse, who wrote the two subsequent Second Circuit opinions supporting a counterproceeding exception, also ignored the exception in a later decision of a companion case to his two earlier cases. Only in later proceedings of one of the

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442. Banco para el Comercio Exterior v. First Nat'l City Bank, 744 F.2d
three cases in which the exception was applied did the court (Judge Kearse again) rest on the supposed exception—but more on “law of the case” grounds than on any further analysis of whether such an exception exists.\textsuperscript{443} One cannot, then, take the counterclaim exception as definitely established.\textsuperscript{444}

To accept an exception for counterproceedings, one must accept the erroneous notion that the act of state doctrine is simply a subsidiary application of the principle of foreign sovereign immunity.\textsuperscript{445} There is no reason to conclude that the same solution is appropriate to similar problems under the two doctrines—even though a foreign state, by filing of a suit, implicitly waives some of its sovereign immunity.\textsuperscript{446} Nor, given the differing policies behind the two doctrines, does simple equity require that the act of state doctrine be set aside when the foreign state brings a suit, no matter how sensible that may be in the context of sovereign immunity.\textsuperscript{447}

Although a careful policy analysis of the act of state doctrine leads to the conclusion that courts should reject an exception for counterproceedings as such, the exception unfortunately is nearly established in the case law.\textsuperscript{448} In light of the unsettled state of the exception in the Supreme Court, however, it is not too late to hope that the exception might yet be disallowed.

\begin{thebibliography}{99}

\bibitem{443} Banco Nacional de Cuba v. Chemical Bank, 822 F.2d 230, 236-37 (2d Cir. 1987).

\bibitem{444} See Restatement (Third), \textit{supra} note 32, \textit{§} 443 reporters’ note 9.


\end{thebibliography}
3. Customary international law

One might think Justice Harlan's oft-quoted opinion in Banco Nacional de Cuba v. Sabbatino\(^{449}\) would preclude an exception for violations of customary international law. He not only found that the act of state doctrine is not a rule of international law,\(^{450}\) but he also refused to except a purported violation of customary international law from the doctrine.\(^{451}\) Yet Richard Falk\(^{452}\) read Justice Harlan's opinion as indicating an exception for acts in violation of clearly and widely accepted principles of customary international law, relying on the following passage:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.\ldots\ [W]e decide only that the Judicial Branch will not examine the validity of a taking of property\ldots 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.\(^{453}\)

Since Sabbatino, lawyers have seldom argued for a customary international law exception,\(^{454}\) perhaps because they expect summary rejection of such an argument. Only two courts have applied customary international law in the face of the act of state doctrine, but in both cases the court relied on a different excep-

\(^{449}\) 376 U.S. 398 (1964); see generally supra § II(D)(1).

\(^{450}\) 376 U.S. at 421-23.

\(^{451}\) Id. at 427-35.

\(^{452}\) Falk III, supra note 147, at 410-11. Michael Bazyler, supra note 3, at 336 n.58, has identified Falk's earlier article criticizing the trial court's handling of the Sabbatino case as the primary source of Justice Harlan's opinion. See Falk, Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino, 16 Rutgers L. Rev. 1 (1961); see also Restatement (Third), supra note 32, § 443 comment d; Halberstam, supra note 33; Lengel, supra note 52, at 72-81, 91-102.

\(^{453}\) Sabbatino, 376 U.S. at 428. The paragraph containing this passage is quoted in full supra at note 135.

\(^{454}\) See, e.g., Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292-93 (3d Cir. 1979).
tion to displace the doctrine.\textsuperscript{455} One might also cite cases like \textit{Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij}\textsuperscript{456} as actually having been based on such an exception, although the courts in those cases explained their decisions differently.

If a customary international law exception were accepted, there would be considerable uncertainty as to which rules of customary international law are sufficiently established to qualify for the exception.\textsuperscript{457} One of the more candid champions of this exception frankly acknowledged that it is simply a variant form of the purported human rights exception.\textsuperscript{458} These problems should not prevent a court from accepting the exception.

As Justice Harlan indicated in \textit{Sabbatino}, so long as the law in question is clear enough to prevent either the foreign state or third parties from relying on the finality or validity of the act, American courts should not accord an irrebuttable presumption of validity to acts violating customary international law. Such an exception would eliminate the act of state doctrine as "the single most important reason for the arrested development of international law in the United States."\textsuperscript{459} The analysis of the treaty exception more fully develops why this conclusion is consistent with


\textsuperscript{457} Note that although the Supreme Court found the question of an international legal duty to compensate for expropriated property to be too uncertain to except from the act of state doctrine, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-31 (1964). Judge Kearse found such a rule certain enough to apply after having set the act of state doctrine aside under the highly questionable exception for counterproceedings. Banco Nacional de Cuba v. Chemical Bank, 822 F.2d 230, 236-37 (2d Cir. 1987); see also United States v. Buck, 690 F. Supp. 1291, 1300-01 (S.D.N.Y. 1988).

\textsuperscript{458} Comment, supra note 132, at 790 n.139; see infra § IV(B)(7).

the policies underlying act of state doctrine.\(^{460}\)

4. Executive suggestions (the Bernstein exception)

The concept of an exception for executive suggestions, usually known as the Bernstein exception, epitomizes the difficulties in applying the act of state doctrine. The exception originated as a ploy for evading the doctrine in order to redress Nazi looting.\(^{461}\) The exception has never been applied in any other case—not even in other cases involving Nazi gangsterism.\(^{462}\) The exception was apparently twice disavowed by a majority of the Supreme Court, but it continues to be resurrected in both judicial opinions and scholarly writings.\(^{463}\)

Arnold Bernstein was arrested and held for two years by vaguely identified Nazi officials, during which time he was coerced into signing his property over to persons designated by those officials.\(^{464}\) The defendants sometime later took title to the property, allegedly with knowledge of its extortion from an imprisoned Jew.\(^{465}\) Although the Nazi acts apparently were illegal even under the German law of the time,\(^{466}\) the first case against ultimate holders of the property was dismissed on act of state grounds. An American court could not sit in judgment on the acts of a foreign state within its own territory, notwithstanding the World War fought in part to establish the international illegality of the acts or the Judgment of the Nuremberg Tribunal declaring the acts criminal under international law.\(^{467}\)

Judge Learned Hand, writing for the majority, suggested that as the act of state doctrine was created to shield the executive

\(^{460}\) See infra § IV(B)(9).

\(^{461}\) See Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949), modified per curiam, 210 F.2d 375 (2d Cir. 1954); see also Bernstein v. Van Heyghen Freres S.A., 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947).


\(^{463}\) The Bernstein exception has produced more scholarly comment than almost any other aspect of the act of state doctrine. For a reasonably complete list of recent articles on the Bernstein exception, see Comment, supra note 337, at 690 n.74. See also Restatement (Third), supra note 32, § 443 reporters' note 8.


\(^{465}\) Id. at 247.

\(^{466}\) Id. at 249.

\(^{467}\) Id. at 251-52.
from embarrassment in its conduct of foreign relations, the doctrine might be set aside if the executive were to suggest that no embarrassment would result from disregarding the doctrine.\footnote{468} The majority declined to infer such a suggestion from the many formal denunciations of Nazi acts by the executive, including the repeal of the Nazi racial laws by the occupation authorities.\footnote{469} Judge Clark dissented precisely because there could be no possible embarrassment to the executive's conduct of foreign relations.\footnote{470}

Bernstein proved remarkably slow to take up Judge Hand's suggestion. He began a second suit, \textit{Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij},\footnote{471} against another ultimate purchaser, only substituting a general allegation of duress for any mention of Nazi action. Taking notice from the earlier suit of the nature of the duress, the Court of Appeals for the Second Circuit again upheld a dismissal on act of state grounds. Only after the second dismissal did Bernstein secure a letter from the Legal Adviser to the State Department stating that there would be no embarrassment to our conduct of foreign relations if the suit were to proceed without regard to the act of state doctrine.\footnote{472} Based on this letter, the Court of Appeals reversed itself in a \textit{per curiam} opinion, nearly five years later, and permitted Bernstein's suit to proceed.\footnote{473}

The peculiar facts of the \textit{Bernstein} cases might permit one to consider the cases to fall outside the scope of the act of state doctrine regardless of what the State Department chose to say. In fact, several other purported exceptions to the doctrine claim the second \textit{Bernstein} decision as the first, perhaps the only, instance of actual application of the other exception.\footnote{474} The insistence of the Court of Appeals for the Second Circuit on an explicit waiver from the State Department, however, appeared to introduce a new and sweeping potential for executive interference of the sort that had then recently become established for questions of for-
The State Department reaction to this opportunity is suggested by the Department's refusal to issue its second Bernstein letter until 1970, twenty-one years after the first was issued and sixteen years after that first letter was acted on. Only a handful of Bernstein letters have been issued since.

The Supreme Court has never definitively ruled on the executive suggestion exception. In the next Supreme Court case, Banco Nacional de Cuba v. Sabbatino, the Court did not reach the issue because, after some confusion, the State Department declined to issue a Bernstein letter. Despite Justice Harlan's express reservation of the question, his reasoning permitted some to argue that the Court had disapproved the exception. The State Department apparently did not think so: it went on to issue its second Bernstein letter six years after Sabbatino.

Nor was the Supreme Court able to resolve the validity of the executive suggestion exception when squarely confronted with it in First National City Bank v. Banco Nacional de Cuba. Only the plurality opinion by Justice Rehnquist, joined by Chief Justice Burger and Justice White, unequivocally endorsed the exception. Justice Rehnquist reasoned that, as the purpose of the act of state doctrine was to protect the conduct of foreign policy by

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475. See, e.g., Mexico v. Hoffman, 324 U.S. 30 (1945); Ex parte Peru, 318 U.S. 578 (1943); J. DELLAPENNA, supra note ***, at 6-8.


478. Sabbatino, 376 U.S. at 420 n.19 (1964) (State Department's ambiguous letter held not to be a Bernstein letter); see also Bazyler, supra note 3, at 362-63.

479. Sabbatino, 376 U.S. at 419-20; see also Cooper, supra note 30, at 220-21; Metzger, The State Department's Role in the Judicial Administration of the Act of State Doctrine, 66 AM. J. INT'L L. 94, 98-99 (1972); Comment, supra note 337, at 689 n.60.

480. See supra note 476. For others who considered the question still open, see, e.g., S. REP. No. 1188 pt. 1, 88th Cong., 2d Sess., at 24, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 3829, 3852 [hereafter S. REP. No. 1188]; RESTATEMENT (SECOND) OF FOREIGN REL. LAW § 41 reporter's note 5 (1965); Leigh & Sandler, supra note 30, at 698.


482. Id. at 760-70 (plurality op. per Rehnquist, J.).
the political branches, and as the President was the "sole organ" of the nation for the conduct of foreign relations,\(^{483}\) courts should defer to the determinations of the President (or his delegates) on the propriety of judging the validity of foreign state acts.

Justice Brennan, joined in a dissent by Justices Blackmun, Marshall and Stewart, equally unequivocally rejected the executive suggestion exception.\(^{484}\) He reasoned that the exception was more likely to hinder the executive's conduct of foreign relations than to facilitate it. In his view, the executive branch is most likely to suggest the inapplicability of the act of state doctrine in cases where it strongly disapproves of the acts in question. A court would embarrass foreign relations if it were to approve an action which the executive branch sought to condemn.\(^{485}\)

The dissenters conceded political control of the recognition of foreign governments.\(^{486}\) They would also receive suggestions from the executive branch on whether to apply the act of state doctrine, but they would not take such a suggestion as binding on courts.\(^{487}\) They saw complete deference to executive judgments as politicizing the judiciary.\(^{488}\) Such deference would require courts to decide cases for which no clear legal standards exist, and hence cause courts to treat similar litigants unequally.\(^{489}\)

Neither Justice Douglas nor Justice Powell would commit to either camp, however, and thus both camps remained short of a majority. Justices Douglas and Powell both criticized the Bernstein exception, but each went on to vote with the plurality on the merits. Justice Douglas criticized the Bernstein exception for reducing courts to "errand boy[s] for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not other's."\(^{490}\) His comments remained mere dictum, however, as he based his opinion on his view that the case involved sovereign


\(^{484}\) City Bank, 406 U.S. at 776-93 (Brennan, J., dissenting).

\(^{485}\) Id. at 783-84. Attorney-General Katzenbach, at least, considered this argument far-fetched. See Mathias, supra note 3, at 400-01. On the other hand, two student commentators concluded that it was the "most convincing argument for rejection of Executive Suggestion." Note, supra note 43, at 621.

\(^{486}\) Id. at 786 (Brennan, J., dissenting).

\(^{487}\) Id. at 790.

\(^{488}\) Id. at 790-91.

\(^{489}\) Id. at 785-87, 792-93.

\(^{490}\) Id. at 773 (Douglas, J., concurring).
immunity and not the act of state doctrine. Justice Powell’s comments were even less pointed. He declared that he was uncomfortable with “a doctrine which would require the judiciary to receive the Executive’s permission before invoking its jurisdiction.” He then went on to state that courts should decide for themselves whether the case involved a political question without, however, indicating how courts were to decide the matter.

Given the divisions of the Court, one is not surprised that several different opinions emerged as to whether an exception for executive suggestions survived the City Bank case. The four dissenters in the next Supreme Court case on the act of state doctrine, Alfred Dunhill of London, Inc. v. Cuba, insisted that City Bank had definitely repudiated the Bernstein exception. Even the plurality in Dunhill did not mention the exception despite the presence of a Bernstein letter for the case. On the other hand, the State Department has continued to issue such letters, and the plurality in Dunhill based its “commercial act exception” on the “presently expressed views of those who conduct our relations with foreign countries.”

Confusion in the Supreme Court engendered similar confusion throughout the legal system. The Court of Appeals for the Second Circuit relied on Bernstein letters as a significant factor in a set of decisions not to apply the act of state doctrine, although it did not indicate which, if any, of the several factors it considered dispositive. Similarly, scholarly and professional opinion has

491. Id. at 770.
492. Id. at 773 (Powell, J., concurring).
493. Id. at 775-76; see supra § III(B); see also Note, supra note 7, at 96-101.
495. Dunhill, 425 U.S. at 686-706 (plurality op. by White, J.). The letter is reprinted in id. at 706-11.
496. Id. at 697. Michael Bazyler curiously concludes that all Justices in Dunhill ignored the State Department suggestion. Bazyler, supra note 3, at 343, 363-65, 368-70.
ranged from the view that the Bernstein exception is dead,\textsuperscript{498} to the view that it is still an open question,\textsuperscript{499} to the view that it is the law of the land.\textsuperscript{500} At this point, one can understand why courts and attorneys are unwilling to put their primary reliance on executive suggestions. Only the Justice Department has recently attempted to rely on the supposed exception, suggesting that the initiation of an antitrust suit by the United States itself should preclude application of the act of state doctrine.\textsuperscript{501}

An exception for executive suggestions is really just a variant form of Justice Powell's political question theory of the act of state doctrine, suffering all the infirmities of that theory.\textsuperscript{502} The exception politicizes the judicial process and makes the finality of "acts" of foreign states highly uncertain. The Bernstein exception serves no necessary purpose: even the case which gives it its name could and should have been decided under other, more appropriate exceptions.\textsuperscript{503} One can easily conclude that the exception has already been disapproved by the Supreme Court,\textsuperscript{504} and little would be lost in burying the exception for good.

\textsuperscript{498} LEFLAR, supra note 31, at 206; Chow, supra note 25, at 417-19; Cooper, supra note 30, at 223-25; Note, supra note 7, at 100-01; Note, supra note 43, at 620-23.

\textsuperscript{499} 2 EHRENZWEIG II, supra note 34, at 74 n.63; Bazyler, supra note 3, at 339-41; Chow, supra note 25, at 445; Conant, supra note 162, at 265; Gardner, Foreign Relations Law, 1982 ANN. SURVEY AM. L. 217, 244-46; McCormick, supra note 50, at 500-02; Note, The Status of the Act of State Doctrine—Application to Litigation Arising from Confiscation of American Owned Property in Iran, 4 SUFFOLK TRANS-NAT'L L.J. 89, 115-16 (1980); Note, supra note 25, at 313-16.

\textsuperscript{500} Bazyler, supra note 3, at 328, 368-70; Cooper, supra note 30, at 222-28; Leigh & Sandler, supra note 30, at 698-700; Timberg, supra note 66, at 30-33; see also Lengel, supra note 52, at 95-96; Comment, supra note 132, at 791-92.


\textsuperscript{502} See supra § III(B).

\textsuperscript{503} See supra note 474.

5. **Governmental extinctions**

In *Menzel v. List*, Judge Klein gave the extinction of the Nazi government in Germany as one of four reasons for denying application of the act of state doctrine. He made the suggestion in a single sentence in the midst of a long discussion of the other reasons. The point was devoid of authority except to prove (in 1966!) that the Nazi government no longer existed.

Judge Klein's suggested exception to the act of state doctrine for acts of a government that no longer exists is not so far fetched as the sparsity of his authority might suggest. There can be no risk of embarrassment to the conduct of the foreign relations by the United States if the government which would take offense no longer exists. Justice Harlan suggested as much in the key passage of the *Sabbatino* decision from which this and most other theories and exceptions trace their lineage:

The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, . . . for the political interest of this country may, as a result, be measurably altered.

The exception for acts of an extinct government might simply be a reciprocal of the retroactive application of the act of state doctrine to protect acts taken by foreign governments before recognition by the United States. Justice Harlan and Judge Klein, however, seemed to consider the governmental extinction to be merely one factor to be balanced against others in deciding whether to invoke the act of state doctrine.

Given the rarity of true governmental extinctions, with no other government succeeding to its place, courts will have few op-

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portunities to determine whether such an exception actually exists. In recent times, only Germany after World War II was stripped of all government and subjected to four years of military occupation without a successor government in place. Even after revolutions or a basic social and legal restructuring, relations with a successor government usually will require the same deference for acts of the prior government as if that government had continued to exist.

The recent efforts of the Philippines to recover the assets of former President Marcos that were located in the United States presented the last issue. The two proceedings denominated Philippines v. Marcos proved no less troubling in this regard than in others. In the end, both courts used Marcos’ fall as a significant, but not dispositive, factor in deciding against application of the act of state doctrine. Because the courts ultimately rested their decisions on a conclusion that the acts in question were not acts of the state, these cases cannot be taken as establishing a governmental extinction exception.

For the claim that there is a full-fledged governmental extinction exception, one must turn to the writings of Richard Falk. Falk’s conclusion should not be incorporated into the act of state doctrine. The extinction of the government that made a decision does end concerns over affront to the sovereign from which the decision emanated and over wasting that sovereign’s decision-making resources. The extinction, however, does not necessarily eliminate reasonable reliance by third parties on the final validity of the act or their commitment of resources to the decision-making process. Therefore, courts probably should not set aside the act of state doctrine simply because the government responsible

509. See Declaration Regarding the Defeat of Germany and Assumption of Supreme Authority by the Allied Powers, in The Axis in Defeat 45 (State Dep’t Pub. 2423, June 5, 1945).


511. See the text at supra notes 4-12.


for the act has ceased to exist. Rather, if the validity of such an act is to be reexamined, a court should seek some other infirmity in the act to establish that a third party had no reasonable basis for relying on it.

6. Human rights claims

The reporters of the Restatement (Third) have suggested that acts in violation of the international law of human rights are not protected by the act of state doctrine, arguing that "the accepted international law of human rights is both well established and contemplates external scrutiny of such acts." In other words, they present it as a particular application of the purported general exceptions for treaties or for clear violations of customary international law. Several authors have also strongly supported such an exception.

Despite this support, however, no court has ever applied an exception for human rights violations as such. A number of cases could be cited as exhibiting a human rights exception, but each in fact was decided on some other basis. Only by quoting language out of context or by citing inapposite cases can one cre-

515. Restatement (Third), supra note 32, § 443 comment c.
516. See supra § IV(B)(3) & infra § IV(B)(9).
518. Bazyler, supra note 3, at 373-74; Chow, supra note 25, at 445-46.
ate the impression that a human rights exception to the act of state doctrine has been judicially recognized.\textsuperscript{520} No one has made a case for such an exception in terms of the policies underlying the act of state doctrine.

Neither the enforcement of clear international standards nor whether human rights violations are subject to external scrutiny are the policy issues in determining whether there is a human rights exception to the act of state doctrine. The policy issue is whether an American court is the proper forum for applying such standards and for providing such external scrutiny. For good reasons, most American jurists have concluded that an American court is not the proper forum.

If the purpose of the doctrine is to avoid having the judiciary interfere with or embarrass the executive’s conduct of foreign relations,\textsuperscript{521} there will rarely be a more sensitive or more potentially embarrassing issue than a claim that a foreign state has violated international standards of human rights. Therefore, courts will probably continue to apply the act of state doctrine to treat such “acts” as conclusive unless the courts find some more widely recognized exception applies to an egregious violation of human rights. As long as the human rights law in question is clear enough to prevent either a foreign state or third parties from relying on the finality or validity of the act, American courts should apply a customary international law or treaty exception, and not accord an irrebuttable presumption of validity to acts violating it.\textsuperscript{522}

7. Improper motives

Two courts have suggested in dictum an exception to the act of state doctrine when the act of the foreign state was procured by bribery, coercion or fraud.\textsuperscript{523} Both courts strangely offered Judge

\textsuperscript{520}. See, e.g., Paust, \textit{supra} note 517, at 242-47.


\textsuperscript{522}. Cf. Justice Harlan’s analysis in \textit{Sabbatino}, 376 U.S. at 427-28, where he wrote “the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . .” The passage is quoted in full at \textit{supra} note 135.

Mulligan’s majority opinion in *Hunt v. Mobil Oil Corp.* as authority for a purported fraud or coercion exception to the doctrine, even though Judge Mulligan had concluded in that case that the act of state doctrine barred the court from inquiring into motives behind a foreign act of state. Judge Mulligan had been careful to emphasize in *Hunt* that, despite the then recent disclosures of widespread American bribery of foreign government officials, which had led to the Foreign Corrupt Practices Act, there had been no allegation of corruption of foreign officials, and there was no exception to the act of state doctrine for such corruption. Judge Van Graafeiland’s dissent in *Hunt* had gone to this very point.

Recently the Supreme Court seemed to find inquiries into the motives of the foreign state to be consistent with the act of state doctrine. Other courts have held that there was no exception for corruption or fraud. By the very nature of the judicial process, courts must inquire into the intent and purposes of governments in order to interpret and apply the relevant law to the cases before them. So long as the court is not asked to review the validity of the act in question, they cannot contravene the act of state doctrine yet if the courts are to avoid embarrassing the executive’s conduct of foreign relations the courts must be circumspect about inquiring into the motives behind an act of state. The solution to this conundrum is perhaps suggested in a suit involving an act of a foreign state induced by the United States—*Langenegger v. United States.*

526. *Hunt*, 550 F.2d at 79; see also *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 407-08 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984); see generally infra § IV(B)(8); Rosenthal, supra note 343, at 500-02.

http://digitalcommons.law.villanova.edu/vlr/vol35/iss1/1
Rosa Langenegger and others sought compensation for their coffee plantation in El Salvador which was taken by the Salvadorean government as part of its land reform program. Instead of suing El Salvador, however, they brought suit against the United States. They claimed that the United States had instigated the taking by threatening to withhold foreign aid if the Salvadorean government did not undertake meaningful land reform. Judge Kozinski of the Court of Claims had doubts about the justiciability of the claim because it would require the court to examine in detail relations between the two governments. He held, however, that there was no taking by the United States when the taking was by, or principally for the benefit of, a foreign government.

On appeal, the Court of Appeals for the Federal Circuit, in an opinion by Senior Judge Nichols, rejected questions about the justiciability of the claim, noting that "courts are often presented with questions which consider congressional or executive actions and purposes, and have managed to decide cases without putting the government in a fishbowl." The court went on to emphasize that the inquiry into purposes would be an objective one, provable from typical sources such as committee reports, executive messages, and other nonsecret documents, rather than from secret conversations or even floor debates in Congress that would involve the court in examining possible ulterior motives behind the act. As Judge Nichols concluded:

To the extent that . . . motivation may be pertinent, . . . the relevant facts reside in what that government "purported" to do. If the "purported" reasons for action are not the real reasons, . . . the matter is not one the judicial bench can correct; a subjective determination of a government's motive is beyond judicial inquiry.

The Federal Circuit panel went on to hold that the issue was justiciable and not a political question, but that the United States was not responsible for the particular taking in question. This same "objective/subjective" motivation analysis could easily be applied to delimit the appropriate measure of inquiry into the motives or purposes expressed in the action of a foreign state.

532. Id. at 234-36.
533. Id. at 232.
534. 756 F.2d at 1569.
535. Id.
536. Id. at 1572.
Such a test would preclude inquiry into improper motives like bribery, coercion or fraud, so long as these motives had been kept hidden. Any other result would eviscerate the entire act of state doctrine. 537

A claim of an exception for acts involving fraud or coercion by or on a foreign government is based on simple disapproval of the acts of the foreign state. This runs counter to every policy at work in the act of state doctrine, producing affront to the foreign state, embarrassment to the executive’s conduct of foreign relations, waste of the foreign state’s (and private) decision-making resources, and disregard of reasonable reliance by third parties on the finality and validity of the act. 538 Ordinary errors of fact or law simply are not a basis for disregarding the finality or validity of an act of a foreign state. 539 Nor, when courts have been unwilling to find an implied repeal of the act of state doctrine from the Foreign Sovereign Immunities Act, 540 should courts be ready to imply a repeal of the act of state doctrine from the Foreign Corrupt Practices Act.

8. Ministerial acts

The supposed ministerial act exception centers on two opinions by Judge Weis of the Court of Appeals for the Third Circuit. In Mannington Mills, Inc. v. Congoleum Corp., 541 Judge Weis wrote for the court that “ministerial activity is not the kind of governmental action contemplated by the act of state doctrine.” Two lower federal courts and several commentators interpreted this statement as creating yet another exception to the doctrine, excluding ministerial acts from its scope. 542

Three years after Mannington Mills, Judge Weis wrote for the court in Williams v. Curtiss-Wright Corp., 543 in which the appeal

538. See the text at supra notes 261-69.
541. 595 F.2d 1287, 1294 (3d Cir. 1979).
543. 694 F.2d 300, 302, 303 (3d Cir. 1982).
challenged the trial judge's use of the supposed ministerial act exception. Judge Weis wrote: "Mannington Mills did not create an exception to the act of state doctrine based on the ministerial-discretionary dichotomy, nor does that opinion differ with the Supreme Court's cases on point." He went on to adopt the balancing approach, with the ministerial nature of the act being merely a factor to be balanced.

Judge Weis noted that insofar as the ministerial nature of an act indicates that it is not politically sensitive, an American court's examination of the act's validity was not likely to seriously affect the conduct of foreign relations. The political sensitivity of an act will not, however, always turn on whether an American court will classify it as ministerial. His reasoning does not leave much scope for a ministerial act exception.

The supposed ministerial act exception suffers from the same difficulties as the proposed commercial act exception. How one decides whether an act is ministerial remains problematic. Furthermore, no matter how one decides an act is ministerial, the finality of the decision, the waste of decision-making resources, and the potential affront to foreign sovereign dignity is not less because the act is described as ministerial. Once again, prudence might well cause a court to defer absolutely to a foreign state's decisions involving its interests within its own territory whether the act is characterized as ministerial or otherwise, as long as the decision really is an "act" by the state, and is not vulnerable under any other exception to the act of state doctrine.

9. **Treaties**

One can trace the idea of a treaty exception to the act of state doctrine to the same passage in Justice Harlan's Sabbatino opinion that suggests a possible exception for clear violations of custom-

544. See supra § IV(A)(3).
545. 694 F.2d at 303-04.
546. See the text at supra notes 402-15.
548. That these are the relevant policies underlying the act of state doctrine, see the text at supra notes 261-69.
549. Cf. supra § IV(A)(2).
550. See supra § IV(A)(1).
ary international law. In his refusal to examine the validity of a taking of property "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles," he seemed to suggest the two exceptions and to discuss the proper allocation of competence between the judiciary and the executive branch for determining international law. A treaty exception would exclude from the doctrine acts covered by a treaty binding the foreign state and the United States.

Strictly speaking, Justice Harlan neither actually recognized a treaty exception nor indicated that a treaty would necessarily affect the balancing process described in the passage as a whole. In *Menzel v. List*, just twenty-two months later, Judge Klein picked up Justice Harlan's language to posit a treaty exception to the act of state doctrine in a case involving Nazi confiscations in violation of the Hague Convention on the Laws of War. As Judge Klein gave three other reasons for disregarding the act of state doctrine, however, this might have been mere dictum. Thereafter, the possibility of a treaty exception lay quietly until the crisis with Iran.

Unlike most other expropriations which were so prominent in act of state litigation in the 1960s and 1970s, when Iran nationalized its insurance industry, including American interests, Iran violated a treaty with the United States. The American insurance companies joined together in *American International Group, Inc. v. Iran*. In an opinion that largely centered on questions of sovereign immunity, with only one paragraph devoted to the act of state doctrine, Judge Hart gave three reasons why the doctrine should be ignored: that the validity of the taking itself was not in question, only the failure to pay compensation; that the failure was in violation of a treaty; and that the failure involved a commercial activity.

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552. RESTATEMENT (THIRD), supra note 32, § 443 comment b, & reporters' note 5.


554. Id. at 308-11, 313-14, 267 N.Y.S.2d at 812-16, 818.


The first and last of Judge Hart's reasons for disregarding the act of state doctrine were clearly wrong. Is a refusal to pay, as a matter of state policy, not an "act"?\textsuperscript{557} Is refusal, as a matter of state policy, to pay for expropriated property a commercial act or decision?\textsuperscript{558} Thus the only sustainable basis for his decision was his assertion of a treaty exception to the doctrine. But the utility of the decision as precedent for a treaty exception was undercut both because Judge Hart included it with two clearly incorrect theories and because his decision was vacated as a result of the executive agreement enabling the release of the hostages held in Tehran.\textsuperscript{559} Shortly afterwards, one court rejected the concept.\textsuperscript{560}

Finally, in Ethiopian Spice Extraction Co. v. Kalamazoo Spice Extraction Co.,\textsuperscript{561} a court faced the treaty exception squarely and unequivocally. When a government-owned Ethiopian corporation sued for non-payment for goods sold and delivered, the defendant (Kalamazoo) counterclaimed for non-payment for the earlier expropriation of Kalamazoo's interest in the plaintiff corporation, as well as for breach of contract by the Ethiopian corporation and appropriation of trade secrets.\textsuperscript{562}

Judge Gibson dismissed the counterclaim against the Ethiopian government because of the act of state doctrine.\textsuperscript{563} He noted that the Ethiopian taking was in violation of a treaty between Ethiopia and the United States,\textsuperscript{564} the language of which was virtually identical with the property protection clause in \textit{American International Group}. Judge Gibson held that the clause did not "provide enough in the way of controlling legal standards to remove the danger of conflict with the Executive Branch that underlies the act of state doctrine."\textsuperscript{565} Having decided that the

\textsuperscript{557} See supra § IV(A)(1).

\textsuperscript{558} See supra § IV(B)(2); see generally J. Dellapenna, supra note ***, at 152-54.

\textsuperscript{559} American Int'l Group, Inc. v. Iran, 657 F.2d 430 (D.C. Cir. 1981).


\textsuperscript{562} Id. at 1225-26.

\textsuperscript{563} Id. at 1233. But see supra § IV(B)(2).


\textsuperscript{565} 543 F. Supp. at 1230-31.
purported treaty exception did not apply, he went on to hold that neither the territorial limitation nor the Hickenlooper Amendment precluded application of the act of state doctrine. 566

Judge Gibson’s decision would have rendered the property protection clauses in at least twelve treaties 567 ineffective in private litigation over violations of the clauses. His decision thus precipitated a shower of protest. The American Bar Association and the U.S. Departments of State, Treasury, and Justice filed amicus briefs urging reversal on the basis of a treaty exception to the act of state doctrine. 568

The Court of Appeals for the Sixth Circuit reversed in a unanimous opinion written by Judge Keith. He relied on Justice Harlan’s Sabbatino opinion and Judge Hart’s opinion in American International Group to find that the treaty with Ethiopia permitted the court to examine the validity of the expropriation or of the failure to pay compensation, notwithstanding the act of state doctrine. 569 Judge Keith also observed that the amicus brief for the United States removed fear of judicial interference with the executive’s conduct of foreign relations, almost as if it were a Bernstein letter. 570 Judge Keith remanded the case for application of the treaty to the facts of the case. 571

Before the year was out, the Court of Appeals for the District of Columbia Circuit followed Kalamazoo and applied the treaty exception. 572 Three courts thereafter accepted the treaty exception, but found it inapplicable to the facts in the cases before them. 573

566. Id. at 1231-33; see supra § IV(A)(2) & infra § IV(C).
567. The court of appeals in Kalamazoo provided an appendix listing treaties between the United States and Belgium, France, Greece, Ethiopia, Iran, Israel, Japan, Korea, Nicaragua, Oman, Pakistan, Togo, and the Republic of Vietnam, from which it quoted virtually identical property protection clauses. 729 F.2d at 428-30. The treaty with the Republic of Vietnam has now effectively lapsed. There are other treaties with property protection clauses that are phrased differently, and which thus might not have the same effect.
568. Id. at 425.
569. Id. at 425-28.
570. Id. at 427-28; see supra § IV(B)(4).
Kalamazoo thus seems to have established a treaty exception, at least until the Supreme Court rules directly on the question. 574

One might think that a treaty exception would depend on a finding of a waiver by the foreign state of the protection of the act of state doctrine. When one reads the treaties in question, 575 however, one finds no waiver of the doctrine, but an agreement on the applicable law. The courts which suggested or held that there is a treaty exception also stressed the agreement on the applicable law rather than any implicit waiver of the act of state doctrine. 576 A treaty exception therefore could more easily be explained if the act of state doctrine were a "super choice-of-law" rule and not a rule of compulsory recognition of final decisions. 577

Careful analysis of the policies relating to recognition of judgments, however, also supports a treaty exception in terms somewhat similar to the waiver exception. 578 Several courts supported a treaty exception by stressing that agreement on the applicable law removed the risk of embarrassment to the executive's conduct of foreign relations. 579 This is a simple acknowledgement that international agreement defuses the recognition policy of avoiding affront to foreign sovereigns. Unacknowledged, but perhaps just as important, is that a treaty sufficiently warns third parties against reliance on the finality or validity of covered acts of the foreign state. The only policy remaining would be a reluctance to see the decision-making resources of the foreign state or of private parties wasted. This concern carries little weight when

574. Restatement (Third), supra note 32, § 443, reporters' note 5; see also Falk III, supra note 147, at 409; Bazylew, supra note 3, at 371-72; Chow, supra note 25, at 445.

575. See the treaties cited supra in notes 555, 564 & 567.


577. See supra §§ III(B), (C).

578. See infra § IV(B)(11).

the foreign state has applied those resources in a manner clearly inconsistent with the state’s solemn international commitments.\textsuperscript{580}

One can only argue against the validity of the treaty exception if one sees the violation of the treaty as a simple error of fact or law, and, like all such errors, irrelevant to the validity of a jurisdictionally sound final decision.\textsuperscript{581} Refusal to re-examine the merits of the foreign state’s "act," however, is judicial abdication of any role in creating or perfecting the rule of law in the affairs of nations.\textsuperscript{582} Giving effect to an error of fact or law at the price of sacrificing the rule of law is hardly justified if neither the state making the error nor any third parties have, or could have, justifiably relied on the finality of the decision.\textsuperscript{583} The treaty exception is consistent with the policies underlying the proper functioning of the act of state doctrine. Courts ought to develop and apply it despite the relatively sparse actual authority for it.

10. Unjust enrichment

In \textit{First National Bank v. Banco Nacional de Cuba},\textsuperscript{584} Judge Breiant reached the remarkable conclusion that the act of state doctrine did not apply if a foreign state unjustly enriched itself by refusing to pay for expropriated assets. Judge Breiant cited \textit{Alfred Dunhill of London, Inc. v. Cuba}\textsuperscript{585} as support for his conclusion, on a vague theory that under these circumstances no act of the state was involved. The Court of Appeals for the Second Circuit took him as suggesting the strangest exception thus far proposed for the act of state doctrine: an exception for unjust enrichment.

The Second Circuit had considered such an argument in an earlier case, rejecting it as without authority and without a sound basis.\textsuperscript{586} This time a unanimous panel, writing through Judge

\textsuperscript{580}. That the policies discussed in this paragraph are the relevant policies, see the text \textit{supra} notes 261-69.
\textsuperscript{581}. \textit{See supra} note 252.
\textsuperscript{582}. \textit{See supra} notes 252-53; \textit{Bazyler, supra} note 147; \textit{Halberstam, supra} note 33, at 329, 381-84; \textit{Goldie, supra} note 147; \textit{Lengel, supra} note 52, at 72-81, 91-102; \textit{Lillich, supra} note 147.
\textsuperscript{585}. 425 U.S. 682 (1976).
Kearse, noted that an unjust enrichment exception would wholly eliminate the act of state doctrine in expropriation cases, "for virtually every taking will enrich the sovereign, and to the extent that compensation is not paid that enrichment will have been unjust."587 This Court of Appeals decision should put an end to the idea of an unjust enrichment exception.

Any other conclusion would defeat every policy involved in the act of state doctrine.588 An unjust enrichment exception would affront the sovereignty of the foreign state, waste the foreign state's and private decision-making resources, and upset reliance by third parties on the finality of the decision. Even so, one commentator seemingly concluded that there might be such an exception despite noting the language of the Court of Appeals decisions rejecting the possibility.589

11. Waivers

In Compania de Gas v. Entex, Inc.,590 the Court of Appeals for the Fifth Circuit confronted a claim that a foreign state had removed the act of state doctrine from the case by consenting to the court's determination of the validity of the state's act, even though the state itself was not directly involved in the suit. This might be thought of as a waiver exception, perhaps as an analogue to the Bernstein (executive suggestion) exception.591 Judge Thornberry, on behalf of a unanimous panel, refused to read the letter as addressed to the act of state doctrine and thus did not actually reach the question of what effect, if any, should be given to such a letter. He did acknowledge that such a letter could influence a U.S. court, but stated that the letter would be only one of many factors to be considered.

Apart from an inconclusive comment in one other case,592 a waiver exception to the act of state doctrine finds its only support in the comments to the Restatement (Third).593 The reporters concluded that such an exception would be contrary to the rationale

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588. See the text at supra notes 261-69.
589. See Comment, supra note 359, at 560 n.92.
591. See supra § IV(B)(4).
593. Restatement (Third), supra note 32, § 443 comment e; see also Comment, supra note 523, at 233.
of the doctrine of deference to the executive's conduct of foreign relations, yet they also concluded that the consent of a foreign state to the litigation or arbitration of claims against the state itself could amount to a waiver of the act of state defense.

The reporters were too cautious. If the purpose of the act of state doctrine is to avoid embarrassment to the State Department, then a clear indication that the foreign state would not be offended by judicial examination of its acts ought to remove that concern even in cases not directly involving the foreign state itself, at least if the State Department has not expressed a concern about the case on some other grounds. Such a waiver should also remove any concern about waste of the foreign state's decision-making resources because the foreign state itself is not concerned about such waste.

The only legitimate concern, then, would be over possible waste of third-party decision-making resources and third-party reliance on the finality of the "act." As an express waiver by a foreign state amounts to a withdrawal of any claim of finality for the act, the concern over third-party reliance should carry no more weight than it would after a court judgment has been vacated or otherwise overturned. Thus, despite the slender authority for an exception for express waivers, such an exception should be upheld in a case where the waiver can be proven, even if the litigation does not directly involve the foreign state itself.

The primary authority against such conclusions is DeRoburt v. Gannett Co., in which the Ninth Circuit applied the act of state doctrine to bar a suit brought by the Prime Minister of a foreign state who objected to the invocation of the act of state defense by the defendant. Assuming, as is almost certainly the case, that the Prime Minister had authority to waive the doctrine, the court's conclusion has been rightly characterized as "absurd." Indeed, courts should be more willing to adopt such a waiver exception than they are to consider a customary international exception to the doctrine. Opportunities for a court to consider the

594. See Bazyler, supra note 3, at 345.
595. See Ebenroth & Teitz, supra note 25, at 253-54.
596. For a fuller explanation of the policies underlying the act of state doctrine, see the text at supra notes 261-69.
597. Restatement (Second) of Judgments § 27 comment o (1982).
598. 733 F.2d 701 (9th Cir. 1984), cert. denied, 469 U.S. 1159 (1985).
599. Bazyler, supra note 3, at 346-47 n.123; see also Chow, supra note 25, at 472.
600. See supra § IV(B)(3).
waiver exception will be rare at best, however, as courts undoubtedly will not find such a waiver unless the foreign state has expressed itself in the clearest possible terms.601

C. The Hickenlover Amendment

The Hickenlooper Amendment is unique among the various exceptions to the act of state doctrine, as it alone certainly is law, having been adopted by Congress as an amendment to the Foreign Assistance Act of 1964.602 The label "amendment" has stuck to the provision in part because it was a very late addition to the Foreign Assistance Act,603 and in part because it provoked such strong opposition when it was enacted. Curiously, the Supreme Court has never considered applying the statute, although it has been analyzed in numerous lower court cases and might have been applied in either of the badly divided decisions in First National City Bank v. Banco Nacional de Cuba604 and Alfred Dunhill of London, Inc. v. Cuba.605

Senator Hickenlooper introduced his Amendment promptly after the Supreme Court's decision of Banco Nacional de Cuba v. Sabbatino,606 in order to reverse part of that decision to enable injured property owners to challenge foreign expropriations (particularly in Cuba) for violations of international law.607 The Amendment therefore has also been variously called the Sabbatino Amendment,608 the Second Hickenlooper Amendment,609 or the

609. See, e.g., West v. Multibanco Comermex, S.A., 807 F.2d 820, 829 (9th Cir.), cert. denied, 482 U.S. 906 (1987); Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1541-42 n.180 (D.C. Cir. 1984), vacated on other grounds, 471 U.S.
"Rule of Law Amendment." The Hickenlooper Amendment reads:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Congress enacted the Hickenlooper Amendment despite strong opposition from the State Department and heavy criticism by legal scholars. Enactment seemed immediately to carry the
day. The Hickenlooper Amendment was applied to the *Sabbatino* case itself on remand, despite the Amendment's retroactive change in the law of a case already decided by the Supreme Court, and despite an argument that the Amendment violated due process and separation of powers.\(^\text{613}\) The State Department switched to supporting the Amendment,\(^\text{614}\) never invoking the power to suggest that a court refrain from determining the validity of a taking under the "principles of international law." No court has ever declared the Amendment invalid for any reason.\(^\text{615}\) However, courts have decided no other case on the basis of the Hickenlooper Amendment.

Courts have refused to apply the Hickenlooper Amendment through an extremely close and hostile reading of its complex language.\(^\text{616}\) As the Amendment applies to every court "in" the United States, and not just to courts "of" the United States, no one could argue that it does not apply in state courts. Courts could seize upon other phrases in the Amendment to narrow its scope to the point that it could only apply to a case through extreme carelessness by the expropriating state or by someone tracing title through an expropriating foreign state.

Courts seized particularly on the phrase "claim of title or other right to property," holding that it limits the application of the Hickenlooper Amendment to what are in effect *in rem* proceedings based on the presence of the specific property, or its traceable proceeds,\(^\text{617}\) within the territorial jurisdiction of the

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\(^{614}\) See *id.* at 181 n.16; *Restatement (Third)*, supra note 32, § 444 reporters' note 3.

\(^{615}\) Two courts suggested that, but did not decide whether, the Amendment was unconstitutional. Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1201 n.6 (5th Cir. 1978), cert. denied, 442 U.S. 928 (1979); MOL, Inc. v. Bangladesh, 572 F. Supp. 79, 83 (D. Or. 1983), aff'd on other grounds, 736 F.2d 1326 (9th Cir.), cert. denied, 469 U.S. 1037 (1984); see also *Falk III*, supra note 147, at 424.

\(^{616}\) Bazyler, supra note 3, at 392-94; Conant, supra note 162, at 267; Halberstam, supra note 33, at 70-71; Comment, supra note 149, at 124-28.

\(^{617}\) The only case in which a court applied the Amendment involved traceable proceeds of expropriated property, rather than the property itself. *Banco Nacional de Cuba*, supra note 147.
court when the proceedings began, with recovery limited to the property or its value. When the defendant is a foreign state, however, a court cannot attach the property or prevent the property’s removal from the jurisdiction prior to judgment. Thus, true in rem proceedings under the Hickenlooper Amendment are only possible against a private party who invokes the act of state doctrine.

Courts have also interpreted the same phrase narrowly in construing what rights qualify as a “claim to title or other right to property.” Several courts have concluded that “other right to property” does not include claims based on contract rights.


619. 28 U.S.C. §§ 1605(b), 1609, 1610(d), 1611 (1982).

Yet "contract rights" frequently are considered property in other contexts;\(^\text{621}\) and there is some authority that contracts qualify as property under international law as well.\(^\text{622}\) While one might make a good argument for excluding claims for breach of the foreign state's own contracts from the term "property" under the Hickenlooper Amendment, it seems peculiar to do so for contract rights expropriated from one party and conveyed to a third party.\(^\text{623}\)

Moreover, to make the phrase "to property" serve to exclude all contract rights from the Hickenlooper Amendment one would have to conclude that Congress intended the addition of the phrase to narrow the scope of the Amendment as first enacted,\(^\text{624}\) but the legislative history is explicitly contrary.\(^\text{625}\) The accompanying Senate Report stated that the phrase "to property" was added solely to protect financial institutions from multiple liability on contracts or insurance policies taken over by a foreign state by distinction distinguishes between property which is real or personal, tangible or intangible."


\(^{624}\) Congress added the phrase "to property" after the phrase "claim of title or other right" a year after the Hickenlooper Amendment was first enacted. See supra note 611.

enabling the institutions to invoke the act of state doctrine.\textsuperscript{626} In the hearings on the proposal, Cecil Olmstead, one of the drafters of the change, reported: "I would think that a contract right would [be covered] because there is a property interest in the contractual right of course. We certainly intended that a contractual right would be covered here."\textsuperscript{627}

These statements are uncontradicted in the legislative record. Thus the phrase "to property" seems to have been added more as a clarification than as a change in the Hickenlooper Amendment. The phrase was not meant to exclude contract rights generally from the reach of the Amendment. Two courts recently concluded in dictum, therefore, that the phrase "to property" included contract rights, but declined to apply the Amendment on other grounds.\textsuperscript{628}

Courts have also used the requirement of a "confiscation or other taking . . . in violation of international law" to limit the reach of the Hickenlooper Amendment. Courts have consistently strained to avoid a finding that a taking had occurred.\textsuperscript{629} They also have taken a narrowing view of what constitutes a violation of international law in this context.

This second Hickenlooper Amendment cross-refers to the first Hickenlooper Amendment for the international law standard to be applied: usually summarized as prompt, adequate and effective compensation.\textsuperscript{630} There has been hot debate, both inter-
nationally and domestically, over whether this standard is in fact required by international law.\textsuperscript{631} As Congress has the power to define “Offenses against the Law of Nations” for courts in the United States,\textsuperscript{632} the pair of Hickenlooper Amendments ought to be sufficient to define the standard for courts confronting foreign expropriations.\textsuperscript{633} Nonetheless, whether Congress intended this statute to be merely declarative, changing as international law changes, or constitutive, fixing the definition so long as Congress does not amend the statute, is not entirely clear.\textsuperscript{634}

Failure to provide prompt, adequate, and effective compensation does not exhaust the relevant criteria for violations of in-

law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, . . . .”

The “prompt, adequate, effective” formula is found in many places, including the Restatement (Second) of Foreign Rel. §§ 188-90 (1965). See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-29 nn.26-30 (1964); H.R. Rep. 94-1487, supra note 398, at 6618; see generally J. Dellapenna, supra note ***, at 172-74.


632. U.S. Const. art. I, § 8, cl. 10; Restatement (Third), supra note 32, § 115.


634. See generally J. Dellapenna, supra note ***, at 173-74.
international law. The United States has traditionally also required that the taking be for a public purpose and non-discriminatory. Courts have shown little interest in these requirements as they would serve to enlarge, rather than to restrict, the possible scope of the Hickenlooper Amendment. Instead, courts have seized on the now obsolete tradition that a state's acts towards its own citizens cannot be in violation of international law as a further means of excluding claims from the reach of the Amendment. No court has applied the more modern approach to the Hickenlooper Amendment.

One might find yet more traps in the language of the Hickenlooper Amendment, although courts have not been receptive to others that have been proposed: they have not needed them. One court rejected an argument that the Amendment did not reach suits directly against the foreign state. Another court rejected an argument that the Amendment did not reach suits directly against the foreign state.

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635. West v. Multibanco Comermex, S.A., 807 F.2d 820, 832 (9th Cir.), cert. denied, 482 U.S. 906 (1987); President's Policy Statement, 8 COMP. PRES. DOC. 64 (1972); RESTATEMENT (THIRD), supra note 32, § 712 (1).


637. The closest case is Banco Nacional de Cuba v. Farr, 383 F.2d 166, 185 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968) (corporate veil was pierced to provide a remedy for American stockholders of a Cuban corporation expropriated because of its American ownership). Other courts have provided a remedy for nationals of the expropriating state when the property was located in the United States at the time of the expropriation, but because of the territorial limitation, not because of the Hickenlooper Amendment. See supra § IV(A)(2); Malta Corp. v. Cawy Bottling Co., 462 F.2d 1021, 1025 (5th Cir.), cert. denied, 409 U.S. 1060 (1972); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 714-16 (5th Cir.), cert. denied, 393 U.S. 924 (1968); F. Palicio y Compania, S.A. v. Brush, 256 F. Supp. 481, 486-88 (S.D.N.Y. 1966), aff'd mem., 375 F.2d 1011 (2d Cir.), cert. denied, 389 U.S. 830 (1967).

jected the dubious suggestion that the Amendment only protects American plaintiffs. Nor have the express limitations in the Amendment figured prominently in the decided cases. With the sweeping limitations the courts have read into the Amendment, the narrow express limitations have not been necessary to restrict its reach. Thus, only one court has considered the temporal limitation, and no court has dealt with property acquired in exchange for short-term letters of credit.

Despite the almost complete judicial evisceration of the Hickenlooper Amendment, courts continue to assert that the Amendment is valid. Congress included an analogue in the Foreign Sovereign Immunities Act, presumably to make suits easier under the Amendment. (The Amendment did not address the jurisdiction or competence of courts.) Still, few judges have advocated a broader reading for the Amendment.

Among the handful of reported arguments for a broader reading of the Hickenlooper Amendment, Judge Keating's dissent in *French v. Banco Nacional de Cuba* is the most developed. Judge Steakley's dissent in *Hunt v. Coastal States Gas Producing Co.* also presented a cogent and powerful argument. The holding which comes closest to supporting a broader reading of the Amendment is Judge Wilkey's majority opinion in *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1541 (D.C. Cir. 1984), vacated on other grounds, 471 U.S. 1113 (1985); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 882 n.10 (2d Cir. 1981); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 n.4 (3d Cir. 1979); *United States v. Pizzarusso*, 388 F.2d 8, 10 n.4 (2d Cir.), cert. denied, 392 U.S. 936 (1968). Remember, the Amendment has been applied only in the very case that prompted its enactment. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 172-83 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968).


640. D'Angelo v. PEMEX, 317 A.2d 38, 42 (Del. Ch. 1973) (taking must have occurred on or after January 1, 1959—the day Castro entered Havana), rev'd on other grounds, 331 A.2d 388 (Del. 1974); see also *Conf. Rep. No. 1925*, supra note 603, at 3890.


lano v. Weinberger, on behalf of a 6-4 majority in an en banc re-hearing reversing an earlier decision by Judge (now Justice) Scalia. Judge Wilkey rejected the alleged restrictions without significant discussion, dropping the point to a footnote. This decision, however, was vacated and reversed on other grounds, leaving the opinion little weight as authority, although Judge Reinhardt quoted Judge Wilkey’s opinion with approval in West v. Multibanco Comermex, S.A.

One might suspect that the dearth of opinions applying the Hickenlooper Amendment is because the Amendment accomplished one of its supporters’ major goals: to prevent the United States from becoming a “thieves’ market” for expropriated property. Perhaps direct application of the Hickenlooper Amendment is unnecessary because the Amendment completely discouraged the marketing or processing of improperly expropriated property or its proceeds in the United States. If so, one might well consider the Amendment a success. Depriving a foreign state of a U.S. market for the fruits of its violation of international law often might deter the violation. Unfortunately, the Amendment does not seem to have had this effect.

When there are at least fifty-eight separate, identifiable shipments of oil from a single confiscated oil field to the United States, title to all of which shipments are held to be shielded from judicial scrutiny by the act of state doctrine notwithstanding the Hickenlooper Amendment, the Amendment definitely does


646. 807 F.2d 820, 830 (9th Cir.), cert. denied, 482 U.S. 906 (1987).


not prevent the marketing, transhipment or processing of the fruits of improper expropriations in the United States. Results such as these oil cases suggest that courts have also frustrated the other major purpose of the Amendment: to assure persons whose property has been taken of a “day in court” to determine whether the taking was consistent with international law. This goal is so central to the Amendment that it has been termed the “Legality Corollary to the Act of State Doctrine,” and the “Rule of Law Amendment.” Decisions such as these shield the foreign taking from judicial scrutiny and avoid saying anything about the legality of the taking under international law.

Judicial hostility to the Hickenlooper Amendment stands in stark contrast to the care with which courts consider the other purported exceptions to the act of state doctrine. Whether one believes the Hickenlooper version of international legal standards is a proper basis for resolving these disputes or not, Congress directed courts to play a major role in developing and applying these standards. Courts have refused to accept the role, probably under a misguided fear of setting themselves up as international policemen.

On the other hand, as the Hickenlooper Amendment is a statute, it cannot be completely buried unless it is found to be


650. See Note, supra note 43, at 614 (legality corollary); and the sources cited in supra note 610 (rule of law amendment).

651. Even the few courts which gave nonviolation of international law as a reason for not applying the Hickenlooper Amendment seemed to be providing more of an excuse to avoid close scrutiny of the taking rather than to be actually engaging in such scrutiny. See supra notes 629-37.


653. See, e.g., West v. Multibanco Comermex, S.A., 807 F.2d 820, 833 (9th Cir.), cert. denied, 482 U.S. 906 (1987); see also Leigh & Sandler, supra note 30, at 700-09; Comment, supra note 149, at 133, 145.
unconstitutional. \(^{654}\) Whether the judiciary's fear of being an ineffective international police force is valid ought to have been seen as resolved by Congress through the statute. Nor should application of the Amendment to takings in violation of international law as many as five years before its enactment trouble the courts. \(^{655}\) Congress simply clarified the misconstruction of international law in \textit{Sabbatino}; \(^ {656}\) it did not change the law to catch unaware those who had relied on the validity of the act of a foreign state.

The major objection to the Hickenlooper Amendment ought not to be its elevating of international law above the protection offered acts of foreign states by the act of state doctrine. Objections ought to center on the Amendment's limitations both in commanding courts to defer to the President or his delegate in determining whether to apply the doctrine, and in applying it only to a limited class of claims. The Hickenlooper Amendment, in permitting the President to determine whether the doctrine should be applied, \(^ {657}\) is really a variation of Justice Powell's political question theory, suffering all the infirmities of that theory. 

It politicizes the judicial process and makes the finality of acts of foreign states highly uncertain, certainly contrary to the basic policies involved in the act of state doctrine. \(^ {659}\)

In any event, due to the evisceration of the statute, the executive branch has not had to undertake a role under this Hickenlooper Amendment. Judging from the attitude of the executive branch towards the First Hickenlooper Amendment (which requires the executive branch to terminate foreign aid to offending countries—a power seldom invoked, and then only reluctantly,


\(^ {655}\) Passed in 1964, the Amendment applied retroactively to Jan. 1, 1959 (the day Castro entered Havana).


\(^ {657}\) The President is given the power to certify that application of the act of state doctrine is necessary for the foreign policy of the United States, in which case courts must apply the doctrine notwithstanding any violation of international law. 22 U.S.C. § 2370(e)(2) (1982).

\(^ {658}\) \textit{See supra} § III(B).

\(^ {659}\) \textit{See the text at supra} notes 261-69.
under political pressure), there is little reason to believe the executive wants to play a role under this, the Second Hickenlooper Amendment.

If the judicial interment of the Hickenlooper Amendment reflects fear of confronting these failings, which clash with the policies of the act of state doctrine, it could be best for the Hickenlooper Amendment to remain ignored. Yet, the Amendment is not so different from situations where Congress, in defining the scope of full faith and credit to be accorded to sister-state judgments, has give other values priority over the finality of a decision. Here Congress has exercised its power to define "Offenses against the Law of Nations" and to give prevention of those offenses priority over the finality of foreign state "acts." Thus, while I also fear the politicization of the judiciary through the Hickenlooper Amendment, I ultimately agree with Judge Keating's dissent in which he argued that the courts have unfairly read the Amendment to render the labor of Congress in vain.

D. Section 15 of the Arbitration Act

After several unsuccessful attempts in Congress to amend or abolish the act of state doctrine in the 1980s, Congress at last passed its second statute limiting the application of the doctrine. This act, S. 2204, added a new section 15 to title 9 of the U.S. Code. The new section simply states:


661. Cf. Golbert & Bradford, supra note 30, at 33; Mathias, supra note 3, at 414; Timberg, supra note 66, at 33.


663. See U.S. Const., art. I, § 8, cl. 10; Restatement (Third), supra note 32, § 115. This is the correct understanding of Judge Reinhardt's observation that in the Hickenlooper Amendment "Congress has determined . . . that the courts are competent to resolve such claims . . . ." West v. Multibanco Comermex, S.A., 807 F.2d 820, 829 n.8 (9th Cir.), cert. denied, 482 U.S. 906 (1987).


665. See infra § VII.
Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.\textsuperscript{666}

The intent of this statute is both clear and limited, and it is not likely to pose serious interpretive problems. The new statute precludes invocation of the act of state doctrine in any suit involving arbitration with a foreign state, leaving any possible defenses based on sovereign state action (whether by way of the act of state doctrine or the foreign sovereign compulsion doctrine) to the arbitrators to resolve.

The new section 15 was intended\textsuperscript{667} to reverse the decision in \textit{Libyan American Oil Co. ("LIAMCO") v. Libya}.\textsuperscript{668} In \textit{LIAMCO}, Libya had agreed in a concession agreement to arbitrate any dispute under the agreement. Judge Smith held that Libya’s repudiation of its concession agreement constituted an act of state. By his reasoning, the act of state doctrine prevented any recognition of the repudiated concession agreement, including the agreement to arbitrate, thus barring enforcement of a Swiss arbitral award based on the repudiated agreement.\textsuperscript{669}

The State Department and the American Arbitration Association strongly opposed this reasoning, and prevailed upon the Court of Appeals to vacate Judge Smith’s opinion even after the parties settled (after oral argument before the Court of Appeals).\textsuperscript{670} Still, as no other court considered the question of the role of the act of state doctrine in arbitral cases arising under the Foreign Sovereign Immunities Act,\textsuperscript{671} Judge Smith’s opinion remained as the only reasoned precedent on point. To prevent the


\textsuperscript{667}. Feldman, \textit{Arbitration Law Strengthened by Congress, N.Y.L.], Nov. 10, 1988, at 1, col. 1. Mark Feldman then held the chair of the ABA Section on International Law and Practice Committee on Sovereign Immunity; as such he was principally responsible for drafting S. 2204 and shepherding it through Congress.


\textsuperscript{669}. \textit{See} J. DELLA PENNA, supra note ***, at 399.

\textsuperscript{670}. 684 F.2d at 1032.

possibility that his opinion would be followed by another court, S. 2204 was proposed.

Gaging the effect of the new statute is easier than explaining how it fits with a correct understanding of the act of state doctrine. One could simply see it as a statutory repeal of the doctrine by a Congress that values American ideas of proper state conduct over the finality of decision and other values expressed by the doctrine. Mark Feldman, who is principally responsible for the new statute, chose to explain the purpose of the statute somewhat differently:

Neither the comity, separation of powers nor choice of law rationales applies to [arbitration] proceedings, because the court does not pass upon the validity of the foreign sovereign's act. It merely enforces the agreement of the foreign state to binding adjudication by a third party.

Despite displaying a somewhat muddled concept of how the act of state doctrine functions, ultimately equating the doctrine with the concept of sovereign immunity, Feldman's statement does suggest a kernel of understanding of what the act of state doctrine is about. The doctrine, absent some relevant exception, requires courts to treat the act of the foreign state as valid. As Mr. Feldman explains, such issues as the validity of the acts of a foreign state are not to be judged by the court; such issues are to be judged by the arbitrators in the fashion the foreign state itself has designated for resolving such questions. Thus, the statute effectively codifies a limited version of the "waiver exception" to the act of state doctrine. As such, it is consistent with the proper understanding of the doctrine.

V. MAKING SENSE OF THE ACT OF STATE DOCTRINE: A SUMMARY OF JUDICIAL ANALYSIS

With so many exceptions, limitations, and general or special theories proposed for the act of state doctrine, anyone seeking to apply the doctrine must develop a thorough understanding of the basic policies underlying the doctrine. One must then examine
each proposed theory, exception, or limitation to determine in light of this understanding whether and how it should be used. In this article I have attempted to show that the purpose of the act of state doctrine is to serve as a rule of repose. It assures the finality in the United States of certain decisions, expressed in "acts" of foreign states, in much the same fashion as the full faith and credit clause of the Constitution676 assures finality throughout the United States for judgments from sister-state courts.677 The doctrine does not serve as a rule of abstention, a special application of the political question doctrine, or a "super choice-of-law" rule.678

Given that the act of state doctrine functions as a rule of repose, the policies which ought to inform the application of the doctrine are four:679 preventing affront to the sovereignty of foreign states; preventing waste of a foreign state's decision-making resources; preventing waste of private decision-securing resources; and protecting reliance of third parties on the finality of "acts" of a foreign state. Thus, the oft-expressed concern that the doctrine be used to prevent embarrassment to the executive's conduct of foreign relations680 reflects two of the policies underlying the doctrine. This concern highlights the "constitutional underpinnings" of the doctrine,681 underpinnings which suggest that courts generally should not carve exceptions out of the relevant policies unless directed to do so by the proper steps within the political branches. The executive will always focus primarily on possible affront to a foreign sovereign682 and will be much less concerned about waste of decision-making and decision-securing resources and reliance by third parties. Therefore, the ideal place

676. U.S. Const. art. IV, § 1.
677. See supra § III(D).
678. See supra § III(A)-(C).
679. See the text at supra notes 261-69.
681. See the text at supra notes 130-34.
682. Consider the analogous experience when the executive branch was vested with the power to "suggest" (or suggest withholding) sovereign immunity from a foreign state. See Jet Line Services, Inc. v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1169 (D. Md. 1978); H.R. Rep. 94-1487, supra note 398, at 6606-07; see generally J. DELLAPAENNA, supra note ***, at 3-8; Cardozo, Sovereign Immunity: The Plaintiff Deserves a Day in Court, 67 Harv. L. Rev. 608, 613-14 (1954); Jessup, Has the Supreme Court Abdicated One of Its Functions?, 40 Am. J. Int'l L. 168, 170 (1946); Timberg, supra note 66, at 11.
to decide the priorities among these policies (the proper place to balance the various political factors, if you will) should be Congress, and not a mere suggestion by the State Department.683

Courts should not undertake on their own to balance these or other factors on a case-by-case basis. To decide through a judicial balancing process whether to recognize as final a decision by a foreign state destroys the very values the act of state doctrine should achieve, regardless of whether the balancing process is called "comity," the "pure theory," or a "phenomenological approach."684 Judicial balancing destroys the certainty without which no one could safely rely on a decision. The process of analyzing the extent of the foreign state's interest and weighing it against the interests of others would itself be an affront to the foreign state's sovereignty.

It is perhaps unfortunate that the first decision to announce the doctrine685 involved a dispute over a specific act, for the use of the term "act" can be misleading. An "act of state" is a decision which determines legal rights and duties and which expresses (determines or carries out) the central policies of the state.686 Thus, an "act" can include total nonaction,687 and can be (but need not always be) in the form of an executive, a legislative, or a judicial decision.688 It is not a decision involving only routine management of government689 or the resolution of strictly private controversies.690

As with any rule of repose, a central question in the application of the act of state doctrine is whether the "act" was undertaken in a proper exercise of jurisdiction. While this issue is resolved in perhaps too cautious a way for today's world, one of the few well-established features of the doctrine is that it does not apply to "acts" which cannot be given initial effect within the territory of the foreign state from which the relevant decision emanates.691

683. As Justice Douglas put it, courts should not be merely an "errand boy for the Executive Branch." First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring in the result); see generally supra § IV(B)(4).
684. See supra § IV(A)(3), (4), (5).
686. See supra § IV(A)(1).
687. See the text at supra notes 245, 279, & 311.
688. See the text at supra notes 277, 278, 287, 288, & 312.
689. See the text at supra note 308.
690. See the text at supra notes 231 & 268.
691. See supra § IV(A)(2).
In addition to the territorial limitation, courts ought to adopt exceptions which ensure that a foreign state will feel no affront to its sovereignty and has no concern about the possible waste of its decision-making resources, and under circumstances in which third persons have not expended their decision-securing resources and could not reasonably rely on the decision as final. These exceptions are: the customary international law exception; the treaty exception; and the waiver exception. All other proposed exceptions ought to be rejected.

VI. THE NEED TO CODIFY—NOT TO REPEAL—THE ACT OF STATE DOCTRINE

Congress, under its authority to define “Offenses against the Law of Nations,” could define answers to any question considered in this article. Should Congress indicate by statute that courts are to prefer other values, courts must follow the command of Congress. The two statutory “exceptions” to the act of state doctrine adopted thus far, however, actually express two limited versions of the judicially-proposed exceptions supported here—the customary international law exception, and the waiver exception.

With these notions in mind, beginning in 1980 Senators Domenici and Mathias introduced an “International Rule of Law Act” several times in an attempt to codify and limit the act of state doctrine. The core of the Domenici/Mathias proposal would have been a new section 1657 for title 28 of the U.S. Code:

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 in any case in which the act of state is contrary to international law.

692. See supra § IV(B)(3).
693. See supra § IV(B)(9).
694. See supra § IV(B)(11).
695. See supra § IV(B)(1), (2), (4)-(8), (10).
697. See supra § IV(C), (D).
699. IRLA, supra note 698, § 3.
Additional provisions would have defined international law by incorporating the definition found in the Statute of the International Court of Justice along with acts of Congress defining international law for the United States, and apparently would have preserved the exculpation of a state for violations of international law against its own nationals. The proposal also would have preserved the foreign sovereign compulsion defense. The proposal would have repealed the Hickenlooper Amendment as superfluous if the International Rule of Law Act were enacted. Finally, the proposal would have applied retroactively to any case "where final judgment has not been rendered."

The core of this proposal was later incorporated in a proposed section 1606(b) which was meant to have been added to the Foreign Sovereign Immunities Act by S. 1071. This proposal was introduced on May 3, 1985, as part of a proposed reform of the Immunities Act. While this latest proposal was less detailed, the most important difference from the proposed International Rule of Law Act was that the new section 1606(b) would have controlled the act of state doctrine only in proceedings against foreign states. Finally, Michael Bazyler has recently argued that the act of state doctrine be repealed completely.

Congress as a whole has shown little inclination to enact any of these proposals. The International Rule of Law Act would create an exception to the act of state doctrine virtually identical to the proposed customary international law exception properly understood. It would avoid the pitfalls of the present Hickenlooper Amendment which accords excessive deference to the executive branch and contains unsupportable restrictions to particular classes of wrongs. One should not, however, entirely discount the danger that courts, through hostile construction,
might render such a statute ineffective.\textsuperscript{708} The proposed section 1606(b) would have a much more limited, and more easily limited, further impact.\textsuperscript{709} Michael Bazyler himself justified his proposed total repeal on grounds that the courts could accomplish much the same goals through other legal doctrines.\textsuperscript{710}

The power of Congress to preclude the application of the act of state doctrine is similar to the power of Congress to preclude full faith and credit to particular classes of interstate judgments. Congress has done so in a number of contexts, usually related to civil rights.\textsuperscript{711} At least for acts occurring after the effective date of the statute, no third party can claim reasonable reliance on the validity of the act in question. If Congress has directed that courts risk affront to foreign sovereigns, duplicate decision-making and decision-securing efforts, and ignore reliance by third parties, courts should no longer attend to those concerns.

A statute could shape the doctrine into a coherent and workable rule entirely compatible with the correct understanding of the policies and functions of the doctrine. Perhaps most importantly, as most relevant rules of customary international law are likely to involve basic human rights,\textsuperscript{712} such a statutory version of the act of state doctrine would impair the finality of foreign state decisions only in the face of egregious wrongs, and would return the United States to its accustomed role among the leaders in shaping the international rule of law.

In considering the International Rule of Law Act in its several proposed forms, however, Congress should focus on special situations where risks to innocent third parties might require recognition of the final validity of certain foreign acts even if the acts violate international law. For example, Congress added a limited exception to the Hickenlooper Amendment to protect against liability on certain short-term letters of credit.\textsuperscript{713} Whether such exclusions are really necessary is debatable; the need to carefully consider such protections is not.

Even bearing in mind the risks of judicial nullification of any proposed codification of the act of state doctrine, given the persistent inability of courts to clarify the meaning and effect of the

\textsuperscript{708} Bazyler, supra note 3, at 394-95 n.405; Ebenroth & Teitz, supra note 25, at 253; Comment, supra note 226, at 130-32.

\textsuperscript{709} Comment, supra note 226, at 134-35.

\textsuperscript{710} Bazyler, supra note 3, at 384-92.

\textsuperscript{711} See supra note 682.

\textsuperscript{712} See supra § IV(B)(3), (7).

\textsuperscript{713} See the text at supra notes 611 & 640.
doctrine, Congress should intervene by adopting a statute that would clarify rather than replace the doctrine and the important policies which it serves. If courts were to analyze the act of state doctrine carefully, they would recognize that such a statutory codification of the doctrine would further the ends they have sought in the judicially-constructed doctrine. If courts so recognize, one could more confidently expect courts to apply the new statute rather than to nullify it. Consistent with the analysis in this article, as well as the caveats expressed in this part, I suggest that Congress consider a statute along the lines suggested below. Alternate language is suggested within brackets that would broaden or narrow the scope of the doctrine. If such a statute were adopted, the Arbitration Act\textsuperscript{714} amendment and the Hicklenlooper Amendment\textsuperscript{715} would both be superfluous and ought to be repealed.

(a) For this section, “act of a foreign state” means any action or nonaction which embodies a decision taken under the authority of a state and carried into effect within the territory of the foreign state, when that decision expresses central sovereign concerns of the foreign state, including, but not limited to:

(1) a complete change in the political structure of the state,
(2) a fundamental change in the economic structure of the state, or
(3) basic policy decisions concerning the management of the society or the economy of the state.

(b) Except as provided in subsection (c), courts in the United States must accept any act of a foreign state as valid and final, and use that act to preclude reexamination of any issue, the resolution of which is necessarily expressed by that act.

(c) Subsection (b) does not preclude reexamination of an issue, the resolution of which was necessarily expressed by an act of state if:

(1) the act of state violates a treaty to which the United States is a [and the foreign state are] party[ies];

\textsuperscript{714} 9 U.S.C. § 15 (Supp. VI 1988); see generally supra § IV(D).
\textsuperscript{715} 22 U.S.C. § 2370(e)(2) (1982); see generally supra § IV(C).
(2) the act of state violates [a clear rule of] customary international law; or
(3) the foreign state responsible for the act has [expressly] waived, either before or after the act was taken, the protection of subsection (b) for an act.