

The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?

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THE ACT OF STATE DOCTRINE AND FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976: CAN THEY COEXIST?

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INTRODUCTION

Long before the passage of the Foreign Sovereign Immunities Act of 1976¹ (F.S.I.A), the United States Supreme Court in *Underhill v. Hernandez*,² had established an "absolute" view of the act of state doctrine by holding that United States courts could not question the act of a foreign government. In that decision, on a United States citizen's suit for illegal detention by a Venezuelan revolutionary leader, the Court said in effect that each nation must respect the independence of other

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1. 28 USC § 1330 (1976).

2. *Underhill v. Hernandez*, 168 U.S. 250 (1897). Since the founding of the Nation, the U.S. has respected the act of state doctrine. It was simple, unqualified, and known as the *classic formulation*.

sovereign nations; the courts of one country may not judge another government's acts performed within the confines of its territory.³ Instead, claims arising from such acts were to be addressed diplomatically.⁴ In establishing this act of state doctrine, the Court made it clear that acts of a foreign sovereign are simply not for the courts to question.⁵ Hence, the "absolute" view. With few exceptions, the Court has rigidly adhered to this doctrine.⁶

Consistent with this stance, the Supreme Court responded to the charged political and economic deterioration of United States-Cuba relations in the 1960's,⁷ by further elaborating on the doctrine and its underlying policy in *Banco Nacional de Cuba v. Sabbatino*.⁸ This case grew out of a controversy over the Sugar Act. As a result of an admixture of events, including land reform policies in Cuba, the United States had suddenly decided to reduce its import quota of Cuban sugar under the Sugar Act. Cuba found the reduction inimical to its economic interest and reacted with a rash of expropriations of sugary-carrying vessels in its territory. Cuba also expropriated an American-owned subsidiary, *Compania Azucarera-Vertientes-Camaguey de Cuba* (C.A.V.) which was incorporated under the laws of Cuba and in the sugar brokerage business. The C.A.V. shipped sugar to the United States where 90 percent of its shareholders resided.⁹ When the American shareholders sued, alleging lack of compensation and violation of international law, the district court held that the Cuban Law 851 violated international law in several respects. The court said the

3. *Id.* at 252.

4. *Id.*

5. *Id.*

6. In *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 860 (2nd Cir. 1962) for the first time in the history of the United States, the well settled principle seemed inadequate. See Reeves, *The Sabbatino Case: The Supreme Court of the United States Rejects a Proposed New Theory of Sovereign Relations and Restores the Act of State Doctrine*, 32 *FORDHAM L. REV.* 631, 639 (1964).

7. See Reeves, *supra*, note 6 at 636-37, on America's dissatisfaction with Cuban Agrarian land Reform of 1959. That reform led to declining sugar production. Fearing that the large pledge of sugar to Russia, combined with declining production, might cause Cuba to default on its quota to the U.S. Congress granted to the President the power to reduce the sugar quota of Cuba. The President acted the same day; also on the same day the Cuban government promulgated a bitterly worded anti-American confiscatory law (no. 851), now known as the "nationalization law." Thus, many private companies were then taken over including the broker-dealer Farr, Whitlock and Company, a partnership with its principal office in New York, the respondent in *Sabbatino*.

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

9. *Banco Nacional de Cuba v. Sabbatino*, 193 F.Supp. 375 (S.D.N.Y., 1961).

expropriation

- a) was motivated by retaliatory and not by a public purpose
- b) discriminated against American nationals
- c) failed to provide adequate compensation for the seizure.

The issue on appeal in *Sabbatino* was whether the act of state doctrine was applicable when the act in question violated international law. In an attempt to state the doctrine definitively, the Supreme Court held that:

The Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.¹⁰

Under severe criticism from various pressure groups,¹¹ Congress immediately expressed its disapproval of this case in the second Hickenlooper Amendment (Hickenlooper II) of the Foreign Assistance Act and since maintained that position in its amendments to the Foreign Sovereign Immunities Act (FSIA).

Since *Sabbatino*, commentators have complained that it has become even more difficult to decipher what the United States' doctrine was because the Supreme Court had been consistently divided: each District Court seemed to be taking its own restrictive view; no Supreme Court decision has been without a dissent;¹² and none has attracted a majority decision.¹³ In fact the Supreme Court does not intend to depart from *Sabbatino*, which is richly supported by precedents.¹⁴

10. 376 U.S. 398 (1964). This holding is firmly grounded on precedents enumerated in notes 14 and 15, *infra*.

11. See Hoagland, *The Act of State Doctrine: Abandon It*. 14 DEN J. INT'L L. & POLICY 317, n.3 (1986).

12. See *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972). The justices were divided over directives from the Executive Branch and also over the "constitutional underpinnings" of the separation of powers doctrine. The Court had become more of an errand boy to the Executive.

13. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

14. See *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812); *Underhill v. Hernandez*, 168 U.S. 250 (1897). The roots go back to the English case of *Blad v. Bamfield*, 36 Eng. Rep. 992 (Ch. 1674), cited often as the common law source of the act of state doctrine. In *Blad*, the patents granted him in Denmark by the Danish King were challenged in England. The English court noted that to allow a court to determine the validity of the King's patent or a jury to determine whether the English have a right to trade in Iceland would be "monstrous and absurd". 36 Eng. Rep. at

PURPOSE OF THIS ARTICLE

The purpose of this article is to determine whether the act of state doctrine and the FSIA are meant to coexist despite the frequent scholarly assaults on the doctrine and in spite of, for example, the "commercial exception" and other strong provisions of the FSIA.¹⁵ Coexistence may depend on the exercise of judicial discretion in the case-by-case application of such provisions. To determine their compatibility, Part I attempts to define the act of state doctrine and distinguish it from sovereign immunity. Part II identifies recent evidence of problems at the Supreme Court, the circuit and district court levels. Part III attempts to reflect some of the views of less developed countries (LDCs) on sovereign immunity and its attendant prerogatives. Part IV discusses selected provisions of the FSIA for purposes of illustration. For example, some comments on the implications of the jurisdictional provisions and the "commercial" exception are appropriate within the limited scope of this study. This article does not pretend to study the entire FSIA. Instead, it focuses on evidence of the Court's role in mediating two laws which derive from equal partners in the Constitution and concludes that judicial discretion in enforcing FSIA's provisions could be the key to their coexistence. Such a judicial role could enhance international cooperation by deemphasizing the political and economic retaliatory approaches fostered by the FSIA's belligerent posture.

I. DEFINING THE ACT OF STATE DOCTRINE

Frequently, United States courts have refused to consider international law claims by invoking the act of state doctrine. This doctrine, a judicially fashioned rule peculiar to American and British law, provides that local courts may not question the legal effect of a foreign state's acts fully executed within its own territory.

This doctrine has been and still remains the subject of disagreement among international lawyers since the Supreme Court's controversial decision in *Banco Nacional de Cuba v. Farr*, one of the Cuban expropriation cases often cited as *Banco Nacional de Cuba v. Sabba-*

993. 28 USC § 1330 (1976).

15. See *Ware v. Hylton*, 3 U.S. (3 Dall) 199, 230 (1796); *The Santissima Trinidad*, 20 U.S. (7 Wheat) 283, 336 (1822); *L'Invincible*, 14 U.S. (1 Wheat.) 238, 253 (1816); *The Schooner Exch. v. McFaddon*, 11 US (7 Cranch) 116, 137 (1812). See generally Cardozo, *A Note on Sovereign Immunity*, 17 VA J. INT'L L. 491 (1977); Note: *The Jurisdictional Immunity of Foreign Sovereigns* 63 YALE L. J. 1148 (1954). Note that the most frequently cited case is *Underhill v. Hernandez*, 168 U.S. 250 (1897).

tino,¹⁶ which involved the broker-dealer Farr, Whitlock and Company whose property was expropriated by Cuba.

A. *Distinguishing an Act of State*

For the first time in the history of America, the well-settled Act of State Doctrine seemed to the lower courts to be an inadequate principle of law. The equivocation came in the early stages of the *Sabbatino* decision where the lower court abolished it. Then the Supreme Court restored it.¹⁷

To begin with an "act of state" should not be confused with sovereign immunity. An act of state is what the words say and mean: "the imposition of the national will upon the people and the property within national domain. Any law, customary or statutory, enforced in any country is an act of state. It is a show of right to govern. It is a doctrine developed by the Court on its own authority as a principle of judicial restraint, essentially to avoid disrespect for foreign states."¹⁸

An act of state doctrine, then, is the recognition by a country of the legal and physical consequences of all acts of state in other countries. It recognizes the effects of sovereignty, the attributes and prerogatives of sovereign power. It acknowledges that the world is made up of independent sovereigns; each has sovereign exclusive power within its own national territorial boundaries governed by its own law or decree. The recognition accorded here is reciprocal and each state respects and

16. 307 F.2d 845 (1962).

17. From the very formulation of the issue by Judge Waterman, the court went off track in *Sabbatino* at the Second Circuit. See 307 F. 2d 845 (1962) at 864. The court said "Refusal by municipal courts of one sovereignty to sanction the action of a foreign state done contrary to the law of nations will often be the only deterrent to such actions. . .therefore we conclude that the Cuban decree violated international law, the appellant's title is invalid and the district court was correct in dismissing the complaint" at 869. The U.S. Supreme Court had to reverse as this holding was an affront even to the sovereignty of the U.S. itself. See *The Schooner Exch. v. McFaddon* at note 36.

18. Reeves, *The Sabbatino Case: The Supreme Court of the United States Rejects a Proposed New Theory of Sovereign Relations and Restores the Act of State Doctrine*, 32 *FORDHAM L. REV.* 631 (1964) at 640-641. Thus it is the U.S. government policy that when the political arm accords recognition to a group which clearly appears to be the sole governing organization in physical control and capable of maintaining order and of fulfilling the nations' international obligations, the withdrawal of diplomatic representatives does not withdraw recognition. Besides when such group is recognized as the *de jure* government such recognition is retroactive in effect and validates all the actions of such foreign government from the commencement of its existence. *Oetjen v. Central Leather Co.*, 246 US 297, 302-03, 304 (1918).

accepts the effects imposed by sovereignty over people and property within its jurisdiction. The doctrine, therefore, is a recognition not only of the right to make laws, but also to enforce such laws and govern them. Thus, it is idle to argue that the proceedings of those who triumphed in revolution should be treated as the acts of a bunch of bandits or mere mobs.¹⁹

Other indicia of this recognition are, for example, official recognition of the state by the government of another state. The courts of one state thereby accepts as "valid" an act of state of any other country whose government is recognized as the sole and independent authority in that country.²⁰ Therefore, it is important not to confuse the doctrine of *sovereign immunity*, which protects a sovereign government against lawsuits, with *immunity from jurisdiction*. The latter is granted under certain conditions to foreign sovereigns in our courts or those of other countries under the act of state doctrine. By way of expedience, necessary in international relations, the act of state doctrine recognizes that the courts of one country lack power to reverse or alter the consequences of acts committed by foreign sovereigns in their country.²¹

Indeed, the connection of the act of state doctrine with sovereignty is merely that each sovereign claims exclusive jurisdiction over persons and property, citizens or aliens within its territory and reciprocally must recognize this same exclusive jurisdiction for all other independent sovereigns. The court said in *The Schooner Exch. v. McFaddon*

The jurisdiction of the nation within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent in that power which could impose such restrictions.²²

19. The courts of the United States have repeatedly declared for over a period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such. *Berstein v. Van Heyden Fieres Societe' Anonyme*, 163 F.2d 246, 249 (2nd Cir. 1947)(L. Hand, J.). As the Court of Appeals and the Supreme Court pointed out in *Sabbatino*, this doctrine dates back even earlier. 307 F.2d 855-56; 32 USLW at 4234. *See also* *Underhill v. Hernandez*, 168 U.S. 250, 253 (1897).

20. *Underhill v. Hernandez*, 168 U.S. 250 (1897). *See also* *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918).

21. 168 U.S. 250, 253 (1897).

22. 11 U.S. (7 Cranch) 116, 135 (1812).

Here the U.S. Supreme Court recognized the two doctrines, their common origins and close interdependence. Outside the territory of a state, an act of a state has no effect since each state jealously guards its territories and sovereign prerogatives. This must also be distinguished from *recognition* which is accorded an act of a foreign state within that foreign state's territories. It is well established that an act of a state, though *recognized*, has no extraterritorial effects.²³ It does not affect the rights of persons in the jurisdiction of another state unless the two states are willing to exchange such recognition.²⁴ Thus, the *Sabbatino* court frowned on any interpretation that would disturb peaceful international order without lacking sensitivity for American victims of foreign confiscation. It said:

However offensive to the public policy of this country and constituents states an expropriation of this kind may be, we conclude that both the national interest and progress towards the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application.²⁵

B. *Distinguishing Absolute Sovereignty*

In *Schooner Exch. v. MacFaddon* Chief Justice Marshall articulated *absolute sovereignty* in a way that has not been improved upon:

The jurisdiction of the nation within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself All exceptions, therefore, to the full and complete power of a nation, within its own territory, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.²⁶

Therefore, in the United States, this absolute sovereignty includes the power to enact, proclaim, and enforce law within its territorial boundaries. It embraces the power to accord to other nations sovereign immunity where there is comity and reciprocal understanding or unambiguous agreement between the two independent states.

Within the context of *absolute sovereignty*, not foreign sovereign

23. *See id.*

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

25. *See id.*

26. 11 U.S. (7 Cranch) 116, 135 (1812).

immunity, a state can enact and validly enforce laws within its jurisdiction even if such laws are contrary to the laws of other states or contrary to international law.²⁷ Thus, the United States was the first in the world to enact a local law declaring the international slave trade a crime although Chief Justice Marshall, while personally abhorring the trade, found he must recognize foreign title to certain slaves claimed by other foreign traders.²⁸ Also, some hundred years later, by an amendment to the United States' Constitution,²⁹ another international business was outlawed and thereafter the court enforced the enabling laws against smuggling liquor into the United States. Local laws have been enacted and enforced within the United States jurisdiction to stop various illegal businesses as part of the exercise of absolute sovereignty though such businesses were legal under international law.³⁰

The power of Congress to enact such laws has long been upheld. For example, the owner of a foreign vessel (in the illegal rum running business) brought suit to retrieve his ship seized by American forces within U.S. jurisdictional limits. The vessel was in the illegal rum running business. The court rejected his contention that the Prohibition Act was void, or should not be enforced, because it was in violation of international law.³¹ It upheld the power of Congress to enact such law.³²

In so doing it found support in the Constitution, Article I, Section 8. "The Congress shall have power . . . to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations" The Constitution also makes an act of Congress supreme if in conflict with the law of nations. This settled law was perhaps not considered by the district and circuit courts in the *Sabbatino* case as they adopted a new rule which would have impaired the sovereignty of the United States. The district court, to recapitulate, declared that Cuba had not acquired title to the sugar it confiscated pursuant to its law no. 851. The lower court could also have gone another step extraterritorially to impose sanctions to establish a new principle of international relations. The lower court said, *inter alia*:

27. *See id.*

28. *The Antelope*, 23 U.S. (10 Wheat) 66, 115 (1825). England followed the U.S. example with English court decision in *The Amedie*, 1 Acton 240, 250, 12 Eng. Rep. 92, 96 (1810).

29. U.S. CONST. amend. XVIII.

30. *The Over the Top*, 5 F.2d 838, 842-43 (D.V. Conn. 1925).

31. *See id.*

32. *See id.*

The basis for such recognition and respect vanishes . . . when the act of a foreign state violates not what may be our provincial notions of policy but rather the standards imposed by international law. There is an end to the right of national sovereignty when the sovereign's acts impinge on international law.³³

The court went on to say that the existence of international law implies that "national sovereignty is not absolute but is limited, where the international impinges, by the dictates of this international law."³⁴ The appellate court, stating that "Refusal by municipal courts of one sovereignty to sanction the action of a foreign state contrary to the law of nations will often be the only deterrent to such violations,"³⁵ also endorsed this lower court's view.³⁶

Clearly such a holding had to be reversed by the Supreme Court since it implied that no sovereign state could pass a law in its jurisdiction unless it was in accord with international law. Simply put, it negated the concept of *absolute sovereignty* and advanced the view that courts of other sovereign states could declare a United States law ineffective if they found it in violation of international law.³⁷

The act of state doctrine is ascribed other shortcomings apart from the usual commingling of the concept with sovereign immunity. It is said to impair the effectiveness of the United States laws in many ways, especially in the national policy areas.³⁸ For example, some critics claim that it precludes adjudication of suits brought by private parties for antitrust violation occurring outside the United States.³⁹ Similar charges have been brought in the area of securities laws and matters involving the concept of "situs." The act of state doctrine is also said to hinder the development of international law in the United States.⁴⁰ Furthermore, attempts of private litigants to recover under the Foreign Corrupt Practices Act (1977) are said to be barred by the act of state doctrine;⁴¹ and that it has encouraged "judicial abdication" of responsi-

33. See *Sabbatino*, *supra* note 6 at 381.

34. *Id.*

35. *Id.* at 868.

36. See *id.* at 860.

37. See notes 28 and 30 *supra*. See generally M. Bayzler, *Abolishing the Act of State Doctrine*, 134 U. PA L. REV. 325 (1986).

38. See Bayzler, *supra* note 37, and compare with the holding in *Sabbatino*, 307 F.2d 845 (1962).

39. See *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1974).

40. See note 38 *supra*.

41. See *id.*

bility for resolving international issues.⁴²

On the other side are views that give some comfort. First, the Supreme Court still feels that the doctrine has some redeeming value and hence, has not overruled it. The court still believes that the doctrine is in accord with international law, especially since *Sabbatino*.

Second, the doctrine affords any sovereign who chooses to come to our court an opportunity to have all claims adjudicated at least up to the amount of the claim.⁴³ Furthermore, it has helped promote equality of states and therefore mutual respect and world peace.⁴⁴

II. SOME EARLY AND RECENT EVIDENCE OF THE PROBLEMS

A. *The Problem at the United States Supreme Court Level*

Some critics still maintain that it has been difficult to find meaningful guidance from the United States Supreme Court on this important doctrine. Since this issue is vital to the economy and competitiveness of both the United States and other countries, especially the developing countries, it becomes imperative that an amicable middle ground be sought. Possibly, in the *Underhill* decision, the Court was already aware of the need for coexistence in the context of the League of Nations then in existence. The criticisms leveled at the Court may have been predicated on erroneous or misconceived assumption that the United States can exist in isolation; that North America is self-sufficient and has no need for coexistence in business, trade, detente and armament.

In *Underhill v. Hernandez*, the United States Supreme Court said in an opinion by Chief Justice Fuller:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in

42. See Bayzler, *supra* note 37, at 383. Mr. Bayzler believes, among other things, that the doctrine encourages abdication of judicial responsibility for resolving intricate international issues.

43. See *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) in which F.N.C.B. was allowed to counterclaim against Bancon Nacional de Cuba.

44. See *Schooner Exchange v. MacFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812); *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). See also Bayzler, *supra* note 37, at 383; D. Hoagland, *The Act of State Doctrine: Abandon It*, 14 DEN. J. INT'L L. AND POLICY 317 (1986). But see L. Henkin, *Act of State Doctrine Today: Recollections in Tranquillity* 6 COLUM J. TRANSNAT'L L. 175, 189 (1967). See generally V. Rabinowitz, *Viva Sabbatino*, 17 VA. J. INT'L L. 697 (1977).

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.⁴⁵

This formulation of the act of state doctrine paved the way for the expanded use of the doctrine beyond the immunity enjoyed by the sovereign.

Since *Sabbatino* and all the emotionalism that it evoked from United States citizens, Congress and elsewhere, even among the most sophisticated lawyers and scholars, the claim has persisted that the decision is unclear and gives no direction as to how to deal with incidents of expropriation or repudiation of international obligations with or without adequate compensation to aggrieved parties.⁴⁶ Perhaps *Sabbatino* was not understood because our vision has been clouded by our vested interests in the Cuban situation. Perhaps our perception of our greatness as a powerful and stable nation, and the policeman of the world, obstructs our ability to see ourselves as citizens of the world.⁴⁷ But *Sabbatino* could not be so totally unclear; if it were, what prevents it from being overruled by the Supreme Court which fashioned it?⁴⁸

Sabbatino involved the dispute over the proceeds of the sale of Cuban sugar which Cuba wanted to reach, as part of its program against private ownership. The Court held that the validity of the Cuban resolution authorizing the seizure could not be questioned.⁴⁹ The majority held that the doctrine is not constitutional but has "constitutional underpinnings" rooted in the separation of powers provisions of the Constitution; it also held that the doctrine is not a rule of international law, although it has international implications. In addition, it pointed out that the doctrine is not merely a conflict of laws rule for

45. *Underhill v. Hernandez*, 168 U.S. 250 (1897).

46. Although the U.S. Supreme Court was blamed for lack of direction, the real problem was in the interest groups and their emotional reaction to U.S. - Cuba relations. Some lower courts have followed the example of the lower court in *Sabbatino*.

47. Evidence of this surfaced in the early lower court decision in *Sabbatino*. It exists in the U.S. perception of its Foreign Assistance Program vis-a-vis less developed countries. Countries we assist must do things our way or else.

48. The act of state doctrine was fashioned by the U.S. Supreme Court and only that Court has constitutional power to change it. Congress may pass a law to change the doctrine but the court remains the final arbiter. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

49. *Sabbatino*, 376 US 398 (1964). See *Sabbatino Comes Full Circle: A Reconsideration in Light of Recent Decisions*, 4 N.Y.U. J. INT'L L. & POLITICS 260 at notes 13 and 14.

application in various states but is a doctrine of federal law derived from the Court's deference to the executive branch in dealing with sensitive international relations.⁵⁰

The *Sabbatino* decision was not ambiguous. The court spoke essentially with one voice on the doctrine. What was not clear in *Sabbatino* was the unspoken emotions of the American people in their various interest groups. In spite of the political haranguing that ensued, the Supreme Court, in an opinion by Justice Harlan, rejected the district court's conclusion that a United States court can pass judgment on a foreign state's local act when that act was committed in violation of international law. Drawing breath from the *Underhill* decision, Justice Harlan said that

The Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign government . . . 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.⁵¹

Sabbatino was neither opaque nor evasive; it could not be said to be unclear. Admittedly, it suggested that under certain circumstances, United States courts could determine the validity of an act of state but on a case-by-case basis taking into account "the balance of the relevant considerations."⁵²

Thus, *Sabbatino* modified the classic formulation of *Underhill* to permit judicial examination of an act of a foreign state when a treaty or other unambiguous international agreement supplies a controlling legal standard.⁵³ When such a treaty is in place, the courts deny the act of state defense.

Worthy of mention in support of the *Sabbatino* court is its vigilance in rejecting the dictum of Judge Waterman that the very exist-

50. As the Supreme Court stated in *Sabbatino*, no rule of international law requires application of the act of state doctrine. Nevertheless, the courts of most states have exercised judicial restraint in adjudicating challenges to expropriations by foreign states, whether by application of the act of state doctrine. The Court also indicated that it was not inclined toward having applicability of the doctrine depend on the wishes of the Executive Branch. 376 U.S. at 420, 436. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 443 (1986).

51. See *Sabbatino*, 376 U.S. 398 (1964).

52. See *id.* Thus, *Sabbatino*, upheld the "Restrictive Theory" as opposed to the unconditional doctrine in *Underhill*. The language of the court is clear, as it suggested the case-by-case approach.

53. See *id.*

tence of international law "carries with it the implication that national sovereignty is not absolute but is limited" ⁵⁴ The circuit judge did not realize that while his index finger pointed at Cuba the other four pointed at the United States' claim to sovereignty. Justice Harlan, on the other hand, recognized that such a posture would undermine the sovereignty of the United States in the territories under its control.

Alfred Dunhill of London, Inc. v Republic of Cuba, another Cuban expropriation case is also not devoid of the emotionalism exhibited in *Sabbatino*. Even before the *Dunhill* decision, the Supreme Court had shown itself to be deeply divided for a variety of reasons over the nature and scope of the act of state defense. ⁵⁵ Justice White's minority decision in *Dunhill* was immediately misread by some lower federal courts and others as a majority opinion. Justice White attempted in Part III of his opinion to create a "commercial exception" as a basis for the District Courts to discountenance a defense of act of state. Under this exception a court may scrutinize a foreign sovereign's action to determine whether it is commercial in nature. ⁵⁶ What this opinion failed to consider is that making such a determination first requires probing the activity of the foreign sovereign done in its own territory. Therefore, the Court did not come any closer to a workable consensus. In this sense, *Dunhill* may be close to encouraging revival of the Hickenlooper Amendment, opening the door for our courts to begin to violate international law with frequency. ⁵⁷ It has not provided guidance for future litigation where the act of a foreign state may have violated international law.

Similarly, in *First National City Bank v. Banco Nacional de*

54. *Sabbatino*, 307 F.2d 845, 860 (1962). The Second Circuit clearly misread the handwriting on the wall.

55. Emotions clearly ran high at the *Sabbatino* Court's refusal to countenance the Hickenlooper Amendment. For details, *See Sabbatino Comes Full Circle: A Reconsideration in Light of Recent Decisions*, *supra* note 49. *See also* RESTATEMENT, *supra* note 50 at § 444 for explanation on the Hickenlooper Amendment.

56. As a consequence of this division, *Dunhill* could not muster a majority decision. Many have misread that opinion as a majority opinion including highly regarded Lord Denning of the English House of Lords in *Trendtex Trad. Corp. v. Central Bank of Nigeria*, 2 W.L.R. 356, 369; 1 All E.R. 881 (1977) *cited in* *Texas Trading and Milling Co. v. Republic of Nigeria*, 647 F.2d 300, 310. (2nd Cir. 1981).

57. *Sabbatino* lessons filtered beyond the United States to the new nation states. Hence the reactions from the less developed countries (LDCs) echoed in one voice the need for a new world order. This voice is clear in the various indigenization legislation or decrees initiated by L.D.C.s. *See* A. ADEDEJI, *INDIGENIZATION OF AFRICAN ECONOMIES* (1981) in which several African countries explained their indigenization programs. Indigenization is the process that makes possible the participation of citizens in the economic process of the particular country.

*Cuba*⁵⁸ decided prior to *Dunhill*, the Court had failed to achieve a majority opinion and the significance of the case had to be extrapolated from a plurality opinion and two separate concurrences.⁵⁹ Consequently, *Dunhill* only further muddled an already confusing situation. In sum, since *Sabbatino*, the U.S. Supreme Court has not with a clear majority approved the "restrictive" theory approach to the sovereign immunity problem. The members of the Court have been divided on a number of rationales, and so have been the lower courts until Congress enacted the FSIA in 1976.⁶⁰

B. Views from the Second Circuit Cases

There is no doubt that with *Schooner Exch.*, *Underhill* and *Sabbatino*, the United States Supreme Court clearly and unequivocally established criteria for the application of the act of state doctrine. If there is any appearance of confusion, it has emanated from the perceptions of the various interpreters of the United States decision in *Sabbatino*. Many of these expert interpreters may have had vested interests in the U.S.-Cuban embroglio.⁶¹ The Second Circuit relied on the *Bern-*

58. 406 U.S. 759 (1972). Justices continued to be divided on whether to follow the Executive Branch's directives. The separation of powers doctrine continued to raise questions about the judicial role as the Executive continued to be inconsistent in its directives. The justices knew that the role of the law is to provide guidance and predictability, a point the *Sabbatino* Court saw clearly.

59. *See id.*

60. With the weak decision in *Dunhill* as a tool, the circuit courts especially the Second Circuit fashioned an exit from the holding of *Sabbatino*. In the process, many confusing decisions have been handed down. For example, questions still linger as to why the Second Circuit did not just enforce the agreements of the parties in *Texas Trad. and Milling Co. v. Republic of Nigeria*, 647 F.2d 300 (1981) and in the *Allied III* cases. In *Allied III* the IMF agreement was involved. That, too, was sidetracked by the court. The court decided the case on the merits contrary to *Sabbatino*. *See also* RESTATEMENT, *supra* note 50 at § 713(j),(k) and Reporter's notes 1, 2 and 3 for a discussion of the use of treaties as sources of remedies.

The Reporter's Note also advances in Note 4 "Remedies pursuant to special contractual arrangements." The note points out that it is common for traders and investors dealing with foreign governments to seek clauses in their contracts providing for the resolution of disputes outside of national legal systems such as Court of Arbitration of the International Chamber of Commerce. Such agreements are generally regarded as effectively waiving sovereign immunity and are enforceable under Convention on the Recognition and Enforcement of Arbitral Awards, 21 U.S.T. 251 U.S.T. 2517 T.I.A.S. No. 6997, 330 UNTS 3. *See generally* Delaume, *States Contracts and Transitional Arbitration*, 75 AM. J. INT'L L. 784 (1981).

61. 134 U. Pa. L. Rev. 325 *supra*, at 328; Restatement (3d) of US Foreign Relations Law § 443 at Note 8 p. 380.

stein exception to the act of state doctrine, to uphold the lower court's decision against Banco Nacional de Cuba. The Bernstein exception to the act of state doctrine requires courts to follow the will of the Executive when the State Department informs the court that the doctrine should not be applied.⁶² During the appeal, two letters issued by State Department officers led the court to believe that the Department did not object to an inquiry on the merits. Such lack of objection meant the court could disregard Cuba's act of state defense. It meant that the courts could then disregard the sovereignty of Cuba and decide whether Cuban law promulgated in Cuba for Cubans was valid. Thus, while the Second Circuit in *Sabbatino* was willing to make a determination on the merits based on blind adherence to the views of the State Department on whether the doctrine should be applied, the U.S. Supreme Court willingly, clearly and succinctly reversed the Appellate Court. The Court did, however, qualify the apparently inflexible and absolute doctrine in *Underhill* to accommodate a case-by-case formulation.⁶³

Even in *First National City Bank v. Banco Nacional de Cuba*,⁶⁴ the lower courts issued confusing statements on the act of state doctrine. The Court found that *Sabbatino* would have controlled the case

62. The Bernstein exception derives from action by Arnold Bernstein, a Jew residing in the United States, against Germany to recover property taken from him under duress by the Nazi Government of Germany. The Bernstein "letter" from the State Dept. relieved the courts of restraints to pass on the validity of the acts of Nazi officials. *Bernstein v. N.V. Nederlandsche-Ameri Kaansche Stoomvarrt-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954); Lillich, *A Pyrrhic Victory at Foley Square: The Second Circuit and Sabbatino*, 8 VILL. L. REV. 155 (1963); Stevens, *The Sabbatino Case - Three Steps Forward and Two Steps Back*, 57 AM. J. INT'L L. 97 (1963). Letters from the State Dept. on the policy of the Executive have come to be known as "Bernstein letters".

63. Being equals under the U.S. Constitution, the Legislative Branch has no dominion over the U.S. Supreme Court. The Court is not required to take directives from Congress as the Bernstein exception required. The Court in *Sabbatino* stated that, "its [act of state doctrine] continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the government on matters bearing upon foreign affairs". *Sabbatino*, 376 U.S. at 427-28, 433-34. See also Rabinowitz, *supra* note 44 for a discussion by the lawyer who represented the Cuban Government. Also see Cooper, *Act of State and Sovereign Immunity: A Further Inquiry*, 11 LOY. U. CHI. L. J. (1980) where the author discusses various aspects of the act of state doctrine; Gordon, *The Origin and the Development of the Act of State Doctrine*, 8 RUT.-CAM. L. J. 595 (1977).

64. 406 U.S. 759 (1972). Here the Supreme Court again considered the act of state doctrine in a case where an expropriation was the basis of a counterclaim by the First National City Bank (FNCB). The Cuban bank had sued in the U.S. for excess proceeds and the FNCB counterclaimed. The counterclaim was upheld.

but for the Hickenlooper amendment (by Congress) to the Foreign Assistance Act of 1964,⁶⁵ which explicitly permitted the courts to reach the merits of cases involving confiscations by a foreign state notwithstanding the act of state doctrine.⁶⁶ In decisions since *Alfred Dunhill of London, Inc. v. Republic of Cuba*,⁶⁷ federal courts of appeal have diverged because of the inability of the *Dunhill* court to fashion a majority view on the act of state doctrine. The court considered, but did not conclusively determine, the validity of another exception to the doctrine, the so-called *commercial exception*.⁶⁸ In the Second Circuit,

65. Pub. L. No. 88-633 § 301(d)(4), 78 Stat 1009, 1012-13 (1964) (Current version at 22 USC § 2370 (e)(z) (1982).

66. *Id.*

67. 425 U.S. 682 (1976) The Supreme Court declined to undertake a basic re-examination of the doctrine, but clarified the definition of what constitutes an act of state. Four justices suggested the existence of an exception to the doctrine when the act of the foreign state has the character of an ordinary commercial act.

The reasons for a division include the separation of powers doctrine of the U.S. Constitution, the question of not embarrassing the Executive in some delicate international relations matters, protection of American citizens abroad and insensitivity to problems of other foreign states. Justice White went on to argue in *Dunhill* as follows:

We are nevertheless persuaded by the arguments of petitioner and by those of the United States that the concept of the act of state doctrine should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.

425 U.S. 682, 695; 48 L. Ed. 2d 301 (1976). Justice Stevens concurred at 425 U.S. at 715. Justice Marshall dissented at 728-30 reasoning that "the retention of *Dunhill* funds was pursuant to the initial act of intervention decree" and thus could not be properly characterized as "purely commercial." *Id.* at 729.

68. In *Bokkelen v. Grumman Aerospace Corp.* 432 F. Supp. 329 (E.D. NY 1977), Judge Platt recognized that the third section of the *Dunhill* opinion did not command a majority of the court, but felt that he had to discuss the commercial exception because it was discussed in *Hunt v. Mobil Oil Corp.* case. There Judge Mulligan speaks of the "Dunhill exception" to the act of state doctrine and refers to the "purely commercial exception to the act of state doctrine. As Victor Rabinowitz flatly put it "There is, however, no *Dunhill* exception" to the act of state doctrine. See Rabinowitz, *supra* note 44 at 702-703.

Many have misunderstood Justice White's opinion as the majority opinion of the U.S. Supreme Court. One of them was Lord Denning in his decision of the cement contract case between *Trendtex Trading Corp. v. Central Bank of Nigeria*, 2 WLR 356, (1977) all E.R. 881 (U.K.). It should be noted that Judge Kaufman had relied on this misdirection in law in his decision in *Texas Trading and Milling Co. v. Republic of Nigeria*, 647 F.2d 300. "Lord Denning, writing in . . ., with his usual erudition and clarity, stated: "If a government department goes into the market places of the world and buys boots or cement - as a commercial transaction - that government department should be subject to all the rules of the marketplace" 647 F.2d at 310.

Judge Kaufman joined Lord Denning in assuming that Nigeria's act in buying cement for the construction of army barrack is a commercial transaction. Alternatively

which includes New York, the center for international business, the act of state doctrine has been frequently restated. In *Hunt v. Mobil Oil Corp.*,⁶⁹ Hunt, an independent oil producer, alleged that Mobil Oil and six other major oil companies conspired among themselves and with Libya to eliminate him as their competitor in Libya, in violation of the anti-trust laws of the United States. Hunt alleged that seven oil companies encouraged him to negotiate with the Libyan government for his oil concessions. He further alleged that they knew that if he held firm against government pressure, Libya would nationalize his oil concessions and defendants would divide his concessions among the companies. When Hunt's concessions were nationalized, he sued. The court held that the act of state doctrine required judicial abstention. To evaluate Hunt's claims properly, the Second Circuit said it would need to examine the motives of the Libyan government.⁷⁰ The court did not reach the merits of that case.

But, in *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*,⁷¹ the Second Circuit took another view of the act of state doctrine. In this case, Nigeria had ordered several tons of cement for the construction of army barracks, a public purpose. The government found that many of the contracts had been procured through fraud, fronting, and collusion. It had to react to the financial and economic crisis that loomed.⁷² Nigeria had executed 109 contracts with 68 suppliers. It pur-

the learned judge predicates his decision merely on the ground that other Western nations have uniformly denied Nigeria's defense of sovereign immunity. These assumptions by Western industrialized nations revive lessons of the colonial era when less developed countries were not existent as sovereign states and had no sovereign voice. "We find defendants' activity here to constitute "commercial activity", and we move on to the next

step of analysis." The countries in question are mainly the United Kingdom, Western Germany and the Netherlands - all industrialized countries of the West. In one case tried in the District of Columbia, an arbitration award was enforced. *Iptrade International, S-A. v. Federal Republic of Nigeria*, 17 I.L.M. 1395-1416 (1978). See 647 F.2d 300, n.29 (1981).

69. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). This case involved nationalization of Hunt's concessions by Libyan government.

70. *See id.*

71. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

72. Compare *Texas Trading and Milling Co. with Allied Bank International v. Banco Credito Agricola De Cartago*, 757 F.2d 516 (2d Cir. 1985) (cited as *Allied III*) dismissed pursuant to S. Ct. Rule 53; 54 U.S.L.W. 3178 (U.S. Oct. 1, 1985) (no. 85-146). For additional information *See Allied Bank, International v. Banco Credito Agricola de Cartago*, 566 F. Supp. 1440 (S.D.N.Y. 1983) [hereinafter *Allied Bank I*]. *See also Allied II*, 733 F.2d 23 (2d Cir. 1984). The decision in advance sheet subsequently vacated does not appear in the bound volume of the Federal Reporter.

chased, in all, over sixteen million metric tons of cement. The price was close to one billion dollars.⁷³ Four of the 109 contracts were made with American companies that were plaintiffs below. The contracts at issue were signed early in 1975. Each is substantially similar; indeed, Nigeria seems to have mimeographed them in blank and filled in details with individual suppliers.⁷⁴

Defendants do not seriously dispute that their actions constituted such anticipatory breaches; their defenses go more to the propriety of jurisdiction under FSIA. Judge Cannella, in *Texas Trading*, found jurisdiction lacking. Judge Pierce, in the *Consolidated Nikkei, East Europe, Chenax*⁷⁵ actions held jurisdiction present and proceeded to trial on the merits, ultimately awarding \$1.857 million to Nikkei, \$1.986 million to East Europe, and nothing to Chenax.⁷⁶ Appeals then followed in which Judge Kaufman held that Nigerian government's act in purchasing cement for the construction of its army barracks is a "commercial activity" under the FSIA, so that Nigeria is not immune from the jurisdiction of the courts in this instance.⁷⁷

The Second Circuit's decision remains troublesome. The logic of its decision compares with its reasoning in *Sabbatino*. Just as the Cuban decree was discountenanced as not an act of state, so in the Nigerian situation the court gives no justification for disregarding the Nigerian government notice No. 1434 aimed at containing the financial and economic crisis that confronted it.⁷⁸ There is no explanation for not countenancing Nigeria's Decree No. 40, a law prohibiting entry to any

In both the Nigerian and the Costa Rica situations, the Second Circuit disregarded international unambiguous agreements and decided the case on the merits. *See* RESTATEMENT, *supra* note 50 at § 443, Comment (e) "Consent of foreign state to judicial scrutiny." Since the act of state doctrine is a judicial policy of self-restraint, the application of the doctrine cannot be "waived" by the sovereign state. The existence of international agreements in both cases (though the Nigeria agreement involved an arbitration clause while Costa Rica's involved a rescheduling of payment), the agreements should have been countenanced.

73. 647 F.2d 300 at 303.

74. *See id.*

75. *See* 500 F. Supp. 320; 647 F.2d 300 at 306.

76. *See* 647 F.2d at 306.

77. *See id.* at 306 and 310; *see also* § 1605(a)(2) of the FSIA.

78. *See id.* at 305. "On Aug. 9, 1975 Nigeria caused its Ports Authority to issue a government notice No. 1434. . . Almost three months later, on Dec. 19, 1975, Nigeria promulgated Decree No. 40. . . imposing criminal penalties for unauthorized entry."

The Unilateral alteration of the contract notwithstanding, an act of state is an act of state; or is it not? *See* 647 F.2d at 305. If it is, then the court ought to look first for international agreement before scrutinizing the act of a foreign state in accordance with *Sabbatino*.

ship which had not secured two months' prior approval, and imposing criminal penalties for unauthorized entry;⁷⁹ nor is there any reason why Nigeria's unilateral alteration of the letter of credit should not be considered an act of state, the consequences in damages notwithstanding. The court simply took refuge under the FSIA and then went on to make a determination on the acts of the state of a foreign country precisely as it did in *Sabbatino*.⁸⁰

That Nigeria signed contracts with suppliers of cement is not disputed. These agreements provided means of measuring performance and settling any disputes. Nigeria unilaterally altered the terms of the letter of credit. But the suppliers, anxious to sell, and having been notified of the changes in method of performance, accepted the changes or the new contracts and then, and only then, did they commit themselves with subcontractors to supply the cement. Suppliers began to ship cement after receiving notice that the letters of credit had been established. Then they engaged subcontractors to supply the cement.

The court properly found that Central Bank had invoked the benefits and protections of American law.⁸¹ Nigeria and the Central Bank cannot now complain about American law. They satisfied the "minimum contacts" requirement of *International Shoe Co. v. State of Washington et al.*⁸² Nigeria lost the sovereign immunity decision and the jurisdictional questions.

The court declined Nigeria's third defense of the act of state doctrine on grounds of general principles of law and equity. It noted:

Our rulings today vindicate more than Congressional intent. They affirm the right of all participants in the marketplace of the world to be treated as equals, and to ascribe to principles of trade which found their birth in the law merchant, centuries ago. Corporations can enter contracts without fear that the defense of sovereign im-

79. *See id.*

80. *Sabbatino*, 376 U.S. 398 (1964). The Supreme Court rejected any restriction on the sovereignty of a foreign state.

81. 647 F.2d 300 at 306.

82. 510 F.2d 870 (2d Cir. 1975). *See International Shoe Co. v. Washington*, 326 US 310 (1945); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *World Wide Volkswagen Co. v. Woodson*, 444 U.S. 286 (1980); *Harrison v. Denckla*, 357 U.S. 235 (1957). In addition, "A party that intends to rely on the act of state doctrine is required to give notice in its pleading or otherwise." *See, e.g., FED. R. CIV. P. 44.1*. The burden of establishing the act and its character as an act of state is on the party invoking the doctrine. Nigeria did not meet this burden either by documentary evidence or otherwise to obviate the need for further scrutiny of its act. Nor did it raise any counterclaim as to why it discountenanced the claims of certain suppliers.

munity will be inequitably interposed, and foreign states can bargain without paying a premium required by a trader in anticipation of a judgment-proof client. Commerce is fostered, and all interests are advanced.⁸³

The logic of the Second Circuit based on the evidence before it and predicated on law and equity is soundly reasoned. A basic principle of sales law dictates that if the seller agrees to supply and the buyer agrees to purchase the goods supplied, the seller having performed, expects, as of right to be paid. It is also basic that if any of the parties interfere with the course of performance, damages will accrue in favor of the performing party against the party hindering or preventing performance.⁸⁴ While Nigeria's handling of the transaction may not be clearly in bad faith since the unilateral cancellation of some of the contracts was a reaction to a crisis situation caused by fronting and fraud, nevertheless, those sellers who were unaware of the special circumstances at the time of making the contract have recourse in the principles of *Hadley v. Baxendale*.⁸⁵ In this classic case the operators of the mill (plaintiffs) delivered a broken shaft used in the mill to a carrier (defendant) for shipment to an engineering company, which manufactured a new shaft using the broken one as a model. Through the negligence of the carrier, the return of the shaft was delayed several days and, because the mill was totally inoperative without the shaft, the plaintiffs lost several days' profits. At issue in the case was whether the lost profits (consequential damages) should be recoverable from defendants where defendants were not notified that the mill was idle or that the case was special. The Hadley court found that plaintiffs had communicated to the defendants only that they were mill operators and that the article to be carried was a broken shaft of the mill.⁸⁶ The fact that the mill was inoperative without the shaft was not communicated to defendants. Because the special circumstances were not disclosed to, or known by, defendants, the court refused to hold them liable for plaintiff's lost profits. Under this principle, the sellers in this case have to recover since there was no evidence that they were informed or knew Nigeria's predicament at the time commitments were exchanged.

83. 647 F.2d 300, 315-16 (1981).

84. U.C.C. §§ 1-203, 11, 2-103(1)(b) (1978); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

85. Ex. 341, 156 Eng. Rep. 145 (Ex. 1854).

86. *See id.*

(i) *Anticipatory Repudiation*

Section 2-610 of the UCC sets forth the rights of the aggrieved party when there is anticipatory repudiation by the other party—in this case, the Nigerian government. The aggrieved party may suspend performance and allow the repudiating party a reasonable time to perform.⁸⁷ The aggrieved party may decide to suspend performance and pursue his remedies for breach.⁸⁸

“Anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impracticable or demonstrates a clear determination not to continue with performance.”⁸⁹ To this extent, Nigeria could not have escaped liability. It is one thing to change the terms of the contract in establishing a letter of credit to which the parties acceded after being advised and before the commitments were made with other suppliers; it is quite another to communicate an overt intention not to perform after supplies have begun. Suppliers are now knee-deep in commitments and financial outlays.

(ii) *International Agreements*

All of the above remedies notwithstanding, in resolving some of the above issues, there was no question that *Sabbatino* was dispositive. The court could readily have invoked the unambiguous international agreements between the parties as it properly observed.⁹⁰ Moreover, Nigeria in the cement contracts agreed to submit to arbitration by the International Chamber of Commerce (ICC). The ICC's headquarters are in Paris, but its arbitrations can take place anywhere in the world.

Based on this critical clause alone, Nigeria was required to go to arbitration for a resolution. The court should have directed arbitration rather than engage in a determination of the merits. All the court should have done was examine the contract for the arbitral provision; having found it, it ought to have done no more than direct arbitration.⁹¹ Such directive would have been consistent with *Sabbatino* and the FSIA. The award would be recognized by the courts under the June

87. U.C.C. §§ 11, 2-610(9)(c) (1978).

88. *See id.*

89. *See* Restatement, *supra* note 84 at § 250. Though repudiation is not explicitly defined in the text of the U.C.C., *see* Official Comment 1 to § 2-610.

90. 647 F.2d 300, 303, 315 (1981).

91. *I.C.C. Arbitration - The International Solution to Business Disputes*, Art. 12 INTERNATIONAL CHAMBER OF COMMERCE *See* 647 F.2d 300 at 315.

10, 1958 convention.⁹² By agreeing to go to arbitration in the event of a dispute, Nigeria consented to and subjected itself to other controlling legal standards and cannot now unilaterally renege on it.⁹³ The arbitration route, in spite of the FSIA, would have been a more palatable resolution of this dispute. Had the dispute gone to arbitration, perhaps Nigeria would have been better disposed to disclose why it unilaterally cancelled some contracts it had suspected were fraudulently procured. Who participated in the fraud? Whether the international suppliers have a role in fronting and fraud and to what extent and whether Nigerians were involved and to what extent has yet to surface in the courts. Nigeria may have had a cross-complaint which it did not develop in the adversarial atmosphere since sovereignty is involved and often can be quite a sensitive subject. This is particularly so between developed and less developed countries. Sovereignty is always jealously guarded by the sovereign state and newly developed countries after their colonial experiences are perhaps most sensitive to any infringement or abridgment of sovereign rights and prerogatives.⁹⁴

In *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*,⁹⁵ Justice Blackmun permitted arbitration in a case in which the question was whether Soler's antitrust claims are non-arbitrable even though it had agreed to arbitrate them. In holding that they are not, the Court of Appeals followed the decision of the Second Circuit in *American Safety Equipment Corporation v. J.P. Maguire and Co.*⁹⁶

92. Convention for Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 7 I.L.M. 1046 (1968).

93. *Kalamazoo Spice Extraction Co. v. Government of Socialist Ethiopia*, 543 F. Supp. 1224 (W.D. Mich. 1982), *rev'd*, 729 F.2d 422 (1984). *But see Callejo v. Bancomer*, 764 F.2d 1101, 1116-21 (5th Cir. 1985). Application of the exception "depends on pragmatic considerations, including both the clarity of the relevant principles of international law and the potential implications of a decision on our foreign policy." *Id.* at 1117-18. The court held "that the treaty exception does not render the act of state doctrine inapplicable" to the claims in issue. *Id.* at 1121. *See also Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1533-36 (D.C. Cir. 1984), *vacated*, 471 U.S. 113 (1985); *American International Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 525 (D.D.C. 1980), *vacated on other grounds*, 657 F.2d 430 (D.C. Cir. 1981). Additionally, in *Ipitrade Int'l. S.A. v. Fed. Rep. of Nigeria*, the court said that Nigeria could not unilaterally avoid arbitration, that Nigeria waived immunity. 17 I.L.M. 1395-1416 (1978). Compare with the RESTATEMENT, *supra* note 50 § 443, which discusses *consent not waiver*.

94. *See The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812).

95. 105 S. Ct. 3346 (1985).

96. 391 F.2d 821 (2d Cir. 1968). This case held rights conferred by the U.S. antitrust laws are "of a character inappropriate for enforcement by arbitration." The

The Second Circuit there reasoned that “the pervasive public interest in enforcement of the antitrust laws, and the nature of claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration”⁹⁷

In its decision, Supreme Court held:

. . . so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions.⁹⁸

Thus while less developed countries may find the FSIA objectionable and an affront to their sovereignty, the more amenable arbitral process may accomplish the same purposes as the antitrust statutes in the *Mitsubishi Motors Corporation Case*. The same applies to the application or invocation of the FSIA.

Furthermore, the Court in *Mitsubishi* said, “Having permitted the arbitration to go forward, the national courts of the United States will have an opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.”⁹⁹

Indeed if arbitration is to take a central place in the resolution of international trade disputes, national courts will need to “shake off the old judicial hostility to arbitration”¹⁰⁰ and also then customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal.¹⁰¹ To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.¹⁰² There was no need, therefore, for the Second Circuit to resort to examining the act of a foreign sovereign in the *Texas Trading and Milling Co.* case where it could have easily directed arbitration.

The same Second Circuit did another full circle in another case involving Cuba’s expropriation of property owned by United States citizens. In *Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn and Co.*,¹⁰³ the Republic of Cuba initiated suit to recover un-

African Safety case was widely followed in other federal circuits.

97. *See id.*

98. 105 S. Ct. 3346 (1985).

99. *See id.*

100. *See id.*

101. *Id.*

102. *Id.*

103. 652 F.2d 231 (2d. Cir. 1981).

paid sums from former owners of an expropriated sugar business now administered by Cuban interveners. The district court applied the act of state doctrine. The Second Circuit agreed although it acknowledged that the Cuban instrumentality's activities were wholly commercial in nature. The court concentrated on the expropriation. It then held it to be a noncommercial act. The court attempts to draw a straight line of demarcation between issues of expropriation and non-expropriation. To accomplish this courts have been drawn into an investigation of the purpose of the act of state. Such excursion is prohibited by FSIA section 1605(a)(2).

As if the situation is not confusing enough, the Second Circuit came under scrutiny in *Allied Bank International v. Banco Credito De Cartago*,¹⁰⁴ which involved a third world debt to a syndicate of American and European banks. Cost Rica, confronted with economic crises in 1981, restricted the export of United States dollars, causing the Cost Rica banks to default on their external obligations. The syndicate sued in New York and lost in the Second Circuit on grounds of the act of state doctrine. Because the decision caused so much concern among bankers and other pressure groups, including government officials, a petition for rehearing was filed. On rehearing, the Second Circuit vacated its earlier decision in favor of Costa Rica. The court held that the act of state doctrine does not preclude adjudication of a default action brought by a syndicate of American and foreign banks against three Cost Rican banks.

From the decision above, it is clear that the Second Circuit has caused the legal pendulum to swing from side to side, just as it did in the *Sabbatino* case at the lower level;¹⁰⁵ there it had reacted more to mounting pressure than law, logic and reason. Unquestionably, debtors ought to pay their debts if the contract was in the first place free of any conduct that would invalidate assent. The government of Costa Rica made clear the fact that it was seeking to restructure its payment schedule. The suit began because Fidelity Union Trust Company of New Jersey, a member of the Allied Syndicate of American and Foreign Banks, declined to enter into the new agreement and on that bank's behalf, Allied appealed the dismissal. That dismissal came after the parties stipulated that there were no remaining factual matters in regard to the out-of-state doctrine defense.¹⁰⁶

104. *Allied Bank International v. Banco Creditor Agricola De Cartago*, 757 F.2d 516 dismissed pursuant to S. Ct. Rule 53, 54 U.S.L.W. 3178 (U.S. Oct. 1, 1985) (No. 85-146).

105. *Sabbatino*, 307 F.2d 845, 860 (1962).

106. See note 104 *supra*.

The Second Circuit then pushed the confusing issue of the act of state doctrine from the frying pan into the fire. The court, unwilling to heed *Sabbatino*, did not countenance the IMF Agreement between the parties. That agreement was a better vehicle for arriving at the same result.¹⁰⁷ The court did not look for a treaty or an *unambiguous international agreement* which in this case was the International Monetary Fund Agreement.

Under the agreement, Article VIII Sec. 2(a) generally prohibits "restrictions" on "current international transactions"¹⁰⁸ while Sec. 2(b) provides for the uniform treatment of foreign exchange controls in the court of member countries.¹⁰⁹ Both could have been relevant sources since United States and Cost Rica are members of the IMF. Since the agreement bound the sovereigns, not parties, its application would have obviated the need for further excursions into the act of state doctrine and the question of jurisdiction.¹¹⁰

C. Views from the Third Circuit

From this circuit the most frequently cited case is *Mannington Mills, Inc. v. Congoleum Corp.*¹¹¹ in which an American manufacturer of floor materials alleged that Congoleum, a competitor, had fraudulently obtained foreign patents and, in violation of antitrust laws, was threatening to use these patents against it in infringement actions abroad.¹¹² Congoleum, on the other hand, argued that plaintiff's action was barred by the act of state doctrine. In dismissing the action, the district court agreed that the validity of the foreign patents was to be

107. See J. Fannigan, *Sovereign Defaults in the United States Courts: The Interrelationship of the Articles of the IMF, the Act of State Doctrine and Community Principles: Allied Bank International v. Banco Credito De Cartago*, 4 B.U. INT'L L. J. 153 (1986).

108. IMF Agreement Art. VIII § 2(a). The Agreement provides that no member of the Fund "shall without the approval of the Fund, impose restrictions on the making of payments and transfers of current international transactions."

109. IMF Agreement Art. VIII § 2(b).

110. See *id.* Arts. 1 and XX § 2(g). *Banco do Brasil S.A. v. Israel Commodity Co.*, 12 N.Y.2d 371, 376 (1986). See also G.D. DELAUME, *LEGAL ASPECTS OF INTERNATIONAL LENDING AND ECONOMIC DEVELOPMENT FINANCING* 295 (1967); 11 J. GOULD, *THE FUND AGREEMENT IN THE COURTS* 258-262 (1982). Delaume believes the court has the burden of establishing the consistency of the exchange control regulations with the Fund Agreement, and that the court has the duty not to enforce an exchange contract whether or not the parties plead and prove unenforceability.

111. 595 F.2d 1287 (3d Cir. 1979).

112. See *id.*

determined by the courts of the respective foreign issuing nations.¹¹³ The Third Circuit reversed. Refusing to apply the act of state doctrine, the court held "the grant of a patent is quite different from an act of state expropriation by a government."¹¹⁴ The court chose to judge both the validity of the foreign act and the foreign government's motivation without clarifying its sweeping distinction between a foreign government's act of expropriation and a government's issuance of a patent where both involve foreign sovereign activity. It is difficult to understand why the act of state doctrine permits examination of one activity while precluding examination of the other.

A possible answer is that courts have been responding to some invisible pressures such as from the State Department and other professional groups as was the case during the early stages of the *Sabbatino* controversy. Needless to say, *Mannington Mills* has only added to the confused situation in the circuit courts which have refused to rise above local pressures.

D. Views from the District of Columbia Circuit

From the District of Columbia, some seasoned opinion emerged in *Ramirez de Arellano v. Weinberger*.¹¹⁵ In that case, the full circuit in a six-to-four decision, reversed a two-to-one panel affirmance of a district court dismissal of plaintiff Ramirez's claim that the American military constructed a military housing center on his 14,000-acre cattle ranch in Honduras. Without plaintiff's knowledge, the United States government, with permission of the Hondurans, picked the land for training Salvadoran soldiers. Ramirez, an American citizen, sued in U.S. district court when he could not convince the military to leave.

In arriving at its reversal, the District of Columbia Circuit, unlike the Third Circuit, was more cautious in dealing with the act of state doctrine. First, it rejected the district court's reliance upon the political question doctrine to dismiss the case. Despite the court's awareness of the political considerations, it designated its task as purely judicial: determining whether the taking of property of an American citizen by the federal government was constitutionally appropriate regardless that it was located in Honduras.¹¹⁶ The court proceeded to disagree with the panel's suggestion that an injunctive relief would hinder executive conduct of foreign affairs in the region. The full court felt that equitable

113. *See id.*

114. *See id.* at 1294.

115. 745 F.2d 1500 (D.C. Cir. 1984) (en banc) *vacated* 105 S. Ct. 2353 (1985).

116. 745 F.2d at 1515-20.

relief could be carefully tailored to avoid such hindrance.

It then held in the last section of its opinion, that the defendant was not entitled to dismissal on grounds of act of state and remanded the case to the lower court. Noting that "separation of powers concerns are the underpinnings of the act of state doctrine," it held that a successful act of state defense requires first, that an act of state has occurred, and second, that the case does not fall within any legally recognized exception to the doctrine.¹¹⁷

The court found that the United States would not be able to refute the assertion of exceptions to the doctrine¹¹⁸ because of an existing treaty between the United States and Honduras guaranteeing payment for any expropriations of American-owned property. This agreement put the case within the treaty exception of *Sabbatino*. While *Ramirez* is the first to follow this line of analysis, it clearly falls within the ambits of *Sabbatino*'s restrictive theory approach to the act of state doctrine.

Because the act of state defense was not raised, the majority did not determine whether the doctrine was applicable. The case was remanded to the district court. The Supreme Court vacated the court of appeals' opinion and remanded the case for reconsideration "in light of the Foreign Assistance and Related Programs Appropriations Act . . ." and other events occurring since Oct. 5, 1984, the date of the *Ramirez* decision.¹¹⁹

Ramirez distinguishes itself from the decisions from the Second, Third and Ninth circuits in that it did not concern itself with the various pressure groups. It specified the comprehensive argument for restrictive application of the act of state doctrine. Its approach clearly contrasted with the decision in *Hunt*, and such other decisions as *Texas Trading and Milling Co.* and *Allied III*, all of which deviated one way or the other from the *Sabbatino* standards. In recognizing the treaty exception, *Ramirez* seems to be in agreement with *Kalamazoo Spice* in which the Sixth Circuit held that the standards in the U.S.-Ethiopian treaty provided sufficient legal basis for compensation. The Second Circuit could emulate *Ramirez* and *Kalamazoo Spice* approach.

But *Ramirez* is not immune to the other internal divisions in other circuits. The opinion remains a model because the clear majority of the full court saw the wisdom in *Sabbatino* with regard to appropriate resort to treaties or international agreement between disputants.

117. *See id.* at 1534.

118. *See id.* at 1539-42.

119. *See id.*

E. Views from the Ninth Circuit

The Ninth Circuit has also registered conflicting decisions on a number of fronts. In *Timberlane Lumber Co. v. Bank of America National Trust and Savings Association*,¹²⁰ Timberlane, an American milling manufacturer, sued Bank of America for allegedly entering into a conspiracy with the government of Honduras to ruin its operations in that country. Bank of America, a private firm took refuge behind the act of state doctrine and won in the district court, but lost at the appellate level. The appellate court correctly noted that the defendant is not a foreign state.

In 1981 in *International Association of Machinists and Aerospace Workers (IAM) v. OPEC*,¹²¹ a labor union sued OPEC and its member nations for alleged violations of United States antitrust laws. OPEC was charged with fixing the world prices of oil. Plaintiff also sought monetary damages and injunctive relief under sections 4 and 5 of the Clayton Act.¹²² Representatives of OPEC argued that the court lacked proper subject matter and in personam jurisdiction; that FSIA was applicable; that oil refineries were government-owned and therefore immune from suit under the antitrust laws.¹²³ They also argued that the court should dismiss for lack of jurisdiction.¹²⁴ The district court held that it lacked jurisdiction under the Foreign Sovereign Immunities Act of 1976 (FSIA). It reasoned that jurisdiction was lacking because OPEC's price-fixing activities were not "commercial acts" under the meaning of the FSIA.¹²⁵ The court also noted that foreign governments were not persons under the Sherman Act. Nor was IAM a direct purchaser.

The reasoning in both cases seems to evince some discrimination before reclining on whether the act of state doctrine applies. The only problem with the court's rationale was that it delved into the *purpose* of OPEC's activities to decide that "OPEC's price fixing amounted to control over natural resources and thus was a public rather than a commercial function."¹²⁶ Under the FSIA test for determining whether an act of state is a "commercial act," the *purpose* of the act should not be considered.¹²⁷ Nor can it be said that the sale of oil worldwide is a

120. 549 F.2d 597 (9th Cir. 1976), *cert. denied* 454 U.S. 1163 (1982).

121. 649 F.2d 1345 (9th Cir. 1981) *cert. denied*, 454 U.S. 1163 (1982).

122. *See id.* at 1355-56; 15 U.S.C. §§ 15-16 (1982).

123. *See id.*

124. *See id.*

125. *See* FSIA §§ 1605-1607.

126. 477 F. Supp. 553, 567-68.

127. *See* FSIA § 1603(d)

commercial activity in the context of some developing OPEC membership. For them it is a governmental property carried out by governmental functionaries; for some it is the product the government must market and monitor itself through its agencies because the entire country depends on it for revenue. For most developing countries (LDCs) this is the case.¹²⁸ LDCs, therefore, take the position that no stranger, not even the courts in the United States, knows the priority this product assumes in their national budgets.¹²⁹ Nigeria, today, appreciates more of its reserves than it ever did. This increasing appreciation may attract greater public control. So the FSIA test remains an issue that tickles a sensitive nerve in the area of international affairs.

Nor is it an area that the Department of State can claim to know all about. Its own directives sometimes have been the causes of the confusion in the courts.¹³⁰ In fact its conflicting advice in cases after *Sabbatino* has been somewhat to blame for the inability of the U.S. Supreme Court to muster any majority, especially in *Dunhill*.¹³¹ However, this subject is for the time being outside the scope of this paper.

It seems that the Second Circuit could have accomplished its re-

128. Nigeria, for example, depends heavily on its crude oil for survival.

129. See Bayzler, *supra* note 42 at 351. Lord Denning made a similar generalization in *Trendtex Trading Corp. v. CBN*, 2 WLR 356, 1 ALL.R. 881 (U.K. 1977). The same generalization carried over into *Texas Trading and Milling Co. v. Fed. Rep. of Nigeria*, 647 F.2d 300, 310 (1981). In *Trendtex Trading Corp.*, Lord Denning mistakenly likened the Bank of England to the Central Bank of Nigeria ignoring that the latter is inextricably interwoven with the minutest details of government including rural development programs. In Nigeria, the CBN gets involved even in the religious pilgrimage of its citizens unlike the Bank of England or Federal Reserve Bank of the United States.

130. See Rabinowitz, *supra* note 44. Victor Rabinowitz represented Cuba in the *Sabbatino* case. See *id.* at 7301-702 for details of the amicus brief from the Solicitor General, urging on reargument, that the act of state doctrine should not be applied to litigation arising out of a commercial transaction. Mr. Leigh, as Legal Adviser to the State Dept. attached a letter to the brief urging reconsideration of *Sabbatino* substantially for the same reason that *Sabbatino* Watchers had been advancing since 1964. Mr. Leigh also concluded that "there would be no embarrassment to the conduct of foreign policy if the court should decide in this case to adjudicate the legality of any act of state found to have taken place and to make such adjudication in accordance with any principle of international law found to be relevant." See *Sabbatino*, Brief for U.S. as Amicus Curiae.

Sabbatino, *First National City Bank* and *Dunhill* were all filed in 1960. *Sabbatino* was decided in 1964, *First National City Bank* in 1972, and *Dunhill* in 1976. In each the position taken by the Executive was different and unpredictable. Its modus operandi is different from that of the Supreme Court which generally follows *Stare Decisis* Rule.

131. See Rabinowitz, *supra* note 44.

sults, not by the unexplained resort to the "commercial activity"¹³² provision, but through the "treaty" or "unambiguous international agreement" basis established in *Sabbatino*.¹³³ Under that principle, the application of the act of state doctrine need not be an inflexible rule but rather a balancing of relevant considerations and a cautious weighing of interests relevant to each case.¹³⁴

International agreements which the Second Circuit sidetracks as, perhaps, not dispositive of some of the cases,¹³⁵ were adequate legal standards for the Sixth Circuit in *Kalamazoo Spice Extracting Co. v. Provisional Military Government of Socialist Ethiopia*.¹³⁶ That case

132. The "commercial activity" provision of FSIA continues to pose a problem of interpretation:

In the opinion of the authors, a commercial activity exception to the act of state doctrine as enunciated in the plurality opinion does not and should not exist. Indeed, it is hard to conceive of an "act of state" that is 'commercial' in nature, since by hypothesis it is a governmental act performed in the exercise of governmental authority. Of course such an act may involve commercial transactions, as for example, the repudiation of an existing contractual obligation - for which there would appear to be no defense of sovereign immunity under Section 1605(a)(2) of FSIA.

See Angulo & Wing, *Proposed Amendments to FSIA and the Act of State Doctrine*, 14 DEN. J. INT'L L. & POLICY 299, 307 (1986).

There is a problem with the theory that a foreign state that enters a market place pursuant to a public purpose must be treated for all purposes as any other merchant with respect to jurisdiction. The plurality opinion in *Dunhill* underscores the confusion between interpretation of the FSIA and the act of state doctrine.

Some courts and commentators forget that "while the effect of foreign sovereign immunity is designed to shield the person of the foreign sovereign, and, by extension, his agents from jurisdiction, the act of state doctrine shields the foreign sovereign's internal laws from intrusive scrutiny." *Id.* at 308. See also *Braka v. Bancomer, S.A.*, 589 F. Supp. 1465, 1470, n. 47 (S.D.N.Y. 1984) *aff'd*, 762 F.2d 222 (2d Cir. 1985).

133. *Sabbatino*, 376 U.S. 398 (1964).

134. *See id.*

135. *See Texas Trading and Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, in which the international agreement providing for arbitration was not countenanced; *See also Allied Bank International v. Banco Creditor Agricola de Cartago*, in which the IMF agreement was ignored although the defendant banks sought a restructuring of their obligations in response to a national economic crisis.

Such a course leaves less developed countries with no choice but to impose, for example, unilateral limits on debt payments. *See Nigeria Limits Debt Payments, Following Peru*, N.Y. Times, Jan. 3, 1986 at 17. Nigeria was then struggling to meet IMF requirements for a loan. As of this writing, Nigeria and the I.M.F. are close to a consensus on Nigeria's debt rescheduling. *Africa Report*, Nov-Dec 1988 at 12.

136. 729 F.2d 422, 425 (6th Cir. 1984) *See also* note 19, *supra*. The lower court had dismissed Treaty of Friendship between U.S. and Ethiopia as vague. The circuit court upheld the Treaty as providing controlling legal standards for resolution of the dispute arising from expropriation.

upheld the treaty of Amity and Economic Relations, itself an *unambiguous international agreement*, which had provided controlling legal principles for the determination of the dispute. Following the Ethiopian government's argument that the action be barred by the act of state doctrine and plaintiff's argument that the treaty was applicable, the U.S. District Court dismissed plaintiff's suit on the ground that the treaty was very vague. It held that "it was so inherently general, doubtful and susceptible of multiple interpretation" that it did not provide a clear standard as established in the *Sabbatino* decision.¹³⁷ The Sixth Circuit reversed, holding the language of the treaty dispositive consistent with the criteria established in *Sabbatino*.¹³⁸

Such case-by-case analysis would consider the separation of powers concerns of the judiciary and Congress, an aspect that has not been adequately examined. There is evidence in the cases after *Sabbatino* that some justices in the Supreme Court had become more conscious of the constitutional underpinnings of the doctrine of separation of powers in our foreign relations policy. The justices are no longer willing to be lead like mere spectators. Thus, the U.S. Supreme Court decisions after *Sabbatino* have not been able to forge a new majority view on this issue; and so, *Sabbatino* stands, alive and well.¹³⁹

It seems then that the Second Circuit ought to heed *Sabbatino* where the U.S. Supreme Court stated that the foreign policy interests of the United States "should not be left to the divergent and perhaps parochial state interpretations."¹⁴⁰ Thus, a court must initially determine whether the controversy is governed by a federal rule, either a constitutional provision, a treaty, a federal statute or federal common law. Being a federal common law, the act of state doctrine coexists with the FSIA.¹⁴¹

The Sixth Circuit approach in *Kalamazoo Spice*, in accordance

137. *Sabbatino*, 376 U.S. 398 (1964).

138. *See id.*

139. Rabinowitz, *supra* note 44.

140. *Sabbatino*, 376 U.S. 398, 425 (1964).

141. Both the Act of State Doctrine and the FSIA are creatures of equals under the U.S. Constitution. It is accepted that an equal has no dominion over an equal. *See* 647 F.2d 300, 302, n.1 (1981). *But see* RESTATEMENT, *supra* note 50, § 443. The Act of State Doctrine may be modified by Congress "Presumably, the doctrine is also subject to modification by treaty or other international agreements of the United States. Whether a particular treaty or agreement is intended to create an exception to the doctrine is to be decided by the courts." Hence the act of state is likely to continue to coexist with the FSIA if the Supreme Court, in the light of changing world order, finds that it has redeeming value regardless of Congressional modification. RESTATEMENT §§ 443(j), 444, COMMENT (A).

with this *Sabbatino* pronouncement, was more palatable and yet less confrontational than the act of state doctrine route considering the emotionalism and jealousy that attend the issue of sovereignty.

III. VIEWS FROM THE THIRD WORLD

Although it is not practicable to address the whole question of FSIA and the developing countries in this article, or even to discuss generally individual reactions, suffice it to mention in broad terms the skepticism most of them entertain about the act.¹⁴²

Less developed countries are seeking to understand the barrage of assaults on the act of state doctrine which is consistent with international law.¹⁴³ The attacks on the doctrine remind the LDCs that there was indeed a new world created before and in the forties and that the new world was conceived by, for, and in the North Atlantic for the developed countries (DCs) to the exclusion of all others.¹⁴⁴ Also, less developed countries perceive a flawed world order. We realize the post-World War II order was managed, intended to be managed, by the 'Western Europeans and Others' for the benefit of Western Europeans and others under the protective umbrella of the United States. Further, one of the principal instrumentalities of that management turned out to be the United Nations at that time.¹⁴⁵

It is fair to surmise that the U.S. Supreme Court foresaw and was sensitive to this new demand for a new world order and equity at the time of the *Sabbatino* decision. While shareholders of the expropriated company were wrapped with emotions for their losses, which should

142. These concerns are reflected generally in the various indigenization programs. In indigenization, there is an attempt to protect what the people have and give citizens a chance to participate in the development process. It puts the task of fashioning the destiny of the countries in the hands of its citizens. See A. ADEDEJI, *INDIGENIZATION OF AFRICAN ECONOMICS* (1981). This work is a compilation of reactions from Egypt, Ethiopia, Ghana, Kenya, Nigeria, Senegal, Southern Africa, Tanzania and Zambia. The goal is local control of one form or another.

143. See generally *Sabbatino*, 376 U.S. 398 (1964). Angulo and Wing express similar concerns in *Proposed Amendments to the Foreign Sovereign Immunities Act of 1976 and the Act of State Doctrine*, 14 DEN. J. INT'L L. & POLICY 299, 306-07 (1986).

144. See F. SNYDER, *THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW - AN INTRODUCTION* (1987). Note particularly C. Ferguson, Jr., *Redressing Global Injustices: The Role of Law* contained therein. See also statement of Ambassador C. Clyde Ferguson, Jr. Head of the U.S. Delegation to ECOSCO, Geneva, July 4, 1975 on Third World Situation and world order.

145. See Ferguson, *The New International Economic Order: General Concepts - The Legal and Political Framework*, 365, 368 in *THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW - AN INTRODUCTION* (1987).

have been compensated by Cuba's measure,¹⁴⁶ the Court was way ahead of the citizenry, the Executive and Congress in visualizing the problems of capital importing nations in refusing to be fettered by the theories of international law which protected aliens more than their own natives.¹⁴⁷ These LDCs might have considered untenable the rules of customary international law based on rules established before the advent of the new states. For example, Bishop explains that these states frequently promise to pay compensation to owners of expropriated property in their agreements.¹⁴⁸ The disputes arise more often over the adequacy rather than refusal to pay compensation.¹⁴⁹

Also, case law concerning personal injury or damage, LDCs argue, have conferred unacceptable rights on aliens.¹⁵⁰ Some of these rights fall in the category not available to nationals. And a fear of perpetuation has given rise to various indigenization exercises designed to eliminate those rights available to a select few, eliminate them completely, or share them where practicable with nationals.¹⁵¹ To this extent the president of Zambia, Dr. Kenneth Kaunda, said:

Development means much more than statistics of growth It is still less than six years since independence and we have far to go But already the reforms I announced at Mulungushi in 1968 and Matero in 1969 have done much to lay the foundation for a man-centered society. Some have called this nationalization. It is, in fact, participation by Zambians in the control and ownership of the key sectors of their country.¹⁵²

Moreover, such disputes raise the question as to whether the LDC's action in its territory might infringe the claimed rights of former colonial property owners and former colonial powers or their instrumentali-

146. See P. Weinstein, *The Attitude of Capital Importing Nations Towards the Taking of Foreign-Owned Private Property* 653 in *THIRD WORLD ATTITUDES supra* note 145.

147. See *id.* at 652.

148. See *id.* at 651-653.

149. See Weinstein at note 146 *supra*.

150. See *id.* at 650. Weinstein notes that "newly independent nations are still emotionally influenced by resentment against former political and economic domination. Undoubtedly these nations are still haunted by experience from South Africa where the majority of aborigines are denied basic rights.

151. See, e.g., President Kaunda of Zambia's definition of development in *INDIGENIZATION OF AFRICAN ECONOMIES supra* note 142, at 94-95.

152. See *id.* Other countries have responded with a wave of indigenization policies. See note 142, *supra*.

ties.¹⁵³ The United States Supreme Court must have foreseen in *Sabbatino* that international law in colonial times concerned itself with the protection of an alien entering the state in search of wealth entirely at his own risk. The court knew that application of such colonial case law would violate state sovereignty, especially that of the emerging states. The court might, perhaps, have sensed that an international standard of justice available to aliens but unavailable to natives would be inimical even to the alien investor's interest; that such justice was non-existent. The court, perhaps, saw ahead of Congress and the Executive that "[F]inally, the use of an external yardstick for measuring the internal machinery of justice is apt to be looked upon as an affront to the national system, whether or not it is below the international standard."¹⁵⁴

To summarize, these states have maintained that the days of the big powers are gone; that a new world order must prevail; that customary international law-starked case law in favor of their former colonial masters; that their citizens are left without rights if the rights of the status quo was maintained.¹⁵⁵ LDCs are insisting, for the benefit of coexistence, that unnecessary walls have to come down.¹⁵⁶

In view of this, the FSIA is perceived as portraying an antagonistic posture, an affront to the sovereignty of the LDCs coming at a time when the LDCs are asking for a revamping of the "Old World Order" — those arrangements that existed during the colonial era when the international meetings that decided the futures of the peoples of the world, were dominated by four world powers. It was also a time when these powers only protected their own best interests.¹⁵⁷

IV. THE FOREIGN SOVEREIGN IMMUNITIES ACT (1976)

The Foreign Sovereign Immunities Act of 1976 (FSIA) was enacted to clarify when a federal court could acquire jurisdiction over a

153. See generally INDIGENIZATION OF AFRICAN ECONOMIES *supra* note 142, particularly J. Chileshe, *The Legalization of the Indigenization Process*, at 95, contained therein.

154. See *Sabbatino*, 376 U.S. 398 (1964). See also C.T. Oliver, *Historical Development of International Law; Contemporary Problems of Treaty Law* 88 RECUEIL DES COURS 417, 432 (1955) which stresses that LDCs favor treaties that provide them with an opportunity to participate in the formulation of the rules and they are not bound by these unless they accept them. Oliver points out that according to S. Prakash Sinha "the newly independent states are not likely to accept the extension of treaties having such an origin." Such acceptance admits of inequality.

155. See note 146 *supra*. See generally, ADEBAYO, notes 151 and 153 *supra*.

156. See Ferguson, notes 144 and 145, *supra*.

157. See note 151, *supra*.

foreign state. Before the FSIA became law, the “absolute view” of the act of state doctrine — that a foreign government could not be sued in the United States courts for acts done in its territory—was the rule that prevailed. That rule was established in *Underhill v. Hernandez*.¹⁵⁸ Although this rule comported with international law, in some instances it resulted in no recourse for American citizens but to sue in the foreign state. Hence, it was modified by *Sabbatino*, which adopted the *restrictive view*.¹⁵⁹

Thus, the purpose of the FSIA is primarily to ensure that American citizens doing business with foreign states abroad can, in the event of disputes, sue such states in the United States Federal courts. Secondly, the FSIA gives the courts *in personam* jurisdiction over such foreign states where, in the court’s determination, the dispute involves a “commercial activity.”¹⁶⁰ In effect FISA “codified the Restrictive Theory of Sovereign Immunity.” This theory distinguishes between a foreign state’s act done for a “public” purpose and that done for a “commercial” purpose.

The FSIA governs the subject-matter jurisdiction of federal and state courts in actions against foreign sovereigns arising from their commercial and private law activities.¹⁶¹ The initial purpose of the drafters was for the courts to look to FSIA to decide whether a foreign sovereign could be sued. But courts have not ceased to resort to the act of state doctrine in spite of the mandate from the FSIA.

The Act provides in pertinent part:

§1330 Action against foreign states: (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in Sec-

158. 65 F. 577, 579 (2d Cir. 1895), *aff’d* 168 U.S. 250 (1897).

159. *Sabbatino*, 193 F. Supp. 375, 384-85 (S.D.N.Y. 1961) *aff’d* 307 F.2d 845 (2d Cir. 1962) *rev’d* 376 U.S. 398 (1964). While Falk believed in judicial deference in his analysis of *Sabbatino*, this author believes that the judiciary should bring in a stabilizing force into the conduct of foreign relations. The judiciary is one institution that will not easily go with the wind. It is not in for politics. 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). This author believes that the ideas of Falk are outdated. More so because the big powers that set up the U.N. are having second thoughts in contributing their cost of maintenance. As of this moment the U.S. has yet to pay its share of U.N. maintenance promised long ago by President Reagan. For additional support that Falk’s idea is antiquated, see Bazylar, *supra* note 42.

160. FSIA § 1605(a)(2).

161. See *id.*

tion 1603(a).¹⁶²

(b) Under § 1603 Definitions, subsection (a) defines a "foreign state" to embrace (b) an "agency or instrumentality of a foreign state" whether a separate legal person, corporate or otherwise whether created under U.S. laws or under the laws of a third country."

Another pertinent subsection here is (d) which covers and attempts to define "commercial activity" as a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.¹⁶³

While Section 1604 provides that subject to existing international agreements between the foreign state and the U.S. at the time of enactment, by this act, a foreign state shall be immune from the jurisdiction of the courts of the United States and the states except as provided in Sections 1605 and 1607.

Section 1605 enumerates the general exceptions to Section 1604 as:

1. Where there is a waiver whether or not explicit . . . (§1605(a)(1))
2. Where the foreign state engages in commercial activity . . . (§1605(a)(2))
3. Where rights to property are taken in violation of international law . . . (§1605(a)(3))
4. Where rights in property in the United States are acquired by succession or gift or such rights are immovable and are in issue . . . (§1605(a)(4))
5. Where money damages are sought against a foreign state for personal injury or death, or damage to or loss of property . . . occurring in the United States and caused by the tortious acts of the foreign state or its omission or of its official or employee while acting within the scope of his office or employment

There are few exemptions from jurisdiction in admiralty cases.¹⁶⁴ The consequence of §§1605-1607 and other provisions of the FSIA is to deny immunity from the jurisdiction of the courts to foreign states. The only avenues left to foreign states in international relations matters

162. See FSIA § 1603(a).

163. 647 F.2d 300, 307 (1981).

164. See FSIA § 1603(a).

with the United States are by way of international treaties or unambiguous agreements in existence at the time of the enactment of the FSIA in 1976. However, it seems that in light of *Sabbatino*, new treaties and international agreements will be the basis for exceptions. During the hearings on the FSIA bill, counsel from the State Department, other international lawyers and experts vehemently criticized the act of state doctrine. They, including Congress, assumed that the FSIA, once it became law, would abolish the act of state doctrine. The FSIA was expected to make unnecessary all the exceptions to the doctrine so that all claims by or against foreign states would deny foreign sovereigns any act of state defense. To make certain that these defenses were a thing of the past, the "commercial exception" to the doctrine was grafted onto the act from the *Dunhill* decision. In *Dunhill*, another expropriation case from Cuba, Justice White in part III of his minority opinion, said that the action of Cuba and its instrumentalities in expropriating *Dunhill's* cigar business, was "commercial" and therefore the act of state doctrine did not apply as a defense. Since the decision in *Dunhill*, an unexplained tension has existed between the United States and foreign countries on the definition of when an act of a state undertaken for the purpose of furthering the functions of the state in its territory, becomes "commercial." The reader is reminded that this paper focuses more on the question of whether the act of state doctrine and the FSIA can coexist and not on a detailed analysis of all the provisions of the FSIA.

A. Jurisdiction

Turning to some specific provisions of the FSIA which are relevant to this study, the jurisdiction-conferring provisions of the Act, 28 U.S.C. §1330(a), creates in the district courts:

original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in Section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under Sections 1605-1607 of this title or under any applicable international agreement.¹⁶⁵ The target of the FSIA is to confer jurisdiction on the courts.

Section 1605 specifically and perhaps the most relevant, provides:

165. See 647 F.2d at 307.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States in any case

(2) in which the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.¹⁶⁶

It becomes necessary that the phrase "commercial activity" be defined so as to distinguish it from "governmental" which is an outgrowth of "sovereign immunity." If the activity is found to be "governmental" then the foreign states act will be entitled to immunity under §1605. That being the case; original jurisdiction is not present under §1330(a).¹⁶⁷

Where the transaction is found to be "commercial," as Judge Kaufman did in the case of *Texas Trading and Milling Corp.*, then personal jurisdiction attaches. For example, when Nigerian government officials signed mimeographed forms,¹⁶⁸ those contracts entered into in the United States and elsewhere other than Nigeria opened up new legal dimensions in the area of personal jurisdiction¹⁶⁹ and the necessary due process contacts were made giving courts in the United States personal jurisdiction.¹⁷⁰ Had all the contracts been executed completely in Nigeria, *Sabbatino* and *Schooner Exchange* would have provided the legal principles to be construed in conjunction with the appropriate provisions of the FSIA¹⁷¹ before concluding the matter of personal and subject matter jurisdiction over the activities and assets of the Central Bank of Nigeria based in the United States. Nigeria opened the door and the court entered and acquired jurisdiction.¹⁷² Other contracts regarding payment of salaries of employees and payments of expenses of the operation of Nigerian embassies abroad are also said to be bases for jurisdiction.¹⁷³ These of course are purely governmental activities so

166. See FSIA § 1605(a).

167. See *id.* But if there is a counterclaim § 1607 will provide jurisdiction. Jurisdiction will also be present under other categories of § 1605.

168. See 647 F.2d at 307.

169. *Id.* at 315; See also *Hanson v. Denckla supra* note 72.

170. See *id.*

171. The act of state doctrine would have applied.

172. The contracts involved provided a basis for determining the existence of substantial contracts.

173. Being activities in furtherance of an act of state, they should not be a basis for jurisdiction.

that the grounds for the courts' determination are unclear.¹⁷⁴

Section 1607 stresses the treaty exception to the jurisdictional powers of the courts. This section clearly coexists with the act of state doctrine as enunciated in *Sabbatino* that where there is an unambiguous international agreement in existence, that route should be taken in resolving the dispute. Clearly, in *Texas Trading and Milling Corp.* and the *Allied III* cases, the Second Circuit could have achieved similar or identical results, namely, protecting American investors by enforcing the relevant international agreements.¹⁷⁵ The agreements were freely entered into by the parties; they chose the fora to arbitrate. Where the agreement is unambiguous, a court should not interject itself into the dispute on grounds of jurisdiction to disregard the act of state doctrine.

In the *OPEC* case, the court had to inquire into the role and relationship of OPEC and their governments to justify its refusal to take jurisdiction. Such investigation of "purpose" of the act of the foreign government instrumentality which the FSIA precludes,¹⁷⁶ will continue to be a dilemma for the courts in dealings with other governments.

B. Commercial Exception

The Second Circuit offered no explanation in *Texas Trading and Milling Corp.* as to why a foreign state's action to buy cement for the construction of military barracks is not an act of state. The court strictly following the mandate of the FSIA construed the act as within "a regular course of conduct and therefore, consistent with FSIA's 'commercial exception'."¹⁷⁷ The court did not explain "regular course" but relied instead on Lord Denning's ruling in *Trendtex v. Central Bank of Nigeria*.¹⁷⁸ In that case Lord Denning reasoned that the "commercial exception" of *Dunhill* was the opinion of the U.S. Supreme Court whereas he had quoted from Part III of Justice White's minority opinion. The Second Circuit's attempt to circumvent the "commercial exception" problem became even more glaring in that now the court attempts to explain it indirectly — not by quoting Justice White in *Dunhill* but by quoting Lord Denning's interpretation of Justice White's dictum in *Trendtex*.¹⁷⁹ Thus, Lord Denning misread Justice

174. *See id.*

175. In the current contracts, Nigeria agreed to submit to arbitration by the International Chamber of Commerce (I.C.C.). 647 F.2d 300 at 315.

176. *See* 647 F.2d 300 at 307; FSIA § 1603(d).

177. *See* 647 F.2d 300 at 307.

178. 2 WLR 356 (1977).

179. Lord Denning equated the CBN with the Banks in his ruling in *Trendtex v. Central Bank of Nigeria*, 2 W.L.R. 356, 369, 1 ALL E.R. 881 (1977).

White and Judge Kaufman did the same. In any event, *Texas Trading and Milling Corp.* did not distinguish a "commercial" from "governmental" act.¹⁸⁰

It has been a comedy of errors even in Congress. As already indicated, the experts misled Congress during the hearing on the FSIA. Hence the Act was erroneously conceived by Congress. The statute suffers from the propaganda of its authors. Wishing to put the best light on what they were doing, they drafted the statute in terms of the arguments made for it, incorporating a number of the legal misconceptions that were reminiscent of the *Sabbatino* controversy. One such inclusion is this commercial exception which dictates to other foreign states what their objectives and purposes have to be. Such imposition amounts to a restriction on the sovereignty of the foreign state.

Regardless of the posture of FSIA's Section 1605(a)(2), it is still an act of state when foreign countries decide to buy ammunition, guns, or gas masks for their army. That the FSIA considers such acts "commercial" does not prevent it from being an act of state. This explains why, in spite of the FSIA overruling of the dictum in *Victory Transport* which states that a contract made by a government for a public purpose, e.g., bullets for the army, is not "commercial activity," the FSIA will continue to contend with this problem.

There is no difficulty comprehending the authority of a sovereign state in making laws within its territory. That is a prerogative that is recognized in international law.¹⁸¹ But there is a problem when the FSIA provides in part in Section 1602:

Under international law, states are not immune from jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.¹⁸²

This provision becomes extremely troublesome in the face of *Texas Trading and Milling Corp.* where Judge Kaufman reasoned that

. . . these are not cases where the challenged governmental conduct is public rather than commercial in nature. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, supra, or where its purpose was

180. 647 F.2d at 307.

181. *Victory Transport v. Comisaria General de Abastecimientos y Transportes*, 103 F.2d 354 (2d Cir. 1964) cert. denied, 381 U.S. 934 (1965).

182. See FSIA § 1602.

to serve an integral governmental function cf. *Hunt v. Mobil Oil Corp.* 550 F.2d 68, 78 (2d Cir.), cert. denied, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977).¹⁸³

From nowhere the court arrives at the conclusion that the act of a foreign sovereign to order cement to build a military complex is not a public act. Lacking a sufficiently sound basis other than that for jurisdiction which was amply supported, it overlooked the key issue, the real FSIA problem of assuming that it can tell the person wearing the shoe where it hurts. Africans believe, for example, that when all lizards lie on their bellies, it is difficult to determine which has a belly ache. Most LDCs do not believe that FSIA, as presently written, has the wisdom to solve that riddle.

In any event, the court was bent on vindicating Congressional intent. This determination explains the court's refusal to recognize even the unambiguous international agreements in *Texas Trading and Milling Corp.* and *Allied III*.¹⁸⁴

Our rulings today vindicate more than Congressional intent. They affirm the right of all participants in the marketplace of the world to be treated as equals, and to ascribe to principles of trade which found their birth in the law merchant, centuries ago. Corporations can enter contracts without fear that the defense of sovereign immunity will be inequitably interposed, and foreign states can bargain without paying a premium required by a trader in anticipation of a judgment-proof client. Commerce is fostered, and all interests are advanced.¹⁸⁵

A note of caution is necessary at this point, especially in view of the above quotation. Suffice it to say that commerce is fostered for the multinational giants. For the LDC, which is constantly struggling with the antics and the itches of multinationals and their sometimes overpowering influence and resources, the gates may have been open for fronting and fraud in international business. Nigeria was clearly a victim of this, but since it did not advance any counterclaims, the entire picture was not unveiled for judicial scrutiny. Nigeria was perhaps unwilling to expose its sovereignty further than its officials already did, maybe, inadvertently.

183. See 647 F.2d 300 at 314-15.

184. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

185. See 647 F.2d 300 at 315.

V. ANALYSIS

Because several commentators have called for the abandonment of the act of state doctrine,¹⁸⁶ it is appropriate at this juncture to repeat the warnings in *Sabbatino* which Congress may have inadvertently overlooked during its hearings on the FSIA. The court said:

“The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.”¹⁸⁷

The Court, more than Congress, recognized ideological differences between countries. Thus in cases involving less developed countries, a public purpose could exist where it is least anticipated by U.S. district courts since goals, dreams and ideologies of LDCs are not identical to ours. This fact, not countenanced by Congress, will continue to plague the courts in implementing the FSIA.¹⁸⁸ As long as the FSIA prohibits the use of “purpose” as a criterion in determining whether or not the act of state doctrine applies, the present method of implementation which categorizes deliberate acts of other states as “not acts of state” is a continuous invitation to retaliation from expropriating or breaching nations.¹⁸⁹ The issue becomes subjective and lends itself to political interpretation. For example, on both economic and political levels, the FSIA is perceived as an attempt by the industrialized countries to perpetuate colonialism. The rapidity and unanimity with which all the Western courts held Nigeria liable on the cement contracts conveyed a silent messages to the LDCs.¹⁹⁰ These countries have been led into the economic and political crossroads and then left helpless while developed

186. See *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 78 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977)

187. See *Sabbatino*, 376 U.S. 398 (1964). Compare with court's dictum in 647 F.2d 300, 316 particularly n.38.

188. *But see* the observations of Angulo and Wing, note 132, *supra* at 307, 308-309, 312, 313 and the prospects of retaliation at 315.

189. *Id.* See also F.S.I.A. 1603(d).

190. See 647 F.2d 300 at 303, n.5 and at 306, n.15.

countries famish in the midst of plenty.¹⁹¹ This is an area that calls for caution and not just a show of judicial power.

When Nigeria had a huge reserve overseas, the banks begged, cajoled and bribed its leadership into huge borrowings for several gigantic projects.¹⁹² By so doing, the big banks were able to unload some of their excess reserves into developing countries. Nigeria was not alone in borrowing such funds.¹⁹³ That could not have been done without influencing the leadership. Little do the banks care whether any benefits from the loans filtered down to the citizenry of these countries.

When the oil glut began to erode Nigeria's economic projections, the IMF came into the picture with a bag full of austerity measures. LDCs, in many cases, see these measures as adding insult to injury if the number of lives IMF programs have taken can ever be accounted for.¹⁹⁴ The economic medicines prescribed by the IMF, designed for

191. See *THE ECONOMIST*, May 1986. See also the Second Circuit's reasoning in *Texas Trade and Milling Corp.* 647 F.2d at 315, n.38. There the court seems to draw a straight line between issues of expropriation and other non-expropriation questions. This "straight line" approach is becoming more abrasive and lacking in diplomacy.

192. See *THE ECONOMIST* May 1986. The author discusses among other things how leaders of developing nations are cajoled, pressed, encouraged and bribed into borrowing large sums of money from giant international banks. The loans are often diverted to private pockets through fronts and fraud. Some of the fraudulent activities are consummated through over-priced contracts for services, equipment and invoice markups. Monies so siphoned out of the country become a burden on the impoverished citizens while its multiplier effect enriches the industrialized nations.

193. South American countries like Peru, Argentina and Brazil. In Africa, Nigeria, Liberia, Zaire, Liberia and many others are heavily indebted to foreign banks.

The austerity imposed on Nigeria to get IMF loan took serious tolls in terms of unemployment resulting from retrenchment. Many breadwinners were psychologically and mentally devastated. This writer observed mental illness on the streets and the "flyovers" in Lagos; important services were curtailed and in some instances (especially in the suburbs) were cut off or postponed. Those retrenched could not return to the farm for lack of capital; armed robbery and other crimes rose; armed gangs took to the streets even during the day. The effect goes on. The impact has simply been indiscriminate.

194. The cultures of the industrialized West in many respects are very different from the cultural patterns in developing countries. See J. Lee, *Cultural Analysis in Overseas Operations* HARV. BUS. REV. 106-14 (Mar.-April 1966); UNESCO, *Report of the World Social Situation* 79 (Paris, Mar 9, 1961). See also Kroeber & Kluckhohn, *Culture: A Critical Review of Concepts and Definitions*, papers of the Peabody Museum of American Archaeology and Ethnology, Harvard University, Vol. 47 no. 1 at 1-223 (1952) M. HERSKOVITS, *CULTURAL ANTHROPOLOGY* 236 (1963). See generally ROBOCK, SIMMONDS & ZWICK, *INTERNATIONAL BUSINESS AND MULTINATIONAL ENTERPRISE*, Chapter 15 (1977); LITKA, *INTERNATIONAL DIMENSIONS OF THE LEGAL ENVIRONMENT OF BUSINESS* (1988); M. MEAD, *CULTURAL PATTERNS AND TECHNICAL CHANGE* (1953).

industrialized countries, often miss the mark because of the differences in cultural patterns.¹⁹⁵ The advent of IMF and Western ideas is changing existing "primitive living" and eroding the extended family culture. There are also differences in the value system with regard to human life and material things.¹⁹⁶ It is, therefore, not surprising that this new culture will be attractive to drug barons who recruit daring young men and women all over the world. There is no question that there are times when IMF policies in LDCs have been clearly counterproductive.

The OPEC scenario is another example. Until recently, OPEC's efforts to stem the declining price of crude oil was assailed as selfishly motivated. The organization was said to be greedy and insensitive to the plight of the industrialized world. Many experts who proposed taxing crude oil imports and several undisclosed retaliatory measures aimed at disorganizing OPEC as an oil cartel saw only one point of view — that OPEC was out to gouge our citizens of their hard-earned money. These experts and the big oil companies depicted OPEC as a villain before the citizenry. OPEC was blamed for the faltering price of crude oil while the big oil companies made their profits surreptitiously with all the write-offs. Critics did not envisage the devastating financial losses that have visited United States savings banks for the substantial investments in crude oil business. Banks that loaned money to companies in oil related business in several states have been in deep financial trouble. Focusing our attention on OPEC, we did not realize when OPEC's problem became ours.¹⁹⁷

195. The new interest in material things has become a serious problem in LDCs. Many officials have been influenced and now go for materialism at the expense of service. It has led to a get-rich quick mentality in some countries. Nigeria has also been tangled in court in an attempt to extradite some of the highly placed officials of the Shagari administration. These officials are accused and are asked to account for billions of dollars. See *Dikko's Reprieve*, British Daily Mail, June 16, 1987; *Dikko Wins Plea for Temporary Sanctuary*, Daily Telegraph June 16, 1987; *Buried Treasure*, Wall St. J., Wed. Feb. 11, 1987 in which the paper says "much of Marcos Wealth, still carefully hidden and eludes investigators." Hiding such enormous wealth can only be done abroad with the acquiescence of governments, private institutions and individuals in the industrialized world. The commendable action of the Swiss bank in freezing the treasures allegedly piled up in that bank by Ferdinand Marcos should signal to other heads of state who plan similar ventures that times have changed.

196. Most leaders of LDCs have learned to put illgotten money away overseas. It is believed by the citizenry that this encourages dishonesty. See, e.g., *Buried Treasure*, Wall St. J. Feb. 11, 1987.

197. Most of the major companies were interested in profits from the crude oil business. The banks were more interested in their interests and the welfare of their clients not of OPEC. Because of the OPEC problem Nigeria, for example, scaled down its budget since the revenue side was no longer accomplishable. Of course, without the

OPEC's dilemma, considered a Third World problem and therefore not a priority, still plagues us. Not only have the giant U.S. oil companies been adversely affected, their refinery operations have suffered.¹⁹⁸ The State of Texas is still laboring to survive the impact of oil economics. The problem has also become real in the areas of office real estate and bank closings. It is a classic case for recognizing that there is urgency in the demand of emerging foreign states that the old order designed for a few nations to the exclusion of the others deserves some overhaul for the purposes of coexistence. OPEC is forging ahead with coexistence in mind. Its recent meetings have included non-OPEC participants who it hopes will bring in new ideas for dealing with our common problem of survival.¹⁹⁹

Also cloudy is the courts' rationale for jurisdiction: "or, put another way, if the activity is one in which a private person could engage, it is not entitled to immunity."²⁰⁰ Government leaders in an LDC are tickled by the reasoning of those experts who testified on the bill before the FSIA was enacted. It is common knowledge that the budgets of multinational corporations allow them to perform feats LDCs may never attain. A private person in the U.S. may also perform where LDCs may not because of scarce resources and problems associated with inadequate infrastructure. Hence, in a LDC, such suggestions will only encourage monopoly and will not redistribute opportunity and wealth

revenue, its international debt could not be serviced. The crisis of OPEC was not heeded until Texas, Oklahoma, Alaska and other states including the Federal Savings and Loan Insurance corporation came under siege. See N.Y. Times, Mar. 24, 1988 at D.1. Otherwise OPEC's plan on reducing output was seen as selfish. See N.Y. Times, Oct. 24 1988 at D.1.

For an account on the situation in the Texas economy see *Hard Times Not Over for Texas Real Estate*, N.Y. Times, March 24, 1988 at D.1. The article also details the grim outlook for Houston and the Federal Deposit Insurance Co. Losses have so far been put at around several billion dollars and continue to increase.

198. See *id.* Note also the crises in the Savings and Loan Associations and in other countries around the world.

199. To avert further crisis and create an atmosphere conducive to effective monitoring of crude oil output, OPEC invited non-OPEC members to participate in the negotiations. It is a realization that all will sink together or survive together. It demands a new approach to the debt problem by the West, the IMF and the debtor countries.

200. See *Texas Trading and Milling Corp. v. Fed. Rep. of Nigeria*, 647 F.2d 300 (1981). The comparison shows inadequate understanding of LDCs, their cultural patterns, the workings of their central banks and institutions. Thus, lower courts have often ascribed a greater degree of sophistication to LDCs when comparing them to industrialized nations. Even now, LDCs are rushed into computers without first training necessary manpower.

already concentrated in few private hands. That kind of reasoning portrays some misunderstanding of the situation in LDCs where communal living in the extended family structure prevails. The court's suggestion lends itself readily to external influences because it means dealing directly with the leadership and not the community. LDCs would prefer community control to Western style representative strategy which lends itself to corruption.

As already indicated, had the restrictive theory of jurisdiction which has been followed by the Department of State and the courts since it was articulated by Mr. Jack B. Tate in his letter of May 29, 1952, been steadily adhered to by the Department, a consistent policy would have emerged.²⁰¹ But the greater part of the present confusion has arisen since after *Sabbatino* because the *Sabbatino* Court did not countenance political pressure either from Congress or the State Department. The inadequacies of the theory do not emanate from the theory itself but from State Department's consistent inconsistency.²⁰² The Supreme Court, from experience, precedents and knowledge of world order, knows enough not to embarrass the Executive and not to buy wholesale the obsolete assumptions made by certain experts during the several hearings on this act.²⁰³ The testimonies of these experts notwithstanding, the courts recognize that in international relations, there is a difference between theory and practice. When the facts reach the court, the judge must put theory into practice on a case-by-case basis.

Another aspect the court must consider is the nature of international law and its relationship with the world today. The false premises on which the experts predicated their testimonies, seldom expressed and never justified, are that the world of today is, in legal and political terms, comparable to the world of 1938 and even 1812,²⁰⁴ and that the international law of the past can be superimposed on the international community of today.²⁰⁵ Many of the experts went off track to protect,

201. Disagreements generated by State Department policy became more obvious after *Sabbatino*. See *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). For more details on conflicting directives from the State Department to the Court when asked for an opinion, see Rabinowitz, *supra* note 44.

202. See generally Rabinowitz, *supra*, note 44. During those years the big powers spoke for their colonial territories. The new states had not attained sovereignty. Now they are sovereign and must meet the needs of their subjects.

203. See *Sabbatino*. See also notes 192, 194 *supra*.

204. See note 202 *supra*.

205. The colonial experiences of these new states gave rise to idigenization laws. See ADADEJI, *supra* note 132. The South African apartheid experience remains a vivid example of what colonization can do to a people. Other developing countries want no

perhaps, the interests of the Executive Branch when it advised the Court to hold as it did in *Dunhill*²⁰⁶ against the sound view of the *Sabbatino* Court. The District Court and the Court of Appeals in *Sabbatino* announced an exception to the general unconditional rule established in *Underhill*²⁰⁷ holding that the act of state doctrine did not apply when the act of a sovereign executed within its territory violates international law and that the Cuban decrees under consideration violated such law.²⁰⁸ The U.S. Supreme Court rejected that exception holding that a U.S. court, in an expropriation case, could not examine the question of whether international law had been violated.²⁰⁹ That

part of this system that denies the greater population of the South African blacks basic amenities and God-given liberties and freedom. Also, under the old law and order, it is proper for international banks to cajole LDC government leaders into excessive borrowing for outdated machinery and equipment which the sellers knowingly sold in the hope of taking shelter behind U.S. or foreign courts under colonial laws. Fraud in the international business arena, though rampant, is yet to be tackled by U. S. Courts. The age has come for such issues to begin to be established if the evidence will surface in court.

Nigeria, for example, has been the dumping ground for obsolete machinery, expired drugs which took many lives. Even more recently, LDCs have become the dumping place for toxic waste. See C. Agege, *Dumping of Dangerous American Products Overseas: Should Congress Sit and Watch?* 19:4 J. WORLD TRADE L. 403 (July-Aug. 1985). For details on the pesticides like Leptophos which took several lives in thirty different developing nations abroad including Egypt. See *id.* at 404.

Excerpts from the testimonies during the Hearing on Banned Products (1978) and the official findings and conclusions that resulted from the hearings were later published in a House Report. According to the findings,

“. . . In the Sudan, Lotmoil is sold in packages proclaiming the drug's use by astronauts during the Gemini and Apollo space flights, and is recommended for children as young as one year." See U.S. Export on Banned Products: hearing before the subcommittee on Commerce, Consumer, and Monetary Affairs of the House Comm. on Govt. Operations, 95th Cong. 2d Sess. 35 (1978). For additional details see Agege, *supra* at 403, 404 and 405.

At the other end of the spectrum, The Economist reports how banks overloaded with petro dollars influenced LDC leaders to borrow for all kinds of projects. Many of them of mediocre quality are now defunct and the sellers have fled to their bases abroad to bring suit against the host nations. In other cases, projects are uncompleted because of economic crunch. In many instances, leaders are cajoled and pressed into negotiating for sophisticated computers or equipment that remain idle because of lack of trained manpower or appropriate infrastructure. See THE ECONOMIST (May 1986). International business is infested with scenarios such as these.

206. See notes 201 and 202 *supra*.

207. See note 2 *supra*.

208. *Id.*

209. See *Sabbatino*, 376 U.S. 398 (1964). The Supreme Court narrowed the issue in *Sabbatino* to expropriation by a state in its territory and ruled that the authority of the foreign state could not be questioned by American courts. As to non-expropriation issues, the courts have assumed that they can invade the sovereignty of other states

view, amply supported by precedent, is contradicted by the commercial exception clause as incorporated in the FSIA.

In refusing to adopt the sweeping innovations ushered in by post *Sabbatino* decisions, the justices demonstrate an understanding of the issues that separate or unite the United States with the rest of the world. They recognize, for example, the cultural differences between the third world countries and the United States. The justices believe that U.S. policy and laws should emphasize the causes of unity among nations and deemphasize the sources of disunity. By so doing the greater majority will benefit from the diversity of cultures. With this vision, the Court, mindful not to embarrass the Executive, knows that it cannot always adhere to Executive directives as to whether the act of state doctrine is applicable. The justices seem to gravitate, where possible, toward those bonds that unite divergent interests of sovereign states. Terrorist actions against United States interests in the recent past, though vehemently abhorred, cannot be said to be unconnected to this kind of legislation which sends unintended messages to LDCs after leading such countries into economic and political crossroads.²¹⁰

even where such states have entered into international agreements underscored in the *Sabbatino* decision - the treaty exception. When such agreements are in place, courts should respect them as the intention of the parties. The Second Circuit will send clearer signals by adhering to the *Sabbatino* decision. It is time that *Dunhill* spoke of the "commercial exception" to the act of state doctrine; it is equally true that it is so far still a very sensitive area to explore. It arouses a great deal of suspicion and mistrust and the tricks of international business in developing countries.

Contracts entered into by LDC governments for goods and services purchased in international markets do not *ipso facto* become commercial activities in order to assume jurisdiction.

210. See notes 201, 202, 205 *supra*. State Department policies in Europe are obviously different from its approach to Southern African or other African problems. LDCs insist on equal treatment in dealings with the U.S. especially for example, in the South African situation and the like. It is a situation which portrays what some see as American duplicity in international relations. This author submits that the advice tendered by former Legal Adviser to the State Dept. Davis Robinson, if heeded will provide more seasoned insight in tackling relations with LDCs.

These views by Mr. Robinson are supported in Rabinowitz, *supra* note 44.

The testimonies of the experts before were guided primarily by U.S. and Executive interests to the total ignorance of the interests of LDCs. Besides, the testimonies were predicated on erroneous assumptions and misunderstandings of the expanding nature and obligations of the LDC governments. The repeal of the decision in *Victory Transport*, 103 F.2d 354 (2d Cir. 1964) shows the advisers did not foresee the difficulty of distinguishing for the foreign sovereign state, between a *public* and a *commercial* purpose. See Flannagan, *Sovereign Defaults in the U.S. Courts: The Interrelationship of the Articles of the IMF, the Act of State Doctrine and the Community Principles: Allied Bank International v. Banco Credito De Cartago*, 4 B.U. INT'L L. J. 153

Moreover, former Legal Adviser to the State Department, Davis Robinson, has stated:

“Friction with foreign government, occurs with some frequency over alleged conflicts of jurisdiction and with regard to enforcement actions perceived to be inappropriate extraterritorial exercises of jurisdiction by the United States. Such controversies may be isolated events in our relations with particular countries. Or they may involve long-term or deep-rooted differences, sometimes with close friends and allies.”²¹¹

In enacting the FSIA, neither Congress nor the experts who testified considered the chance of the shoe being on the other foot or the idea of reversed roles. Nor was sufficient thought given to the act's negative impact on diplomatic and consular relations and other international relation matters, nor to the fact that default judgments in the U.S. courts against foreign sovereigns and non-appearances may be on the increase.²¹² It may be too late to undo the damage to foreign relations wrought by judicial decisions rendered without the benefit of adversary proceedings.²¹³ These were actually questions and concerns

(1986).

It is submitted that the FSIA is not the best avenue for solving the world's debt problem. *Sabbatino*, it appears, has greater prospects of meeting such challenges because of its built-in flexibilities. *Sabbatino* envisages an atmosphere of respect and reciprocity in the context of treaties and unambiguous international agreements. See Treaty of Friendship between the U.S. and Ethiopia and the decision by the Sixth Circuit to uphold the treaty between Kalamazoo Spice Extracting Co. v. The Socialist Revolutionary Government of Ethiopia, 729 F.2d 422, 425 (6th Cir. 1984). The lower court had dismissed the treaty as vague and therefore not controlling. Such a decision would have left Kalamazoo Spice without a remedy although an unambiguous treaty was in place for the resolution of disputes arising from the transaction.

211. The advise of the former legal adviser to the State Department, Mr. Davis Robinson, that friction with foreign government occurs with some frequency over alleged conflicts of jurisdiction and with regard to enforcement actions perceived to be inappropriate extraterritorial exercises of jurisdiction by the U.S. Such controversies do become deep-rooted differences. Incidentally, with regard to these situations, the controversies have existed between LDCs and the U.S. As of the time President Reagan left office, the LDCs were most suspicious and uncertain as to what the U.S. was about in its foreign policies. Look anywhere in Africa, South America, South Korea and the Middle East. Controversies and differences have become deep-rooted.

212. It is appropriate to consider the negative effects of the F.S.I.A. as it is strictly interpreted by the courts.

213. Various groups have introduced bills to eliminate the act of state doctrine. These include the American Bar Association and Senator Charles Mathias, Jr. Senator Mathias' bill entitled *International Rule of Law Act* did not pass the Senate Judiciary

raised by Mr. Robinson about the implications of Section 1071, a similar Congressional bill. Section 1071 was the American Bar Association Bill which was introduced in the Senate by Senator Charles Mathias, Jr. whose bill titled: "International Rule of Law Act" had failed to pass the Senate Judiciary Committee. Senator Mathias' bill was designed to eliminate the act of state doctrine and to guide courts in making the determination.²¹⁴ It has been suggested that a bill with a simple language that unequivocally prohibits all further invocations of the doctrine will successfully abolish it.²¹⁵ Bayzler proposes the following bill to eliminate the act of state doctrine:

"The act of State doctrine shall not be available as a bar to consideration of any case on the merits in any court of the United States."²¹⁶

But even this version will not accomplish the purpose which is not just to abolish the doctrine but to make it amenable to our national objectives. This, *Sabbatino* already did in its vision of emerging new sovereign states and a new world order. However, *Dunhill* muddled the waters not so much with "Commercial exception" which it advocated so vociferously, but the inability to envisage the equitable underpinnings of this new world order.

VI. CONCLUSION

In *First National City Bank v. Banco Nacional de Cuba*²¹⁷ (which involved the counter claim of the bank on the plaintiff's claims), the

Committee. Like the Hickenlooper Amendment II, these attempts are aimed at guiding the courts in making determination. Those earlier bills failed because they were opposed to *Sabbatino* which stood for equality and respect for the sovereignty of each state developed or developing.

214. *See id.* *See also* Bayzler, *supra* note 44. Even the version suggested by this author cannot be imposed on the court which is the final arbiter. The bill had referred then to the International Court of Justice Act and Document No. 1, 37, 46.

215. The bill introduced by Senator Mathias was designed to accomplish that purpose of emasculating the act of state doctrine. *See* Bayzler, *supra* note 44, for more details. *See also*, *Dunhill* 425 U.S. 682 (1976) on which the FSIA was to a greater degree predicated.

216. *See generally* Bayzler, *supra* note 44. What Mr. Bayzler failed to fully consider is that sovereignty is a pretty sensitive matter to any country. Nor did *Dunhill* clearly delineate its "commercial exception" doctrine which attempts to dictate to LDC where it should shop for basic needs of the state. *See id.*

217. *See* *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972).

justices were split for a number of reasons. The reasons included a refusal to continue to defer to the Executive Branch in all cases.²¹⁸ The justices began to insist on their constitutional rights under the separation of powers doctrine.²¹⁹ The next opportunity came in *Alfred Dunhill of London Inc. v. Republic of Cuba*.²²⁰ There, no more than four of the justices were attracted to the plurality opinion written by Justice White in which he created a commercial exception to the act of state doctrine. This exception was unattractive because it had all the ingredients and flavor of those amendments that attempted to reverse the *Sabbatino* decision²²¹ and abolish the act of state doctrine.²²²

Besides, in terms of separation of powers, the FSIA enacted by Congress and the act of state doctrine created by the U.S. Supreme Court, are laws created by "separate but equal" branches of the United States Constitution. Each is within its authority and, therefore, it cannot be said that the act of State doctrine is inferior and therefore overruled by the FSIA. Rather it is submitted that Congress, in enacting the FSIA, intended, in a spirit of accord, to obviate the need for judicial justification for disregarding an act of a foreign government in a given situation.²²³ It is further submitted that Congress did not mean to foreclose judicial invocation of the act of state doctrine where the Court, the final arbiter, finds such invocation appropriate.²²⁴ It is therefore proper to infer that the enactment of FSIA is intended first to occupy the field, i.e. other areas not affected by the doctrine; then to supplement the act of state doctrine. It is a common law principle that could be a "catch basin" when the FSIA's specific provisions are ineffective in dealing with peculiar problems.²²⁵

218. *See id.*

219. *See Sabbatino.*

220. *See Dunhill*, 425 U.S. 682, 691 (1976).

221. *See note 219 supra.*

222. *See Hickenlooper Amendment II. See also, Angulo and Wing, supra note 132 at 315.* Among other things, these authors discussed the possibilities of retaliation from foreign states adversely affected by decisions under the FSIA (1976).

223. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) in which the Supreme Court established the doctrine of judicial review and the supremacy of the U.S. Constitution. In other words, the Supreme Court is concerned more with the "constitutional underpinnings" of the act of state doctrine to determine whether to stand by the doctrine or overrule it, the FSIA notwithstanding.

224. *Id.*

225. The act of state doctrine need not be abolished since it could be invoked under the "catch basin" doctrine where the specific provisions of the FSIA do not effectively resolve a particular problem. *See Meinhard - Commercial Corp. v. Hargo Woolen Mills*, 300 A. 2d 321 (N.H. 1972). The logic of the N.H. Court in interpreting the U.C.C. is applied here. There the court did not abolish the common law.

Although the Ninth Circuit affirmed the OPEC case, it had difficulty sustaining its position on the Act of State doctrine vis-a-vis the FSIA. But the *OPEC* case raises a serious question that must be answered. Is the Act of State doctrine a law established by Congress? If not, does the U.S. Supreme Court need power from Congress to overrule its own pronouncement? This question was answered by the Illinois Supreme Court when it overruled the application of the doctrine of sovereign immunity extended to school districts in *Molitor v. Kaneland Community Unit District No 302*.²²⁶ The court said:

We have repeatedly held that the doctrine of *stare decisis* is not an inflexible rule requiring this court to blindly follow precedents and adhere to prior decisions, and that when it appears that public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to overrule those decisions and establish a rule consonant with our present day concepts of right and justice.²²⁷

The Illinois Supreme Court overruled *Kinnare v. City of Chicago*,²²⁸ the leading case which extended the immunity rule to school districts. Therefore, along this line of reasoning, the United States Supreme Court has the power and the duty to overrule its previous decisions acknowledging the act of state doctrine if it thinks justice is not served.²²⁹ But it has chosen not to do so in spite of the F.S.I.A. Al-

226. *Molitor v. Kaneland Community Unit Dist. No. 302*, 163 N.E. 2d 89 (Ill. 1959). The court reasoned that it is guided by the concept of "right and justice." In *Molitor*, plaintiff, a student, was injured when the school bus in which he was riding drove off the road and exploded. Molitor sued defendant - school district, alleging that the driver, an employee of the school district, negligently caused Molitor's injuries. The trial court dismissed his lawsuit on the grounds that the common law of the State of Illinois, including the school districts, could not be held liable for negligently caused injuries under the doctrine of sovereign immunity.

Reasoning that the court is guided by concepts of "right and justice," it responded to the defendant's argument as follows:

Defendant strongly urges that if said immunity is to be abolished, it should be done by the legislature; not by this court. With this contention we must disagree. The doctrine of school district immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity. . .

227. *Id.*

228. *Kinnare v. City of Chicago*, 49 N.E. 536 (1898).

229. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 1803. The Court noted that Congress' attempt to expand the types of cases that the Court may hear to include those cases not listed in the Constitution was "repugnant" to the Constitution. The

though Congress has passed the FSIA, there is no constitutional requirement that the Court must take orders from an equal. For Congress and the Court, under the U.S. Constitution, it has been a matter of cooperation and coexistence.²³⁰ It is, therefore, submitted that in enacting the FSIA, Congress contemplated the act's coexistence with the act of state doctrine and not necessarily its abolition of the doctrine.

The act of state doctrine established by the U.S. Supreme Court has been a solid foundation for the practice of American foreign relations. Unlike those amendments which the Supreme Court did not countenance because they were predicated on emotionalism,²³¹ the Act of State doctrine for years provided sound guidance and predictability within the same "constitutional underpinnings."²³² It draws from the separation of powers doctrine and this explains why Congressional attempts to abolish it have failed. The act of state doctrine is simply a law not created by Congress and it is a good thing that it was established and maintained by seasoned jurists at the U.S. Supreme Court. The unfortunate experiences of the appellate and lower courts in *Sabbatino* and others need not be repeated here. These courts were swayed by emotions and pressure groups as the facts reveal.²³³

As a rule established by the U.S. Supreme Court, only that Court has the power to change it. The Supreme Court of Illinois responding

Court then considered whether it should follow the law established by the Judiciary Act of 1789.

Justice Marshall also said: "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose is that limitation committed to writing, if these limits may, at any time, be passed by the intended to be restrained. . . ?"

The FSIA is one such law that triggers the vigilance of the Supreme Court.

230. See "constitutional underpinnings" in *Sabbatino*, 376 US 398 (1964). The court will not be led by the nose by the Executive. But they respect each other and are determined to cooperate with each other. Therefore, they must respect each other's constitutional rights to coexist. They must remain separate but equal under *judicial* vigilance.

231. See for example, the Hickenlooper Amendment II which was a direct response to public pressure during the *Sabbatino* controversy.

232. See note 230, *supra*. What is needed is greater flexibility not imposing statutes; greater cooperation not dogma.

233. See notes 7, 9 and 10 *supra*. America is blessed with a Supreme Court that by its decisions in most cases restrains the excesses of the Executive in its conduct of international relations. Only the Supreme Court could exercise the wisdom of the *Sabbatino* court under such monumental public pressure. That decision needs to be closely studied and applied rather than this stampede for new legislation like the FSIA which has immense potentials for triggering retaliation from sovereign states equally protective of their sovereignty. See notes 202, 205, 211, 212, 222, *supra*.

to a challenge on the question of state immunity from liability reversed the appellate court saying in pertinent part that the court does not need the legislature to abolish the doctrine established by the court.

It therefore follows that in enacting the FSIA, Congress intended the Court to exercise discretion in enforcing it; Congress also intended that the instrument should give the Court greater participation in fostering new world international order in the interest of all. Congress in its full understanding of the concept of *stare decisis* and the "constitutional underpinnings" of the act of state doctrine, intended that the doctrine and the FSIA should coexist.²³⁴

234. Nothing in the FSIA suggests that the act of state doctrine must be repealed. Rather, the act of state doctrine should be available where specific FSIA provisions fail to adequately resolve a particular problem. *See* note 225 *supra*.