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I. INTRODUCTION

In 1897, Chief Justice Fuller of the United States Supreme Court made what has become the classic pronouncement of the act of state doctrine in *Underhill v. Hernandez*:[1]

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.[2]

In the United States, the doctrine developed from the rule that a sovereign cannot be sued in the courts of another country without the sovereign's consent. The principle traditionally existed *ratione personae* and applied only where the sovereign or its agent was the respondent in some legal proceeding.[3]

The facts of the twentieth-century cases of this country applying the act of state doctrine fit within the following general scenario: Property belonging to an American national and situated in a foreign country is nationalized and expropriated by the foreign government. The American national is not compensated for the confiscated property. The foreign government then transfers the property to a third party who somehow brings it within the jurisdictional grasp of the courts of the United States. The American owner then initiates an action to challenge the third party's title. In effect, the issue in such cases, from the jurisdic-

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* B.A., 1972, University of South Carolina; J.D., 1975, University of South Carolina; LL.M., 1980, Yale University. The author is an associate in the firm of Morgan, Lewis & Bockius, Washington, D.C.

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1. 168 U.S. 250 (1897).

2. *Id.* at 252.

3. *See* 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW §§ 169-176 (1941).

tional standpoint, is no longer *ratione personae,* but *ratione materiae.* The traditional concept of granting protection to a foreign sovereign is inapplicable. Nevertheless, the act of state doctrine has been applied in these cases, thereby expanding the scope of protection accorded a sovereign. The complexity involved in such an expansion led one author to comment:

> Why did the Supreme Court formulate the act of state doctrine in *Underhill*? Although no definite answer is possible, the most likely reason involves the political situation in Venezuela from 1877 to 1899. It was a period with tumultuous military *coups d'etat* and civil war occurring throughout. Precisely because of this highly inflammable situation, the Court may have invented the act of state doctrine. Because of the rule of American law which provides that the success of a new government automatically accords retroactive validity to all of its acts, a decision by the Court to apply the doctrine of sovereign immunity when the stability of a provisional government was in doubt, would have implicitly accorded sovereign status to that government. To avoid any decision, however implicit, on the political question involved, the Court seemingly invented the act of state doctrine.[4]

The Schooner Exchange v. M'Fadden[5] has also been considered to have led to the conclusion in *Underhill.* The primary issue in *The Schooner Exchange,* according to Chief Justice Marshall, was "the very delicate[6] and important inquiry, whether an American citizen can assert, in an American court, title to an armed national vessel found within the waters of the United States."[7] The lower court had dismissed the libel action because "a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel."[8] Chief Justice Marshall discussed the value of sovereign interaction for the

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4. Gordon, *The Origin and Development of the Act of State Doctrine,* 8 RUT.-CAM. L.J. 595, 615 (1977).

5. 11 U.S. (7 Cranch) 116 (1813).

6. Perhaps the issue was delicate for several reasons not articulated by the Court. When the case arose, the United States, a very young nation, was again at war with England. France had been America's ally since the War for Independence and the War of 1812. Therefore, policy necessitated a preservation of the amicable and supportive relationship that existed between the United States and France, even though legitimate claims of American citizens would suffer thereby.

7. 11 U.S. at 135.

8. *Id.* at 120.

promotion of mutual benefit[9] and stated, "The world [is] composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require . . . ."[10] The court then affirmed the lower court's dismissal of the libel action. Consequently, *The Schooner Exchange* can be seen as the pronouncement of a national policy not to do anything, absent extraordinary circumstances, that would chill mutually beneficial relations then existing with another sovereign.[11]

Sovereign immunity during the early history of the United States was not absolute, but was a privilege granted on the basis of comity between nations. "[I]t was not founded on any notion that a foreign sovereign had any absolute right . . . . [I]t may be withdrawn upon notice at any time, without just offence . . . ."[12]

Until 1964, courts seemed to rely upon concepts of comity and sovereign immunity in their determination not to judicially review the conduct of a foreign sovereign. The theory of comity that emerges from a review of those court decisions demonstrates a judicial impression of absolute independence of nation-states operating in a condition of perfect equality. In *Oetjen v. Central Leather Co.*,[13] Justice Clarke said:

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rest[s] at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."[14]

From the perspective of international law, the development of the doctrine was also seen as the synthesis of comity and sov-

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9. Interestingly, the Chief Justice narrowly perceived the interaction of sovereigns in terms of mutual benefit rather than on the broader perspective of peace within the world community. The impression is that "mutual benefit" may have meant alliances that would prevent or undermine the aggressive tendencies of unallied sovereigns.

10. 11 U.S. at 136.

11. The proposition differs significantly from Justice Harlan's statements in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). *See infra* p. 66.

12. The Santissima Trinidad, 20 U.S. 283, 352-53 (1822).

13. 246 U.S. 297 (1918).

14. *Id.* at 303-04.

ereign immunity. However, most modern scholars seem to disfavor adherence to the doctrine of absolute sovereign immunity. Philip Jessup states that the principle of "unlimited sovereignty is no longer automatically accepted as the most prized possession or even as a desirable attribute of states."[15] Instead, Jessup preferred a system of law among nations that "would not start with sovereignty or power but from the premise that jurisdiction is essentially a matter of procedure which could be amicably arranged among the nations of the world."[16]

In most of the court decisions prior to 1964, only nations (or those claiming some special connection to the particular nation) which were friendly with the United States utilized the act of state doctrine as defense. Consequently, continued harmonious interaction between the United States and such other nations was a paramount consideration.[17] In 1964, however, the Court in *Banco Nacional de Cuba v. Sabbatino*[18] extended sovereign immunity and comity principles to persons not directly linked through recognized principles of agency to the sovereign. More recent cases involving act of state problems have relied upon political question[19] and separation of power principles to justify judicial noninvolvement. The Court in *Sabbatino* considered these two problems and was particularly concerned about not causing embarrassment to the executive branch of the government in its

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15. P. JESSUP, A MODERN LAW OF NATIONS 1 (1948).

16. P. JESSUP, TRANSNATIONAL LAW 71 (1956).

17. In contrast, consider the strained relations between the United States and Cuba during the early 1960's which led to the Sabbatino litigation. The Castro government had demonstrated positive support for the Soviet Union. The United States, through the two political branches, responded to the presence of Communism in the Western Hemisphere by imposing quota limitations on the importation of sugar. The reaction of the Cuban government was to nationalize sugar concerns belonging to Americans, several of whom later became parties to the suit. *See* Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964).

18. 376 U.S. 390 (1964). *See also* Ricaud v. American Metal Co., 246 U.S. 304 (1918); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116 (1813).

19. Since *Oetjen*, the courts have been concerned about the justiciability of issues that might be of eminent concern to the political branches of the federal government. However, the courts have been disinclined to become involved in such disputes. The best expression of the doctrine can be found in Justice Brennan's opinion of Baker v. Carr, 369 U.S. 186 (1952). In *Baker*, Justice Brennan established a test for determining whether a political question has been presented to the Court. The test requires a "textually demonstrable constitutional commitment" of the controversial matter to one of the two political branches. *Id.* at 217. When the test is met, it is impossible for the judiciary to decide the matter without first making a policy determination outside the province of judicial discretion.

handling of foreign affairs.

This Article undertakes a polemical analysis of the act of state doctrine, particularly as applied in *Sabbatino, First National City Bank v. Banco Nacional de Cuba,*[20] and *Alfred Dunhill of London, Inc. v. Republic of Cuba.*[21] In addition, it discusses problems attending the Congressional effort to circumvent the decision of the Court in *Sabbatino* by enacting the Hickenlooper Amendment to the Foreign Assistance Act of 1964.[22] Because an exercise in polemics is useless and perhaps hypocritical unless accompanied by positive, constructive suggestions to solve the problems raised, this Article also offers a possible solution, a solution that may be implemented by the Congress or by the courts.

II. NEO-ACT OF STATE DOCTRINE: THE *Sabbatino* TRILOGY

In 1964, the Supreme Court of the United States decided a case that may well be the most important judicial pronouncement of this country's posture toward international law in the twentieth century. That decision, authored by Justice John Marshall Harlan, was *Banco Nacional de Cuba v. Sabbatino.*[23] In two later cases, *First National City Bank v. Banco Nacional de Cuba* and *Alfred Dunhill of London, Inc. v. Republic of Cuba,* the Court attempted to clarify the act of state doctrine in terms of the perceptions the other two political branches had expressed about the nation's role in disputes involving the confiscation of Americans' property by foreign sovereigns, either within or outside the foreign sovereigns' territory. Following is a critical discussion of the three cases, focusing on the perceived judicial role in matters involving the act of state doctrine.

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20. 406 U.S. 759 (1972).

21. 425 U.S. 682 (1976).

22. Pub. L. No. 88-633, Pt. III, 78 Stat. 1013 (codified at 22 U.S.C. § 2370(e)(2) (1976)).

23. 376 U.S. 398 (1964). Congress responded to *Sabbatino* by passing an amendment to the Foreign Assistance Act that was directed to the problem of expropriations by the Cuban government. Viewed as corrective legislation, the amendment, which came to be known as the Hickenlooper Amendment, demonstrates the confusion surrouding the underlying principles upon which the act of state doctrine is founded. *See infra* notes 99-101 and accompanying text.

A. Banco Nacional de Cuba v. Sabbatino[24]

A brief exposition of the facts in *Sabbatino* is essential to an understanding of the problems resulting from the decision.[25] Initiated by the Banco Nacional de Cuba as a financial agent of the Cuban government,[26] the action concerned the title to a sugar shipment that had been made by Compania Azucarera Vertientes-Camaguey de Cuba (C.A.V.). The Banco Nacional de Cuba claimed that title to the sugar and any proceeds derived from its sale belonged to the Bank by virtue of the Cuban government's nationalization of the property of C.A.V. The Cuban government's nationalization effort, which was purportedly in response to action taken by the American government in lowering the import quota of Cuban sugar, focused exclusively on Cuban corporations in which Americans held controlling interests.[27]

Farr, Whitlock & Co. (Farr Whitlock) had contracted to purchase sugar from a wholly-owned subsidiary of C.A.V. Payment was to be made in New York upon presentment of the necessary shipping documents. On August 6, 1960, a shipment of sugar intended for Farr Whitlock was loaded onto barges in Cuba and taken to a German ship anchored off the Cuban coast.[28] Pursuant to the nationalization order, the ship was detained by the Cuban government until August 11. In order to obtain the release of the ship and its cargo, Farr Whitlock entered into a new agreement with a government-owned corpora-

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24. Numerous articles have discussed the *Sabbatino* case: Gordon, *Origin and Development of the Act of State Doctrine*, 8 RUT.-CAM. L.J. 595 (1977); Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805 (1964); McDougal & Reisman, *The Changing Structure of International Law*, 65 COLUM. L. REV. 810 (1976); Rabinowitz, *Viva Sabbatino*, 17 VA. J. INT'L L. 697 (1977); Comment, *Rationalizing the Federal Act of State Doctrine and Evolving Judicial Exceptions*, 46 FORDHAM L. REV. 295 (1977) [hereinafter cited as Comment, *Rationalizing Act of State*]; Comment, *Nonviable Act of State Doctrine*, 38 U. PITT. L. REV. 725 (1977).

25. Justice Harlan's opinion, speaking for the majority of the Court, is the primary target for this polemical analysis. However, Justice White's dissenting opinion also is problematic in light of his treatment of the doctrine in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976), nearly ten years after *Sabbatino*. I shall reserve criticism of Justice White's failure to go far enough in that case for the appropriate stage of textual discussion. It is noted here, however, only to demonstrate that this author believes that the entire *Sabbatino* case was a poorly reasoned effort to correlate national and international jurisprudence.

26. Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964).

27. 193 F. Supp. at 376. The decree of nationalization was signed on August 6, 1960, by Fidel Castro.

28. *Id.*

tion[29] to buy the sugar under substantially the same terms. Upon presentation of the paperwork in New York, Farr Whitlock sold the sugar to its customers for $175,250.69.[30] Farr Whitlock did not, however, pay the proceeds to the agent of Banco Nacional de Cuba because a receiver had been appointed by the New York Supreme Court for C.A.V., which claimed the right to the proceeds of the sales.[31]

The issue, according to Federal District Court Judge Dimock, was "whether this court can examine the validity of the Cuban act under international law and refuse recognition to the act if it is in violation of international law."[32] He concluded:

> Foreign forums have evidenced some willingness to examine the validity of foreign acts under international law but by far the strongest support for such examination has come from legal commentators and textwriters. I hold that in the circumstances of the present action the law of the forum will not enforce the Cuban decree if it is violative of international law.[33]

Before he could determine whether the Cuban decree violated principles of international law, Judge Dimock had to circumvent the difficulties created by the act of state doctrine. To accomplish this he observed:

> The doctrine that courts of this country will not examine the validity of an act of a foreign state insofar as it purports to be effective within the territory of the acting state has its source in our conflict of laws principles. The rule is thus a self-imposed restraint.[34]

He also observed that the basis for comity was "a wise recognition of and respect for the sovereignty of each state within its own territory, the right of each state to conduct its own internal

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29. *Id.* The government-owned corporation was the assignor of Banco Nacional. The contract between Farr Whitlock and the government corporation supposedly accomplished a sale of the sugar on board the ship to Farr Whitlock.

30. *Id.*

31. *Id.* at 376-77. C.A.V. had asserted that the confiscation of its property was a violation of international law since it was not compensated for the sugar expropriated by the Cuban government. Moreover, C.A.V. also claimed that the decree under which the sugar was confiscated was discriminatory because it focused only on sugar companies controlled by Americans.

32. *Id.* at 380 nn.6 & 7. Judge Dimock seriously attempted to determine how the issue should be resolved under international law.

33. *Id.* at 380.

34. *Id.* at 381.

affairs as it wishes."[35]

Judge Dimock recognized that when a nation engages in decisionmaking that affects only the inhabitants of that country, that nation should be able to do so without fear of reprisal from other nation-states. This expectation has become an important factor in the decisionmaking processes throughout the free world.[36] However, though a decision made by a sovereign state affects only property within its exclusive territory, when a decision is directed at either individuals of another nation or another nation itself (as in *Sabbatino,* where Americans were targets of disparate and confiscatory treatment) problems arise. How does the affected nation-state react under the circumstances? As Judge Dimock indicated:

> The basis for such recognition [of] and respect [for sovereignty and comity] vanishes, however, 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 upon international law.[37]

Consequently, if the act of state violates international law, then the act of state doctrine can not be used as a defense. In effect, Judge Dimock argued that sovereignty is not absolute.[38] It is a privilege, not a right, created between states as a matter of comity.

Judge Dimock also commented upon the United States' protest that the expropriation of American interests in Cuban sugar was a violation of international law.[39] Because the State Department considered the Cuban decree to be violative of international law, the Court concluded, "It can scarcely be believed . . . that judicial examination of the decree in the light of international law would embarrass the Executive."[40] Thus, the judicial policy of not embarrassing the executive in matters affecting foreign policy was respected.[41]

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35. *Id.*

36. "Free," as used here, means independent states not dominated by another state.

37. 193 F. Supp. at 381.

38. *Cf.* The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822); Hudson v. Guestier, 8 U.S. (4 Cranch) 293 (1808).

39. 193 F. Supp. at 381 (citing 43 DEP'T ST. BULL. 171 (1960)). *See also* 42 DEP'T ST. BULL. 153 (1960).

40. Bernstein v. Van Heyghen Freres S.A., 163 F.2d 246 (2d Cir.), *cert. denied,* 332 U.S. 772 (1947).

41. 193 F. Supp. at 381.

Analyzing the Cuban decree in terms of international law,[42] Judge Dimock concluded that it was discriminatory because it focused only on the United States. The "[e]xpropriation of C.A.V.'s property was not reasonably related to a public purpose involving the use of such property."[43] The expropriation was not temporary or done to achieve some legitimate governmental purpose. It was "avowedly in retaliation for acts by the Government of the United States, and was totally unconnected to the subsequent use of the property being nationalized."[44] This alone, Judge Dimock thought, was sufficient to constitute a violation of international law.[45] Accordingly, he held that the expropriation was "a patent violation of international law."[46]

Judge Dimock examined the acts of the Cuban government and principles of international law and determined that a discriminatory expropriation of foreign-controlled property does not further a legitimate public interest of the expropriating state. Moreover, if the expropriation is without just compensation, it violates the normative expectations of all nation-states and, therefore, normal rules of sovereign immunity and comity must not prevent a just determination of the underlying interests of the parties in the litigation. The opinion demonstrates that international law, in particular circumstances, can be applied by national courts to resolve disputes.[47]

The Second Circuit affirmed the district court's decision.[48] Judge Waterman, writing for the court, focused on the act of state doctrine and its jurisprudential foundation. He observed that the doctrine "stems from the concept of the immunity of the sovereign because 'the sovereign can do no wrong.' "[49] However, he noted, notions of universal infallibility were never an accepted theory of sovereign immunity. Rather, the notion that a sovereign could do no wrong implicitly means the sovereign

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42. Judge Dimock recognized international law as an applicable body of law that should and must be applied by the courts of the United States. *Cf.* The Paquete Habana, 175 U.S. 677 (1900); 1 OPPENHEIM'S INTERNATIONAL LAW 41-42 (8th ed. 1955).

43. 193 F. Supp. at 384.

44. *Id.* at 384-85.

45. *Id.* at 385.

46. *Id.* at 386.

47. I have provided a relatively detailed analysis of Judge Dimock's opinion because I believe it is diametrically opposed to Justice Harlan's conclusion that a clear consensus of international opinion did not exist to resolve the problems present in *Sabbatino*.

48. 307 F.2d 845 (1962).

49. *Id.* at 855.

could do no wrong to its subjects. Finally, Judge Waterman listed the policies and theories underlying the judicially created rule of self-restraint: "[t]he desire by the judiciary to avoid possible conflict with or embarrassment to the executive and legislative branches of our Government in our dealings with foreign nations . . . ; a positivistic concept of territorial sovereignty . . . ; and a fear of hampering international trade by rendering titles insecure."[50] When a government practices an ideology that is wholly inconsistent with that of the United States and perceived to be a threat to this country, the legislative branch may authorize the President to impose import quotas on certain products from the other country. In *Sabbatino,* the President acted in accordance with legislative authority, and the foreign state retaliated by expropriating certain American-held property within the state. The judiciary should not conclude, on the basis of maintaining comity among nations, that it will ignore the operative signs of a dissipating relationship between the United States and another country; it could hardly be said that the judiciary was acting inconsistently with the other political branches by deciding the case on its merits.[51]

Moreover, is it not more plausible to believe that the establishment of a principle that, in effect, legitimates the confiscation of foreign property without compensation does more harm than a judicial declaration that such conduct is internationally intolerable? It seems the latter course of conduct would provide a more secure world community in which to conduct trade. The expectations of interacting participants in the trade community would be more certain with the establishment of sanctions for internationally intolerable conduct. Under a rule of absolute sovereignty, an international investor or trader has no way of effectively dealing with the whims of an egocentric state.

Judge Waterman, however, relied on even more concrete evidence and found that the letter from the Department of State to the Cuban government served as an announcement by the executive branch that it did "not oppose inquiry by American courts into the legality of foreign acts."[52] He viewed the announcement as coming within the exception to the act of state

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50. *Id.* at 857.

51. Judge Waterman considered the concept of territorial sovereignty in a positivistic sense. Justice Harlan's underlying jurisprudential persuasion in deciding *Sabbatino* is also reminiscent of 19th Century positivism. *See infra* text accompanying notes 61-63.

52. *Id.* at 857-58.

doctrine recognized by the Second Circuit in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*.[53] Deciding that the exception applied to the *Sabbatino* case,[54] he proceeded to review the case on its merits and concluded that the Cuban decree violated principles of international law.[55]

The decision was appealed to the Supreme Court of the United States.[56] In a majority opinion written by Justice Harlan, the Court reversed, declaring:

> [T]he 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 the 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.[57]

One of Justice Harlan's statements preceding this declaration gives a clearer understanding of his analysis in applying the act of state doctrine:

> If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . . [T]he less important the implications of an issue are for our foreign relations, the weaker the justification

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53. 210 F.2d 375 (2d Cir. 1954).

54. 307 F.2d at 858.

55. *Id.* at 869. Judge Waterman has expressed support for an active judiciary in cases similar to *Sabbatino*.

> 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 violations. More important, the only relief open to persons injured by a confiscation will often be the invalidation of the confiscating country's title to the confiscated goods by decree of a court of another country.

Id. at 868. *See also* Note, *The Castro Government in American Courts: Sovereign Immunity and Act of State Doctrine*, 75 HARV. L. REV. 1607 (1962) (concluding that the act of state doctrine does not preclude the review of foreign judicial acts). Arguably, then, the sovereign is only partly immune.

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

57. *Id.* at 428.

for exclusivity in the political branches.[58]

There are problems with Justice Harlan's reasoning. He perceives the role of judicial involvement in terms of the degree of codification or consensus of international law.[59] He is in effect looking for some clear and convincing body of law governing international interaction, particularly where a sovereign is concerned, as the basis for reviewing the act of that sovereign. Thus, his entire theoretical foundation is premised on some undefined, and apparently in this case unmet, degree of consensus among authorities—judicial, executive, legislative, and even academic—as to what the principle of law may be.

The approach of legal rigidity, of searching for the well-defined principle, was the analytical process advocated by 19th century positivist philosophers. The approach requires a determination of the "facts" of the case and a categorization of the facts according to predetermined areas of law, such as expropriation. The applicable rule or principle is then identified, and finally, by using deductive reasoning, the correct answer is found.[60] This mechanical approach to decisionmaking attempts to eliminate, as much as possible, the personal predilections of the decisionmaker.[61]

The positivistic approach is based on several erroneous assumptions.[62] When a decisionmaker is determining which "facts" are relevant to the process, some of those facts may be derived from a highly personal perspective. Consequently, the choice of "relevant" facts is subjective rather than objective. Further, what body of law does one use in deciding which rule or principle to apply? The applicable rules may not always be readily available. The common law, for instance, is in a process of evolution. When a new cause of action arises, resort to stare decisis at best allows one to classify the case broadly, such as contract or tort; the rigid concept of positivism does not allow for the application of new legal theories. Finally, the positivistic approach presumes that cases exist within only one particular context. Lawsuits, however, often involve a resolution of conflicting principles.

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58. *Id.* at 427-28.

59. *Id.* at 428.

60. *See generally* F. DUNN, THE PROTECTION OF NATIONALS, A STUDY IN THE APPLICATION OF INTERNATIONAL LAW ch. 5 (1932).

61. *Id.* at 72.

62. *Id.* at 78.

Interestingly, Justice Harlan did not view the absence of international legal opinions on the problem before the Court as precluding the Court from reaching a decision; the consensus he sought could have existed by virtue of other than judicial authorities. But he felt that a consensus simply did not exist from which the Court could draw any conclusions.[63] The impression is that courts are retrospective in their analysis; they will decide cases only when there exists some clearly articulated consensus regarding the subject. In the absence of a clear consensus or codification of the law, such determinations should be within the exclusive province of the legislature, or at least outside the competence of the judiciary. But, what did Justice Harlan mean by a consensus, and when is that consensus reached? He gave no clues. Moreover, what references can be used to form a consensus on which the courts can rely in making a determination?

Even a cursory review of the opinions in both the district and appellate courts reveals a fairly large and impressive body of law on the subject. In addition, many existing treaties demonstrate that, at least between the nation-parties, compensation is expected when the property of one nation's citizens is expropriated by a foreign government within the latter's territory.[64] A review of the case law of other countries also reveals an attitude that there is no requirement of compulsory deference to the nonjudicial acts of foreign states. Examples can be found in West Germany,[65] Switzerland,[66] Sweden,[67] the Netherlands,[68]

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63. 376 U.S. at 428.

64. *See* Comment, *Rationalizing Act of State, supra* note 24, at 309. The Comment discusses a study by Professor Robert V. Jennings in which he collected some fifty treaties providing for compensation in accordance with international law for any property confiscated belonging to the citizens of a foreign state.

65. Expropriation of Sudeten-German Co-op. Soc'y, 25 Bundesgerichtshof in Zivilsachen 134 (W. Ger. Fed. Sup. Ct. 1957), *digested in* 24 I.L.R. 35 (1957); Expropriation of Eastern Zone (Germany), 8 Neve Juristische Wochenschrift 1151 (W. Ger. Fed. Sup. Ct. 1955), *digested in* 22 I.L.R. 14 (1955).

66. Vereinigte Carborundum- und Elektritwerke v. Federal Dep't for Intellectual Prop., 82 Recueil officiel des Arrêts du Tribunal fédéral Suisse 196 (Switz. Fed. Trib. 1956), *digested in* 23 I.L.R. 24 (1956); Zivnostenska Banka v. Wismeyer, 79 Arrêts du Tribunal fédéral Suisse, pt. II, 87 (Switz. Fed. Trib. 1953), *digested in* 20 I.L.R. 34 (1953).

67. Molnar v. Wilsons A/B, 1954 Nytt Juridiskt Arkiv 262 (Swed. Sup. Ct.), *digested in* 21 I.L.R. 30 (1954).

68. *See* Senembah Maatschappij N.V. v. Republiek Indonesie Bank Indonesia 1959 Nederlandse Jurisprudentie, No. 350, p. 855 (Amsterdam App. Ct. 1960), *cited in* Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 AM. J. INT'L L. 305, 307 n.15 (1960).

and France.[69]

Given the existence of international authority from which a conclusion can be drawn that the expectations of the world community require compensation when the property of nonsubjects has been discriminatorily confiscated, it is worth noting that under Justice Harlan's reasoning the act of state doctrine should not apply to international cases absent a consensus in the international community. Describing the lack of consensus on the doctrine, he stated:

> That international law does not require application of the doctrine is evidenced by the practice of nations. Most of the countries rendering decisions on the subject fail to follow the rule rigidly. No international arbitral or judicial decision discovered suggests that international law prescribes recognition of sovereign acts of foreign governments.[70]

It is interesting to match Justice Harlan's position that there is no prescription requiring recognition of the sovereign acts of foreign governments with his statement that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it."[71] When the two ideas are combined, it appears that Justice Harlan has rejected the classic concern of respect for the acts of sovereign states within their own territory.

Subsequently, however, Justice Harlan turned his attention to what he perceived to be the proper analysis of international law. Following a conclusion that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens,"[72] he noted, "We do not, of course, mean to say that there is no international standard in this area; we conclude only that the matter is not meet for adjudication by domestic tribunals."[73] However, he also recognized the existence of certain authorities indicating that a discriminatory taking, without compensation, is violative of international law.

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69. Bauer Marchal et Cie v. Pioton, 1955 Revue critique de droit international privé 44 (Fr. 1955) 22 I.L.R. 13 (1955).

70. 376 U.S. at 421-22 (citations omitted).

71. *Id.* at 428.

72. *Id.*

73. *Id.* at 428 n.26.

> There is, of course, authority in international judicial or arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate and effective compensation.[74]

Furthermore, Justice Harlan recognized that the courts of this country are a source of evaluation in the determination by decisionmakers of other nations as to the way in which citizens can expect to be treated in expropriation cases. The United States exerts a great deal of influence, not only between another country and itself, but also between other countries. Since the customary modes of interrelationship evolve over time, a rule such as the act of state doctrine only creates an atmosphere of uncertainty among nations. Justice Harlan's opinion does not adequately account for the dynamics of customary law as it develops through historical experience and in response to particular sociopolitical and socioeconomic stimuli. He examined the world situation, and said of other nations:

> Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.[75]

The judicial decisionmaker should be concerned with the impact of decisions, and his concern should be bifurcated in nature. First, the judge must focus on the short-term effect of the decision: i.e., does it solve the problems immediately before the court? Second, he must temporally extend the impact of the decision to determine its effect in the long run. Justice Harlan's observation that Communist countries compensate for expropriations on a nonobligatory basis is certainly not an example of long-range insight into the evolution of custom in this area of the law. In dealing with the property interests of Americans in a

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74. *Id.* at 429 (citations omitted).
75. *Id.* at 429-30.

Communist country, the Communist nation, because it generally operates from a premise that compensation is not obligatory, would not be compelled to provide any compensation to Americans due to the assumption that resort could not be had to courts of the United States, given Justice Harlan's expansive interpretation of the act of state doctrine. Other countries may react similarly and eventually a pattern, or custom, of noncompensation would become the norm.

Justice Harlan arguably failed to fully comprehend the multifarious aspects of the process of interaction between, and the resulting normative expectations of, the many nation-states comprising the world community. The norms governing the relationship between two interacting nations are based on demands and counter demands made after each nation considers how the other nation has historically reacted in similar situations. If a court in this country, after considering a particular issue, decides the applicable law to be contrary to the law of the other state, such law should be applied nevertheless. The court should not be overly concerned with insulting the other nation. Such a decision, if consistent with the normative expectations of the world community, would hardly be an insult. A breach of these norms only corrupts the relationships among nations; a refusal to pronounce judicial disdain by one nation on behalf of all nations, by imposing sanctions consistent with the policy of the forum, serves only to ratify the internationally egregious conduct. The law, both domestic and international, should further legitimate social, economic, and political objectives.[76] So long as nations charged with confiscating the property of citizens of a foreign nation are afforded uniform treatment, there is no rational basis upon which the offending nation can complain.

If, however, a court investigates the law of nations to determine what the relevant principle or rule of law might be and none is found, the court should not automatically refuse to decide the case. Professor Myres S. McDougal, in discussing the operation of customary international law, stated:

> [U]nilateral assertions about international law . . . if accepted and acted upon by a considerable number of other states, can create the expectations we call customary international law. Unanimity has never been a requirement for such law. The

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76. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911).

> very purpose of customary law, in contrast with agreement, is to bind states who have not explicitly accepted—to give states a way of binding themselves without appearing to impair inflated notions of sovereignty.[77]

Therefore, the United States should not be afraid to assert itself, through its judiciary, as a leader in the shaping and sharing of values in the world community.

Justice Harlan's concern over what he perceived to be the unsettled posture of the law on the subject caused him to ignore almost entirely a vital source of the law.[78] Had he adequately explored customary international law, he may have had the support of Justice White[79] and could have cited an earlier case, *Hilton v. Guyot*,[80] decided in 1895, just two years before the classic pronouncement of the act of state doctrine in *Underhill*.[81] In *Hilton*, the Court said,

> But when . . . there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them.[82]

So, it seems that little can be found to justify the operative principle Justice Harlan created for the Court when he expanded the act of state doctrine. Justice Harlan apparently ignored the arguments presented by past American jurists, and, even more significantly, he demonstrated poor perception of the role of international law as a vital element in the system of American jurisprudence. It is time the courts developed a better understanding of the body of law governing the relationship of nations interacting in a world order of political, economic, and social transactions.

Justice Harlan rejected the idea that the act of state doctrine was derived from principles of sovereignty.[83] He believed

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77. Remarks of Professor Myres S. McDougal, Seventh Hammarskjold Forum, Jan. 11, 1965, *reprinted in* THE AFTERMATH OF SABBATINO 99 (L. Tondel, Jr., ed. 1965), *quoted in* Comment, *Rationalizing Act of State, supra* note 24, at 308.

78. Mr. Justice Harlan did not entirely ignore sources of law that should have led him to consider customary international law; he cited several sources that should have, inferentially at least, led him in the proper direction. *See* 376 U.S. at 428.

79. Justice White dissented in *Sabbatino*. *See* 376 U.S. at 479.

80. 159 U.S. 113 (1895).

81. *See supra* text accompanying note 1.

82. 159 U.S. at 163.

83. Justice Harlan stated, "We do not believe that this doctrine is compelled . . . by

the doctrine derived its authority from the theory of separation of powers.

> The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationship between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.[84]

The theory of separation of powers, as construed by Justice Harlan, represents an angular sense of shared competence in authoritative decisionmaking under our constitutional scheme. The diversity of foreign affairs under the Constitution justifies an attitude of shared competence. Professor Laurence Tribe said:

> The Madisonian clockwork would enable the forces and counterforces of government to mesh as needed to execute the purposes of the nation in the community of nations . . . .
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> . . . .
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> . . . [Further, it would enable government] to focus on the degree to which various governmental arrangements comport with, or threaten to undermine, either the *independence and integrity* of one of the branches or levels of government, or the ability of each to fulfill its mission in checking the others so as to preserve the *interdependence* without which independence can become domination.[85]

The three branches of government in the United States were not constructed to operate entirely separate from one another.

> It scarcely requires a comprehensive and precise specification of the constitutional allocation of competence in the United States to establish that all three major branches of government are accorded important roles in the control and performance of these various activities. One needs only to recall

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the inherent nature of sovereign authority, as some of the earlier decisions seem to imply . . . ." 376 U.S. at 421. *See also* Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

84. 376 U.S. at 423.

85. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 15 (1978) (emphasis added).

> the many specific grants of competence to the Congress, to the President, and to the Judiciary—grants which cannot be made meaningful except in terms of control over foreign affairs—to be reassured that with respect to such affairs, no less than with respect to internal affairs, the framers of the Constitution sought a balancing of effective power among the three branches of the government, and not a monopolization of power by any single branch.[86]

The concept that separation of powers necessitates a precise determination of decisional self-restraint in the area of international affairs is wholly inconsistent with a system of government that must formulate policies having global political import.

Justice White alone dissented in *Sabbatino,* arguing that the majority had declared "the ascertainment and application of international law beyond the competence of the courts of the United States."[87] In addition, he did not "believe that the act of state doctrine, as judicially fashioned in this Court, and the reasons underlying it, require American courts to decide cases in disregard of international law."[88] Justice White firmly believed that American courts are under an obligation to apply the applicable law to legal controversies, and that international law forms a part of the applicable law.[89] He did not, however, believe that the act of state doctrine, as it existed prior to the majority opinion in *Sabbatino,* should be abolished. While Justice Harlan engaged in a microanalytical, positivistic analysis to reach a conclusion that the act of state doctrine was based on principles of the separation of powers, Justice White determined that international law is a primary foundation for the doctrine.

> That the act of state doctrine is rooted in a well-established concept of international law is evidenced by the practice of other countries. These countries, without employing any act of state doctrine, afford substantial respect to acts of foreign states occurring within their territorial confines.[90]

Justice White pointed out that the Court had decided numerous cases involving the validity of foreign acts which were

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86. Brief for *Amicus Curiae,* Executive Branch, Comm. of the Am. Branch of the Int'l Law Ass'n, at 13-14, Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961).

87. 376 U.S. at 439.

88. *Id.* at 441.

89. *Id.* at 450-51.

90. *Id.* at 446.

contrary to the public policy of this country. He seems to have implicitly endorsed a theory that would apply the law of the situs of an action, unless the law conflicted with the forum's public policy. After surveying a number of cases,[91] he concluded:

> These rules demonstrate that our courts have never been bound to pay unlimited deference to foreign acts of state, defined as an act or law in which the sovereign's governmental interest is involved; they simultaneously cast doubt on the proposition that the additional element in the case at bar, that the property may have been within the territorial confines of Cuba when the expropriation decree was promulgated, requires automatic deference to the decree, regardless of whether the foreign act violates international law.[92]

He considered the interests of the litigants in terms of the impact the litigation would have on world stability and decided that "fundamental fairness" would be achieved, and that stability in the world community could be attained, by taking into consideration the norms governing international behavior.[93]

Instead of restricting judicial review in cases that might, even remotely, involve questioning the act of a sovereign state, Justice White suggested that courts proceed cautiously with their inquiry, taking into consideration the severity of the alleged violation of international law, the existing relationship between the United States and the foreign state, and the degree of consensus regarding the applicable rules of international law: "Where a clear violation of international law is not demonstrated, I would agree that principles of comity underlying the act of state doctrine warrant recognition and enforcement of the foreign act."[94] Justice White believed that courts should apply the principle of comity only when the foreign nation's actions are consistent with the normative expectations of the other participants to the action.[95]

He recognized that the executive branch is primarily responsible for the formulation of foreign policy. However, he did

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91. *Id.* at 449 n.10, 450 n.11. *See also id.* at 447-51 nn.7-11.
92. *Id.* at 449-50.
93. *Id.* at 453.
94. *Id.* at 458.
95. All legitimate exercises of sovereign power, whether territorial or otherwise, should be exercised consistently with rules of international law, including those rules which mark the bounds of lawful state action against aliens or their property located within the territorial confines of the foreign state.

Id. at 457 (White, J., dissenting).

not believe that the judiciary should refrain from participating in matters affecting foreign affairs. Rather, he argued that the Constitution requires the coextensive operation of the three branches of government. He doubted that most judicial decisions would have any pernicious impact on the United States' foreign relations. "These speculations founded on the supposed impact of a judicial decision on diplomatic relations, seem contrary to the Court's view of the arsenal of weapons possessed by this country to make secure foreign investment 'and ample powers [of the political branches] to effect compensation.' "[96] Finally, when the executive has indicated persuasive reasons for judicial abstention, "the executive has removed the case from the realm of the law to the realm of politics, and a court must decline to proceed with the case."[97] In such a case, according to Justice White, proceedings should be stayed until such time as "circumstances permit an adjudication."[98]

Justice White's position needs to be qualified; as proposed the stay may not be comportable with constitutional principles of separation of powers. Instead, the court should engage in a balancing process, weighing the seriousness of the alleged violation of international law and the degree of consensus on what the law is against the desirability of honoring the request by the executive branch for judicial abstention. Only then should the courts consider whether to abstain from deciding the case in deference to another government branch.

Sabbatino was remanded to the district court for reconsideration consistent with the Supreme Court opinion. After the case was reargued in the district court but before the court rendered a decision, Congress passed the Foreign Assistance Act of 1964.[99] Portions of the Act focused on the act of state doctrine and specifically on whether judicial review of the Cuban expropriation was appropriate. Those portions of the Act, known as the second "Hickenlooper Amendment," represented a pro-

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96. *Id.* at 464. Justice White's use of the metaphorical expression "the arsenal of weapons" is interesting in light of the extremely turbulent period in United States' history in which the case was argued. The Cuban Missile Crisis, a major military confrontation between the Soviet Union and the United States, had occurred only a year before *Sabbatino* was decided; President Kennedy was assassinated just one month after oral argument was heard; and the United States was rapidly becoming involved in the military conflict in Southeast Asia.

97. *Id.* at 471.

98. *Id.*

99. Pub. L. No. 88-633, 78 Stat. 1009 (codified at 22 U.S.C. § 2370 (1976)).

nouncement of Congressional disappointment with the Court for failing to decide *Sabbatino*. The second Hickenlooper amendment reads:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, that this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interest of the United States and a suggestion to this effect is filed on his behalf in that case with the court.[100]

Congress apparently intended to alter the judicial presumption of embarrassment to the executive when the judiciary decides cases involving an allegedly improper act of a foreign state.[101]

On remand, then, the district court examined the legislative history of the Hickenlooper Amendment and determined that Congress intended to require the courts to give retroactive effect to its direction.[102] Judge Bryan, writing for the court, held that

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100. 22 U.S.C. § 2370(e)(2) (1976). In large part, the second Hickenlooper Amendment reiterates Justice White's dissent in *Sabbatino* and mandates that the courts decide cases affecting a title or right to property that has been confiscated in violation of international law.

101. The effect of the amendment is to achieve a reversal of presumptions. Under the *Sabbatino* decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy.

S. Rep. No. 1188, pt. I, 88th Cong., 2d Sess. 24 (1964).

102. *See* Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 967 (S.D.N.Y. 1965).

the Act was a valid exercise of Congressional power, justified under the commerce clause of the Constitution.[103] The Second Circuit affirmed,[104] and a petition for certiorari was denied,[105] even though the district court failed to reconsider the case in light of the Supreme Court opinion.[106]

B. First National City Bank v. Banco Nacional de Cuba

In 1972 the United States Supreme Court again had the opportunity to consider the act of state doctrine as it applied to an expropriation by the Cuban government in *First National City Bank v. Banco Nacional de Cuba.*[107] A commercial loan, secured by bonds of the United States government and certain other securities, was made by First National City Bank to a predecessor of the Banco Nacional de Cuba.[108] In 1960, when the loan balance was approximately $10 million, the Cuban government seized all the branches of First National City Bank located in Cuba. First National City Bank retaliated by selling the loan collateral and applying the proceeds to the loan balance. Banco Nacional de Cuba brought suit to recover the $1.8 million excess proceeds. First National City Bank had capital in Cuba worth more than the excess proceeds and filed a counterclaim to recover the value of the confiscated property.[109] The dispositive issue in the case was whether First National City Bank could assert a claim for the value of its confiscated properties against the Cuban government.

The district court ruled that First National City Bank was entitled to its setoff against Banco Nacional, but denied the motion for summary judgment since there was a triable issue as to

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103. *Id.* at 971-73.

104. 383 F.2d 166 (1967).

105. 390 U.S. 956 (1968).

106. Prior to the district court review, the attorneys could have petitioned the Supreme Court to reconsider the case under the amendment. However, a rehearing would not have been granted absent the concurrence of a majority of the Court. *See* Sup. Ct. R. 58(2). For a brief discussion of the procedural problem, see Henkin, *Act of State Today: Recollection in Tranquility,* 6 COLUM. TRANSNAT'L L.J. 175, 177 (1967).

107. 406 U.S. 759 (1972).

108. The loan was originally made to Banco de Desarrollo Economico y Social (Bandes), a governmental corporate agency of Cuba. Pursuant to Cuban Law No. 730, 16 Feb. 1960, and Law No. 847, 30 Jun. 1960, Bandes was dissolved and Banco Nacional succeeded to the rights and obligations of Bandes. The Republic of Cuba guaranteed repayment. Banco Nacional de Cuba v. First National City Bank, 270 F. Supp. 1004, 1005 (1967).

109. 406 U.S. at 761.

the amount of the setoff.[110] The court also found that the act of state doctrine was not a defense to the counterclaim: even though "[u]nder *Banco Nacional de Cuba v. Sabbatino*, . . . inquiry into the legality *vel non* of the expropriations here involved would be foreclosed," . . . "the holding in *Sabbatino* was for all practical purposes overruled by the Hickenlooper Amendment to the Foreign Assistance Act of 1964 . . . ."[111]

Taking the case on appeal, the Second Circuit held that the Hickenlooper Amendment was not controlling. Consequently the assertion of the counterclaim was barred.[112] The Supreme Court granted certiorari to consider "whether, in view of the substantial difference between the position taken in this case by the executive branch and that which it took in *Sabbatino,* the act of state doctrine prevents"[113] the assertion of the counterclaim. The Court held that the act of state doctrine did not prevent the assertion of the counterclaim.[114]

Justice Rehnquist, writing for the majority, reasoned that both the act of state doctrine and principles of sovereign immunity were created to implement the notion of comity among nations and to further the federal government's orderly conduct of foreign relations.[115] He observed that "[i]t is clear, however, from both history and the opinions of this Court that the doctrine is not an inflexible one."[116] Under the Constitution, the executive is charged with the primary responsibility for the development and conduct of our nation's foreign policy, and a great deal of deference should be given the pronouncements of that branch on matters affecting international affairs. Unfortunately, the State Department chose not to make a pronouncement re-

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110. 270 F. Supp. at 1011. The plaintiff's second cause of action was to recover some $34 million in deposits made by Cuban banks and held by First National City Bank. The plaintiff asserted that these deposits now belonged to it as agent of the Cuban government by virtue of the confiscation decree purporting to give full title to all the assets of these Cuban banks, including the deposits with First National City Bank, to the Cuban government. As to this cause of action, the court granted the defendant's motion for summary judgment on the grounds that the confiscation decree was clearly contrary to the laws and public policy of the United States.

111. *Id.* at 1007 (citations omitted); 22 U.S.C. § 2370(e)(2) (1976).

112. Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394 (2d Cir. 1970).

113. 406 U.S. at 762.

114. *Id.*

115. Presumably, Justice Rehnquist believed that the act of state doctrine was based, at least in part, on the theory of separation of powers.

116. 406 U.S. at 763.

garding international affairs in *Sabbatino.*[117] In *First National City Bank,* however, the legal adviser for the State Department notified the Court that it should proceed to decide the case on the merits, citing *Bernstein v. N.V. Nederlandsche-Amerikaansche*[118] as precedent: "The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."[119] After further demonstrating the primacy of the executive branch in matters of foreign affairs, Justice Rehnquist concluded:

> where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called *Bernstein* exception to the act of state doctrine.[120]

It should be noted, however, that only three justices adopted the *Bernstein* exception as the basis for allowing First National City Bank to pursue its counterclaim.[121] Justices Douglas and Powell wrote concurring opinions based on different reasoning. Justice Douglas determined that the counterclaim should be based on the Court's opinion in *National City Bank v. Republic of China.*[122] *Republic of China* posited a theory of fairness, suggesting that when a foreign government avails itself of the American judicial system that government must be prepared to face meritorious counterclaims.

> It would offend the sensibilities of nations if one country, not at war with us, had our courthouse door closed to it. It would also offend our sensibilities if Cuba could collect the amount owed on liquidation of the collateral for the loan and not be required to account for any setoff.[123]

By contrast, Justice Powell suggested that the Court in *Sabbatino,* though it technically reserved a determination as to the validity of the *Bernstein* exception, implicitly rejected the ex-

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117. *Id.* at 764. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 420 (1964).
118. 210 F.2d 375 (2d Cir. 1954). *See also* 406 U.S. at 764.
119. 406 U.S. at 764.
120. *Id.* at 768.
121. Justice Rehnquist was joined by the Chief Justice and Justice White.
122. 348 U.S. 356 (1955).
123. 406 U.S. at 772 (Douglas, J., concurring).

ception.[124] He also disagreed "with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction."[125] The constitutional separation of powers will not allow restraint of the judiciary according to the determinations of the executive branch.

> Such a result would be an abdication of the judiciary's responsibility to persons who seek to resolve their grievances by the judicial process.
>
> Nor do I think the doctrine of separation of powers dictates such an abdication. To so argue is to assume that there is no such thing as international law but only international political disputes that can be resolved only by the exercise of power.[126]

Justice Powell was cognizant of the interrelationship between law and politics, especially when the dispute involves foreign citizens or foreign states. He concluded as follows:

> Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by political branches, federal courts have an obligation to hear cases such as this . . . . When it is shown that a conflict in those roles [between judiciary and political branches] exists, I believe that the judiciary should defer because, as the Court suggested in *Sabbatino,* the resolution of one dispute by the judiciary may be outweighed by the potential resolution of multiple disputes by the political branches.[127]

Justice Powell rejected Justice Douglas' reliance on the *Republic of China* case.

Justice Brennan, in dissent, was adamantly opposed to adopting the *Bernstein* exception. In his view, "[t]he task of defining the contours of a political question such as the act of state doctrine is exclusively the function of this Court."[128] Though Justice Brennan followed the reasoning of Justice Harlan in *Sabbatino,* he dissented primarily because of Justice Rehnquist's opinion "that the act of state doctrine is designed primarily, and perhaps even entirely, to avoid embarrassment to the

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124. *Id.* at 773 (Powell, J., concurring). Justice Brennan, in his dissenting opinion in *Sabbatino,* felt the majority had implicitly rejected the *Bernstein* exception.

125. *Id.*

126. *Id.* at 775.

127. *Id.* at 775-76.

128. *Id.* at 790 (Brennan, J., dissenting).

political branch."[129] *Sabbatino,* argued Justice Brennan, held that the validity of a foreign act of state is a political question beyond the reach of the courts.[130]

The case of *First National City Bank v. Banco Nacional de Cuba* represented the first major pronouncement of judicial concern over the act of state doctrine as expanded in *Sabbatino.* It represents a major exception to the act of state doctrine, an exception that is not without problems. The deferential judicial attitude toward the acts of foreign states is still the norm. All *First National City Bank* really did was to alert foreign nations that have expropriated property not to initiate actions in American courts. Consequently, the problem of this nation's judiciary allowing unfavorable expectations to be created, fostered, and firmly established still exists.

C. *Alfred Dunhill of London, Inc. v. Republic of Cuba*

The Supreme Court of the United States was to have yet another opportunity to consider the applicability of the act of state doctrine in a case involving an expropriation by the Cuban government. In 1976, just four years after *First National City Bank,* the Court decided *Alfred Dunhill of London, Inc. v. Republic of Cuba.*[131]

The case involved a rather complicated set of facts. Originally, two actions were brought independently, but one of those actions, *F. Palicio y Compania, S.A. v. Brush,*[132] was held to be dispositive of a number of issues in the other action, *Menendez*

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129. *Id.* at 785.

130. For a thorough discussion of what constitutes a political question, see Baker v. Carr, 369 U.S. 186 (1962), wherein Justice Brennan said:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, *and is the responsibility of this Court as ultimate interpreter of the Constitution.*

369 U.S. at 211 (emphasis added). If Justice Brennan, and indeed the other members of the Court, had engaged in a meaningful constitutional analysis in *Sabbatino,* the issue of which branch has the textually demonstrated commitment for conducting the foreign affairs of this nation may have resulted in a significant increase in judicial influence. *See also* H. LASSWELL & A. KAPLAN, POWER AND SOCIETY (1950). The authors considered, in some depth, the subjective and objective possession of authority.

131. 425 U.S. 682 (1976).

132. 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd,* 375 F.2d 1011 (2d Cir.), *cert. denied,* 389 U.S. 830 (1967).

v. Faber, Coe & Gregg, Inc.[133] Since *Menendez* eventually went to the Supreme Court, the discussion will focus on that case.

In 1960 the Cuban Government, pursuant to its scheme of nationalization, expropriated vast amounts of private property. In this process, it confiscated the manufacturing facilities of five of Havana's leading cigar producers. These companies were organized under Cuban law and, as far as the record demonstrated, no American directly lost property. These companies, however, transacted a great deal of business with importers in the United States, including Alfred Dunhill of London, Inc. (Dunhill), Faber, Coe & Gregg, Inc. (Faber), and Saks and Co. (Saks). After expropriating the property of the Cuban exporters, the Cuban Government appointed interventors to operate the manufacturing and export business. The interventors did so, utilizing trademarks which were registered with the United States government to the former owners, who had fled to the United States after the expropriation.

The former owners filed suit in this country for trademark infringement and for the purchase price of cigars shipped prior to the date of intervention. The Cuban Government and the interventors joined the litigation. The district court, in accordance with Justice Harlan's interpretation of the act of state doctrine in *Sabbatino,* gave full legal effect to the 1960 confiscation, but found that the accounts owing at the time of intervention were still valid. The court determined that the situs of the debt was the United States and, relying on the Second Circuit's opinion in *Republic of Iraq v. First National City Bank,*[134] held "the interventors did not have the right to be paid for preintervention shipments and that the owners are entitled to pursue claims for such amounts as may be due and owing from the importers therefor."[135] Consequently, the interventors were to return to the importers the payments that represented preintervention obligations. All of the defendants except Dunhill were satisfied. Dunhill sought a deficiency judgment against the interventors, which was granted. The interventors argued for, but the district court rejected, the assertion that a mere statement by counsel

133. 345 F. Supp. 527 (S.D.N.Y. 1972).

134. 353 F.2d 47 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966). The Second Circuit stated that "when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state only if they are consistent with the policy and law of the United States." *Id.* at 51.

135. 345 F. Supp. at 540.

denying liability constituted a cognizable act of state.[136]

Considering the case on appeal, the Second Circuit agreed that the former owners were entitled to recover from the importers and that the mistaken payment generated a quasi-contractual obligation for repayment. However, the Second Circuit rejected the district court's conception of an act of state, holding that the Cuban government's conduct during the litigation was sufficient to constitute such an act. Nevertheless, the importers were entitled to a setoff from the Cuban government in accordance with the reasoning of the Supreme Court in *First National City Bank v. Banco Nacional de Cuba.*[137]

The Supreme Court asked the parties to consider several questions,[138] the first of which involved the statement of counsel for the Republic of Cuba that Dunhill's claim was for unjust enrichment. Was the statement, the Court inquired, an act of state? The Court agreed with the district court that it was not an act of state.[139]

Justice White's plurality opinion established yet another exception to the act of state doctrine. Dunhill and the government argued that the act of state doctrine should not apply to situations in which a country has a proprietary interest in the commercial activity which is the center of the legal controversy. Justice White agreed, stating: "[T]he concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owned by a foreign sovereign or by one of its commercial instrumentalities."[140] He demonstrated that the distinction between governmental acts of a foreign state and private or commercial acts had been accepted many years before.[141]

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136. *Id.* at 545. "It is hard to conceive how, if such a statement can be elevated to the status of an act of state, *any* refusal by *any* state to honor *any* obligation at any time could be considered anything else." *Id.*

137. 406 U.S. 759 (1972).

138. The parties were requested to address these questions:

> (1) Can statements by counsel for the Republic of Cuba, that petitioner's unjust enrichment counterclaim would not be honored, constitute an act of state?
> (2) If so, is an exception to the act of state doctrine created, under *First National City Bank v. Banco Nacional de Cuba* [citation omitted], where petitioner's counterclaim does not exceed the net balance owed to Cuba on its claims by petitioner's co-defendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?

425 U.S. at 689-90 n.5.

139. *Id.* at 690.

140. *Id.* at 695.

141. *Id.* at 695-96 (citing Chief Justice Marshall's opinion in Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824)):

Justice White's opinion further erodes the act of state doctrine by creating a provincial exception to the rule. The opinion fails to recognize the unity of political and economic theory as an operative basis from which to conduct foreign policy. To say merely that when a government engages in private, commercial transactions it cannot avail itself of the defense afforded by the act of state doctrine is indicative of a judicial disregard for reality. The act of state doctrine is a pernicious and unruly doctrine in a world community where total deference to sovereign acts is no longer, if indeed it ever was, an accepted norm.

Justice Powell, concurring, took a more realistic approach:

> Since the line between commercial and political acts of a foreign state often will be difficult to delineate, I write to reaffirm my view that even in cases deemed to involve purely political acts, it is the duty of the judiciary to decide for itself whether deference to the political branches of government requires abstention.[142]

Justice Marshall dissented and was joined by Justices Brennan, Stewart, and Blackmun. Justice Marshall interpreted the act of state doctrine to mean that U.S. courts are "not to sit in judgment on the acts of a foreign government performed within its own territory."[143] If the act of state doctrine is indeed viable, then Justice Marshall was correct. The act complained of was a direct result of the Cuban government's expropriation of the interests of five manufacturers, and the interventors were agents of the Cuban government. There is no significant difference between the acts of expropriation in this case and the actions taken in *Sabbatino* or *First National City Bank*. It should be

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> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes that character which belongs to its associates, and to the business which is to be transacted.

Id. at 907. Note that the Chief Justice was primarily concerned with the free-market community of nations. Europe and, to some extent, the United States were influenced by A. SMITH, THE WEALTH OF NATIONS (1776), when Chief Justice Marshall wrote the opinion in *Planters' Bank*.

142. 425 U.S. at 715. Justice Powell was specifically referring to his statement in *First National City Bank:* "Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to hear cases such as this." 406 U.S. at 759.

143. 425 U.S. at 715-16 (footnote omitted).

noted, however, that the restrictive theory of sovereign immunity which does not protect the commercial acts of a government from judicial inquiry has been recognized, at least by the executive, since 1952.[144]

III. Duty of National Courts to Apply International Law

Since the 1930's, the judiciary in this country has consistently held that the conduct of foreign policy is vested solely in the executive branch.[145] There has been no recognition of any real concomitant responsibility in either the legislative or judicial branches. Chief Justice John Marshall, while a member of the House of Representatives, said, "The President is the sole Organ of the nation in its external relations, and its sole representative with foreign nations."[146] This position, prevalent in Justice Harlan's opinion in *Sabbatino,* is followed by the Court today.

The position, however, is inconsistent with the constitutional division of responsibilities between the government branches. The Constitution requires a sharing of the multifarious activities in which this country engages, each branch having a sphere of explicit and implicit competence to make decisions affecting the interaction this nation has with other nations. Although the three major cases just considered suggest that the executive is primarily, if not exclusively, responsible for the conduct of U.S. foreign policy,[147] that responsibility may not, in re-

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144. The restrictive theory of sovereign immunity is credited to Jack B. Tate, who was the acting legal adviser to the Secretary of State during the Eisenhower administration. In the "Tate Letter," he wrote:

> [T]he immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property . . . .

425 U.S. at 711 (app. 2).

145. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). This is not to say that Congress has no role in foreign policy formulation.

146. 10 Annals of Cong. 613 (1800).

147. For example, Justice Sutherland, in *Curtiss-Wright,* characterized the power of the President in the area of foreign relations by saying:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the *President as the sole organ* of the federal government *in the field of international relations* . . . .

Id. at 319-20 (emphasis added).

ality, be exclusively within the province of the executive branch. The Constitution reflects the framers' realization that the government would have to deal with foreign governments. Indeed, it is fairly clear that the framers contemplated interaction in that process by nearly all components of our nation, from the individual to the federal government. Governments must be prepared to deal effectively with the conflicts that may arise during commercial interaction with foreign governments.

Historically, when problems have arisen, special rules have evolved. The development of the law merchant is a prime example. Prior to the rise of merchant trade among nations, the world was essentially an arena of self-centered nations. Ocean transport of goods necessitated the adoption of special rules that included the autonomy of distinct foreign policies. Blackstone described the process in terms of "the transactions carried on between subjects of independent states, [where] the municipal laws of one will not be regarded by the other."[148] Consequently, the parties often resorted to practices generated through customary interaction over long periods of time and recognized as involving a sufficient number of parties until they ultimately became accepted norms.[149] Thus, commerce came to be regulated by a law of its own: the law merchant.

The system of government selected by the people in this country requires each of the three branches to operate within a constitutional framework of independent and interdependent competence. Since a primary concern is the power of the judiciary to decide cases in accordance with international law, it is appropriate to examine the Constitution and other sources to determine what the prescribed and normative judicial conduct is and should be.

Article III, section 2, of the United States Constitution,

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148. 1 W. BLACKSTONE, COMMENTARIES* 264. The rise in transmunicipal law developed in part from the relationship between merchants in different nations.

149. An excellent discussion on the development of *lex mercatoria* and other forms of Anglo-American law can be found in Dickinson, *The Law of Nations as Part of the National Law of the United States* (pt. 1), 101 U. PA. L. REV. 26 (1952) [hereinafter cited as Dickinson, *The Law of Nations* (pt. 1)]. I am indebted to Professor Dickinson's insight into the area. Many of my ideas on this topic were generated after reading the first and second part of Dickinson's article. *See also The Law of Nations as Part of the National Law of the United States* (pt. 2), 101 U. PA. L. REV. 792 (1953). I am also indebted to Professor Myres S. McDougal for his brilliant analysis in *The Impact of International Law Upon National Law: A Policy Oriented Perspective*, 4 S.D.L. REV. 25 (1959).

which specifies the powers vested in the judicial branch, reads, in pertinent part:

> The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made under their Authority;—to all Cases affecting Ambassadors . . . to all Cases of admiralty and maritime Jurisdiction; . . . and between a State, or Citizens thereof, and foreign States, Citizens or Subjects.[150]

Arguing in favor of ratification of the Constitution, Alexander Hamilton wrote: "The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."[151] Moreover, section 2 indicates that the judiciary has power over cases "of admiralty and maritime Jurisdiction," implicitly recognizing incorporation of the law of nations as an ingredient of this country's jurisprudence. One commentator, after a fairly extensive review of the development of international norms in mercantile transactions and other areas, summarized the attitude of the founders as follows:

> [N]otwithstanding a cleavage foreshadowed between defenders of states' rights and proponents of national power with respect to the structure of a national judiciary, there appears to have been an impressive measure of agreement at the outset that the Law of Nations and treaties must be subjects, immediately or ultimately, of a paramount national concern.[152]

Maritime law has long been recognized as belonging to a corpus of law affecting the interests of all nations. In deciding what law to apply in a maritime problem, Lord Mansfield wrote, in *Luke v. Lyde*,[153] that "the maritime law is not the law of a particular country, but the general law of nations . . . ."[154] This reasoning was accepted implicitly by Chief Justice Jay, who said, "because . . . the seas are the joint property of nations, whose rights and privileges relative thereto, are regulated by the law of nations and treaties, such cases necessarily belong to national

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150. U.S. CONST. art. III, § 2.

151. THE FEDERALIST No. 80 (A. Hamilton).

152. Dickinson, *The Law of Nations* (pt. 1), *supra* note 149, at 37.

153. 97 Eng. Rep. 614 (K.B. 1759).

154. *Id.* at 617.

jurisdiction."[155] The rationale for the development of an international body of law is the recognition that nations interact in a global community and must take into account the expectations and actions of neighboring states.[156]

Additional sources of judicial competence can be found in other sections of the Constitution. Congress is empowered, under article I, section 8, "[t]o regulate Commerce with foreign Nations." Congress' power makes the notion of executive supremacy in the area of foreign relations constitutionally problematical, particularly when an act of state is involved. Absolute deference to the executive, for instance, in expropriation cases such as *Sabbatino* ignores Congress' power. Congress is empowered to regulate the international commercial activities of this nation, conducted through private business participants, and judicial deference should be given to Congress, as well as to the executive, to avoid congressional embarrassment. The enactment of the Hickenlooper Amendment to the Foreign Assistance Act in 1964 demonstrated the practical, as well as theoretical, involvement of Congress in commercial matters such as those found in *Sabbatino*.

Congress also has the power to declare war, raise and support the military, regulate foreign trade, establish rules of naturalization, and define and punish offenses against the law of nations.[157] Presumably, Congress would exercise these powers through legislation. The judicial power extends to all cases arising "under this Constitution, [and] the Laws of the United States . . . ."[158] Therefore, the powers are coextensive, at least between the Congress and the judiciary. With the increasing interaction in the world of trade and other areas, the role of Congress is, or should be, expanding to oversee that growth. Apparently, this expanding role was not taken into account by Justice

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155. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 475 (1793). The language asserts the jurisdictional proposition that the federal government is preeminent in the area of maritime matters.

156. The Supreme Court recognized the rationale as early as 1874.

> No one doubts that every nation may adopt its own maritime code. . . . [S]till, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice.

The Lottawanna, 88 U.S. (21 Wall.) 558, 572 (1874).

157. U.S. CONST. art. I, § 8.

158. *Id.* art. III, § 2.

Harlan in *Sabbatino,* nor has it been fully recognized by the other members of the Court.

As for the executive's role in foreign relations, the President is empowered, under article II, section 2, to make treaties "by and with the Advice and Consent of the Senate, . . . provided two thirds of the Senators present concur . . . ." In addition, the President has the authority to appoint "Ambassadors, [and] other public Ministers and Consuls, . . ." again with the consent of the Senate.[159] The President is also responsible for receiving ambassadors and other public ministers.[160] It is notable that the majority of functions in this area are conducted by the President and the Senate jointly. It should also be observed that when the President and the Senate effectuate a treaty, the power of the judiciary, under article III, section 2, comes into play; the judicial power extends "to all Cases . . . arising under . . . Treaties made . . . ." It is, therefore, quite difficult to understand the position, for example, of Justice Sutherland in *United States v. Curtiss-Wright Corp.*[161] that the President is the dominant, if not exclusive, governmental organ in the conduct of the United States' foreign relations. Nevertheless, through the years the position of Justice Sutherland has found support among jurists and scholars, though it is inconsistent with the spirit, if not the language, of the Constitution.[162] The framers differed concerning the degree of participation each branch was to have, but there should be little question that the conduct of foreign relations was conceived of by the framers as a cooperative proposition.[163]

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159. *Id.* art. II, § 2.

160. *Id.* art. II, § 3.

161. 299 U.S. at 304. For years, Justice Sutherland argued that the President is the exclusive force in the handling of foreign relations. Apparently, he was influenced by John Marshall's address to the House of Representatives on March 7, 1800. Marshall said, "The President is the sole organ of the nation in its external relations . . . ." 10 ANNALS OF CONG. 613 (1800). Moreover, Sutherland, in reliance upon other sources, attempted to show that the executive branch dominates the foreign affairs of the United States. However, even though his arguments are eloquent and logical in a semantical sense, they are not persuasive.

162. Justices Sutherland and Harlan, however, are not without judicial opposition. For instance, in Perez v. Brownell, 356 U.S. 44 (1958), the Supreme Court recognized the implied powers of Congress in the area of foreign relations. For a very brief discussion of the case, see J. NOWAK, HANDBOOK ON CONSTITUTIONAL LAW 178 (1978). Note that even though the exact holding of the case was overruled, the reasoning remains persuasive. *Accord,* Fong Yue Ting v. United States, 149 U.S. 698 (1893).

163. See, for example, references in M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1966), particularly Vol. I, at 21-22, 238, 244; Vol. II, at 136, 157; Vol. III, at 117, 608, 628.

As the world scene entertains greater participation in commercial interactions, the shared functions of the three branches should become more profoundly recognized. The judiciary frequently will be called upon to decide disputes involving problems that transcend the application of purely domestic principles. The judiciary, therefore, must be prepared to determine and define the principles of law that govern international interaction. Decisions like *Sabbatino,* which constitute an abrogation of constitutionally prescribed authority, do a disservice to the development of the norms necessary to effectuate world public order.

IV. The Development of Customary International Law

Once it is accepted that the federal courts are obligated to apply international law in the resolution of disputes within their jurisdiction, the problem arises: How is international law determined? The formal rules governing the relations of two or more nations may be the subject of a treaty or other agreement. In that event the principles governing a particular relationship may be determined from the writing. However, the intended goals of treaties or agreements are often based upon norms that have become standardized expectations of the parties. These norms, which become custom through the passage of time, indicate how another nation will react to a particular mode of conduct and are commonly referred to as "customary international law."

Customary international law had its genesis in the development of transnational interaction among nations not adjacent to one another; in other words, more than respect for a neighboring nation was involved. The special rules resulted from the efforts of a nation to demonstrate respect for the sovereignty of other nations and, in turn, secure respect for its own sovereignty. The rules evolve to meet changing needs and, with the passage of time, become normative standards of conduct guiding the interrelationship of members of the world community. Because it evolves through custom, this body of law is best able to take into account the needs and values of emerging states, a concern Justice Harlan expressed but did not develop analytically in his opinion in *Sabbatino.*

The process of custom develops as the values held by individual states are recognized and articulated through socioeconomic and political interaction. As interaction between nations and individuals of different nations increases, the world becomes

more aware of the values and principles of all the component members of the world community. The nations interacting in the world community are the source of customary international law.

Particular customs are developed, explained, and clarified by the appropriate authoritative bodies in each participating state. Decisionmakers operating in the world arena must be prepared to make decisions affecting international law in an authoritative manner.[164] The pronouncements of the decisionmakers in a particular state are considered authoritative in the sense that they articulate the expectations of that state in the world arena. Expectations arise from past experience or custom and are molded to meet the needs of a changing and expanding world order. Expectations, then, represent the sociopsychological identity of interacting states for purposes of measuring the quality of demands, counterdemands, and reactions.[165]

How long does it take before an act can be said to reflect "customary" law?[166] Apparently, the duration of time depends primarily upon the source of the act and how the act is received. For example, the manifestation of a position on nuclear disarmament by the United States or the Soviet Union in the mid-1960's would have been accorded a great deal more deference than the voluntary disarmament of a small country not engaged in any conflicts. Moreover, one commentator has stated, "Assuming that judicial precedents may be classified under the category of customary law, it may be said that one judicial decision is sometimes sufficient to create a custom even in international law . . . ."[167] Thus, Justice Harlan's extension of the act of state doctrine, the refusal to decide cases involving acts of a sovereign committed within its territory no matter how egregious the conduct, might have been the impetus for the establishment of a new custom; however, because Congress quickly pronounced its

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164. A seven-step method of authoritative decisionmaking in this context was proposed some years ago by Professor Myres McDougal. For a detailed discussion, see McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, 4 S.D.L. REV. 25 (1959). Professor McDougal establishes a modality of operative analysis through which the decisionmaker can make well-reasoned decisions.

165. For an elaborate discussion on the evolution of customary international law in *lex mercatoria* and maritime law, see Dickinson, *The Law of Nations* (pt. 1), *supra* note 149.

166. A similar question was proposed in Silving, *Customary Law: Continuity in Municipal and International Law*, 31 IOWA L. REV. 614, 624 (1946).

167. *Id.*

disapproval of *Sabbatino* and because the Court has seen fit on two occasions since that time to further limit the effects of the decision,[168] it is doubtful that the decision remains a persuasive statement of customary law.

What is the attitude of the judiciary of this country towards customary international law? In 1870, the Supreme Court, in *Merchant's Bank v. State Bank*,[169] stated:

> The *law merchant* was not made. It grew. Time and experience, if slower, are wiser lawmakers than legislative bodies. Customs have sprung from the necessities and convenience of business and prevailed in duration and extent until they acquired the force of law. This mass of our jurisprudence has thus grown, and will continue to grow by successive accretions.[170]

In *Hilton v. Guyot*[171] the Court observed that the absence of written law should not prevent the judiciary from resolving the problems confronting it. The law is a necessary force in reaching the goal of social order and, when nations are involved, a tool in achieving a world social order. Justice Harlan in *Sabbatino* was convinced, however, that even if customary international law did apply, it should not be used in the absence of a very clear consensus among nations as to the applicable customary international law. In 1963, the General Assembly passed a resolution demonstrating international abhorrence of discriminatory, uncompensated confiscations.[172] Although resolutions of the General Assembly are not usually regarded as binding, they are a significant indication of the attitudes of the member states, attitudes that may be used to gauge the acceptability of particular conduct in the world arena. Furthermore, one commentator cites a study done by Professor Robert Y. Jennings in which some fifty treaties, involving thirty-two nations, included compensation provisions for confiscations violative of international law.[173] Assuming the arguments were presented by counsel, Justice

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168. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

169. 77 U.S. (10 Wall.) 604 (1870). The extension occurred in U.S. Mining Co. v. Lawson, 134 F. 769 (8th Cir. 1904); The Paquete Habana, 175 U.S. 677 (1900); and O'Reilly v. Campbell, 116 U.S. 418 (1886).

170. 77 U.S. at 651.

171. 159 U.S. 113 (1895).

172. G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. 223, 225 (1963).

173. Comment, *Rationalizing Act of State, supra* note 24, at 309. *See also* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 224 (1972).

Harlan should have searched the treaties or looked to the United Nations for an existing or emerging attitude of customary international law. Nevertheless, one explanation may be that given by Professor Louis Henkin: In the area of foreign affairs, "[t]he Court does not build and refine steadily case by case, it develops no expertise or experts; . . . the precedents are flimsy and often reflect the spirit of another day."[174]

Customary international law is a part of this nation's jurisprudence and will become more significant as interaction in the world community increases. It is time the federal judiciary fully recognizes this fact and prepares to effectively resolve international disputes.

V. Conclusion

The act of state doctrine, since its earliest pronouncement, has been difficult to apply and is theoretically quixotic. In the nineteenth century, when international interaction was slow and haphazard, the problems lay mostly dormant. In the twentieth century, however, the development of satellites and telecommunications has changed that fact. Moreover, transportation is no longer hazardous nor time-consuming. Consequently, decisionmakers the world over must be prepared to take into account the long-range implications and effects of their decisions.

This polemical analysis of the act of state doctrine, as it has been applied since the 1960's, is intended to demonstrate the problems inherent in applying a rule of self-restraint, a rule that has antiquarian origins of questionable validity. The act of state doctrine should be abolished. In its place, the courts should adopt a principle of reasonableness that has as its focal matrix a procedure that is acceptable to the foreign nation involved in the litigation, the forum state, and the world community. This system of multifactoral analysis will serve to develop, and hopefully satisfy, the expectations of interacting participants in the world system. Professor Martin Wolff broadly described such a process and its goals:

> [J]ustice demands that every country in making [rules of private international law] . . . should consider how they will affect social and economic intercourse between any persons, be they its own nationals or aliens. The community the interests of which must be borne in mind by the lawgiver is neither the

174. L. Henkin, Foreign Affairs and the Constitution 224 (1972).

> community of his own nationals nor that of the various states or nations, but the community of all individuals, of mankind.[175]

This article demonstrates the fundamental problems inherent in the application of the act of state doctrine, from the standpoint of both domestic and international law. The courts have attempted to justify the doctrine without focusing on all the policy considerations involved in the application of such a rigid rule. United States courts should, as a matter of judicial policy, define the relationship between domestic courts and the world community; judicial decisions affect the world, as well as the nation, and the courts must demonstrate recognition of this fact in their decisions.[176]

Since the act of state doctrine is a judicially created rule of self-restraint, the judiciary should be given the first opportunity to make the necessary revisions. If, however, it does not, the Congress may enact legislation that would require federal courts to examine customary international law and define the inclusive elements. It could likewise require the federal courts to apply conflict of law principles to cases that have traditionally fallen into the category of act of state. Ideally, however, any changes should emanate from the judiciary.

A court must commence its analysis with an understanding that in cases involving international interests, the world order is potentially at stake. The court should decide these cases on recognized conflict of law principles. It should look first to the law of the situs, particularly to the decree of nationalization and any relevant law of expropriation. For example, does that country provide for compensation to national owners of property that has been subjected to confiscation? Is there any law in the situs that indicates how that country has treated the citizens of other countries in expropriation cases? Were they compensated? While the law of the situs should be given a great deal of weight, if the public policy of the forum state is clearly contrary to that of the situs, the court may refuse to apply the law of the situs.[177]

The court should next turn its attention to international law. Are there any treaties between the United States and the situs-country that might provide for compensation to owners of

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175. M. WOLFF, PRIVATE INTERNATIONAL LAW 15-16 (2d ed., 1950).

176. *See* R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964).

177. Ciampittiello v. Campitello, 134 Conn. 51, 54 A.2d 669 (1947).

confiscated property? Have there been any similar problems in the past between the two countries that may form the basis of an evolving pattern of mutual behavior? The court should look to the law of nations for indications of international expectations that might form the basis for, or perhaps already constitute, a norm.

The court should also look to the existing relations between the United States and the situs-country. This requires an examination of domestic policy. The usual source to examine in defining the foreign policy of the United States and other nations is the executive branch. Deference should be given to the executive branch because of its significant responsibilities in the area of foreign affairs, which, if not found specifically in the constitutional document, have evolved as a customary principle of American constitutional law. Thus, the court should examine executive policies, including negotiations, memoranda, letters, or other communiques from the Department of State. However, executive policy should not be determinative, but should be weighed along with all other factors. Depending upon the sensitivity of the problem, though, executive policy may be given great emphasis. Congress should also play a significant role in the conduct of foreign relations. The judiciary should look to both of these branches to determine domestic policy toward the problem before the court. The judiciary should not automatically abstain from deciding cases on the basis of the political question doctrine or the principle of separation of powers. It is the duty of the court to apply the relevant substantive law available and, under the Constitution, the law of nations is implicitly a part of that law.

Finally, the court should seek to satisfy the interests of the parties in the case before it. If the foreign nation is a party, the court should assure it due process of law and decide the case as fairly and equitably as possible. Additionally, the doctrine of sovereign immunity must be considered and, when applicable, applied.

Escapism, by resorting to artificial rules of self-restraint, may solve the problem for the court in a particular case; but in the long term it creates and fosters a system of international uncertainty. Therefore, the principle of reasonableness, as suggested, should be the focal point in resolving international disputes involving acts of state.

Judicial application of the principle of reasonableness

should provide a more effective means of remedying problems raised in cases like *Sabbatino, First National City Bank,* and *Alfred Dunhill of London, Inc.* Certainly, it should be more effective than trying to secure the aid of the government in opening diplomatic channels to bring about a just solution,[178] or pressing for a resolution of the dispute before an international tribunal which would hardly be able to enforce its decision.

The application of international law by domestic courts "would contribute significantly to the development of international law. Since international judicial bodies have few cases before them due to the absence of compulsory jurisdiction, application of international law by domestic courts may make substantial contributions to the accretion of case law."[179] By applying principles of international law to international disputes, a court can apply a standard that takes into account changing normative expectations in the world community, including those of emerging states, and changing political ideologies in established states.

Today, we are faced with a doctrine that has experienced two major exceptions carved out by the judiciary and one myopic endeavor by Congress to abolish it. Since the decision in *Sabbatino,* the executive branch has expressed disdain for the application of the doctrine. The signals are plain: either the Supreme Court should abolish the rule as it exists, or Congress should enact legislation mandating the application of international law, including conventional concepts of conflicts of law rules, to cases in which the interests of the litigants somehow affect a foreign state.

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178. *See* 5 INT'L & COMP. L.Q. 301 (1956).

179. Comment, *Rationalizing Act of State, supra* note 24, at 310.