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Alfred Dunhill of London v. Republic of Cuba: International Law Redivivus

In *Alfred Dunhill of London v. Republic of Cuba*¹ the Supreme Court once again considered the scope of the act of state doctrine. The act of state doctrine, a rule of federal law, provides that federal or state courts cannot consider the validity, under international law, of acts of foreign governments which occur within their own territory.² In *Dunhill*, the Court had to consider for the first time whether the *commercial* acts of foreign governments must be considered acts of state which cannot be challenged in United States courts.³

In order to understand the importance of the issue in *Dunhill*, it is necessary to examine the case within the context of a series of decisions which have concerned the act of state doctrine. The Supreme Court held, in 1963, that the application of the act of state doctrine was required in order to prevent the judiciary from impeding the executive's conduct of foreign relations,⁴ and in order to prevent the courts of this country from applying nationally biased principles of international law which might diminish respect for international law and authority.⁵ The trend of decisions since the Court's holding in *Banco Nacional de Cuba v. Sabbatino* has, however, been toward allowing courts to apply international law to foreign government acts; and this trend suggests a rejection of the *Sabbatino* rationale.⁶ The Court's decision in *Dunhill* presented an opportunity to take the final step in overruling its landmark holding in *Sabbatino*. But, as will be seen, the Court never reached that question.

The specific issue in *Dunhill*, whether commercial acts are acts of state, is of paramount concern to private commercial interests in the United States.

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¹*Menendez v. Saks and Co.*, 485 F.2d 1355 (2d Cir. 1973), *cert. granted sub nom.*, *Alfred Dunhill of London v. Republic of Cuba*, 416 U.S. 981 (1974) *restored to calendar for reargument with additional question*, 422 U.S. 1005 (1975).

²*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416-28 (1963); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1971).

³See text, *infra*, at notes 87-105, hereinafter referred to as TAN.

⁴*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428-33 (1963); see TAN 14-17 *infra*.

⁵*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 434-35, 437; see TAN 30-32 *infra*.

⁶*Ibid.*, 85-86 *infra*.

The Court's decision in *Dunhill* made possible a determination whether or not private parties will henceforth be able to effectively bring suit against foreign governments' commercial interests in federal court.⁷ The Solicitor General of the United States filed a brief in this case recommending that the Court adopt a distinction between acts of state "qua sovereign" and government acts taken in a commercial capacity.⁸

I. The Act of State Doctrine and the Limitation Of the Role of the Judiciary in the United States

A. The Act of State Doctrine as a General Rule of Deference

The act of state doctrine⁹ is in essence a rule of international comity¹⁰ by which the federal judiciary gives recognition to the authority of governments in other states to make and enforce decisions.¹¹ In doing so, federal courts help preserve the present status of the international system, a system characterized by the lack of strong centralized authority, and thereby facilitate transnational interaction.¹²

The debate concerning the appropriate scope of the act of state doctrine focuses on whether, and what, exception(s) should be permitted to this general rule. Exceptions would allow federal courts to consider whether foreign government acts violate principles of international law.¹³ If exceptions to the general rule are permitted, federal courts could find foreign governmental acts which violate international law to be invalid insofar as they affect the legal rights of persons or property which are within federal jurisdiction.

B. Establishing a Priority of Interests

1. THE INTEREST WHICH FAVORS JUDICIAL DEFERENCE

The Supreme Court has feared that allowing adjudication of the legality of foreign government acts might interfere with the executive's conduct of foreign

⁷*Ibid.*, 110-16, *infra*.

⁸Brief for the United States as amicus curiae, *Alfred Dunhill of London v. Republic of Cuba, restored for reargument*, 422 U.S. 1005 (1975).

⁹See TAN 2 *supra*.

¹⁰*First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972).

¹¹The act of state doctrine, according to Lauterpacht, is recognized as "(a) . . . consequence of equality—or independence—of States. . . ." 1 H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 267, § 115aa (8th ed. 1955).

¹²See McDougal, *Act of State in Policy Perspective: The International Law of an International Economy*, SOUTHWESTERN LEGAL FOUNDATIONS SYMPOSIUM PRIVATE INVESTORS ABROAD, STRUCTURES AND SAFEGUARDS, 327, 338-39 (1966) [hereinafter cited as McDougal, *Act of State in Policy Perspective*].

¹³See generally, R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY, 403-22 (1970); Friedmann, *National Courts and the International Legal Order: Projections on the Implications of the Sabbatino Case*, 34 GEO. WASH. L. REV. 443 (1966); McDougal, *Act of State in Policy Per-*

relations.¹⁴ Its concern has been that foreign governments might take offense at United States courts declaring their acts to be in violation of international law. Since international law principles often lack "codification or consensus" among nations, the Court's concern has been that the application of such principles might be considered expressions of national interest rather than the application of sound, disinterested principles of law.¹⁵ Essentially, the Court equated the application of international law with the conduct of foreign policy¹⁶ and has decided that in many cases the executive is best suited to resolve competing claims.¹⁷

There is a national interest in preventing adjudications from harming the conduct of foreign affairs. The Constitution commits the conduct of foreign relations to the political branches and there may be cases in which an adjudication might interfere with the conduct of delicate foreign policy negotiations.¹⁸ The Supreme Court, in its capacity as interpreter of the Constitution, may determine that in certain cases the foreign policy interests of the United States are best served by permitting the executive branch to resolve competing claims involving foreign government acts.¹⁹ If, in fact, a decision by a federal court that an act of a foreign government violated international law might harm the national interest or potentially lead to a breakdown in the international system, this interest should be weighed by the Court when deciding whether or not to limit the scope of the act of state doctrine.

2. THE INTERESTS OPPOSING JUDICIAL DEFERENCE

The primary interest which should motivate the Court to permit the examination of foreign governmental acts under international law is the interest of this country in promoting law or expectations which contribute to the maintenance of a secure world economy.²⁰ In order to appreciate the way in which the application of international law by the federal judiciary may further the interest of United States citizens in the maintenance of a secure world economy it is necessary to inquire briefly into the way in which international law is made.

spective, *supra* note 10; Goldie, *The Sabbatino Case: International Law Versus the Act of State*, 12 U.C.L.A. L. REV. 107 (1964).

¹⁴*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428; *First National City Bank v. Banco Nacional de Cuba* 406 U.S. at 765-67; Snyder, *Banco Nacional de Cuba v. Sabbatino: The Supreme Court Speaks*, 16 SYRACUSE L. REV. 15, 22-25 (1964).

¹⁵*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428-33.

¹⁶*First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972).

¹⁷*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428.

¹⁸See R. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY*, 433-36; *Banco Nacional de Cuba v. Sabbatino* 376 U.S. at 461-71 (Justice White dissenting).

¹⁹See generally, L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, 210-16 (1972).

²⁰The Supreme Court's decisions relating to the act of state doctrine have all involved competing claims to property or other commercial interests. It is therefore appropriate to discuss the act of state doctrine in the context of the maintenance of the international economy. Other classes of

a. INTERNATIONAL LAW AS A
DECISION-MAKING PROCESS²¹

To view international law as a body of rules which are established through the efforts of international organizations, other international authorities (such as international courts) and treaties is to neglect the major role which national decision-makers play in the creation of international law in a variety of other situations. International law is in great part the expectations of national officials about the way officials in other states will behave.²² These expectations are created in a process of continuous interaction between decision-makers in various states.²³ The expectations so created influence the way in which authority is exercised.²⁴

When officials within a state decide to act in a certain way, their decision is a claim to exercise authority which officials in other states evaluate. If the claim in question is compatible with the interests of the external state(s), this claim will most likely be tolerated (not challenged). If the claim is antithetical to the interests of the external state(s), the claim will most likely be rejected by one or more of a variety of means, such as diplomatic protest, economic sanction, military action, etc. In accepting or rejecting claims, national officials (along with international officials) create expectations regarding the way in which their authority will be exercised in the future.²⁵

National courts, just as executive authorities such as presidents, prime ministers and foreign offices, participate in the process by which expectations are created.²⁶ When a national court decides to apply a certain rule of international law in a particular case it is asserting a claim (by accepting or rejecting the claim of a foreign state). This claim is evaluated by decision-makers in other

foreign government acts, such as acts which affect human rights, have not yet received judicial attention in our courts. For this reason, acts other than those affecting the international economy are not specifically treated in this note.

²¹The model which is used in this section to describe the process by which international law is made is a somewhat simplified version of the international law-making process model developed by Professor Myres McDougal and his associates. For a more detailed description of the law-making process, see generally, McDougal and Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 *YALE L.J.* 648 (1955); and Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 *YALE STUDIES IN WORLD PUBLIC ORDER* 1 (1974).

²²See McDougal and Schlei, *id.* at 655-57.

²³*Loc. Cit.*

²⁴*Ibid.*, at 657.

²⁵The Anglo-Norwegian Fisheries Case [1951] I.C.J. 116, in which Britain objected to Norway's use of unconventional baselines to define its territorial sea, and in which the International Court of Justice upheld Norway's claim on the grounds of its "practical needs and . . . requirements," illustrates the process by which international law is created and applied. *Id.* at 665.

²⁶This is an example of the *dedoublement fonctionnel* first recognized by the late Professor George Scelle. And see R. FALK, *op. cit.*, 433.

states and is taken into account when they decide whether to act in a certain manner.²⁷

The act of state doctrine, when viewed within this process, serves to limit the role of the federal judiciary in the process by which international law is created and maintained. When the Supreme Court refuses to consider whether the acts of a foreign government violate international law, it refuses to assert a claim on behalf of this country.²⁸ By applying principles of international law in cases before it, the Court can contribute to the creation of or adherence to principles of law which reflect this country's interest in maintaining a secure international economy.²⁹

The Supreme Court has held, in agreement with commentators such as Professor Richard Falk,³⁰ that the application of challenged principles of international law by the courts of this country to acts of foreign governments whose ideologies may differ from our own will diminish respect for international law and authority.³¹ The suggestion has been made that rules of deference encourage the development of international law principles which are characterized by "codification or consensus."³²

In suggesting that international authorities³³ and consensus³⁴ play the major role in the development of substantive international law principles the Court attempts to promote a world order in which confrontation is minimized. While the promotion of such a world order is obviously not to be discouraged,³⁵ a rapid strengthening of international authority cannot soon be expected as a means of protecting the right of nations and individuals to the maintenance of a secure world economy. As Professor Falk concedes, nation-states remain the primary repository of decision-making authority and will most likely continue in this status for the indefinite future.³⁶ The interaction of national offi-

²⁷Thus, if officials in another state know that federal courts in this country will examine an expropriation under international law, they must take this situation into account when deciding whether or not to expropriate in a manner which will be considered illegal by United States courts.

²⁸This does not mean that the Court asserts a claim only when it finds a foreign government act to violate international law. If it decides that the act in question is compatible with international law it likewise represents this country's interests in the process by which expectations are created.

²⁹See McDougal, *Act of State in Policy Perspective*, 352.

³⁰The influence of Professor Falk's work on act of state related decisions has been explicitly recognized by the Court. See, e.g., 376 U.S. at 424 n.22; 406 U.S. 759, 789 n.12, 790, 791 n.14, 793. Commentators have noted this impact as well. See, e.g., Professor Lillich's forward to R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* at vii; cf. Friedmann, *supra* note 13, 452-53.

³¹*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 434-35, 437; *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. at 793 (dissenting opinion).

³²R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER*, 6-7.

³³E.g., *id.* at 14-15, 74-5, 171-72.

³⁴E.g., *id.* at 8, 12, 15, 171.

³⁵See McDougal, *Act of State in Policy Perspective*, *supra* note 12, at 351.

³⁶R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER*, 16-19, 170-71.

cial will continue to play a major role in the creation of international law, along with the consensus resolutions of international organizations.³⁷ The Supreme Court, as both a national and international decision-maker, must consider that when it declines to limit the scope of the act of state doctrine, refusing to apply international law in a case before it, it is refusing to assert a claim on behalf of this country's interest in the maintenance of a secure world economy.

b. THE INTEREST OF PRIVATE PARTIES
IN ADJUDICATION

The Constitution allocates to the judiciary the authority to decide cases before it on their merits, including those in which international law must be applied and in which foreign states are parties.³⁸ In Choosing not to examine foreign acts of state on their merits, i.e., not limit the scope of the act of state doctrine, the Court forecloses the opportunity of private parties to obtain relief other than by petition to the executive branch; it leaves in the hands of that branch the authority to determine which interests must be given precedence in resolving competing claims, and, again limits the capacity of private parties to obtain relief on the legal merits of their claims. As a result, private interests are liable to become subordinated to public interests, i.e. the interest in maintaining friendly diplomatic relations.³⁹ While there may be situations in which this subordination of interests is necessitated by an overriding concern with maintaining international order, the national interest is certainly not jeopardized by every adjudication involving a foreign government's act.

The Supreme Court has suggested in prior determinations, that United States citizens are advantaged in having their claims against foreign governments championed by the executive as compared with bringing their claims into court.⁴⁰ The Court decided that the positive effect which judicial determinations may have on resolving claims in favor of wronged United States citizens is minimal when compared with the success which may be achieved with the variety of options open to the executive for obtaining redress.⁴¹ There is, however, scant justification for limiting the role of the judiciary in applying international law or for limiting the means open to private interests to obtain satisfaction in saying that other remedies are available; "as if," it has been remarked, "one prohibited the other."⁴²

³⁷See TAN 21-27 *supra*.

³⁸*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 450-53 (Justice White dissenting).

³⁹R. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY*, 429-30.

⁴⁰*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 431, 435; *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. at 786-87 (dissenting opinion).

⁴¹*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 435; *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. at 786-87 (dissenting opinion).

⁴²R. FALK, *op. cit.*, 429.

C. Three Preferred Criteria for Evaluating Act of State Claims

In deciding whether to apply principles of international law to foreign governmental acts taken within their own territory or, in other words, whether to limit the scope of the act of state doctrine, the Supreme Court should apply the following criteria. First, the application of international law in a particular case or class of cases should not harm the executive in the conduct of foreign affairs. If there is a legitimate danger in permitting adjudication, the Court should decline to limit the scope of the act of state doctrine. On the other hand, given the competing interests at stake, the Court should be able to perceive more than a *de minimis* threat to the foreign policy branch before it decides that it will not apply international law in a particular case or class of cases.⁴³

Second, the application of international law to a foreign government act should promote the maintenance of a secure world economy. The interest in promoting principles of international law must, if the situation demands it, be weighed against potential harm to the conduct of foreign affairs.

Third, the act of state doctrine limitation in question should provide private interests with the opportunity to have their claims adjudicated on their merits. Private interests should not be deprived unnecessarily of their day in court.

II. The Trend Towards Limiting the Scope of the Act of State Doctrine

The Supreme Court decision which initiated the recent debate concerning the appropriate scope of the act of state doctrine was *Banco Nacional de Cuba v. Sabbatino*.⁴⁴ Since *Sabbatino* was decided, the Court and Congress, in a series of decisions, have gradually limited the scope of the act of state doctrine.

A. *Banco Nacional de Cuba v. Sabbatino*⁴⁵

There has been considerable scholarly disagreement as to what, in fact,

⁴³The Court should give serious consideration to recommendations by the executive branch as to the foreign policy implications of a particular adjudication. However, in its capacity as interpreter of the Constitution, *see note 19 supra*, the Court should make the final determination as to whether or not the foreign policy interests of the executive override its duty to hear a case before it on its merits. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 467-71 (Justice White dissenting).

⁴⁴376 U.S. 398 (1963); *see Mann, The Legal Consequences of Sabbatino*, 51 VA. L. REV. 604 (1965); R. FALK, *op. cit.*, 403.

⁴⁵A great deal has, of course, already been written about the *Sabbatino* decision. In addition to the citations in Note 44, *supra*, *see generally*, McDougal, *Act of State in Policy Perspective*, *supra* note 12; Falk, *The Sabbatino Controversy*, THE AFTERMATH OF SABBATINO, THE HAMMARSKJOLD FORUMS, Working Papers 525/65/1 (1965); Domke, Friedman and Henkin, *Act of State: Sabbatino in the Courts and in Congress*, 3 COLUM. J. TRANSNAT'L L. 99 (1965); Friedmann, *National Courts and the International Legal Order*, 39 GEO. WASH. L. REV. 443 (1966); Stevenson, *The Sabbatino Case—Three Steps Forward and Two Steps Back*, 57 AM. J. INT'L L. 97 (1963); and Snyder, *Banco Nacional de Cuba v. Sabbatino: The Supreme Court Speaks*, 16 SYRACUSE L. REV. 15 (1964).

Sabbatino held.⁴⁶ Justice Harlan's consideration of the act of state doctrine began with an affirmation of dicta from prior act of state decisions which suggested that the Court might refuse to consider the validity, under international law, of any foreign governmental act taken within its own territory.⁴⁷ The opinion then suggested that there were several exceptions to this general rule which would allow judicial consideration, such as the existence of "codification or consensus" regarding controlling legal principles.⁴⁸ The narrow holding of *Sabbatino* was that, "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles," federal courts would not examine takings of property within their own territory by foreign governments.⁴⁹

1. APPLICATION OF PREFERRED CRITERIA TO *SABBATINO*

First, being prevented from applying international law to expropriatory actions, United States courts could not interfere with the executive's conduct of foreign affairs.⁵⁰ The question that remains is whether or not such adjudications would, in fact, have more than a *de minimis* impact in the foreign relations sphere. At the time *Sabbatino* was decided, the Department of State refused to comment on whether it considered the adjudication of claims arising out of nationalizations to be appropriate.⁵¹ At the time of decision, the Court may have had some justification for presuming that the conduct of foreign affairs might be impeded.⁵² Nevertheless, following the *Sabbatino* decision, several commentators asked why adjudications regarding expropriations should be

⁴⁶The literature reflects a wide range of opinions as to what *Sabbatino* held. For example, Professor Goldie concluded that the Court "seems to have come precariously close to legislating a doctrine of full faith and credit for foreign judgments and decrees," Goldie, *The Sabbatino Case: International Law Versus the Act of State*, 12 U.C.L.A. L. REV. 107, 137-38, 158 (1964). On the other hand, Professor Mann observed:

Although it may surprise some readers and although prevailing impressions are likely to tend in the opposite direction, the Supreme Court of the United States seems to have accepted in *Sabbatino* the suggestion that a foreign act of state ceases to be sacrosanct when it is contrary to international law.

Mann, *op. cit.*, 604-12.

⁴⁷*Sabbatino* affirmed the broad dictum of *Underhill v. Hernandez*, 168 U.S. 250, 252:

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 another taken within its own territory. 376 U.S. at 416.

The majority opinion observed that "none of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifested any retreat from *Underhill*." *Id.*

⁴⁸376 U.S. at 427-28.

⁴⁹*Ibid.*, p. 428.

⁵⁰The Court explicitly stated that its holding was based on its desire not to intrude in the conduct of foreign relations. 376 U.S. at 427-33. See Mann, *op. cit.*, 623.

⁵¹376 U.S. at 420.

⁵²That is, if executive silence could be considered a recommendation not to adjudicate.

singled out as potentially harming foreign relations while customary international law might be applied to other government acts.⁵³

The *Sabbatino* holding did not promote the maintenance of a secure world economy, nor did it promote the interests of the United States. In *Sabbatino*, the Court was asked to rule that expropriation without compensation violated international law. While there may have been some legitimate diversity as to the amount of compensation which must be afforded in the event of an expropriation,⁵⁴ the Court ignored the overwhelming weight of precedent and authority when it asserted that there was no consensus to support a holding that expropriation without compensation violated international law.⁵⁵ The movement of capital and technology in the modern world is dependent upon the adherence to rules which govern the flow of investment and, in particular, the rule that compensation must be paid in the taking of alien-owned property.⁵⁶ The inhibition of the movement of capital would adversely affect both the developed and the developing countries.⁵⁷ The United States clearly shares an interest in promoting the secure flow of capital and technology, and the executive branch has consistently adhered to the policy of supporting the duty to compensate.⁵⁸ In *Sabbatino*, the Court failed to promote the maintenance of a secure world economy and the interests of this country.⁵⁹

Finally, the *Sabbatino* holding denied to private interests the ability to have their claims vindicated in court. There is evidence to suggest that the ability to pursue claims for illegally expropriated property in court may benefit private interests both in obtaining compensation and in inhibiting illegal expropriations.⁶⁰ But the *Sabbatino* holding deprived private interests of the ability to invoke that remedy and thus failed to meet the third preferred criterion for evaluating act of state limitations.

The *Sabbatino* Court weighed the competing interests at stake and decided in favor of deference to the executive. The Court was apparently reluctant to tread on unsettled ground without some indication from the political branches that its decision would not be viewed as an intrusion into the realm of the

⁵³See, e.g., Mann, *op. cit.*, 620-21; McDougal, *loc. cit.*, note 12 *supra*.

⁵⁴See, e.g., Weigel and Weston, *op. cit.*, 3; McDougal, *op. cit.*, 352-53.

⁵⁵Even the *Sabbatino* majority's most ardent supporter, Professor Falk, now appears to have conceded that perhaps the Court should have distinguished between diversity as to relevant standards of compensation to be provided and the requirement of paying compensation. R. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY*, 414-15.

⁵⁶See, e.g., Committee Report, *The Compensation Requirement in the Taking of Alien Property*, 22 N.Y. BAR ASSOCIATION RECORD, 196 (including footnotes); Weigel and Weston, *op. cit.* at 4; McDougal, *op. cit.*, 351-2.

⁵⁷See, e.g., Committee Report, *loc. cit.* note 56, *supra*.

⁵⁸Mann, *op. cit.*, 620, 625-26.

⁵⁹*Ibid.*, 626-27.

⁶⁰See Statement by the Department of State on Policy on "Hot" Libyan Oil, May 7, 1974, p. 3, 18.

conduct of foreign relations. As discussed below, the presumption that the executive might be impeded by adjudication of expropriation claims should now be reversed.

B. *The Sabbatino Amendment*

In 1964, shortly after the Supreme Court's *Sabbatino* decision, Congress (under its foreign affairs power⁶¹) acted to limit the scope of the act of state doctrine by adopting the *Sabbatino* (or Second Hickenlooper) Amendment.⁶² The *Sabbatino* Amendment provided that no court in the United States could refuse, on the ground of the act of state doctrine, to consider on its merits the legality, under the principles of international law, of a claim involving a confiscation of property by the government of another nation.⁶³ The amendment also provided that the president could require a court to apply the act of state doctrine in a particular case by filing a "suggestion" to that effect with the Court.⁶⁴ It also provided, by reference, the appropriate rule which courts should apply in determining the legality of a confiscation of property.⁶⁵

The purpose of the *Sabbatino* Amendment was to overrule the narrow holding in *Sabbatino* to the effect that federal courts could not examine expropriatory actions on their merits.⁶⁶ The original *Sabbatino* litigation, on remand to the district court at the time the *Sabbatino* Amendment was enacted,⁶⁷ was eventually decided on the basis of the *Sabbatino* Amendment.⁶⁸ Cuba's ex-

⁶¹See McDougal, *op. cit.*, 345-47; Recent Developments, *Sabbatino Doctrine Modified in Foreign Assistance Act of 1964*, 63 MICH. L. REV. 1310, 1311-12 (1965); but see Cardozo, *Congress Versus Sabbatino: Constitutional Considerations*, 4 COLUM. J. TRANSNAT'L L., 297 (1966).

⁶²The *Sabbatino* Amendment was originally adopted as a rider to the Foreign Assistance Act of 1964. 78 Stat. 1009, 1013 (1969). After slight modification it was made permanent legislation in the Foreign Assistance Act of 1965, 79 Stat. 653, 22 U.S.C. § 2370(a)(2) (Supp. I, 1965). Much has been written about the *Sabbatino* Amendment. See generally, McDougal, *op. cit.*, 343-50; Bleicher, *The Sabbatino Amendment in Court: Bitter Fruit*, 20 STANFORD L.J. 858 (1968); Cardozo, *op. cit.*, 297ff.; Note, *Act of State Doctrine: Effect of Sabbatino Amendment*, 8 HARV. J. INT'L LAW 357 (1967); Statement by the Department of State on "Hot" Libyan Oil, May 7, 1974.

⁶³22 U.S.C. § 2370(a)(2) (Supp. I, 1965); see Bleicher, *loc. cit.*

⁶⁴*Loc. cit.*

⁶⁵*Loc. cit.* This results from the inclusion of a clause in the amendment to the effect that the principles of international law to be applied include the principles set out in the rest of the subsection, which includes the first Hickenlooper Amendment. The first Hickenlooper Amendment provided that the international law related to confiscations included "speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law." 22 U.S.C. § 2370(e)(1) (1964). Whether or not courts are required, as a result of the "includes" clause, to apply the standards set forth in the Hickenlooper Amendment is not yet fully resolved. See Bleicher, *op. cit.*, at 860-69.

⁶⁶The Senate Report on the amendment spoke of achieving a "reversal of presumptions." That is, that courts would assume that adjudications would not impede the conduct of foreign relations and would apply international law, unless the Executive specifically advised against it. S. REP. NO. 1188, 88th Cong., 2d Sess., pt. I, at 24 (1964).

⁶⁷*Sub. nom.* Banco Nacional de Cuba v. Farr, 293 F. Supp. 957 (S.D.N.Y. 1965) and Supplemental Opinion, 272 F. Supp. 836 (S.D.N.Y. 1965).

⁶⁸Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

propriation was held to have violated international law and was therefore ineffective to transfer title to property.⁶⁹ The Supreme Court denied certiorari and thereby affirmed the application of the *Sabbatino* Amendment.⁷⁰

1. EVALUATING THE *SABBATINO* AMENDMENT

First, by providing that the president may require the application of the act of state doctrine in particular cases, the *Sabbatino* Amendment permits the executive to maintain its control over the conduct of foreign relations.⁷¹ Second, the amendment promotes principles of international law which contribute to the maintenance of a secure world economy and foster the national interest.⁷² Finally, the *Sabbatino* Amendment provides private interests with the opportunity to vindicate their claims in Court.⁷³ The *Sabbatino* Amendment therefore meets all three preferred criteria for evaluating limitations on the scope of the act of state doctrine.

C. *First National City Bank v. Banco Nacional de Cuba*⁷⁴

In 1972 the Supreme Court again considered the appropriate scope of the act of state doctrine, in *First National City Bank v. Banco Nacional de Cuba*.⁷⁵ In

⁶⁹383 F.2d at 183, *aff'g*, 243 F. Supp. at 980.

⁷⁰*Cf.* FALK, *op. cit.*, 424-25.

⁷¹*See* McDougal, *op. cit.*, 344. While this provision meets with the first preferred criterion for evaluating act of state limitations it is still a second-best solution. As discussed *supra* TAN 19, the judiciary, not the executive or Congress, should ultimately decide whether or not adjudication will interfere with the conduct of foreign relations.

⁷²*See* TAN 54-59 *supra*. The amendment promotes the principle that states owe a duty to compensate in expropriations.

⁷³The caveat which must be entered here is that by granting the executive the authority to require courts to apply the act of state doctrine, the amendment allows the executive to determine when private interests must be subordinated to the public welfare. The courts should determine whether or not the executive suggestion should be followed. *Cf.* TAN 38-39; *see*, R. FALK, *op. cit.* 424.

⁷⁴406 U.S. 759 (1972). *See generally*, Leigh, *The Supreme Court and the Sabbatino Watchers: First National City Bank v. Banco Nacional de Cuba*, 13 VA. J. INT'L L. 33 (1972); Gunther, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 284-97 (1972); Case Comment, *New Indications of Justicability of American Claims Against Cuban Expropriation*, 52 BOSTON U. L. REV. 847 (1972); Note, *The Act of State Doctrine After First National City Bank v. Banco Nacional de Cuba*, 8 NEW ENG. L. REV. 219 (1973).

⁷⁵*First National City Bank* foreclosed on a secured loan made to the Cuban government, sold the collateral, and retained \$1.8 million in excess collateral, which, it claimed, Cuba owed to it as a result of Cuba's uncompensated expropriation of its property. Cuba sued to recover the collateral. *First National City* counterclaimed for expropriation loss, and Cuba interposed the act of state doctrine as a defense to the counterclaim. 406 U.S. at 760-61. The district court held that the *Sabbatino* amendment barred Cuba's use of the act of state doctrine as a defense, *Banco Nacional de Cuba v. First National City Bank*, 270 F. Supp. 1004 (S.D.N.Y. 1967); but the court of appeals reversed on the grounds that the amendment was not broad enough to preclude the use of an act of state defense, 431 F.2d 392 (2d Cir. 1970). After certiorari had been granted, 400 U.S. 1019 (1971) the State Department legal adviser filed a letter with the Court which recommended that when the executive filed a suggestion that the act of state doctrine need not be applied the Court should proceed to examine the case on its merits; relying on the precedent of *Bernstein v. N. V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954). The legal adviser stated that the act of state doctrine should not be applied in cases involving counterclaims or set-offs "in this or like cases."

this case the Court held that federal courts could examine the validity of foreign governmental acts in cases in which the act of state doctrine is pleaded as a defense against a counterclaim or set-off.⁷⁶ While a majority of justices agreed in the result, there was significant divergence of opinions. Three justices in the plurality opinion held that in cases in which the executive specifically advises a court that an adjudication would not interfere with the conduct of foreign relations, courts should proceed to consider foreign governmental acts on their merits. Thus, three justices approved the so-called *Bernstein* exception to the act of state doctrine.⁷⁷ The four dissenting justices as well as the two justices concurring in result emphatically rejected the *Bernstein* rationale.⁷⁸ It is not likely that in future cases the validity of the *Bernstein* exception will be confirmed.⁷⁹ It is more appropriate to conclude only that the act of state doctrine will not bar adjudication in cases involving counterclaims or set-offs.⁸⁰

1. EVALUATION OF *FIRST NATIONAL CITY BANK*

There is very little basis to distinguish between the affront which might be caused to a foreign government by a holding that its act violated international

406 U.S. at 764. The Supreme Court remanded the case to the court of appeals for consideration in light of the legal adviser's so-called *Bernstein* letter: but the court of appeals refused to reaffirm the *Bernstein* exception to the act of state doctrine and again found in favor of Cuba. 442 F.2d 530 (2d Cir. 1971). The Supreme Court again granted certiorari, 404 U.S. 820 (1971).

⁷⁶406 U.S. at 764-68. See Leigh, *op. cit.*, 34-35.

⁷⁷406 U.S. at 764-68. The opinion of Justice Rehnquist, in which Justices Burger and White concurred, suggested that the application of the act of state doctrine is required almost exclusively because of potential embarrassment to the executive. 406 U.S. at 767-68. Therefore, if the executive expressly represents that an adjudication could not damage the interests of foreign policy, "'(t)he reason of the law ceasing, the law itself also ceases.'" 406 U.S. at 768. Judge Learned Hand had followed a similar course in *Bernstein v. N. V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954), in which the validity of certain Nazi decrees was in question. Justice Rehnquist's opinion expressly affirmed Judge Hand's holding that a State Department letter removed the act of state doctrine as a bar to adjudication. 406 U.S. at 768. See Leigh, *op. cit.*, at 41-42.

⁷⁸Justice Douglas, concurring in result, rejected the validity of the *Bernstein* exception, 406 U.S. at 772. He allowed the set-off on the precedent of *National City Bank v. Republic of China*, 348 U.S. 356 (1965); a case in which it was ruled that a "sovereign's claim may be cut down by a counterclaim or set-off." 406 U.S. 771-72. See Leigh, *op. cit.*, at 40-43. Justice Powell, concurring in result, rejected both the *Bernstein* exception and the precedent of *Republic of China*, 406 U.S. at 773-74; but indicated that "[h]ad I been a member of the *Sabbatino* Court, I probably would have joined the dissenting opinion of Mr. Justice White" 406 U.S. at 774. Justice Powell would consider the validity of expropriations under customary international law. 406 U.S. at 774-75. See Leigh, *op. cit.*, at 43-4.

Justice Brennan dissented, joined by Justices Stewart, Marshall and Blackmun. He emphatically rejected the *Bernstein* exception, both because the *Sabbatino* holding was based on more than deference to the executive branch, 406 U.S. at 785, and because he considered the *Bernstein* exception to be an abdication of the judicial function to the executive. 406 U.S. at 790-93. Justice Brennan's dissent strongly affirmed the Court's *Sabbatino* holding and indicated that in his view, the validity of a foreign act of state in certain circumstances is "a 'political question' not cognizable in our courts." 406 U.S. at 782-89. See Leigh, *op. cit.*, at 44-5.

⁷⁹See Leigh, *The Supreme Court and the Sabbatino Watchers*, *op. cit.*, at 33, 45-6; but see Gunther, *op. cit.*, p. 293; and Note, 8 NEW ENG. L. REV. 225 (1973).

⁸⁰See Leigh, *op. cit.*, at 34.

law in a case involving a set-off or counterclaim as opposed to a case involving expropriated property which has entered the federal jurisdiction.⁸¹ Both cases involve the application of the same principles of international law to the same act.⁸² Once again the question raised in *Sabbatino* must be considered: will considering on the merits on expropriation by a foreign government impede the conduct of foreign relations?

At the time *First National City Bank* was decided, the Court had before it both the view of Congress expressed in the *Sabbatino* Amendment that the Court should consider expropriations on their merits and the recommendation of the Department of State's legal adviser that the conduct of foreign affairs would not be impeded in cases involving counterclaims or set-offs. In light of these expressions of opinion by the representatives of both political branches of government, it was appropriate for the Court to conclude, on the weight of the evidence before it, that considering the merits of an expropriation as it did in *First National City Bank* would not jeopardize the conduct of foreign affairs.

First National City Bank's limitation of the scope of the act of state doctrine also met the second criterion suggested for evaluating act of state claims. At least in one class of cases, the Court chose to promote international law principles which contribute to the maintenance of a secure world economy and which further the national interest.⁸³

Finally, *First National City Bank* permitted private interests to have their claims vindicated in court. While affirmation of the *Bernstein* exception would certainly not contribute to judicial independence within the federal government,⁸⁴ the rejection of the exception by a clear majority of justices strongly suggests that the *Bernstein* precedent will not be relied on by the Court in future cases.

D. Trend Analysis

Since *Banco Nacional de Cuba v. Sabbatino* was decided in 1963, the trend in the Supreme Court, Congress, and the executive branch has been towards limiting the scope of the act of state doctrine. Congress acted by passing the *Sabbatino* Amendment, the executive by filing a suggestion to the Court urging limitation, and the Court itself with its decision in *First National City Bank*. This trend would appear to reflect a perception on the part of officials in the three branches of government that adjudications regarding the legality of

⁸¹Perhaps, as Justice Douglas suggested, the affront might be lessened because "Cuba is the one who asks our judicial aid in collecting its debt." 406 U.S. at 772.

⁸²Both in *Sabbatino* and in *First National City Bank* the Court was asked to find that Cuba's expropriation violated international law.

⁸³See TAN 54-9 *supra*.

⁸⁴406 U.S. at 792-93 (Justice Brennan dissenting).

foreign governmental acts under international law are not likely to harm the executive in the conduct of foreign affairs. It may also signal a recognition that the Court has a duty to promote the interests of this nation in maintaining a secure world economy; and an obligation to provide private interests with the opportunity to achieve redress in the courts.

The Supreme Court was given an opportunity to continue this trend in *Alfred Dunhill of London v. Republic of Cuba*.⁸⁵ Pursuant to a request of the Court, the litigants presented arguments on whether the Court's *Sabbatino* holding should be reconsidered and the solicitor general and the Department of State legal adviser both recommended further limitation of the act of state doctrine.

III. Alfred Dunhill of London v. Republic of Cuba

A. *The Issue in Dunhill*⁸⁶

In 1960, the government of Cuba confiscated the property and assets of five cigar companies located in Cuba and owned by Cuban nationals.⁸⁷ Prior to confiscation, these cigar companies had exported cigars to importers in the United States (including Alfred Dunhill of London). At the time of confiscation, the importers owed payments on accounts receivable,⁸⁸ which payments were transmitted to the Cuban government.⁸⁹ The former owners of the cigar companies, who had fled to the United States, sued in federal district court to recover these payments from the importers⁹⁰ who asserted that their obligation had been discharged by the prior payment to Cuba.⁹¹ The importers then sought to recover the payments from Cuba on the ground that Cuba had been unjustly enriched.⁹² Cuba denied its liability both because the confiscation decree was effective to transfer ownership to the receivables,⁹³ and because a governmental refusal to return the payments would constitute an act of state which would bar the court from rendering a judgment against it.⁹⁴

The district court held that the former cigar company owners retained ownership of the accounts receivable, finding that the Cuban government's confiscation decree violated the public policy of the United States and as such was in-

⁸⁵*Menendez v. Saks and Co.*, 485 F.2d 1355 (2d Cir. 1973), *cert. granted sub nom.*, *Alfred Dunhill of London v. Republic of Cuba*, 416 U.S. 981 (1974) (No. 73-1288), *restored to calendar for reargument with additional question*, 422 U.S. 1005 (1975).

⁸⁶The present article was written before the Supreme Court rendered its decision on May 24, 1976.

⁸⁷*Menendez v. Faber, Coe, and Gregg, Inc.*, 345 F. Supp. 527, 532 (S.D.N.Y. 1972).

⁸⁸345 F. Supp. at 533.

⁸⁹*Ibid.*, at 536.

⁹⁰*Ibid.*, at 540.

⁹¹*Loc. cit.*

⁹²*Ibid.*, at 543-44.

⁹³*Ibid.*, at 537-39.

⁹⁴*Ibid.*, at 544-45.

effective to transfer ownership of property located in this country⁹⁵ at the time the decree was issued.⁹⁶ The importers were not discharged from their obligation to pay the former owners by reason of previously having paid the Cuban government,⁹⁷ but Cuba was held liable to return the payments made on the accounts to the importers.⁹⁸ Cuba's contention that its refusal to return these payments would constitute an act of state, barring the court from rendering a judgment against it, was rejected.⁹⁹ The importers were also allowed to set off their unjust enrichment claims against Cuba against monies owed to it for postconfiscation shipments of cigars.¹⁰⁰ Among the group of importers, only *Dunhill* was awarded an affirmative judgment below against the Cuban government.¹⁰¹

The court of appeals,¹⁰² partially reversing, held Cuba's refusal to return the importers' previous payments to constitute an act of state, as defined in *Sab-batino*, and as such immune from judicial examination.¹⁰³ However, the court of appeals also held that the importers could set off the amounts previously paid for preconfiscation shipments against amounts owed for postconfiscation shipments.¹⁰⁴ *Dunhill's* affirmative judgment against Cuba was vacated and its obligation to pay the former owners remained.¹⁰⁵ *Dunhill* petitioned the Court for review and certiorari was granted.

The Supreme Court was therefore presented with the question of whether federal courts must give legal effect to a foreign government's repudiation of

⁹⁵The situs of the debt is located with the debtor. 345 F. Supp. at 538, *aff'd*, 485 F.2d 1365.

⁹⁶345 F. Supp. at 537-39. The district court relied on *Republic of Iraq v. First National City Bank*, 253 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966) (effect given to acts of state affecting property located in United States at time acts taken "only if they are consistent with the policy and laws of the United States"). The district court previously had held in *Palacio v. Brush*, 256 F. Supp. 481, 458 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied*, *Brush v. Republic of Cuba*, 389 U.S. 830 (1967), that the Cuban decree which confiscated the property of its own nationals was contrary to United States policy and laws.

⁹⁷345 F. Supp. at 540-42.

⁹⁸*Ibid.*, at 542-46.

⁹⁹*Ibid.*, at 544-46. Judge Bryan, in the district court, held that Cuba's obligation to return the unjust enrichment arose in New York and thus could not be affected by an act of the Cuban government. 345 F. Supp. at 545. His view was that, as Cuba's refusal was merely a statement of counsel and not a formal governmental act, it could not be considered an act of state.

¹⁰⁰*Ibid.*, at 546.

¹⁰¹*Ibid.*, at 563-63. Cuba was ordered to return approximately \$55,000 to *Dunhill*. This was the amount by which payments on accounts exceeded the amount owed for postconfiscation shipments.

¹⁰²*Menendez v. Saks and Co.*, 485 F.2d 1355 (2d Cir. 1973).

¹⁰³485 F.2d at 1370-71. Judge Mansfield, writing for the court of appeals, ruled that the Supreme Court's rationale that the executive's conduct of foreign affairs might be impeded by an adjudication related to a foreign governmental act would as well apply to judicial enforcement of an implied obligation as to a confiscation of property. *Ibid.*, at 1370. The court of appeals also decided that an act of state need not be embodied in a formal decree.

¹⁰⁴The court of appeals based its holding on *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (act of state doctrine need not act as bar to adjudication in cases invoking set offs or counterclaims). *Ibid.*, at 1372-74.

¹⁰⁵*Menendez v. Saks and Co.*, *Ibid.*, at 1355, 1368.

a commercial obligation, or more generally, whether federal courts can apply international law to a foreign government's commercial acts.

C. Brief for the United States as Amicus Curiae

The executive branch, in a brief filed by the solicitor general, recommended that the Court limit the scope of the act of state doctrine to acts performed by foreign governments in their public capacity ("qua sovereign").¹⁰⁶ Acts of foreign governments in a commercial capacity, the solicitor general submitted, should not be considered acts of state which federal courts must decline to examine under international law.¹⁰⁷

The solicitor general based this distinction on analogy to that created by the "restrictive theory of sovereign immunity" to which the executive branch has adhered since 1952 (the "Tate Letter").¹⁰⁸ The restrictive theory of sovereign immunity is applied only when foreign governments seek immunity from suit in United States courts. The Department of State, whose suggestion regarding whether or not sovereign immunity should be granted is generally given deference in court,¹⁰⁹ considered whether the foreign government was acting in a public (*jure imperii*) or commercial (*jure gestionis*) capacity. If the government acts in a commercial capacity, sovereign immunity is not granted.¹¹⁰

The distinction has been recognized in this and other countries as a result of the increased participation by government-owned enterprises in international commerce.¹¹¹ In the absence of this distinction, private interests are in a severely disadvantaged position relative to state-owned enterprises because they may be legally compelled to meet their obligations while state-owned enterprises are not. The purpose of the restrictive theory of sovereign immunity is to place private and government-owned commercial enterprises on an equal footing.¹¹²

The United States government argued that the distinction should be applied to limit the scope of the act of state doctrine. The solicitor general expressly advised the Court that examining the commercial acts of foreign states on their merits would not interfere with the conduct of foreign relations. If foreign

¹⁰⁶Brief for the United States as amicus curiae at 13-15, 27-31, 41-42, Alfred Dunhill of London v. Republic of Cuba, *restored for reargument*, 422 U.S. 1005 (1975).

¹⁰⁷*Loc. cit.*

¹⁰⁸*Ibid.*, at 17-31. The solicitor general also somewhat misleadingly bases the public-commercial distinction on a footnote in Justice White's dissenting opinion in *Sabbatino*, which cites a commentator to the effect that "(a)n act of state has been said to be any governmental act in which the sovereign's interest qua sovereign is involved." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 445 n.3, *citing* Mann, *The Sacrosanctity of the Foreign Act of State*, 59 LAW Q. REV. 42 (1943); Brief for the United States as amicus curiae at 27-28.

¹⁰⁹*See* Moore, *The Role of the State Department in Judicial Proceedings*, 31 *FORDHAM L. REV.* 277, 285-92 (1962).

¹¹⁰Brief for the United States as amicus curiae at 20-23, *supra* note 105.

¹¹¹*Ibid.*, at 23-24.

¹¹²*Ibid.*, at 23-24, 26-27.

governments could claim that their commercial acts were acts of state which could not be examined by federal courts then, in effect, they could obtain immunity from suit "through the back door." It would be impossible for private interests to obtain judgment against government commercial interests because all acts undertaken by the government would be considered valid. Once again, private commercial interests would be placed in a disadvantaged position; and the restrictive theory of sovereign immunity would be circumvented.¹¹³

D. *The Position of the Department of State*

In a letter to the solicitor general (which is appended to the United States brief in *Dunhill*) the legal adviser of the Department of State also advised the Court that adjudications of the commercial liability of foreign states would not impede the conduct of foreign relations.¹¹⁴ The legal adviser, in addition, addressed the question posed by the Court: whether its *Sabbatino* holding should be reconsidered.¹¹⁵ He observed that the trend in this and other countries has been towards limiting the scope of the act of state doctrine, and that in countries where international law has been applied to foreign governmental acts, no "serious foreign relations consequences" have resulted. He concluded that, if the Court were to decide to overrule *Sabbatino* and to apply international law to foreign governmental acts, the Department of State "would not anticipate embarrassment to the conduct of the foreign policy of the United States."¹¹⁶

IV. The Outcome in *Dunhill*

There are two alternative courses which the Supreme Court might have taken in deciding to limit the scope of the act of state doctrine in *Dunhill*. First, by limiting its decision to the specific issue in *Dunhill*, whether or not commercial acts are acts of state, the Court could have adopted the distinction recommended by the solicitor general. Second, if the Court chose to reconsider its *Sabbatino* holding, it could have held that all foreign governmental acts must be compatible with international law if they are to be given legal effect in federal courts. A Supreme Court decision which adopted the distinction recommended by the solicitor general would come very close to constituting an overruling of *Sabbatino*, but reconsideration of *Sabbatino* is not essential for a decision in *Dunhill* on the question of whether commercial acts are acts of state. This article

¹¹³*Ibid.*, 39-43, passim.

¹¹⁴*Ibid.*, at 46. The solicitor general's brief does not discuss the question of whether *Sabbatino* should be reconsidered, but takes the position that since commercial acts fall outside the scope of the act of state doctrine, it is unnecessary to consider the doctrine in its other realms of application in order to reach a decision in *Dunhill*. *Ibid.*, at 43.

¹¹⁵*Ibid.*, at 47-48.

¹¹⁶*Ibid.*, at 48-49.

contends that whichever of the alternative courses may be chosen by the Court, it would have effectively overruled the broad dictum in *Sabbatino*.¹¹⁷

A. Applying Preferred Criteria to the Position Recommended by the Solicitor General—Implications of its Adoption

On the basis of the submissions before it, it would have been appropriate for the Court to draw the conclusion that examining the commercial acts of a foreign government under international law would not impede the executive in the conduct of foreign affairs. If state-owned enterprises were permitted to escape commercial liability in federal courts by invoking the act of state doctrine, such enterprises would operate under blanket immunity from legal obligation. The national interest is clearly not served by such a result.¹¹⁸

In addition, a holding that commercial acts are not acts of state would promote international economic order. Governments, as well as private interests, would continue to be expected to adhere to long-established rules of behavior in their commercial dealings.¹¹⁹ Governments would be restrained from arbitrarily exercising their authority against private commercial interests, as well as against the commercial interests of other governments. This is clearly a situation in which the common interests of all nations would be served by a Supreme Court decision to apply international law.¹²⁰

Finally, and most significantly, by holding that commercial acts are not acts of state, the Supreme Court would be permitting private interests the opportunity to have their claims vindicated in court. This is of special concern in the commercial sphere because of the great participation of foreign governments in international commerce.¹²¹ The Supreme Court would not only be maintaining its own role within the federal government, but would be supporting an executive determination that the public welfare is not served by immunizing government commercial acts.

Thus, all three preferred criteria for evaluating whether to limit the scope of the act of state doctrine are met in *Dunhill*.

The *Sabbatino* Amendment limited the scope of the act of state doctrine to acts other than expropriations of property.¹²² *First National City Bank* permit-

¹¹⁷See TAN 47-48, *supra*.

¹¹⁸*Ibid.*, at 42-43.

¹¹⁹The law applicable to international commercial dealings is well established, as is the rule that sovereignty does not confer "a protected status" in commercial intercourse. *Id.* at 36-39. See also, ALL. RESTATEMENT OF FOREIGN RELATIONS LAW (SECOND), § 69, pp. 209-18 (1965); Mann, *State Contracts and State Responsibility*, 59 AM. J. INT'L L. 572 (1960).

¹²⁰See Comment, *Judicial Adoption of Restrictive Immunity for Foreign Sovereigns*, 51 VA. L. REV. 316, 321-24.

¹²¹Brief of the United States as amicus curiae at 23-24, 42.

¹²²See TAN 64 *supra*.

ted the adjudication of counterclaims and set-offs.¹²³ If commercial acts are likewise excluded from the protection of the act of state doctrine, then the only situations in which the doctrine would presumably remain in effect are: first, situations in which the executive recommends that the doctrine be applied in expropriation cases (per the *Sabbatino* Amendment) and second, cases in which federal courts would find it necessary to render affirmative judgments against acts taken in a public capacity (other than expropriations).

Since executive suggestions relating to the foreign affairs power have traditionally carried great weight in United States courts,¹²⁴ the first exception represents only a slight increment in the executive's authority to advise courts that foreign relations would be adversely affected by an adjudication.¹²⁵ While the legality of the public acts of foreign governments has been the subject of a small amount of litigation in federal court,¹²⁶ the relative lack of litigation in this area suggests that this exception is not of great significance to the maintenance of international economic security or the national interest.

B. *Sabbatino* Overruled—The Application Of Preferred Criteria

A holding which overruled *Sabbatino* would permit federal courts to consider the legality of foreign governmental acts under relevant principles of international law. Such a holding, of course, satisfies the three preferred criteria suggested for evaluating limitations on the scope of the act of state doctrine. From what has been seen above, the overruling of *Sabbatino* would have, at most, a *de minimis* impact on the executive branch.

Second, international law is in great part the expectations of national officials

¹²³See TAN 77 *supra*.

¹²⁴See Moore, *The Role of the State Department in Judicial Proceedings*, 31 FORDHAM L. REV. 277 (1962); cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 467-70 (Justice White dissenting).

¹²⁵The difference between an affirmation of the *Bernstein* exception and what might be considered a "reverse *Bernstein* exception" in the *Sabbatino* Amendment is crucial. Under the *Bernstein* exception, courts would not adjudicate foreign government acts unless specifically advised to do so by the executive. The presumption strongly favors non-adjudication. Under the *Sabbatino* Amendment, courts proceed to adjudicate unless specifically advised not to do so. There is a strong presumption in favor of adjudication. Nonetheless, it would be preferable to let the courts ultimately decide whether or not to accept the executive's recommendation. See TAN 19 and note 71 *supra*.

¹²⁶The challenging of the validity of public governmental acts under international law has occurred in the antitrust field. See, *Occidental Petroleum Corp. v. Buttes Gas and Oil Co.*, 331 F. Supp. 92 (C.D. Calif. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972). In this case Occidental alleged that Buttes Gas had conspired with the rulers of certain Persian Gulf States (and Great Britain) to deprive it of valuable oil concessions by changing boundaries in territorial seas. The allegations included that the acts of the government co-conspirators violated international law. The district court ruled, and the court of appeals affirmed, that the act of state doctrine (per *Sabbatino*) prevented the court from inquiring into the legality of the foreign governments' acts and dismissed the complaint for "failure to state a claim upon which relief may be granted." 331 F. Supp. at 108-13. See INTERNATIONAL LAW ASSOC., FIFTY-FIFTH REPORT 149-51 (1972).

about the way in which authority will be exercised by officials in other states.¹²⁷ The application of international law by federal courts to foreign governmental acts will promote the expectation that authority must be exercised consistently with such law. Security in the international economy is promoted by the maintenance of such expectations.¹²⁸

Finally, the Constitution allocates to the judicial branch the obligation to adjudicate controversies on their merits, including those in which foreign states are participants and in which international law must be applied.¹²⁹ As Justice White noted in his *Sabbatino* dissent, "[f]undamental fairness to litigants" may require the application of international law in a case or controversy.¹³⁰

Whatever the scope of its decision, whether to limit the act of state doctrine to public acts, or to overrule *Sabbatino*, a refusal by the Supreme Court to give legal effect to Cuba's repudiation of its commercial obligation on act of state grounds would be warranted. This would then clear the way for a consideration of Cuba's action under the relevant principles of international law. There is ample precedent and authority to support a holding that international law requires states to make restitution for an unjust enrichment.¹³¹

Epilogue

The Supreme Court decided *Dunhill* on May 24, 1976. The Court held that Cuba's apparent repudiation of its obligation to Dunhill was not an act of state and that, in consequence, the district court did not err in ordering Cuba to return Dunhill's mistaken payment. Justice White's opinion for a 5-4 majority of the Court contained two independent grounds on which Cuba's act of state claim was rejected. The first was that counsel for Cuba offered no evidence other than its own litigating position to show that any sovereign authority in Cuba had in fact decided to repudiate its obligation to Dunhill. Thus, no act of state was proven. Justice White, in addition, adopted the position recommended by the solicitor general to the effect that the commercial acts of foreign states are to be distinguished from public acts and that the former are not acts of state which United States courts must refuse to examine. The Court did not reach the question of whether *Sabbatino* should be reconsidered.

¹²⁷See (TAN 22-29 *supra*).

¹²⁸McDougal, *op. cit.*, 351-352.

¹²⁹*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 450-53 (Justice White dissenting).

¹³⁰376 U.S. at 453.

¹³¹See, e.g., Schreuer, *Unjustified Enrichment in International Law*, 22 AM. J. COMP. L. 281 (1974) and cases cited therein; see also, Landreau Claim (United States/Peru), 1 U.N. REP. INT'L ARB. AWARDS 347, 364 (1921) (recovery on a *quantum meruit* basis); Parker Claim (United States/Mexico), 4 U.N. REP. INT'L ARB. AWARDS 35, 40 (1927) (liability based on "a tacit or implied contract"); The Lena Goldfields case (U.S.S.R. v. United Kingdom) (1930), III WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1737-40 (award based on restitution of an "unjust enrichment" arising out of U.S.S.R.'s breach of contract).

Justice Stevens concurred in rejecting Cuba's act of state claim but only to the extent that counsel had offered no evidence to show that a sovereign Cuban authority had, in fact, repudiated its obligation.

Justice Marshall, in dissent, would have denied the rendering of an affirmative judgment against Cuba on a variety of grounds. First, the statements made by counsel for Cuba regarding its intention to repudiate its alleged obligation would be accepted as confirming an exercise of sovereign authority. Second, the dissenting justices refused to accept the public-commercial distinction recommended by the solicitor general inasmuch as the policies underlying the granting of sovereign immunity and the application of the act of state doctrine are seen to be different. Third, Cuba's retention of Dunhill's funds would have been considered a part of the same act by which the property of its own nationals was confiscated. Finally, but not exhaustively, Justice Marshall considered that the rendering of an affirmative judgment against Cuba was not mandated by the Court's *First National City Bank* decision. Professor Falk's tenuous rationale once again figured heavily in the dissent's approval of *Banco Nacional de Cuba v. Sabbatino*.

