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An Approach to Acts of States: *Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co.*

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## NOTES

### **An Approach to Acts of State: *Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co.***

According to the act of state doctrine, lawsuits regarding the acts of a foreign nation in its own territory are not justiciable in United States courts. The doctrine has generated much controversy in the legislative, executive, judicial, and academic arenas. In the leading case, *Banco Nacional de Cuba v. Sabbatino*,<sup>1</sup> the United States Supreme Court ruled that American property expropriated by Cuba could not be recovered through the federal courts; however, the effect of this decision and its various "exceptions" has led to considerable uncertainty in the courts as to the parameters of the act of state doctrine. The lack of a definitive policy is certain to have significant impact on cases yet to reach the courts concerning foreign seizures of American property by emerging powers and by nations undergoing economic and political change.

The present case of *Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co.*<sup>2</sup> presents a concise review of the act of state doctrine and its legislative and judicial exceptions. After considering the doctrine and each exception in turn, the Second Circuit Court of Appeals held that a counterclaim asserted against a Cuban governmental entity and a direct third party claim against the Republic of Cuba, both based on expropriation of American property, were barred by the act of state doctrine,<sup>3</sup> since neither claim qualified as an exception to the doctrine.<sup>4</sup> The court's method of analysis has far reaching implications for the development of international law in the area of foreign expropriations.

In 1960 the defendant Lamborn & Co., as sugar broker for a private American concern, purchased sugar from the plaintiff, Empresa Cubana de Azucar y Sus Derivados, a wholly-owned governmental entity serving as Cuba's official sugar merchant.<sup>5</sup> The defendant failed to pay a five

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<sup>1</sup> 376 U.S. 398 (1964).

<sup>2</sup> 652 F.2d 231 (2d Cir. 1981).

<sup>3</sup> *Id.* at 233.

<sup>4</sup> See the court's discussion of each exception, *id.* at 237-38.

<sup>5</sup> *Id.* at 233.

percent balance due.<sup>6</sup> The assets of the company which had employed Lamborn & Co. were seized pursuant to a request from the Cuban Minister of Labor, who had determined that the company was discontinuing operations in Cuba.<sup>7</sup> The value of the assets seized exceeded the amount of the balance owed to the Cuban seller.<sup>8</sup>

In 1961 the Republic of Cuba filed an action in the Southern District of New York to recover on the debt owed by Lamborn.<sup>9</sup> In 1979 the Republic of Cuba amended its complaint to substitute Empresa Exportadora, Cuba's official sugar merchant, as plaintiff.<sup>10</sup> Lamborn sought to assert a counterclaim or setoff based on the value of the property seized by the Cuban government and therefore also filed a third-party claim against the Republic of Cuba. The district court dismissed the counterclaim on the basis of New York statutes<sup>11</sup> and one of its prior decisions.<sup>12</sup> The court dismissed the third-party claim as it was barred by the act of state doctrine.<sup>13</sup>

The Court of Appeals for the Second Circuit affirmed the lower court decision solely on the basis of the act of state doctrine.<sup>14</sup> The direct claim against Cuba was held barred as a "classic act of state,"<sup>15</sup> involving a seizure of assets by a governmental official acting pursuant to formal resolution issued in compliance with Cuban law.<sup>16</sup> Recovery on the counterclaim was held precluded by the act of state doctrine as enunciated and applied in *Sabbatino*.<sup>17</sup> The *Sabbatino* court had recognized that there is an exception to the act of state doctrine when the presence "of a treaty or other unambiguous agreement regarding controlling legal principles"<sup>18</sup> allows judicial examination of an expropriation. This exception could not apply in *Lamborn*, however, because there was no agreement between the United States and Cuba defining circumstances under

<sup>6</sup> Id.

<sup>7</sup> Id. at 234.

<sup>8</sup> Lamborn owed \$32,088 on its sugar purchase. Among the assets seized was a bank account worth \$91,358. Id. at 233-34.

<sup>9</sup> Id. at 233.

<sup>10</sup> Id. See Republic of Cuba v. Lamborn & Co., No. 61 Civ. 1847 - CLB (S.D.N.Y. Nov. 1, 1979).

<sup>11</sup> 652 F.2d at 235. The court of appeals ruled that since Craig, owner of the assets seized by the Cuban government, and Lamborn, to whom Craig assigned its claim, had been closely affiliated throughout the transactions involved in the instant suit, Lamborn's actions did not violate the anti-champerty statutes of New York. N.Y. Jud. §§ 489, 495 (McKinney 1968 & Supp. 1981) (prohibiting the purchase of claims by a corporation if it intends to bring suit thereon). 652 F.2d at 236.

<sup>12</sup> 652 F.2d at 234. The court of appeals indicated that the lower court felt bound by its decision in Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412 (S.D.N.Y. 1980) (construing Banco Nacional de Cuba v. First National City Bank, 406 U.S. 759 (1972)).

<sup>13</sup> 652 F.2d at 233.

<sup>14</sup> Id.

<sup>15</sup> Id. at 237.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> 376 U.S. at 428.

which expropriation without compensation was permissible.<sup>19</sup> The Hicklooper Amendment to the Foreign Assistance Act of 1961,<sup>20</sup> which directs the courts to disregard the act of state doctrine if the act complained of violates international law, was held inapplicable because of prior decisions in the Second Circuit, which restricted application of the Amendment to cases in which the expropriated property was present in the United States.<sup>21</sup> The court declined to apply the "Bernstein Exception"<sup>22</sup> to the act of state doctrine, under which the Executive Branch may direct the courts to disregard an act of state defense,<sup>23</sup> because the Executive Branch did not express any opinion regarding the appropriateness of applying the act of state doctrine in the instant case.<sup>24</sup> Moreover, the court rejected the "commercial exception" outlined in *Alfred Dunhill of London, Inc. v. Republic of Cuba*,<sup>25</sup> since the seizure of the assets was a governmental action in response to a labor problem rather than a mercantile transaction.<sup>26</sup> The appellate court in *Lamborn* summarized its decision by stating that the act of state doctrine is a matter of United States substantive law which a foreign sovereign plaintiff may invoke just as any other affirmative defense.<sup>27</sup> The court noted that the result may be inequitable because a foreign state plaintiff may collect on a direct claim while avoiding liability on a counterclaim.<sup>28</sup> Thus, in *Lamborn*, the Cuban government not only seized defendant's property but also collected on defendant's debt, without having to offset the expropriation against the indebtedness.

Although the result in *Lamborn* appears inequitable, it is in harmony with the longstanding rule of law which insulates the actions of a foreign sovereign in its own territory from inquiry by courts of another sovereign state. The act of state doctrine was first promulgated by the Supreme Court in *Underhill v. Hernandez*,<sup>29</sup> in which the Court recognized that governmental acts by a sovereign within its own territory are not subject

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<sup>19</sup> 652 F.2d at 237.

<sup>20</sup> Foreign Assistance Act of 1961, § 301(d)(3), 22 U.S.C. § 2370(e)(2)(1976).

<sup>21</sup> See *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965), aff'd, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968), and *Banco Nacional de Cuba v. First National Bank of New York*, 431 F.2d 394 (2d Cir. 1970), rev'd on other grounds, 406 U.S. 759 (1972).

<sup>22</sup> See *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954); *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947).

<sup>23</sup> 652 F.2d at 237.

<sup>24</sup> Id. at 237-38.

<sup>25</sup> 425 U.S. 682 (1976).

<sup>26</sup> 652 F.2d at 238.

<sup>27</sup> Id. at 239.

<sup>28</sup> Id.

<sup>29</sup> 168 U.S. 250, 252 (1897):

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 government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

to adjudication by the courts of another sovereign nation. The doctrine is a rule of deference applied by domestic courts and has been defended as a way of "institutionalizing respect for diverse social and economic policies."<sup>30</sup>

Executive influence on the judicially-created act of state doctrine increased in the 1940's in the famous Bernstein litigation in the Second Circuit.<sup>31</sup> Concerns of the Executive Branch had been foreshadowed earlier by the Supreme Court,<sup>32</sup> but the expropriations of the Nazi regime in Germany prompted affirmative executive action in the post-World War II Bernstein cases. These cases gave rise to the "Bernstein Exception" to the act of state doctrine, under which a supervening expression of executive policy may disallow an act of state defense by a foreign government.<sup>33</sup> The Supreme Court explicitly recognized the discretionary role of the executive and legislative branches in the resolution of issues concerning foreign relations in *Baker v. Carr*,<sup>34</sup> particularly in situations where a single-voiced statement of the government's position is necessary.<sup>35</sup>

The leading judicial pronouncement of the act of state doctrine in the United States came in *Banco Nacional de Cuba v. Sabbatino*,<sup>36</sup> a case arising from the 1960 Cuban nationalization of property owned by United States nationals. The Cuban government seized the property in retaliation for the United States' reduction of Cuba's sugar quota. The United States Supreme Court applied the act of state doctrine to bar a counterclaim against Cuba, despite the possibility that the expropriation decree violated international law.<sup>37</sup> The Court reversed the Second Circuit Court of Appeals,<sup>38</sup> which had held that the Cuban expropriation decree violated international law and that two letters from the State Department indicated the Executive Branch had no objection to a judicial testing of the validity of the expropriation decree and would not comment on the case.<sup>39</sup> The oft-quoted holding of *Sabbatino* clearly deline-

<sup>30</sup> R. Falk, *Role of Domestic Courts in the International Legal Order* 7 n.12 (1964).

<sup>31</sup> See 210 F.2d at 375; 163 F.2d at 246.

<sup>32</sup> See *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918). See also *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918).

<sup>33</sup> See 163 F.2d at 251, where L. Hand notes that evidence of some "positive intent [of the Executive Branch] to relax the [act of state] doctrine" is necessary before the court will disallow an act of state defense. See also R. Falk, *supra* note 30, at 104, for a discussion of Bernstein and the diminished prospects of judicial independence for domestic courts.

<sup>34</sup> 369 U.S. 186, 211-12 (1962) (dictum).

<sup>35</sup> Courts have the power to construe executive statements, however, and to decide whether a statute applies to a given act once a foreign government has been officially recognized by the Executive Branch. *Id.* at 212-13.

<sup>36</sup> 376 U.S. 398 (1964).

<sup>37</sup> *Id.* at 439. See *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375, 379 (S.D.N.Y. 1961). The district court found the expropriation decree to violate international law because of retaliatory motive, discrimination against American nationals, and failure to provide adequate compensation, and granted summary judgment against the petitioners.

<sup>38</sup> *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962).

<sup>39</sup> 376 U.S. at 420.

ates the proposition that the courts will not inquire into the legality of acts of state.<sup>40</sup>

The *Sabbatino* Court did not find it necessary to pass on the validity of the Bernstein Exception, distinguishing *Sabbatino* on the basis that the Nazi government at the time of the Bernstein cases was not in existence at the time suit was brought.<sup>41</sup> The Court also noted that the two letters involved in *Sabbatino* merely expressed the State Department's wish not to make a statement at all with respect to the litigation, while the Bernstein letter affirmatively relieved U.S. courts of any restraints imposed by the act of state doctrine.<sup>42</sup> The Court, speaking through Justice Harlan for an 8-1 majority, stated that the vitality of the act of state doctrine "depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."<sup>43</sup> Emphasizing the possible danger resulting from conflicts between the Judiciary and the Executive Branch if the courts should attempt to adjudicate claims involving foreign acts of state,<sup>44</sup> the Court advanced the position that it is the function of the Executive to secure appropriate relief for United States citizens harmed by foreign expropriations.<sup>45</sup> Justice Harlan expressly rejected the suggestion that the act of state doctrine should not be applied when international law is violated unless the Executive Branch expressly directs that it should apply.<sup>46</sup> Instead, Justice Harlan expressed the view that acts of state are automatically protected from judicial inquiry, regardless of the nature of the acts.<sup>47</sup>

The other major issue addressed in *Sabbatino* was whether the act of state defense is appropriate when the foreign government is the plaintiff

<sup>40</sup> *Id.* at 428:

[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 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.

<sup>41</sup> *Id.* See, however, Cheatham and Maier, *Private International Law and its Sources*, 22 *Vand. L. Rev.* 27, 91 (1968), commenting on *Sabbatino*: "[T]he rationale upon which [the Supreme Court's] decision was based would clearly include the possibility of executive waiver of the doctrine where this was politically useful." The Court declined to examine the validity of the Bernstein exception *per se*, although it recognized that the political interests of the U.S. may be significantly affected if a foreign government who committed an act of state no longer exists. 376 U.S. at 428.

<sup>42</sup> 376 U.S. at 419-20. See also *id.* at 419 n.18, for the relevant text of the Bernstein letter.

<sup>43</sup> *Id.* at 427-28.

<sup>44</sup> *Id.* at 433.

<sup>45</sup> *Id.* at 431. The Court suggests that diplomatic channels and economic and political sanctions are appropriate methods of redress to be advanced by the Executive Branch in settlement of claims of U.S. citizens against foreign governments when acts of state are involved.

<sup>46</sup> *Id.* at 436.

<sup>47</sup> *Id.* See the sole dissent by Justice White, which asserts that cases involving violations of international law should be decided on the merits, based on international law, in the absence of an executive declaration that adjudication would interfere with the conduct of international relations. Justice White therefore expressly rejects the presumption espoused by the majority that the act of state doctrine applies in any given case. *Id.* at 462.

and a counterclaim is asserted based on an act of state. The Court stated that the status of a foreign state as plaintiff has no effect on the applicability of the doctrine.<sup>48</sup> An analogy to the area of sovereign immunity, where counterclaims against a foreign state plaintiff have been held permissible,<sup>49</sup> was distinguished by the Court, because sovereign immunity relates to the prerogative right of a sovereign not to be subject to suit, while the act of state doctrine concerns limits for determining the validity of an otherwise applicable rule of law.<sup>50</sup>

Congress, outraged at the *Sabbatino* decision because it had the effect of upholding the Cuban expropriation,<sup>51</sup> promptly enacted the Hickenlooper Amendment to the Foreign Assistance Act of 1961, specifically directing the courts to disregard the act of state doctrine if acts complained of violate international law, unless the President otherwise directs.<sup>52</sup> Without this congressional directive, in light of *Sabbatino*, the courts would have been unable to rule on international law in act of state cases, unless the Bernstein Exception were invoked.<sup>53</sup> On remand, the *Sabbatino* case resulted in a judgment for the defendant, based on the Hickenlooper Amendment.<sup>54</sup>

Eight years after *Sabbatino*, the Supreme Court again ruled on the scope of the act of state doctrine in *First National City Bank v. Banco Nacional de Cuba*,<sup>55</sup> often referred to as *Citibank*, in which a setoff was al-

<sup>48</sup> Id. at 437-39. The Court notes that the plaintiff status of a foreign government actually heightens the possibility of adversely affecting foreign relations and embarrassing the President.

<sup>49</sup> See *National City Bank v. Republic of China*, 348 U.S. 356 (1955). The Court utilized the concept of "fair dealing" in rationalizing the implied waiver of sovereign immunity with respect to counterclaims if a foreign state avails itself of U.S. courts, regardless of the subject matter of the counterclaim. Id. at 364-65. A dissent by three Justices asserted that immunity is not thus waived, and that the majority sanctioned a "circuitous evasion of the well-established rule prohibiting direct suits against foreign sovereigns." Id. at 372. The dissent took the position that sovereign immunity is not a fit subject for the courts and that it was the function of the other branches of the government to determine public policy in carrying out foreign affairs. Id. at 371. See also *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>50</sup> 376 U.S. at 438.

<sup>51</sup> President Kennedy, in an act which reflected prevailing popular sentiment, had declared an embargo on all trade with Cuba. Proclamation No. 3447, 27 Fed. Reg. 1085 (1962), reprinted in 22 U.S.C. § 2370 (1976).

<sup>52</sup> Foreign Assistance Act of 1961, Pub. L. No. 87-565, § 301(d)(3), 78 Stat. 1012-13 (1962) (codified at 22 U.S.C. § 2370(e)(2) (1976)). The Amendment specifically states:

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. . . by an act of. . . state in violation of the principles of international law, including the principles of compensation. . . .

A proviso allows application of the doctrine upon request of the President. Id. The Act thus approves of Justice White's position in dissent in *Sabbatino*. 376 U.S. at 462.

<sup>53</sup> See Cooper, Act of State and Sovereign Immunity: A Further Inquiry, 11 Loy. U. Chi. L.J. 193, 232 (1980).

<sup>54</sup> See *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965), aff'd, 383 F.2d (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968).

<sup>55</sup> 406 U.S. 759 (1972). Cuba sued for the excess resulting from the sale of its collateral for a loan made by Citibank. The sale took place after the seizure of all the bank branches located in Cuba. The State Department indicated that the act of state doctrine should not be applied to prevent the assertion of Citibank's counterclaim.

lowed against a claim brought by a Cuban governmental entity. Four widely divergent opinions were filed, of which no single proposition commanded a majority. The opinion filed by Justice Rehnquist, joined by Chief Justice Burger and Justice White, asserted that the judiciary may decide a case if there is a communication from the Executive Branch that the act of state doctrine should not or need not be applied, thus recognizing the Bernstein Exception.<sup>56</sup> Justice Douglas, concurring, would have decided the case on the basis of "fair dealing,"<sup>57</sup> requiring recognition of any counterclaim or setoff that eliminates or reduces a claim asserted by a sovereign nation in United States courts.<sup>58</sup> Justice Powell concurred on the ground that *Sabbatino* was overbroad<sup>59</sup> and that courts are obliged to hear cases involving violations of international law without having to wait for the Executive Branch to speak.<sup>60</sup> The four dissenters, speaking through Justice Brennan, disapproved of the Bernstein Exception, considering it to be an abdication of judicial responsibility.<sup>61</sup>

The nondefinitive nature of the decision in *Citibank* did little to clarify the status of the act of state doctrine. As one commentator has observed, the effect of the decision is the same as if certiorari had been denied.<sup>62</sup>

The Supreme Court again addressed the act of state doctrine in *Alfred Dunhill of London, Inc. v. Republic of Cuba*.<sup>63</sup> The Court refused to apply the doctrine because Cuba had failed to prove an act of state.<sup>64</sup> The effect of this decision was to allow a counterclaim and affirmative

<sup>56</sup> *Id.* at 767. The Rehnquist opinion distinguishes *Sabbatino*, where the Executive took no position. In *Citibank* there was a State Department communication regarding the case, indicating that the Supreme Court should try the case on the merits, stating that "The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or setoff against the Government of Cuba in this or like cases." Letter from John R. Stevenson to E. Robert Seaver, Nov. 17, 1970, cited in *Banco Nacional de Cuba v. First National City Bank*, 442 F.2d 530, 538 (2d Cir. 1971).

<sup>57</sup> 406 U.S. at 772.

<sup>58</sup> *Id.* at 771. Justice Douglas adopted the reasoning of *National City Bank v. Republic of China*, 348 U.S. 356 (1955), stating that foreign nations who ask the aid of U.S. courts in collecting debts should be subject to counterclaims in the interests of fairness. Interestingly, Justice Rehnquist notes that the result in *Citibank* is "consonant with the principles of equity" set forth in *National City Bank v. Republic of China*, although his decision is not based on these grounds. 406 U.S. at 768. See also then-Circuit Judge Burger's dissent in *Pons v. Republic of Cuba*, 294 F.2d 925, 927 (D.C. Cir. 1961), where he urges that since Cuba had filed a claim in equity for an injunction and an accounting from a Cuban national in possession of Cuban property, Cuba should comply with the doctrines of equity and render an accounting to the plaintiff, who had counterclaimed for the value of property seized by Cuba. (The majority had dismissed the counterclaim on the basis of the act of state doctrine.)

<sup>59</sup> 406 U.S. at 771.

<sup>60</sup> See *id.* at 775-76.

<sup>61</sup> *Id.* at 778.

<sup>62</sup> Lowenfeld, Act of State and Department of State: *First National City Bank v. Banco Nacional de Cuba*, 66 Am. J. Int'l L. 795, 803 (1972).

<sup>63</sup> 425 U.S. 682 (1976). Interventors failed to repay funds mistakenly paid to them by American importers after the nationalization of their concerns in Cuba. The payment was for shipments made prior to the nationalization.

<sup>64</sup> The interventors only proved commercial rather than sovereign authorization. *Id.* at 692-93. No formal decree or resolution of the Cuban government was shown. *Id.* at 695.

relief, as contrasted with the allowance of only a setoff in *Citibank*. Justice White, joined by three other Justices, advanced the theory that the act of state doctrine should not be extended to acts in the course of purely commercial operations,<sup>65</sup> based on the same rationale taken in the restrictive approach to sovereign immunity, as later codified by the Foreign Federal Sovereign Immunities Act of 1976.<sup>66</sup> In Justice White's view, because sovereign immunity and acts of state are linked as assertions of sovereignty, they should have the same effect when claims arise out of purely commercial acts.<sup>67</sup> Citing *Sabbatino*, he stated that the purpose of the act of state doctrine is to prevent embarrassment to the Executive Branch by precluding court determination of the legality of acts of foreign nations in their own territory.<sup>68</sup>

Justice Marshall, joined in dissent by three Justices, disagreed with the linkage of sovereign immunity and acts of state and distinguished the policies served by the two doctrines.<sup>69</sup> The dissenters argued that Cuba's action qualified as an act of state, but they would have allowed a setoff under the *Citibank* holding.

In summary, three exceptions to the act of state doctrine have been recognized in Supreme Court opinions: the existence of "a treaty or other unambiguous agreement" regarding the applicable law when foreign property is expropriated, approved by eight Justices in *Sabbatino*; the

<sup>65</sup> *Id.* at 705.

<sup>66</sup> 28 U.S.C. §§ 1602-1611 (1976). The Foreign Sovereign Immunities Act restricted sovereign immunity to suits involving public acts and did not extend immunity to suits based on commercial or private acts. The purpose of the Act was to let the courts exclusively decide questions of sovereign immunity rather than allowing the State Department to intervene as was the prior practice. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6605. The report makes clear that § 1605(a)(3) treating expropriation claims in violation of international law does not affect situations where the act of state doctrine is applicable, since the section only deals with issues of immunity. *Id.* at 19, reprinted in 1976 U.S. Code Cong. & Ad. News at 6618. The report also indicates, however, that characterizing a commercial act as an act of state would frustrate the restrictive theory of sovereign immunity by letting sovereign immunity reenter through the back door (citing *Dunhill* with approval). *Id.* at 20, reprinted in 1976 U.S. Code Cong. & Ad. News at 6619.

For examples of cases dealing with sovereign immunity and executive intervention prior to 1976, see *Rich v. Naviera Vacuba*, 295 F.2d 24 (4th Cir. 1961); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971); *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965) (definitive guidelines for application of sovereign immunity suggested, although exception of executive suggestion of immunity was recognized).

<sup>67</sup> 425 U.S. at 705. See Gordon, *The Origin and Development of the Act of State Doctrine*, 8 Rut.-Cam. L.J. 595, 616 (1975) for an argument that the ultimate effect of *Dunhill* will be to merge the concepts of sovereign immunity and act of state.

<sup>68</sup> 425 U.S. at 697.

<sup>69</sup> *Id.* at 725-26, 728. The dissent characterizes sovereign immunity as concerned only with status and a foreign state's exemption from suit by virtue of its status. Policies served by the act of state doctrine are independent, however, and concern the competency of branches of government to make certain kinds of decisions in the international arena. The dissent also notes that the validity of acts may be political questions not cognizable in the courts, and that the Executive has the power to effect a fair remedy for U.S. citizens. The dissent therefore concludes that, in view of the differing policies underlying the two doctrines, exceptions to sovereign immunity should not be automatically applied to acts of state.

Bernstein Exception, approved by three Justices in *Citibank*; and the "commercial exception," approved by four Justices in *Dunhill*.

Against the background of these conflicting and nondefinitive Supreme Court decisions, the *Lamborn* court rejected the assertion of a counterclaim against a Cuban governmental entity by a process of enumerating and then dismissing as inapplicable the exceptions to the act of state doctrine. Although only the *Sabbatino* "treaty" exception has been pronounced as valid by a majority of the Supreme Court,<sup>70</sup> the *Lamborn* court nonetheless accorded each exception equal precedential value by not distinguishing Supreme Court decisions with plurality opinions. Although a lower court is not free to ignore the law as promulgated by the highest judicial body, it is nonetheless appropriate for a lower court to expressly recognize that a given area of law is in need of further explication. If the *Lamborn* court had mentioned, for example, that the Bernstein Exception has been recognized by only three Justices and the commercial exception by four Justices, then the present nondefinitive status of exceptions to the act of state doctrine would be clear. The *Lamborn* court's mechanical approach of listing and testing each exception accorded status to the Bernstein and commercial exceptions equal to the "treaty" exception of the majority *Sabbatino* Court.<sup>71</sup> Since the act of state doctrine as announced in *Sabbatino* has already been extended to acts of conversion and breach of contract by a foreign government in its own territory,<sup>72</sup> the danger of lower court extension of the exceptions which are not grounded in Supreme Court majority opinions is a danger to be recognized. Lower courts, therefore, should acknowledge the need for Supreme Court review and clarification of the act of state doctrine by expressly recognizing the lack of strong precedent in this area of the law.

The *Lamborn* court, in the final paragraph of its decision, noted the "inequity" of permitting a sovereign state to collect on its direct claim while being able to avoid a counterclaim based on its uncompensated expropriation of the defendant's property.<sup>73</sup> The court's attitude reflects the feeling that, but for the act of state doctrine, courts could adjudicate the validity of foreign seizures. Rather than viewing the doctrine itself as an application of international law, such a judicial attitude implies that domestic courts are competent to judge international issues involving expropriations. A noted commentator observes that the "[l]aw is best ap-

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<sup>70</sup> The proviso in *Sabbatino* that prevents the courts from examining the validity of foreign expropriations "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles," 376 U.S. at 428, is not in issue in *Lamborn* since no such agreement is involved.

<sup>71</sup> The *Lamborn* case on its facts could have been decided solely on the basis of *Sabbatino*, since in both cases the expropriations were official acts of state and in neither case did the Executive Branch indicate that the act of state doctrine be disregarded.

<sup>72</sup> See *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968). See also Conant, *The Act of State Doctrine and Its Exceptions: An Introduction*, 12 *Vand. J. Transnat'l L.* 259 (1979).

<sup>73</sup> 652 F.2d at 239.

plied by the refusal to apply it," especially in the area of foreign seizures, because of the nonavailability of norms in this area.<sup>74</sup> The act of state doctrine thus prevents the risk of bias resulting from the partisan orientation of domestic courts.<sup>75</sup>

From the viewpoint of international law, a more acceptable solution to the act of state dilemma may be to apply the doctrine in all instances, with no allowance for executive intervention, in order to assure deference for the diverse policies espoused by the nations of the world and to prevent nationalistic prejudices from entering into adjudication of acts of state. An alternative solution is to allow domestic courts to apply and develop fundamental international norms of conduct if there is a firm consensus among dominant nations on appropriate norms.<sup>76</sup>

Until the Supreme Court hands down a definitive decision on the status of the act of state doctrine, courts will find themselves in the position of the *Lamborn* court, attempting to render a decision on the basis of the doctrine itself, while simultaneously considering a list of exceptions, some of which are based on questionable precedent. Until the Supreme Court clarifies the limits of the act of state doctrine, however, lower courts will have to continue deciding cases involving acts of state without definitive guidance.

—ANNE CHARETTE HILL

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<sup>74</sup> R. Falk, *supra* note 30, at 107.

<sup>75</sup> *Id.* at 106.

<sup>76</sup> *Id.* at 136. An obvious difficulty in this approach, however, is the treatment of acts of state of those nations not in agreement with the consensus of dominant powers.