ACT OF STATE DOCTRINE—ACTIONS OF INTERVENORS APPOINTED BY THE CUBAN GOVERNMENT AND STATEMENTS OF COUNSEL DO NOT CONSTITUTE SUFFICIENT ACTS OF STATE TO COME WITHIN THE DOCTRINE

In September 1960 the Cuban government nationalized the businesses of five of its leading cigar manufacturers, confiscating all assets and naming intervenors to take possession and operate the businesses. Plaintiff and other cigar importers temporarily continued to conduct business with the intervenors, making payments for both pre- and post-intervention shipments. The former owners, most of whom were Cuban, fled to the United States where they instituted nine actions against the three principle United States cigar importers seeking payment for pre- and post-intervention shipments made from the seized Cuban plants. These actions were held in abeyance while the United States District Court for the Southern District of New York, in an action brought by the intervenors challenging the right of the former owners to maintain an action against the importers, decided that the intervenors were entitled to continue their actions seeking payment for the post-intervention shipment. The Cuban intervenors were then allowed to join in the pending actions which were consolidated for trial in 1969. The former owners sought recovery of $477,000, presumably paid to the intervenors through New York collection houses for pre-intervention shipments, and of $700,000 for post-intervention shipments.

The district court held that although the act of state doctrine required that the intervenors were entitled to payment for post-intervention shipments, the former owners were entitled to pre-intervention accounts receivable because the debt’s situs was in New York with the debtors and this was not subject to confiscation. The payments made to the intervenors had not discharged the obligation to the former owners who were entitled to restitution. United States counsel for the intervenors claimed that their clients would not honor the claim for such repayment. As the court refused to accept this statement as an act of state, it rendered judgment

1 The former owners were Cifrientes y Compania; F. Palicio y Compania, S.A.; Menendez, Garcia y Compania, Limitada; Por Larranga, S.A.; and Tabacalera Jose L. Piedra, S.A.
2 Petitioner Alfred Dunhill of London, Inc. (Dunhill), Saks and Co. (Saks), and Faber, Coe & Gregg, Inc. (Faber).
3 F. Palicio y Compania v. Brush Block, 256 F. Supp. 481 (S.D.N.Y. 1966). Following 375 F.2d 1011 (2d Cir.), cert. denied, 389 U.S. 830 (1967), the intervenors and the Republic of Cuba were allowed to intervene in the suits. In Palicio, the intervenors sought to enjoin the attorneys of the owners from pursuing the suits. The intervenors were held entitled to post-confiscation payments and the owners were held entitled to sue on the trademark infringement. Due to a mistaken belief that the amounts owed at the time of the confiscation were negligible, that question was not addressed.
4 Id. at 534.
6 Id. at 536.
7 Id. at 537.
8 "There was no formal repudiation of these obligations by a Cuban Government decree of general application or otherwise." Id. at 545.
against the intervenors. The importers were allowed to recover their pre-intervention payments from the intervenors by way of set off and counterclaim. In the case of Dunhill, whose pre-intervention payments totaled more than its post-intervention debts, this necessitated an affirmative award against the intervenors. Dunhill alone was granted such an affirmative judgment.

The Court of Appeals for the Second Circuit modified the district court's decision by disallowing the amount of the award to the petitioner insofar as it exceeded the post-intervention debt. Concluding that the obligation to repay was quasi-contractual and had its locus in Cuba, the court of appeals decided that the intervenors' refusal to repay was the act of an agent of the Cuban government and, therefore, an act of state. Referring to First National City Bank v. Banco Nacional de Cuba, (hereinafter referred to as Citibank) the court held that although the importers' counterclaims were not barred up to the limits of the claims asserted against them by the intervenors, the act of state doctrine barred the affirmative judgment awarded petitioner to the extent petitioner's claims exceed its debt. On petition for certiorari to the United States Supreme Court, held, five to four, reversed. Neither a refusal by governmentally-appointed business intervenors to repay amounts mistakenly paid to them nor a statement by their counsel made during trial to that effect is an act sufficiently indicative of a sovereign's repudiation of the obligation or its determination to confiscate the amounts to constitute an act of state. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

Although a number of nations recognized the act of state doctrine, it is not an accepted principle of international law. According to the classic American formulation of this doctrine, as expressed by Justice Fuller in 1897 in Underhill v. Hernandez, the courts of the United States will not examine the acts of a foreign government performed within its own territory. This conception was subsequently affirmed in Oetjen v. Central Leather Co. and Ricaud v. American Metal Company. Each of these three cases dealt with the validity of the acts of military commanders during a civil war. The acts were performed before the factions to which the commanders belonged were recognized as the legitimate governments.
of the various countries. The suits, however, were brought after recognition by the United States. Because recognition is a power given by the Constitution to the President alone, the courts are reluctant to interfere with the consequences of such recognition. Thus, although the early cases did not clearly articulate any rationale for the doctrine, it appears to be grounded, both historically and conceptually in the notions of separation of powers, the role of the executive in the conduct of foreign relations, and the extent to which international law is a part of United States law.

Two recent cases (Banco Nacional de Cuba v. Sabbatino and Citibank) dealt with situations similar to that involved in Dunhill and indicate a trend toward justiciability. The validity of the act of state doctrine was affirmed in Banco Nacional de Cuba v. Sabbatino, which involved a dispute over proceeds from the sale of a shipment of sugar which had come into the United States. Although the United States District Court for the Southern District of New York held that the act of state doctrine was subject to an exception in the case of an act and in violation of international law, and affirmed by the court of appeals, the Supreme Court reversed. The Court, influenced by a letter from the State Department urging that the act of state doctrine be applied in the case, held that the act of expropriating the property of foreign nationals by a government was an act of state. As such, it was not subject to judicial review even though it might have been in violation of international law if there were no treaty or other such agreement which would arguably control the situation. The dispute in Sabbatino involved a public, rather than a private, commercial act. Thus, the rationale of the Court's decision, that the constitutional doctrine of separation of powers would prevent examination of such matters as expropriation, is not as clearly applicable to the situation in Dunhill, which the Court held to be a private commercial dispute.

The decision in Sabbatino caused a great deal of concern among international lawyers and bankers. Their concern was translated into action in the form of an amendment to the Foreign Assistance Act of 1964. The amendment, introduced by Senator Hickenlooper, forbids any court in the United States to decline, on the ground of the act of state doctrine, to determine the merits of a case in which right or title to property is based upon a confiscation or taking by an act of state in violation of international law.

Underhill dealt with the civil war in Mexico and the other two with the civil war in Venezuela.

406 U.S. 759.
376 U.S. 398.
442 F.2d 530 (2d Cir. 1971).
376 U.S. 398.
Id. at 428.
The court of appeals in *Dunhill* rejected contentions by the defendants that the amendment applied in this case and the question was not put before the Supreme Court.  

In *Citibank*, involving a dispute over collateral held in a United States bank which was retained to satisfy a counterclaim for uncompensated expropriation of the bank's Cuban properties, the Court held that the act of state doctrine did not preclude adjudication of a counterclaim up to the amount claimed by the foreign sovereign. In reaching its decision, the Court examined the policy considerations underlying the act of state doctrine. Recognizing that judicial examination of acts of a foreign sovereign might frustrate the conduct of foreign relations, the Court decided the case with reference to an opinion from the executive branch that the application of the doctrine would not advance the interests of foreign policy. In taking this action three Justices expressly approved the *Bernstein* exception to the act of state doctrine, which allows the executive branch to advise the judiciary as to whether or not a particular case should be considered on its merits. Justice Rehnquist, writing for the majority and joined by Justice White and Chief Justice Berger, based his opinion on the traditional supremacy of the executive branch in foreign relations and the necessity of effectuation of the general notion of comity between the separate branches of government.

A plurality, however, refused to accept the notion that the *Bernstein* exception should control in *Citibank*. Although they concurred in the judgment of the Court that the case should be considered on its merits, they did not agree that an opinion expressed by the executive branch should be dispositive in every situation. Justice Douglas concluded that the case should be governed by *National City Bank v. Republic of China*, which held that a sovereign's claim could be offset by a counterclaim for expropriated properties. Although *Dunhill* did involve a counterclaim, its factual situation would require an affirmative judgment against the intervenors, whereas in *Citibank* no such judgment was required. Thus it is doubtful that the rationale of *Citibank* should be extended to *Dunhill* on the ground that an exception to the act of state doctrine existed with respect to such an affirmative award.

The existence of the exceptions indicates a growing dissatisfaction with the traditional concept of the act of state doctrine. The State Department
appears to have reversed the position it took in Sabbatino. A trend toward allowing the courts greater freedom to consider cases involving the actions of foreign sovereigns is evident in the opinions of the State Department, as expressed both in Citibank and in Bernstein. This trend has culminated in the opinion letter in Dunhill which urges that the doctrine not be applied in cases involving commercial as opposed to public acts. Thus both the executive view and the legislative view, as expressed by the Hickenlooper Amendment, militate against a broad interpretation of the act of state doctrine.

The majority in Dunhill sidestepped the issue of the scope of the act of state doctrine in its decision of the case. They found that no act of state had been evidenced by the facts surrounding the repudiation of the obligation to repay the monies to the importers. The intervenors were held to lack sufficient authority to exercise powers as representatives of the government. Statements by their consel during trial that the intervenors denied liability and refused to repay were held to be a restatement of the intervenors' position rather than an act of state.

Four of the majority justices did address the question of the scope of the doctrine, however, Justice White's dictum considers several factors and maintains that even if there had been sufficient authority on the part of the intervenors, the act of state doctrine should not apply in commercial cases. Among the factors he considers is the present position of the executive branch, previously discussed. Another factor is the evolution of the doctrine of sovereign immunity. Recognizing that the United States and a large number of foreign states accept the restrictive view of sovereign immunity, which does not grant immunity to a foreign state with regard to commercial acts, Justice White sees the two doctrines as accomplishing the same end. They each balance injury to our foreign policy against injury to private parties. As long as protection for commercial acts is withdrawn from the scope of sovereign immunity, he finds it would be anomalous to extend such protection under an act of state. Other factors he considers are the substantial increase in participation by foreign governments in the international commercial market and a fear that recognition of repudiation of debts as acts of state would cause more embarrassment and conflict in international relations than adjudication of the issue.

Writing the dissenting opinion, Justice Marshall refuses to find that the

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32 425 U.S. at 706.
33 Id. at 694-95.
34 Only the Chief Justice and Justices Powell and Rhenquist joined Justice White in his limitation of the act of state doctrine.
35 425 U.S. at 695.
36 Id. at 705 n. 18.
37 Id. at 704.
38 Id. at 703.
39 Id. at 699-700.
act of state doctrine would not apply in this case. He argues that the retention of the payment for pre-intervention debts by the intervenors and their refusal to repay is an act of state even though there was no formal action on the part of the Cuban government. Justice Marshall also addresses the question of the scope of the act of state doctrine and advocates a stricter application of the doctrine. In Citibank, he declared that the Bernstein exception contributed to a blending of the judicial and executive functions. In Dunhill, he finds it difficult to visualize any definite rule, especially one as broad as a general commercial exception, which would be responsive to the separation of powers idea behind the act of state doctrine. Justice Marshall considers it inappropriate that the judiciary be called upon to settle disputes in which there is a political question.

Justice Marshall appears to address the proper issue at hand, that being the existence of a "political question." In dealing with cases involving foreign relations there certainly may be political questions present. However, the Supreme Court has said that not every case involving foreign relations lies beyond judicial cognizance. In the area of sovereign immunity, for example, a determination by the executive branch that immunity should be granted or denied has been recognized as dispositive of that issue. The availability of sovereign immunity is no less a political question than that of the availability of immunity under the act of state doctrine. Additionally, allowance of immunity from adjudication under the act of state doctrine for acts which are denied immunity under sovereign immunity would be contradictory. The policy which is served by adoption of the restrictive theory of sovereign immunity is equally as forceful in relation to the act of state doctrine.

The approach of Mr. Justice Powell in Citibank appears to offer the most suitable solution to the application of the act of state doctrine. It calls for the exercise of jurisdiction by federal courts unless the political branch determines that such an exercise would interfere with the conduct of for-

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43 Id. at 715. Justice Marshall was joined by Justices Blackmun, Brennan, and Stewart, thus composing the same dissenting group as in Citibank, 406 U.S. 759 (1972).
44 Id. at 720.
45 Id. at 726-27.
46 406 U.S. at 791-92.
47 425 U.S. at 728.
48 Id. at 730. Certain factors are given to indicate the existence of a political question: absence of a consensus on applicable international rules, unavailability of a treaty or other agreement, questions of recognition, importance of the issue in national concerns, and the sole authority of the executive to effect a fair remedy.
50 Compare Ex parte Peru, 318 U.S. 578 (1942), with Mexico v. Hoffman, 324 U.S. 30 (1944). In these cases claims of sovereign immunity were made by the captains of governmentally owned commercial ships. The Department of State allowed the claim in one case but not the other, and the Supreme Court abided by that determination.
51 406 U.S. at 774-75.
eign relations. This approach would provide an acceptable balance of func-
tions between the judicial and executive branches, bearing in mind that
the founding cases involved a political question—recognition as a legiti-
mate government—which was decided by the executive branch. Such an
approach would complement the Hickenlooper Amendment and further
the policy underlying the act of state doctrine. The Hickenlooper Amend-
ment compels decisions involving expropriation of property contrary to
international law, and the underlying policy of the doctrine is to allow
sovereigns to resolve differences through diplomatic channels. The cases
in which the doctrine would then be applied would most likely be those of
valid exercises of governmental power or cases which could best be resolved
through diplomatic channels.

John C. Stephens