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The Harvest of Sabbatino: Vishipco Line v. Chase Manhattan Bank

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Of the many troublesome issues in relations between the United States and the third world, most seem to revolve around economics. Third world countries need both capital and technology to develop their industries and offer significant rate of return, taxation, and regulatory advantages in order to attract the necessary industrial investment. These advantages combined with the lackluster U.S. economy are causing a significant rise in the amount of overseas business investment by U.S. banks and business.[1]

Unfortunately, when relations between the United States and the third world sour, U.S. investments become tempting targets for expropriation. Radical governments that defeat U.S.-backed opposition often surrender to the compelling temptation to gain both revenge and economic benefit by seizing the available assets of U.S. banks and businesses. Frequently, the former owners of these seized assets flee to the United States and sue either the bank in which their assets were deposited or the importer who returns the assets to this country, in hopes of recovering the seized assets.

A recent federal case, *Vishipco Line v. Chase Manhattan Bank*,[2] typifies such a situation. The Second Circuit Court of Appeals held a U.S. bank libale for deposits made at its Vietnam branch by a Vietnamese corporation whose Vietnam property had since been seized by a government not recognized by the United States. By so holding, the court reaffirmed that the risk of loss due to foreign government seizure of the assets of U.S. branch banks located in foreign countries falls upon the home office of the bank, not upon the depositor. The court based its holding upon a finding that the seizure by Vietnam of plaintiffs' Vietnamese assets was neither a dissolution of the plaintiff corporations nor a seizure of their U.S. assets. Hence, the plaintiffs were capable of bringing suit, and plaintiffs' banks deposits, constructively located in New York, had not been seized by the Vietnamese government. Had the court not made this finding, the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*[3] would have forced the court to recognize and enforce a seizure

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[1] *See generally* C. BALL, GLOBAL COMPANIES: THE POLITICAL ECONOMY OF WORLD BUSINESS (1975).

[2] 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 51 U.S.L.W. 3340 (U.S. Nov. 2, 1982).

[3] 376 U.S. 398 (1964).

which clearly violated international law. *Sabbatino*, which is discussed below, is likely to cause similar problems in the future.

I. Facts

On April 24, 1975, due to the impending capture of Saigon, by hostile North Vietnamese forces, Chase Manhattan Bank (hereinafter Chase) closed its Saigon branch, without notifying its depositors. After seizing Saigon, the North Vietnamese government confiscated the assets of all banks and announced that in the future, the "revolutionary administration" would manage the banks.[4] Among Chase's depositors in Saigon were ten Vietnamese corporations. Nine of the corporations had purportedly granted power of attorney to Tran Dinh Truong, the manager of the tenth corporation, but a South Vietnamese legal requirement that such grants be published in an official newspaper had not been met.[5] Truong requested that Chase's main office in New York repay the South Vietnamese piastres deposited in the Saigon branch, but Chase refused. Truong filed suit in U.S. District Court for the Southern District of New York, claiming breach of contract and demanding return of the deposits.[6] Ms. Nguyen Thi Cham, a Vietnamese citizen who purchased a six month certificate of deposit from the Chase branch in Saigon, was also a plaintiff, as Chase had refused to honor her certificate in New York.[7]

II. Holding

In a non-jury trial, the district court held for Chase. The court held that Truong had invalid powers of attorney from the nine corporations he claimed to represent and that the corporate plaintiffs lacked standing to sue as all the corporations had been dissolved by the new Vietnamese government. The district court noted that even if the plaintiffs had standing, they could not recover from Chase, because the Vietnamese government had assumed all the debts of Chase's Saigon branch. The district court also held that if the debts had not been assumed by Vietnam Chase was not liable because no valid demand for payment had been made at Chase's Saigon branch. Since Chase was physically unable to pay plaintiffs from its Saigon Branch assets, Chase's duty to pay was also excused under the defense of impossibility. Even if the plaintiffs had overcome all these defenses and had been awarded damages, the piastre deposits they would recover by law would be converted into dollars at the exchange rate prevailing on the day of the district court judgment. Since the piastre was worthless at that time, plaintiffs had no damages.[8]

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[4] *Vishipco*, 660 F.2d at 857.
[5] *Id.* at 858.
[6] *Id.* at 856.
[7] *Id.*
[8] *Id.* at 865.

The Second Circuit unanimously reversed the district court holding. The court determined that the plaintiffs' failure to prove Vietnamese law did not require dismissal of their case. While a party specifically relying on foreign law need prove it, the plaintiffs in *Vishipco* claimed under U.S. law.[9] Truong's powers of attorney were found valid, because the failure to publish them in the official newspaper was not a fatal error.[10] The court also found that Vietnam's seizure of property abandoned in Vietnam by the plaintiffs amounted to neither a seizure of property located outside Vietnam nor a dissolution of the plaintiff corporations.[11] After the Saigon branch closed, the bank deposits in issue became payable at Chase's home office in New York; the deposits were thus constructively located in New York after Saigon fell, and were not affected by the Vietnamese seizure of plaintiffs' Vietnam property.[12]

Since payment was possible in New York, the defense of impossibility was held inapplicable.[13] A New York state law limiting bank liability for overseas deposits was held applicable only to banks operating solely within the state of New York, and not to national banks like Chase.[14] Finally, the court chose to convert piastres to dollars at the exchange rate prevailing at the time the deposit contract was breached. As the piastre was not worthless until after the breach, plaintiffs' damages were not nominal.[15]

III. Background and Significance

The Second Circuit's refusal to dismiss the plaintiffs' case for failure to prove Vietnamese law was consistent with recent holdings. Before the mid-1960s, a plaintiff failing to prove applicable foreign law generally would have his complaint dismissed as courts felt they were unable to properly evaluate the claim. Thus, in *Riley v. Pierce Oil Co.*,[16] for example, the plaintiff's claim was dismissed for failure to introduce sufficient evidence of the applicable foreign law. Similarly, in *Esso Standard Oil Co.*

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[9] *Id.* at 859.

[10] The only effect of publication was to create an irrebuttable presumption that the powers were valid. The lack of publication exposed the powers to attack on other grounds, but Chase introduced no evidence to show that such grounds existed. The court also mentioned that four of the corporations granted Truong powers of attorney at Chase's request. Having benefitted substantially from these grants, Chase could not now challenge their validity. *Id.* at 860-61.

[11] *Id.* at 861.

[12] *Id.* at 862-64. *See* Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 L. & POL. INT'L BUS. 903, 975 (1979).

[13] *Vishipco*, 660 F.2d at 863-64.

[14] New York law limits liability to the amount recoverable under the law of the jurisdiction in which the branch is located. N.Y. Banking Law § 138(1) (1971). Section 2 reduces liability by "the proportion that the value . . . of such assets bears to the aggregate of all . . . liabilities of all . . . offices of such bank . . . in the foreign territory." *Id.* § 138(2).

[15] *Vishipco*, 660 F.2d at 865-67. The corporate deposits amounted to approximately $200,000 at the April 24, 1975 exchange rate. At the same rate, Ms. Cham invested approximately $266,000 in her certificate of deposit, at 23.5% per annum. *Id.* at 857, 865 n.6.

[16] 245 N.Y. 152, 156 N.E. 647 (1927).

v. S.S. Gasbras Sul,[17] the court refused to apply a seemingly clear Guatemalan statute because plaintiff had not shown a Guatemalan case interpreting the statute.

Following the adoption of Federal Rule of Civil Procedure 44.1[18] in 1966, the general rule changed. In *Bartsch v. Metro-Goldwin-Meyer*,[19] neither party introduced evidence of the applicable German law. Rather than dismissing the case, however, the court assumed that German and U.S. law did not differ on any relevant points and allowed the parties to introduce evidence on the merits of the case.[20] The Restatement (Second) of Conflicts of Laws supports the *Bartsch* decision, stating that where "insufficient information has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law."[21] The *Vishipco* court thus followed the modern rule in deciding the conflicts of law issue.

Chase claimed that even under Federal Rule of Civil Procedure 44.1 plaintiffs had to introduce evidence on Vietnamese law, since a New York statute mandated that Vietnamese law be applied to the case. The appeals court held that such "choice of law" rules were permissive, not mandatory, and therefore that Vietnamese law applied only where the parties invoked it. Since Chase introduced evidence on several affirmative defenses under Vietnamese law, Vietnamese law would be applied solely to those defenses. As the plaintiffs did not invoke Vietnamese law, New York law applied to their case.[22]

Chase's major defenses to the plaintiffs' claims for monetary recovery can be divided into three groups. First, Chase claimed that it owed no debt to anyone, because no valid demand for payment had been made, or, in the alternative, because payment was impossible. Second, Chase claimed the plaintiff corporations were not entitled to the deposits at issue, because all of the plaintiffs' assets, including their bank deposits, had been seized by the Vietnamese government. Finally, Chase claimed that plaintiffs suffered no damages, because the piastre was worthless on the day when the piastre deposits were to be converted into dollars.

The defenses of no valid demand and impossibility have been raised in similar cases and rejected. The leading case in this area, *Sokoloff v. National City Bank*,[23] retains much vitality despite fifty years of age. In

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[17] 387 F.2d 573 (2d Cir. 1967), *cert. denied*, 391 U.S. 914 (1968). *See also* Gates v. Collier, 256 F. Supp. 204 (D. Hawaii 1966).

[18] Fed. R. Civ. P. 44.1 states, "The court, in determining foreign law, may consider any relevant material . . . whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law."

[19] 391 F.2d 150 (2d Cir.), *cert. denied*, 393 U.S. 826 (1968).

[20] *See also* Commercial Ins. Co. v. Pacific-Peru Constr. Corp., 558 F.2d 948, 952 (9th Cir. 1977); Morse Electro Prod. Corp. v. S.S. Great Peace, 437 F. Supp. 474 (D.C.N.J. 1977). *But see Esso*, 387 F.2d at 580-81, denying rehearing despite the then-new rule 44.1.

[21] Restatement (Second) of Conflict of Laws § 136 comment h (1967).

[22] N.Y. Banking Law § 138(1). *See supra* note 14.

[23] 119 Misc. 332, 196 N.Y.S. 364 (Sup. Ct.) (motion to strike defense denied), 120 Misc.

the *Sokoloff* case, the plaintiff deposited dollars at the New York branch of National City Bank (NCB), asking that the dollars be converted to rubles and used to open an account in his name at NCB's branch in Petrograd, Russia. NCB opened the Russian account, and plaintiff used it while residing in Petrograd. When he moved to another Russian city, the plaintiff asked NCB to transfer the money there. NCB attempted to transfer the money via the Russian state bank, but the political situation prevented transfer.[24] There was some evidence that the state bank had attempted to return or had returned the money to NCB. When the money failed to arrive, plaintiff demanded it from NCB by every conceivable method, other than appearing at the Petrograd branch to make a personal demand. NCB refused all demands, claiming it did not have the plaintiff's money. The Bolsheviks then took control of the government and seized NCB's Russian assets. Shortly thereafter, plaintiff fled Russia and demanded payment at NCB's New York office. The bank refused and plaintiff filed suit to recover his money.

After six years and seven published opinions, the plaintiff recovered his deposit. Since the Petrograd office was a branch bank, NCB's home office was held responsible for its liabilities. With payment in Russia impossible, the court held that NCB was obligated to pay plaintiff in New York.[25] The court stated that the unrecognized Soviet government had no jurisdiction to seize assets or liabilities located in the United States; NCB's debt to the plaintiffs jumped to New York after the Petrograd branch closed.[26] The court also held that the plaintiff had revoked his transfer request, and hence that NCB was in breach of its resulting duty to obtain his money from the state bank.[27] The plaintiff's demands were adequate, since demanding payment in Petrograd would manifestly have been futile.[28] NCB's defenses therefore failed and plaintiff won his case.

NCB's defenses in *Sokoloff* strongly resemble Chase's first group of defenses in *Vishipco*. Central to the defendants in both cases was the "separate entity" theory, which states that a branch bank is a legally separate entity from the bank's home office.[29] Under this theory, debts incurred at the branch bank are payable only at that branch bank, and not at any other branch or at the home office. If payment at the branch bank becomes impossible or if a valid demand is not made there, the depositor cannot recover his money.

252, 199 N.Y.S. 355 (Sup. Ct. 1922) (second motion to strike defense denied), *both rev'd*, 208 A.D. 627, 204 N.Y.S. 69 (1923), *rev'd*, 239 N.Y. 158, 145 N.E. 917 (1924); *on remand*, 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct.), *aff'd mem.*, 223 A.D. 754, 227 N.Y.S. 907 (1927), *aff'd*, 250 N.Y. 69, 164 N.E. 745 (1928).

[24] *Sokoloff*, 239 N.Y. at 167, 145 N.E. at 918.

[25] *Id.* at 167, 145 N.E. at 919.

[26] *Id.* at 169, 145 N.E. at 920.

[27] *Sokoloff*, 250 N.Y. at 77-79, 164 N.E. at 748-49.

[28] *Id.* at 80, 164 N.E. at 749.

[29] *See* Heininger, *supra* note 12, at 934-44.

Both *Sokoloff* and *Vishipco* clearly rejected the separate entity theory. The rejections were based upon the courts' belief that the risks of international banking should fall upon the bank, rather than upon its depositors.[30] The *Vishipco* court drew a distinction, however, between branch banks and separately incorporated subsidiaries, indicating in dicta that Chase would have won if its Saigon branch had been separately incorporated.[31] Separate incorporation, however, was impossible under South Vietnamese law, which permitted foreign banks to operate branches only, in order to provide depositors with the security of home office liability in the event of branch bank closure.[32] Since Chase's Saigon branch was established under this government policy, the court had a strong incentive to hold Chase's home office liable.

The major policy issue in *Vishipco* was the proper distribution of risk between banks and depositors in their foreign branches. Where the deposit contract does not specify the risks to be borne by each party,[33] courts often look to the reasonable expectations of the parties. Neither *Vishipco* nor *Sokoloff* addressed this issue directly, but in holding the home offices liable for the deposits, both opinions relied heavily upon a belief that depositors reasonably expected the risks to fall primarily upon the bank. For example, to the extent that depositors in Chase's Saigon branch were aware of the rationale for allowing foreign bank branches but not separately incorporated foreign banks, they probably expected Chase to be liable. Even a legally unsophisticated depositor would probably expect home office responsibility and may have chosen a U.S. bank because he believed he would not lose his money if the branch closed unavoidably.

In the final result, the distribution of risk between foreign branches of U.S. banks and their depositors is not critical. If the home office is to be deemed liable to branch bank creditors, it will pass the costs of insuring against such liability along to those depositing money in its overseas branches. If the depositor bears the risk of loss, future depositors will avoid countries where the risk of closure is unacceptably high. Either way, the results are the same: fewer overseas branches offering a lower rate of return on deposits.

Once the separate entity theory was rejected, Chase's first group of defenses fell apart. Since the debt's situs was in New York, a valid demand for payment had been made. Payment was possible in New York,

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[30] *See Vishipco*, 660 F.2d at 863; *Sokoloff*, 239 N.Y. at 169, 145 N.E. at 919-20.

[31] *See Vishipco*, 660 F.2d at 863-64.

[32] *See* Comment, *The Ramifications of the International Banking Act of 1978 on North Carolina*, 7 N.C.J. INT'L L. & COM. REG. 67, 68-71 (1982).

[33] Apparently, the deposit contract in *Vishipco* stated that the risk of loss due to actions of the Vietnamese government was on the plaintiffs. Petition for Certiorari at 4, Chase Manhattan Bank v. Vishipco Line, 51 U.S.L.W. 3340 (U.S. Nov. 2, 1982). The Second Circuit's opinion did not mention this. Perhaps the court disregarded the contract as being one of adhesion, or perhaps the court considered that since payment was possible in New York, no loss had taken place.

so the defense of impossibility was inapplicable. The Vietnamese government was jurisdictionally incapable of seizing Chase's Saigon branch debts, since the debts fled with Chase to New York. Therefore, Chase was still liable on debts incurred at its Saigon branch.

Chase's second group of defenses constituted the most crucial part of the case. Even if it were deemed liable on its Saigon debts, Chase claimed it was not liable to the plaintiff corporations. Chase claimed that by seizing maritime transport facilities, the Vietnamese government nationalized the plaintiffs, terminating their legal existence; hence, they had no standing to sue. Chase argued that even if the corporations could sue, all of their assets, including their bank deposits, now belonged to the Vietnamese government. The nationalization may have been contrary to international law, but Chase contended that the act of state doctrine prevented the court from passing on the validity of a Vietnamese seizure of Vietnamese corporations. Hence, Chase argued that it owed the deposits not to the plaintiffs but to the Vietnamese government.

The *Vishipco* court neatly sidestepped Chase's arguments by finding that Vietnam did not intend to seize plaintiffs' deposited funds. A Vietnamese legal expert, testified that the Vietnamese government had taken over "all maritime transportation facilities abandoned by the owners in South Vietnam. . . ."[34] The court strictly interpreted this testimony, which was a paraphrasing of the official Vietnamese communique, to mean exactly what it said: that the Vietnamese had seized the *facilities* of the plaintiff corporations.[35] Since neither the corporations themselves nor their intangible assets (such as bank deposits) were mentioned, the court found that the assets were not seized and the corporations were not dissolved.

The court's interpretation of the Vietnamese communique is open to question. The task before the court was to determine, from all available evidence, exactly what action the Vietnamese government had intended to take with respect to the plaintiffs and their assets. The best single source available was the Vietnamese communique and the court gave great weight to it. Unfortunately, the court may have ignored other relevant evidence. The Vietnamese government is communist; and communist principles oppose the very existence of privately owned corporations. Under communist principles, all capital belongs to the state; certainly plaintiffs' bank deposits would qualify as capital. Hence, communist ideology seems to indicate that Vietnam intended to seize *all* the plaintiffs' assets. Further, a seizure of only the Vietnamese assets of the plaintiff corporations would result in the plaintiff corporations having no assets and doing no business in the state under whose laws they were incorporated. It is unlikely that the Vietnamese government intended to

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[34] *Vishipco*, 660 F.2d at 861-62.

[35] *Id.* at 862.

leave the corporations legally intact, but without assets in Vietnam, the country of their incorporation.

Had the *Vishipco* court considered these arguments, it might well have held that the plaintiff corporations had been dissolved or that the bank deposits at issue had been seized by the Vietnamese government. Nevertheless, the court reached a just decision. On general equitable principles, a decision that the Vietnamese government was entitled to assets it seized in clear violation of international law would be erroneous. The court, however, could have reached the same result through alternate rationales: the U.S. nonrecognition of the Vietnamese government or violation of international law in the seizure. Either rationale would have permitted the court to acknowledge the Vietnamese seizure without enforcing it. Failure to follow either of these two rationales weakens the *Vishipco* opinion.

The first of the rationales was an alternative ground for recovery in *Sokoloff*. The key to recovery in that case was the unrecognized status of the Soviet government. The court held that nonrecognition prevented it from giving any effect at all to decrees of the Russian government, whether internationally legal or not.[36] The final *Sokoloff* opinion hints that the case might have been decided differently had the Soviet Union been unrecognized.[37]

A stronger case for ignoring the acts of unrecognized governments was *Petrogradsky Bank v. National City Bank*.[38] The Petrogradsky Bank (PB) had been chartered by the Czarist Russian government, but the Soviet government revoked its charter and nationalized its assets. Surviving directors of the bank, exiled from Russia, tried first informally and then in court to recover money PB had deposited in National City Bank (NCB). In defense, NCB claimed that PB no longer existed; that if it did exist, the directors could not speak for it; and that the possibility of a separate recovery of the money by the Soviet government in U.S. courts made recovery inequitable to NCB.[39]

The New York Court of Appeals rejected these defenses. As the Soviet government was unrecognized, U.S. courts could not give its decrees any effect. Hence the decree terminating PB's existence was void, and PB was capable of bringing suit. As a matter of Russian law, the court found the directorships valid. The court deemed the risk of double liability negligible, and held that the risk which did exist was inherent in

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[36] *Sokoloff*, 239 N.Y. at 169, 145 N.E. at 920. *See also* Dougherty v. Equitable Life Assurance Soc'y, 266 N.Y. 71, 193 N.E. 897 (1934) (recovery on insurance policies purchased in Russia prevented by Russian seizure of insurance company assets, where Russian government was subsequently retroactively recognized).

[37] *Sokoloff*, 250 N.Y. at 81, 164 N.E. at 749.

[38] 253 N.Y. 253, 170 N.E. 479, *reh'g denied*, 254 N.Y. 563, 173 N.E. 867, *cert. denied*, 282 U.S. 878 (1930).

[39] *Id.* at 26-28, 170 N.E. at 480.

the banking business. PB therefore recovered its deposits with NCB.[40]

The plaintiffs' case was significantly weaker in *Petrogradsky* than in *Vishipco*. The Soviet government had unequivocally seized PB's assets and terminated its existence, but U.S. courts ignored the seizure because the Soviet government was unrecognized. The *Vishipco* court, however, makes no reference in its opinion to the unrecognized status of the Vietnamese government. The *Vishipco* court could have cited *Petrogradsky*, and refused to enforce an action by an unrecognized government. It did not, either because the issue was never raised or because it saw some obstacle to such a refusal. One obstacle could have been the act of state doctrine, which also lies behind the *Vishipco* court's decision not to use the second path of reasoning.

The second method involves enforcement of international law, Vietnam's seizures of Chase's branch and of the assets of the plaintiff corporations were unlawful uses of force[41] and expropriations without just cause,[42] and thus clearly violated international law. Since international law is recognized by U.S. courts,[43] the seizures need not have been enforced.

The only obstacle to the non-recognition and international law methods of analysis is the act of state doctrine. The act of state doctrine prevents U.S. courts from passing on the validity of a foreign government act done in a foreign nation.[44] The leading act of state case is *Banco Nacional de Cuba v. Sabbatino*.[45] In that case, the U.S. Supreme Court considered a fact situation similar to *Vishipco*, and held the act of state doctrine forced U.S. courts to recognize internationally illegal acts. *Sabbatino* arose when the Cuban government illegally seized sugar belonging to Compania Azucarera Vertientes-Camaquey de Cuba (CAV), a Cuban

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[40] *Id.* at 40, 170 N.E. at 484-85. The chance of double liability on the *Vishipco* facts is even more remote. If Vietnam filed suit in U.S. court to obtain debts Chase owed to the nationalized plaintiff corporations, Chase could counterclaim for losses it incurred when Vietnam seized its Saigon branch. The act of state doctrine would not apply and Chase could recover at least as much as it owed Vietnam. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); National City Bank v. Republic of China, 348 U.S. 356 (1955). Further, the U.S. statute of limitations would apply to Vietnam's claims. Guaranty Trust Corp. v. United States, 304 U.S. 126 (1937).

[41] Vietnam's seizure of Chase's Saigon branch was not an illegal use of force per se, but would not have occurred if Vietnam had not illegally used force to acquire the territory formerly constituting South Vietnam. *See* U.N. Charter art. 2, para. 4. As a member of the United Nations, Vietnam is, of course, bound by the U.N. Charter.

[42] *See* G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962). Compare G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 30) at 3, U.N. Doc. A/9030 (1973). In general, the trend in international law has been away from requiring complete compensation for nationalized assets. The United States has staunchly opposed any deviation from complete compensation. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 429 (1964); Restatement (Second) of Foreign Relations Law of the United States § 185 and reporter's note 1 (1965).

[43] *See, e.g.*, *Sabbatino*, 376 U.S. at 423; The Paquette Habana, 175 U.S. 677 (1900) (International law is a part of U.S. law).

[44] *See* Underhill v. Hernandez, 168 U.S. 250 (1897).

[45] 376 U.S. 398 (1964).

corporation owned largely by U.S. citizens. When seized, the sugar was on board a ship owned by Farr-Whitlock, a U.S. commodities broker. In return for permission to export the sugar, Farr-Whitlock promised to pay the purchase price to Banco Nacional de Cuba (Banco), an agent of the Cuban government, rather than to CAV. When the sugar arrived in New York, Farr-Whitlock paid CAV. Banco then sued Farr-Whitlock and CAV's agent Sabbatino to recover the purchase price of the sugar.[46]

Both the district and appeals courts held for the defendants.[47] The courts refused to apply the act of state doctrine, since it did not apply when the act being questioned violated international law.[48] The confiscations were therefore not enforced and the district court denied Banco the price of the sugar.

In an eight to one decision, the Supreme Court reversed. Since Cuba had expropriated the sugar itself, rather than expropriating Farr-Whitlock's debt to CAV, the act in question occurred solely within Cuba. Hence, Cuba had jurisdiction over the sugar.[49] Citing a long line of cases, the Court ruled that international law did not affect the application of the act of state doctrine to jurisdictionally valid acts of foreign governments within their own states.[50] The Court held that permitting such an exception might interfere with the executive branch's conduct of foreign policy, and cautioned that any venture by the judiciary into the international political issues of expropriation and compensation would be a violation of the separation of powers doctrine.[51] The court therefore enforced the Cuban seizures, and awarded the price of the sugar to Banco.[52]

The *Sabbatino* decision was not popular and efforts were made to overrule it legislatively. These efforts resulted in the enactment of the "Hickenlooper amendment,"[53] which was "intended to reverse in part the [*Sabbatino*] decision."[54] The amendment provides that with respect to

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[46] *Id.* at 401-06.

[47] *Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961); *Sabbatino*, 307 F.2d 845 (2d Cir. 1962).

[48] *Sabbatino*, 307 F.2d at 859; 193 F. Supp. at 380.

[49] *Sabbatino*, 376 U.S. at 413-15.

[50] *See, e.g.*, Shapleigh v. Miller, 299 U.S. 468 (1937); Oetjen v. Central Leather Co., 246 U.S. 297 (1918). All of these cases involved violations of international law in only a peripheral sense. In none was the violation of international law as important or unquestionable as in *Sabbatino*. *See Sabbatino*, 376 U.S. at 442 (White, J., dissenting).

[51] *Sabbatino*, 376 U.S. at 423.

[52] The lone dissenter in *Sabbatino* was Justice White. He pointed out the weakness of the cases relied upon by the majority, *see supra* note 50, and argued that "fundamental fairness to litigants" called for a violation of international law exception to the act of state doctrine. *Id.* at 453 (White, J., dissenting). Any possible embarassment of U.S. foreign policy would be avoided if the court applied the act of state doctrine whenever the State Department so requested. *Id.* at 467-72 (White, J., dissenting).

[53] Foreign Assistance Act of 1964, Pub. L. No.88-633, § 301(d)(4), 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (1976)) [hereinafter cited as the Hickenlooper Amendment].

[54] S. Rep. No. 1188, 88th Cong., 2d Sess. 24, reprinted in 1964 U.S. Code Cong. & Admin. News 3829, 3852.

any assertion of a "claim of title or other right to property . . . based upon . . . a confiscation by a foreign . . . state in violation of the principles of international law, no court . . . shall decline on the grounds of the federal act of state doctrine to make a determination on the merits."[55] The amendment does not apply, however, when "the President determines that application of the act of state doctrine is required . . . by the foreign policy interests of the United States."[56] Hence, the amendment supersedes *Sabbatino* in cases involving "claim of title or other right to property," unless the President determines that foreign policy requires that the case not be heard.

Unfortunately, the Hickenlooper amendment has been interpreted very restrictively. The courts have interpreted the phrase "claim of title or other right to property" as referring only to tangible property, and not to contract rights.[57] Some courts have further held that the property involved must be the specific property that was expropriated—that is, the amendment applies only when expropriated property is brought into this country.[58] These interpretations make the amendment functionally meaningless.[59] Since bank deposits are contract rights, the *Vishipco* court probably assumed that the Hickenlooper amendment was not applicable.

With the Hickenlooper amendment effectively inoperative, *Sabbatino* remains the basic statement of the act of state doctrine. The Supreme Court has created several exceptions to the doctrine. In *First National City Bank v. Banco Nacional de Cuba*,[60] the Court held that the act of state doctrine did not apply to counterclaims made against a foreign government plaintiff.[61] The Second Circuit Court of Appeals, in *Bernstein v. Neder-*

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[55] Hickenlooper Amendment, *supra* note 53. Only confiscations taking place after Jan. 1, 1959 are covered. *Id.*

[56] *Id.*

[57] The Johnson Administration was opposed to the amendment, and some members of Congress insisted that the amendment not be viewed as allowing seizure of any foreign government property as compensation for the expropriation of unexported property. *See* Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394, 400-02 (2d Cir. 1970), *rev'd on other grounds*, 406 U.S. 759 (1972); *See also* Occidental Petroleum Corp. v. Buttes Oil & Gas Co., 331 F. Supp. 92, 111-12 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968). *But see French*, 23 N.Y.2d at 76, 242 N.E.2d at 724, 295 N.Y.S.2d at 461 (Keating, J., dissenting); Golbert & Bradford, *The Act of State Doctrine: Dunhill and other Sabbatino Progeny*, 9 S.W. L. REV. 1, 27-33 (1977).

[58] *See* Empresa Cubana Exportadora, Inc. v. Lamborn & Co., 652 F.2d 231 (1981); Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394, 400-02 (2d Cir. 1970), *rev'd on other grounds*, 406 U.S. 759 (1972). Statements to the contrary exist in some cases, but are almost always made in the context of a counterclaim, to which application of the act of state doctrine is limited. *See infra* notes 59-60 and accompanying text.

[59] Cases adopting this view include Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), *rev'd on other grounds sub. nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Libyan-American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980); Occidental of Umm Al Qaywayn v. Cities Service Oil Co., 396 F. Supp. 460 (D.W. La. 1975).

[60] 406 U.S. 759 (1972).

[61] *Id.* at 768-69. *See also* National City Bank v. Republic of China, 348 U.S. 356 (1955),

landsche Amerikaansche Stoomvart-Maatschappi',[62] received a letter from the State Department stating that refusal to apply the act of state doctrine would not harm U.S. foreign policy. The court treated this as conclusive evidence that hearing the case would not be interfering with the executive branch's conduct of foreign policy, and refused to apply the act of state doctrine. *Bernstein* was rejected by two concurring and four dissenting justices in *National City Bank*,[63] and is therefore of questionable precedential value. In *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[64] a plurality of the Supreme Court held that the act of state doctrine did not apply to foreign governments engaged in commercial activity.

If none of the aforementioned exceptions apply, the act of state doctrine applies to any act done by a foreign state within its own territory. Vietnam's nationalization of the plaintiff corporations was clearly an act done by a foreign state. Since the corporations were all organized under Vietnamese law, they are considered Vietnamese citizens and are constructively located in Vietnam. Hence, their nationalization took place within a foreign country. The commercial act, State Department letter, and counterclaim exceptions do not apply. Therefore, if Vietnam had nationalized the plaintiff corporations, the *Sabbatino* version of the act of state doctrine would have forced the *Vishipco* court to accept that nationalization and decide the case in favor of Chase.

The effect of *Sabbatino* was crucial to the *Vishipco* opinion. If the *Vishipco* court had held that a valid nationalization had taken place, it would have had to uphold it. Neither the unrecognized status of the Vietnamese government nor the international illegality of the seizure would have changed the result. Given the clear injustice of enforcing the seizures, the court was left with only one way to reach a just result: it refused to interpret the Vietnamese communique as a nationalization of the plaintiff corporations. Thus, the court neatly defined the dilemma out of existence.

Having found Chase liable to the plaintiff corporations, the court next considered the issue of damages. The deposits at issue were in South Vietnamese piastres. The Supreme Court has held, however, that U.S. courts can award damages only in dollar amounts.[65] It was therefore necessary to decide upon an exchange rate between piastres and dollars, in order to establish the dollar amount of damages the plaintiff corporations would receive.

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allowing a counterclaim against a plaintiff foreign government despite the doctrine of sovereign immunity.

[62] 210 F.2d 375 (2d Cir. 1954).

[63] *National City Bank*, 406 U.S. at 772-73 (Douglas, J., concurring); *id.* at 773 (Powell, J., concurring); *id.* at 776-77 (Brennan, J., joined by Stewart, Marshall, and Blackmun, JJ., dissenting). *But see id.* at 767-68 (Rehnquist, J., plurality opinion) (explicitly approving the *Bernstein* exception).

[64] 425 U.S. 682, 706 (1976).

[65] Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 254 (1868). *See also* 22 Am. Jur. 2d *Damages* § 65 (1965).

Currency exchange rate issues have arisen in other cases, and the federal courts have a long-standing rule for deciding which rate to use.[66] If the cause of action arises outside the United States, the courts view the lawsuit as basically foreign in nature. In order to best approximate the damages a foreign court would give, the courts convert the foreign currency into dollars at the rate which prevails on the day the court hands down its judgment.[67] The amount recovered under this "judgment day rule" is thus exactly equal to the amount that would be recovered if a foreign court had awarded damages.

Where a cause of action arises within the United States, a different rule applies. The courts are concerned that using the judgment day exchange rate in these cases would reward one party for delaying the judgment as long as possible, in order to benefit from rising or falling exchange rates. If the exchange rate between dollars and the foreign currency involved is declining, the defendant's overall liability is also declining. The later the judgment day, the more the exchange rate declines and the less the defendant has to pay. Similarly, a rising exchange rate rewards the plaintiff for delay. To avoid encouraging lengthy litigation, the courts set one invariable date on which the exchange rate is determined. To make this date completely independent of the litigation process, the courts use the exchange rate as of the day the cause of action arose.[68]

The district court in *Vishipco* held that the cause of action arose in Vietnam and applied the judgment day rate. Since South Vietnam had fallen and the piastre was worthless on the date of judgment, the court effectively found no damages. The appeals court, however, did not apply the federal rule. Since jurisdiction in *Vishipco* was based on diversity of citizenship, *Erie R.R. Co. v. Tompkins*[69] dictated that New York substantive law be applied to the case. In *Hanna v. Plumer*,[70] the Supreme Court held that the substantive-procedural distinction must be drawn in such a manner as to ensure "discouragement of forum-shopping and inequitable administration of the laws.[71] If the federal courts apply the judgment day rate in diversity cases, plaintiffs in states applying the breach day rule will be tempted to file suit in federal court when exchange rates are

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[66] *See, e.g.*, Deutche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 518-520 (1926); Gutor Int. v. Raymond Packer Co., 493 F.2d 938, 943-44 (1st Cir. 1974).

[67] *Humphrey*, 272 U.S. at 520; *Vishipco*, 660 F.2d at 865-66.

[68] Until 1975, Great Britain used the breach day rate. In *Miliangos v. George Frank Textiles, Ltd.*, 1975 3 All E.R. 801, Britain adopted a third alternative, giving the recovering party a choice between payment in foreign currency and payment in pounds at the payment day rate. The *Vishipco* court mentioned but did not discuss this alternative. *Vishipco*, 660 F.2d at 866-67 n.7. While awarding damages in foreign currency runs counter to *Bronson*, there seems no reason why legislation or a Supreme Court overruling of *Bronson* could not implement the British rule in the United States. Nevertheless, neither Congress nor the Supreme Court has considered doing so.

[69] 304 U.S. 64 (1938).

[70] 380 U.S. 460 (1965).

[71] *Id.* at 462-68.

falling and to file suit in state court when the rates are rising. In order to diminish the incentive to forum-shop, the *Vishipco* court followed *Erie* and *Hanna* and applied the New York exchange rate rule.[72]

Unlike the federal courts, the New York courts have consistently favored the breach day rule in most situations.[73] The rule is not absolute, however, since either rule will be rejected when it will work an injustice.[74] The *Vishipco* court adopted the breach day rate, but lacking evidence as to the rate of exchange on that date, the court remanded the case for further evidence.[75]

IV. Conclusion

The *Vishipco* opinion is not a legally sound one. The court handled several issues, including choice of law, damages, and Chase's first group of defenses, in a clear and logical manner. Unfortunately, a legally incorrect result was reached on the central issue in the case. By turning its back on a possible nationalization of the plaintiff corporations, the court allowed recovery by the victims of an event which strongly resembled a Vietnamese dissolution of a Vietnamese corporation. In almost twenty years of litigation based on expropriations by Cuba, the Supreme Court has never permitted recovery for foreign dissolutions of foreign corporations. The Supreme Court's denial of certiorari in *Vishipco* is therefore more than a little puzzling. *Vishipco* could well represent another step in the general movement away from *Sabbatino* which has marked Supreme Court decisions since 1972.

Despite the unsoundness of the *Vishipco* opinion, the court reached a just result. A holding for Chase would have effectively enforced the Vietnamese nationalization of the plaintiff corporations, despite the unrecognized status of the Vietnamese government and the clear international illegality of the nationalization. A holding for Chase would also remove a primary detriment to the establishment of overseas branches by U.S. banks, creating a caveat emptor theory of international banking. In light of recent attempts to limit the incentives behind the establishment of overseas U.S. branch banks,[76] this would be an inappropriate holding.

The position of the *Vishipco* court was thus an uncomfortable one; it

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[72] *Vishipco*, 660 F.2d at 865-66. *See also* Compania Engraw Commercial E. Industrial S.A. v. Schenely Distillers Corp., 181 F.2d 876, 879 (9th Cir. 1950), deriving and applying the California (breach day rate) rule in a diversity case.

[73] *See, e.g.*, Hope v. Russo-Asiatic Bank, 235 N.Y. 37, 138 N.E. 497 (1923). *See also Vishipco*, 660 F.2d at 866, citing a long line of New York cases on the subject.

[74] Librairie Hachette v. Paris Book Center, Inc., 62 Misc. 873, 309 N.Y.S.2d 701 (Sup. Ct. 1970).

[75] *Vishipco*, 660 F.2d at 865 n.6, 867.

[76] *See* International Banking Facilities, 46 Fed. Reg. 32,426 (1981) (to be codified at 12 C.F.R. §§ 204, 217) (Federal Reserve Board regulations setting up special "international banking facilities" which are free from certain government regulations, and hence are better able to compete with foreign subsidiaries of U.S. banks). *See also* Recent Development, *Authorization of International Banking Facilities: A Call for State Tax Reform*, 8 N.C.J. INT'L L. & COM. REG. __ (1983).

was given an unenviable choice between an unsound opinion and an unjust result. The dilemma was the unfortunate result of the *Sabbatino* case, which denied U.S. courts the power to enforce the universally accepted principles of international law which prohibit the use of force and completely uncompensated expropriation. The *Vishipco* court was extremely fortunate to have before it a fact situation permitting escape from *Sabbatino*. Future courts hearing cases involving clear violations of international law may not be so fortunate.

It is, therefore, time for the Supreme Court to abandon *Sabbatino*. In *National City Bank* and *Dunhill*, the court created substantial exceptions to the act of state doctrine, as the doctrine was stated in *Sabbatino*. No adverse consequences have followed from these decisions. Other nations routinely use international law in refusing to enforce acts done by foreign nations within foreign countries[77] and fare no worse internationally than does the United States. The act of state doctrine can force unsound opinions, as in *Vishipco*, and can force U.S. courts to enforce internationally illegal decrees. With few supporting bases and a plethora of problems, the *Sabbatino* holding is far more hindrance than help to both the judicial and executive branches of our government. The time has come for a violation of international law exception to the act of state doctrine.

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[77] *See* Golbert & Bradford, *supra* note 57, at 4-8.