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An Evaluation of the Commercial Activities Exception to the Act of State Doctrine

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AN EVALUATION OF THE COMMERCIAL ACTIVITIES EXCEPTION TO THE ACT OF STATE DOCTRINE

I. INTRODUCTION

The United States has played a prominent role in promoting the development of international law.[1] Early in United States history, with the international legal positivism[2] of Westphalia[3] in full force in the international arena, the Supreme Court acknowledged the power of state sovereignty by refusing to subject foreign sovereigns to the jurisdiction of American courts.[4] The Court later supplemented the doctrine of sovereign immunity with the "act of state doctrine."[5] Motivated by international comity as well as by deference to the political branches in the field of foreign relations, the act of state doctrine precluded American courts from reviewing the acts of the government of a foreign sovereign State carried out within the State's own territory.[6]

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1. In *The Paquete Habana*, the Supreme Court stated: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." 175 U.S. 677, 700 (1900). The Constitution provides that treaties "shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. The Constitution gives Congress the power to "define and punish . . . Offenses against the Law of Nations." *Id.* art. I, § 8, cl. 10.

2. The doctrine of positivism "teaches that international law is the sum of the rules by which states have *consented* to be bound, and that nothing can be law to which they have not consented." JAMES L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 51 (6th ed. 1963).

3. The Peace of Westphalia brought an end to the Thirty Years War in 1648. CLIVE ARCHER, INTERNATIONAL ORGANIZATIONS: KEY CONCEPTS IN INTERNATIONAL RELATIONS NO. 14 (1983). The Peace of Westphalia and the Treaty of Utrecht in 1713 laid the foundation for the sovereign state system in Europe. *Id.* After Westphalia, sovereign states were considered to be the source of order in international society. *Id.* The concept that international law is derived from consent as established by treaty or customary agreement replaced the pre-Westphalia use of natural law as a guide to relations. *Id.*

4. For a discussion of the doctrine of sovereign immunity, see *infra* notes 125-58 and accompanying text.

5. The Third Restatement of the Foreign Relations Law of the United States defines the act of state doctrine as follows:

> (1) In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.
>
> (2) The doctrine set forth in Subsection (1) is subject to modification by act of Congress.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987).

6. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972).

In the wake of World War II, positivism began a process of erosion, and the development of international law accelerated.[7] As a result, the justifications supporting the act of state doctrine weakened. Accordingly, it is contended that international comity and the separation of powers no longer justify a judicial abdication with respect to certain activities of a foreign sovereign. Discussing this position, Part II of this Comment explores the development of the act of state doctrine as a rule for adjudication in the courts of the United States.[8] Part III evaluates the act of state doctrine in light of the current status of international law.[9] Part III also addresses the commercial activities exception and concludes that a blanket exception to the act of state doctrine is unwarranted.[10]

II. BACKGROUND

The American act of state doctrine is firmly grounded in notions of separation of powers[11] and institutional competency.[12] Additionally, the doctrine is supported by international comity concerns.[13] Because the act of state doctrine is one of judicial restraint in the area of foreign relations, the doctrine implicates the foreign affairs powers of both the executive branch and the legislative branch.[14] The development of the act of state doctrine paralleled the development of sovereign immunity and, therefore, the two doctrines are similar in many respects.[15] Recently, several United States Supreme Court Justices have argued the propriety of a commercial activities exception to the act of state doctrine.[16] Courts are currently divided on the issue of a commercial activities exception.[17]

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7. *See* REBECCA M.M. WALLACE, INTERNATIONAL LAW 1-2 (1986).

8. For a discussion of the development of the act of state doctrine, see *infra* notes 76-124 and accompanying text.

9. For an evaluation of the act of state doctrine in light of the current status of international law, see *infra* notes 201-351 and accompanying text.

10. For a discussion of the commercial activities exception to the act of state doctrine, see *infra* notes 159-200 and accompanying text.

11. For a discussion of separation of powers, see *infra* notes 18-41, 94-97 and accompanying texts.

12. For a discussion of institutional competency, see *infra* notes 42-75 and accompanying text.

13. For a discussion of international comity, see *infra* notes 86-93 and accompanying text.

14. For a discussion of the foreign affairs powers of the President and Congress, see *infra* notes 42-61 and accompanying text.

15. For a discussion of sovereign immunity, see *infra* notes 125-58 and accompanying text.

16. For a discussion of the commercial activities exception, see *infra* notes 159-200 and accompanying text.

17. For a discussion of the split of authority with respect to the commercial activities exception, see *infra* notes 198-200 and accompanying text.

A. *Separation of Powers*

The first area of controversy with respect to the act of state doctrine is judicial independence in a system premised upon a separation of powers. The American notion of a separation of powers grew out of an acknowledgement of the political theories of Enlightenment figures such as Montesquieu.[18] Montesquieu believed that the very structure of government preserved liberty:[19] "Political liberty . . . is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it . . . . To prevent this abuse, it is necessary from the very nature of things that power should be a check to power."[20] According to Montesquieu, liberty was preserved by distributing sovereign authority between the monarch, as the executive power, and the aristocracy and people, as the legislative power.[21] Although separate, Montesquieu did not view courts as a power.[22] National judges were "no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor."[23] Courts were merely the implementing arm of the legislature.[24]

During the framing of the American Constitution, James Madison echoed Montesquieu's distrust for the individual as politician: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary."[25] Because men are not angels, Madison suggested, "In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the Government to controul the governed; and in the next place, oblige it to controul itself."[26] To secure the power of government to control itself, the Feder-

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18. Martin H. Redish & Elizabeth J. Cisar, "*If Angels Were to Govern*": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 462 (1991).

19. *Id.* at 461.

20. MONTESQUIEU, THE SPIRIT OF THE LAWS 150 (Thomas Nugent, trans., Hafner Pub. Co. 1966).

21. *Id.* at 151-52.

22. *Id.* at 152-53.

23. *Id.* at 159.

24. *Id.* at 152-54.

25. THE FEDERALIST No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

26. *Id.*

alists[27] argued that Montesquieu's doctrine of separated powers should be expanded to include a truly independent judiciary.[28]

In support of a separation of powers, the Federalists recognized that "[t]he accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[29] To combat tyranny, the Federalists separated the legislative, executive, and judicial powers through the mechanism of a limited Constitution.[30] In a limited Constitution, "[t]he complete independence of the courts of justice is peculiarly essential."[31] For the Federalists, an independent judiciary guarded the Constitution and protected the rights of individuals.[32] The judge provided a public check on political behavior.[33]

The judiciary is inherently the weakest of the three departments of government because it lacks the powers of the sword and of the purse.[34] "[L]iberty can have nothing to fear from the Judiciary alone, but would have everything to fear from its union with either of the other departments . . . ."[35] Because of this inherent weakness, the judiciary requires structural safeguards to preserve its continued viability. The Federalists safeguarded the independence of the judiciary through the mechanisms of a tenure during "good behavior" and a nondiminishable salary.[36] Because federal judges do not stand for re-election, they are insulated to a large extent from the public and from political pressure.[37]

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27. The Federalists supported the new Constitution, believing that the Articles of Confederation had not served the foreign affairs, war, and commerce needs of the thirteen states. 1 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 404 (1972). The Federalists believed in expanding the power of the national government as a repository of the foreign affairs, war, and commerce powers. *Id.* James Madison, Alexander Hamilton, and John Jay published essays in support of the Constitution under the common signature "Publius." *Id.* The essays are now published under the title *The Federalist Papers*. *Id.*

28. David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechsstaat*, 61 S. CAL. L. REV. 1795, 1798 (1988).

29. THE FEDERALIST No. 47, at 324 (James Madison).

30. THE FEDERALIST No. 78, at 521 (Alexander Hamilton).

31. *Id.* at 524. Courts are the "bulwarks of a limited constitution against legislative encroachments." *Id.* at 526.

32. *Id.*

33. John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1766 (1988).

34. THE FEDERALIST No. 78, at 523 (Alexander Hamilton). As commander in chief, the President possesses the power of the sword. *Id.* at 522. By controlling appropriations, the Congress possesses the power of the purse. *Id.* at 523.

35. *Id.*

36. *Id.*

37. William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 27 (1990).

The same insulation that allows a judge to dispense justice impartially also presents an occasion for abuse. John Marshall premised his conception of an independent judiciary upon the notion that each judge will have "nothing to influence or control him but God and his conscience."[38] Yet, many fear a judiciary that is not directly accountable to its public: " 'Put a lock on the door: keep her in.' But the question arises, Who will be guarding the guards?"[39] Accordingly, our government's framers strove to balance the judiciary's independence with accountability.

Beyond structural safeguards that insulate the judiciary, judicial independence is bolstered by the affirmative powers of the judiciary. The most formidable power of the judiciary is the power of judicial review.[40] Intrinsically related to the power of judicial review is the courts' special role as ultimate guardian of the meaning of the Constitution.[41]

B. Foreign Affairs and Institutional Competency

A second area of controversy with respect to the act of state doctrine is institutional competency in the area of foreign affairs. John Marshall declared that the President was the " 'sole organ of the nation in its external relations, and its sole representative with foreign nations.' "[42] Contrary to Marshall's assertion, the Constitution is unclear and incomplete with respect to the foreign affairs power.[43] The Constitution vests the President with the power, subject to the advice and

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38. Evans v. Gore, 253 U.S. 245, 250 (1920) (quoting John Marshall, Debates, Va. Conv. 1829-31, 616, 619), *overruled by* O'Malley v. Woodrough, 307 U.S. 277 (1939).

39. JUVENAL, THE SATIRES OF JUVENAL (Satire VI) 78 (Rolfe Humphries, trans., Indiana University Press 1958).

40. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (recognizing the Supreme Court's authority to declare void as unconstitutional a legislative act); *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding that the Supreme Court has appellate jurisdiction over state court constitutional decisions).

41. *See* Cooper v. Aaron, 358 U.S. 1 (1958) (courts entrusted with special role as ultimate guardians of the meaning of the Constitution and other government officials must not interpret the Constitution for themselves but instead must adhere to courts' interpretation as authoritative).

42. Louis Henkin, *Foreign Affairs and the Constitution*, 1987 FOREIGN AFF. 284, 292 (1988) [hereinafter Henkin, *Foreign Affairs*] (quoting John Marshall). Alexander Hamilton, like Marshall, believed that all of the foreign affairs power belonged to the President except as otherwise provided. *Id.* Hamilton premised his belief upon Article II, Section 1, Clause 1 of the Constitution which states that "[t]he Executive Power shall be vested in a President." *Id.* (quoting U.S. CONST. art. II, § 1, cl. 1). James Madison, on the other hand, believed that the Constitution vested the foreign affairs power in Congress except as otherwise provided. *Id.*

43. *Id.* at 285.

consent of the Senate, to make treaties[44] and to appoint ambassadors.[45] Additionally, the Constitution states that the President shall be the commander in chief.[46] Congress, on the other hand, is assigned the power to regulate commerce with foreign nations,[47] to declare war,[48] and to define offenses against the law of nations.[49] Congress' power to tax and spend for the common defense and general welfare[50] also directly implicates the foreign affairs power.[51] Beyond the specific constitutional provisions, Justice Jackson noted: "[t]here is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."[52] Many controversies, therefore, arise with respect to the distribution of the foreign affairs power.[53]

An analysis of the intent of the framers is equally inconclusive.[54] One of the primary purposes of the framers was to create a central authority capable of effectively conducting foreign relations.[55] Accordingly, the framers replaced the foreign affairs power of the Congress under the Articles of Confederation with that of a federal government.[56] Although the framers considered the conduct of foreign relations as executive, they were determined not to make the President "a republican elected facsimile of the king of England, with republican-royal powers and republican-royal prerogatives."[57] To avoid such a con-

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44. U.S. CONST. art. II, § 2, cl. 2 ("[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties").

45. *Id.* art. II, § 2, cl. 2 ("[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors").

46. *Id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . .").

47. *Id.* art. I, § 8, cl. 3 ("[the Congress shall have Power] [t]o regulate Commerce with foreign Nations").

48. *Id.* art. I, § 8, cl. 11 ("[the Congress shall have Power] [t]o declare War").

49. *Id.* art. I, § 8, cl. 10 ("[the Congress shall have Power] [t]o define and punish . . . Offenses against the Law of Nations").

50. *Id.* art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence . . . .").

51. *See* Henkin, *Foreign Affairs*, *supra* note 42, at 288.

52. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

53. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981) (considering the legality of President Carter's executive agreement for the release of American hostages in Iran); Goldwater v. Carter, 444 U.S. 996 (1979) (the president has no authority to terminate a treaty without the approval of Congress); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (considering the legality of a congressional delegation of authority to the president to forbid arms sales to countries engaged in armed conflict).

54. Henkin, *Foreign Affairs*, *supra* note 42, at 288.

55. Jonathan I. Charney, *The United States in its Third Century: Foreign Affairs: Distribution of Constitutional Authority: Judicial Deference in Foreign Affairs*, 83 AM. J. INT'L L. 805, 806 (1989).

56. *Id.*

57. Henkin, *Foreign Affairs*, *supra* note 42, at 289.

solidation of powers, the framers distributed the foreign affairs power between the executive and the legislature.

Over time, the presidency has expanded its power in the area of foreign relations: "From the start the president was the eyes and ears and voice of the United States; slowly he became also its sturdy arms."[58] Congress often defers to the President in areas where the legislative and executive powers are ill-defined or overlapping.[59] Thus, the President's foreign affairs power increases through the force of repeated acts by the President coupled with congressional acquiescence. The President currently controls the day-to-day conduct of foreign relations, and, as a result, has superior access to information regarding foreign affairs.[60] Additionally, the President may deploy American troops without formal congressional participation.[61]

The Supreme Court has offered little assistance in the delineation of the foreign affairs power between the President and Congress.[62] The Constitution does not expressly limit the role of the courts in deciding cases or controversies implicating foreign relations.[63] Still, the Supreme Court has developed an armory of reasons for refusing to hear such issues.[64] The Court will only hear cases or controversies[65] that are ripe,[66] not moot,[67] and presented by petitioners with standing.[68] Also,

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58. Henkin, *Foreign Affairs*, *supra* note 42, at 291. Congress enacted the War Powers Resolution in an endeavor to enumerate the President's war powers. *See* 50 U.S.C. §§ 1541-48 (1988). Section 1541(c) of the Resolution lists three situations in which the President may use armed force: when Congress declares war; when Congress legislates to give the President specific authority to act; and when the United States or the armed forces of the United States are under attack. 50 U.S.C. § 1541(c).

59. Henkin, *Foreign Affairs*, *supra* note 42, at 290.

60. Henkin, *Foreign Affairs*, *supra* note 42, at 292.

61. Henkin, *Foreign Affairs*, *supra* note 42, at 292. In situations such as the conflicts in Korea and Vietnam, where the President deploys American troops without prior congressional approval, Congress usually ratifies the President's action soon after the deployment. *Id.*

62. Henkin, *Foreign Affairs*, *supra* note 42, at 285.

63. Charney, *supra* note 55, at 806.

64. Henkin, *Foreign Affairs*, *supra* note 42, at 285.

65. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . [and] to Controversies . . . ."); *see also* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-76 (1982) ("case or controversy" requirement founded upon the idea of separation of powers and the proper role of the courts in a democratic society).

66. The doctrine of ripeness bars courts from deciding cases that are brought prematurely because the issues are too speculative or remote to warrant judicial intervention. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 123 (2d ed. 1991); *see also* Poe v. Ulman, 367 U.S. 497 (1961) (Court refused to hear challenge of Connecticut law prohibiting use of contraceptives because there was no allegation the state threatened prosecution).

67. The doctrine of mootness bars a court from hearing a case when "events subsequent to the institution of the lawsuit have deprived the plaintiff of a stake in the action." STONE, *supra* note 66, at 124; *see also* DeFunis v. Odegaard, 416 U.S. 312 (1974) (challenge to preferential

the Court will not rule on political questions.[69] Since the Court often characterizes foreign affairs issues as political questions, the Court seldom adjudicates issues implicating foreign affairs.

In *Baker v. Carr*,[70] the Supreme Court discussed the political question doctrine. The Court explained that "the nonjusticiability of a political question is primarily a function of the separation of powers."[71] In the area of foreign relations, the Court justified the doctrine by acknowledging that "resolution of such issues frequently turn[s] on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature . . . [and] many such questions uniquely demand single-voiced statement of the Government's views."[72] Still, the Court continued, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[73] Alexis de Toqueville observed, however, "[t]here is hardly a political question in the United States that does not sooner or later turn into a judicial one."[74] Where the court is competent with respect to an issue and where the issue does not require a single-voiced statement of the Government's views, the issue is not a political question and is therefore justiciable.[75]

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university admissions program moot because student was in third year of law school and his registration could not be canceled).

68. *See* Allen v. Wright, 468 U.S. 737 (1984) ("standing," an Article III limit on federal judicial power, exists where a party suffers actual or threatened injury which is fairly traceable to challenged conduct and likely to be redressed by a favorable decision).

69. Baker v. Carr, 369 U.S. 186 (1962) (challenge to state apportioning statute is nonjusticiable political question). For a discussion of the political question doctrine, see *infra* notes 70-75 and accompanying text.

70. 369 U.S. 186 (1962).

71. *Id.* at 210.

72. *Id.* (footnotes omitted). "It is fundamental to our constitutional scheme that in dealing with other nations the country must speak with a united voice." Iraq v. First Nat'l City Bank, 353 F.2d 47, 50 (2d Cir. 1966); *see also* United States v. Pink, 315 U.S. 203, 233-34 (1942); United States v. Belmont, 301 U.S. 324, 331 (1937).

73. *Baker*, 369 U.S. at 186. Sometimes the courts hear foreign affairs cases. *See* Japan Whaling Ass'n v. Baldridge, 478 U.S. 221, 238 (1986) (Court rejected contention that political question doctrine barred adjudication of dispute concerning the Secretary of Commerce's decision not to certify Japan for harvesting whales in excess of quotas set by the International Whaling Commission); Goldwater v. Carter, 444 U.S. 996 (1979) (reversing a court of appeals decision that the President has authority to terminate a treaty without congressional approval); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971) (holding some Vietnam War issues are justiciable), *cert. denied*, 404 U.S. 869 (1971).

74. ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 248 (J.P. Mayer & M. Lerner eds. & George Lawrence trans., 1966).

75. In many cases, the Court has reached the merits of a case even though the case had foreign affairs implications or involved disagreement between the branches of government. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981) (adjudicating dispute over legality of President Carter's executive agreement for release of hostages in Iran); United States v. Nixon, 418 U.S. 683 (1974) (forcing President Nixon to turn over Watergate tapes); Youngstown Sheet & Tube

C. *The History of the Act of State Doctrine in the United States*

In general, a United States court possessing jurisdiction to reach the merits of a case will include the rules of international law in its adjudication.[76] The act of state doctrine is an exception to this general rule.[77] "The [act of state] doctrine precludes any review whatever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State."[78] While not depriving the court of jurisdiction, the doctrine is issue-preclusive in operation because the doctrine precludes judicial inquiry into the particular facts that are at issue in a case.[79] The act of state doctrine

> does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision.[80]

Since the courts not only refuse to explore the details of a particular course of conduct, but also accept the propriety of the conduct as a rule for adjudication, the doctrine is essentially a special conflict of laws rule.[81]

Co. v. Sawyer, 343 U.S. 579 (1952) (invalidating President Truman's seizure of steel mills despite the President's national emergency claim); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (adjudicating congressional delegation of power to President to prohibit sale of arms to countries engaged in armed conflict).

76. First Nat'l Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972). International law is an integral part of American law. *See* The Paquete Habana, 175 U.S. 677 (1900) ("where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these to the works of jurists and commentators . . . ."); Murray v. The Charming Betsy, 6 U.S. 64 (1804) ("An act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ."); Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980) ("It is an ancient and salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case.").

77. *First Nat'l Bank*, 406 U.S. at 763. The party asserting the act of state doctrine has the burden of proving that a dismissal is warranted by the particular circumstances presented in the case. *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 694 (1976); Environmental Tectonics v. W.S. Kirkpatrick Inc., 847 F.2d 1052, 1058 (3d Cir. 1988).

78. *First Nat'l Bank*, 406 U.S. at 763.

79. *See* Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1380 (5th Cir. 1980) (act of state doctrine is issue-preclusive); National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 640 (S.D.N.Y. 1978) (act of state doctrine operates as issue preclusion).

80. Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918).

81. *See* Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 178-80 (1967) [hereinafter Henkin, *Act of State*] ("Act of state is a special rule modifying the ordinary rules of conflict of laws.").

The act of state doctrine existed in English jurisprudence as early as 1674.[82] The American doctrine emerged in the late eighteenth and early nineteenth centuries.[83] In *Underhill v. Hernandez*,[84] the Supreme Court expressed an early formulation of the American act of state doctrine. The *Underhill* Court stated:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. 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.[85]

In a subsequent decision, *Oetjen v. Central Leather Co.*,[86] the Court explained that the *Underhill* formulation was premised upon "the highest considerations of international comity and expediency."[87] In keeping with *Oetjen*, the Restatement (Third) of Foreign Relations Law describes the doctrine as one which "was developed by the Court on its own authority, as a principle of judicial restraint, essentially to avoid disrespect for foreign states."[88] The earliest version of the act of state

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82. Blad v. Bamfield, 36 Eng. Rep. 992 (Ch. 1674). In *Blad*, the English courts refused to question a patent which was granted by the King of Denmark. *Id.*

83. *See, e.g.*, The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 336 (1822); L'Invincible, 14 U.S. (1 Wheat.) 238, 253 (1816); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 146 (1812); Hudson v. Guestier, 8 U.S. (4 Cranch) 293, 294 (1808); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 230 (1796).

84. 168 U.S. 250 (1897).

85. *Id.* at 252. Underhill, a United States citizen, was in Venezuela performing a contract for the Venezuelan government to construct a waterworks system and supply the city of Bolivar with water. *Id.* at 250. In 1892, revolutionaries initiated a revolt against the legitimate government of Venezuela. *Id.* General Hernandez, a revolutionary, assumed civil and military control of the city of Bolivar. *Id.* at 251. Soon Hernandez' revolutionary party took possession of the capitol and was formally recognized as the legitimate government of Venezuela by the United States. *Id.*

While Hernandez controlled Bolivar, Underhill applied to him for a passport to leave the city. *Id.* Hernandez refused the request resulting in Underhill's detainment in Bolivar for a short period. *Id.* Underhill brought an action to recover damages for detention and assault against General Hernandez. *Id.* at 250. The Supreme Court affirmed the circuit court's decision denying recovery. *Id.* at 254. The Court held that Hernandez' acts were not subject to adjudication in the courts of the United States because they were the acts of the government of Venezuela. *Id.*

86. 246 U.S. 297 (1918).

87. *Id.* at 303-04. In *Oetjen*, the Court addressed the seizure of a Mexican citizen's hides by a revolutionary military commander for use as a military contribution. *Id.* at 299-300. The Court held that the seizure was an act of state that was not subject to examination by a New Jersey court due to international comity concerns. *Id.* at 303-04; *see also* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972) (the doctrine has its roots in the "notion of comity between independent sovereigns"). The *Oetjen* Court also advanced the separation of powers justification for the act of state doctrine. 246 U.S. at 302.

88. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. a (1987).

doctrine, therefore, derived its force from a judicial recognition of, and respect for, the independence and sovereign equality of States.[89]

In 1964, the Supreme Court expounded a modern formulation of the American doctrine in *Banco Nacional de Cuba v. Sabbatino*.[90] The *Sabbatino* Court held:

> [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.[91]

While recognizing the importance of comity in the international arena,[92] the Court rejected the notion that the act of state doctrine was compelled by either the inherent nature of sovereign authority or international law.[93] Instead, the *Sabbatino* Court noted that the doctrine, although not compelled by the Constitution, has constitutional underpinnings.[94] The act of state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[95] Regarding the separation of powers, the *Oetjen* Court stated that the "conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative — 'the political' — Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[96] Similar to the political question doc-

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89. In The Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), the Permanent Court of International Justice noted the prominence of state sovereignty and equality: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . . Restrictions upon the independence of States cannot therefore be presumed." *Id.* at 18.

90. 376 U.S. 398 (1964).

91. *Id.* at 428.

92. For example, "[u]nder principles of comity governing this country's relations with other nations, sovereign states are allowed to sue in the courts of the United States." *Id.* at 408-09. In the legal sense, comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

93. *Sabbatino*, 376 U.S. at 421. The Court stated that "while historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence." *Id.* Furthermore, the Court reasoned that the act of state doctrine was not required by international law because application of the doctrine was not evidenced by consistent state practice. *Id.*

94. *Id.* at 423.

95. *Id.*

96. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

trine, the act of state doctrine reflects judicial deference to the executive branch.[97]

D. The Role of the Executive Branch in Act of State Cases

The executive branch often issues statements called "Bernstein letters," which are expressions of the executive branch's position regarding the applicability of the act of state doctrine to a particular case.[98] The Supreme Court has been divided as to the impact of these executive branch statements.[99] The practice of issuing "Bernstein letters" originated with the companion cases of *Bernstein v. Van Heyghen Freres, S.A.*,[100] and *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*.[101] Bernstein, a Jew residing in the United States after World War II, brought a series of actions against German officials to recover property taken from him by the Nazi Government during his former residency in Germany.[102] The Second Circuit Court of Appeals refused to hear Bernstein's claims, holding that the act of state doctrine applied because the executive branch had not indicated a

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97. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. a (1987). Henkin writes:

> Determination and application of international law are integral to the conduct of foreign relations and are the responsibility of the federal government. In the absence of federal statute, treaty, or authoritative Executive action, international law is determined, 'made,' by the federal courts as though it were federal law, and their views bind the state courts. Issues of international law that arise in the state courts, then, are federal questions and can be appealed to the Supreme Court; and the Supreme Court can determine and establish a single, uniform rule of customary international law for state as well as federal courts.

LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 223 (1972) [hereinafter HENKIN, CONSTITUTION].

The United States Supreme Court has always played a prominent role in the development of international law. Henkin writes:

> Like treaties, customary international law is law for the Executive and the courts to apply, but the Constitution does not forbid the President (or the Congress) to violate international law, and the courts will give effect to acts within the constitutional powers of the political branches without regard to international law. On the other hand, the courts have enforced international law against lower federal officials not directed by the President to disregard international law.

Id. at 221-22. (footnotes omitted).

98. The State Department wrote "Bernstein letters" declaring that the Executive Branch did not object to the adjudication in Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954), First Nat'l City Bank of New York v. Cuba, 425 U.S. 682 (1976), and Kalamazoo Spice Extraction Co. v. Government of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984). RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 reporters' note 8 (1987).

99. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. h.

100. 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947).

101. 173 F.2d 71 (2d Cir. 1949), *amended*, 210 F.2d 375 (1954).

102. *Bernstein*, 163 F.2d at 246.

"positive intent to relax the doctrine."[103] In response, the State Department wrote a letter which stated that "the policy of the Executive . . . [was] to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."[104] Accordingly, the court of appeals reversed its decision in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij* and remanded the case to the trial court for a full inquiry into Bernstein's allegations.[105] Thus, the court of appeals held that the act of state doctrine applied unless the State Department issued a "Bernstein letter" instructing the courts not to apply the doctrine.[106]

In *Sabbatino*, the Supreme Court rejected the notion that a statement by the State Department regarding the application of the act of state doctrine was controlling.[107] The *Sabbatino* Court noted that "[i]t is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive as to probable result."[108] The Court also noted that occasionally the State Department will refrain from taking official positions in the interest of diplomacy.[109] Thus, when the State Department issues a "Bernstein letter" stating that it has no objections to adjudication, United States courts will make their own determination regarding the applicability of the act of state doctrine taking into account the view of the executive branch.[110] A "Bernstein letter," therefore, is persuasive but never determinative of the court's resolution of the act of state issue.[111]

E. The Role of Congress in Act of State Cases

In response to the *Sabbatino* decision in 1964, Congress adopted the Second Hickenlooper Amendment, which became part of the Foreign Assistance Act of 1965.[112] The Amendment is a statutory excep-

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103. *Id.* at 251; *see also Bernstein*, 173 F.2d 71.

104. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 reporters' note 8 (1987).

105. 210 F.2d 375 (2d Cir. 1954).

106. *Id.* at 376.

107. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436 (1964).

108. *Id.*

109. *Id.*

110. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 reporters' note 8 (1987); *see also* First Nat'l City Bank of New York v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (two concurring and four dissenting Justices reject the Bernstein exception where State Department writes Bernstein letter); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (State Department's Bernstein letter not applied).

111. *See supra* note 110.

112. 22 U.S.C. § 2370(e)(2) (1988). The Amendment reads:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights

tion to the act of state doctrine that, by its terms, applies to a taking of property in violation of international law by a foreign state in the absence of a statement by the Executive Branch requiring the court to apply the doctrine.[113] Congress intended for the Amendment to reverse the *Sabbatino* Court's presumption that the adjudication of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not.[114] The Amendment establishes the contrary presumption that a court may adjudicate on the merits unless the President states that the adjudication would inhibit the conduct of foreign policy.[115] In practice, courts have applied the Amendment to title claims regarding specific property before the court but have not applied the Amendment to claims for compensation.[116] As of 1987, no President had determined, in a case where the Amendment applied, that United States foreign policy interests called for application of the act of state doctrine.[117]

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to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and standards set out in this subsection:

Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Id.

113. *Id.*

114. S. REP. No. 1188, 88th Cong., 2d Sess. 3890 (1964).

115. *See* 22 U.S.C. § 2370(e)(2). When *Sabbatino* was remanded, the district court applied the Amendment and dismissed the complaint. 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).

116. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 444 cmt. a (1987). *See, e.g.*, Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 882 n.10 (2d Cir. 1981); First Nat'l City Bank of New York v. Banco Nacional de Cuba, 431 F.2d 394, 399-402 (2d Cir. 1970) (Second Hickenlooper Amendment only applies to a claimant's specific property found in the United States, not to all assets of nationalizing state), *rev'd on other grounds*, 406 U.S. 759 (1972); French v. Banco Nacional de Cuba, 242 N.E.2d 704 (N.Y. 1968) (only property directly related to expropriation and found in the United States subject to Second Hickenlooper Amendment); *contra* Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1541 n.180 (D.C. Cir. 1984) ("property" in the Second Hickenlooper Amendment not restricted to property located within the United States), *vacated*, 471 U.S. 1113 (1985).

117. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 444 reporters' note 3 (1987). President Carter, implementing the Algiers Accords between the United States and Iran, made assurances that the act of state doctrine would not bar adjudication of claims brought by the government of Iran to recover property removed from Iran by the Shah or his family. Exec. Order No. 12284 § 1-104, 46 Fed. Reg. 7,929 (1981).

Congress' attempt to limit the application of the act of state doctrine is problematic. First, the Amendment requires the courts to make a determination on the merits.[118] Since the act of state doctrine merely acts as a special conflict of laws rule requiring that the substantive law of the foreign state be applied, the doctrine is issue-preclusive in effect and never divests the courts of jurisdiction.[119] With or without the Amendment, courts always reach the merits in an act of state case.[120] Second, courts are not required by the act of state doctrine to decline to apply principles of international law.[121] Even if the act of state doctrine did not exist, courts would not be obliged to apply principles of international law in these cases.[122] Instead, courts would give effect to domestic conflicts principles and to the appropriate substantive law as required by the conflicts principles.[123] Thus, international law "might become relevant only if, somehow, the governing substantive law including its conflicts rule made it relevant, or if the public policy of the forum invoked it."[124] Because Congress treated the act of state doctrine as jurisdictional and misapprehended the doctrine's relationship to international law, the impact of the Second Hickenlooper Amendment remains unclear.

F. The Relationship Between the Act of State Doctrine and Sovereign Immunity

Both the act of state doctrine and sovereign immunity[125] have their roots in the "notion of sovereignty between independent states."[126] Under some circumstances, the act of state doctrine and sovereign immunity may be raised as defenses in the same case and with respect to the same issue.[127] The act of state doctrine applies only to a government's activities within its own territory.[128] Sovereign immunity ordinarily applies to a government's activities within the forum state.[129]

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118. *See* 22 U.S.C. § 2370(e)(2) (1988).
119. Henkin, *Act of State*, *supra* note 81, at 178.
120. Henkin, *Act of State*, *supra* note 81, at 180.
121. Henkin, *Act of State*, *supra* note 81, at 180-81.
122. Henkin, *Act of State*, *supra* note 81, at 181.
123. Henkin, *Act of State*, *supra* note 81, at 181.
124. Henkin, *Act of State*, *supra* note 81, at 181.
125. Sovereign immunity is the immunity of foreign states to the jurisdiction of the courts of other states. WALLACE, *supra* note 7, at 108.
126. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 438 (1964) (act of state doctrine shares with sovereign immunity a respect for sovereign states).
127. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 455 cmt. c (1987).
128. *Id.* at § 443 reporters' note 11 (1987).
129. *Id.*

Whereas the act of state doctrine is "addressed to the permissible scope of inquiry by courts into particular issues presented," sovereign immunity is "addressed essentially to the jurisdiction of the court."[130] Therefore, when both the act of state doctrine and sovereign immunity are asserted, the issue of immunity should be resolved first because the success of an immunity defense would divest the court of jurisdiction.[131] The failure of the immunity defense, however, is not dispositive of the issue of applicability of the act of state doctrine.[132]

Historically, the courts of the United States recognized the absolute immunity of a foreign sovereign from the jurisdiction of the courts of the United States.[133] The American doctrine of sovereign immunity dates back to Justice Marshall's opinion in *The Schooner Exchange v. McFaddon*.[134] In *The Schooner Exchange*, American plaintiffs sought the return of a vessel which had been forcibly taken on the high seas for military use by the French Emperor.[135] In affirming the dismissal of the suit, Justice Marshall wrote for the Court:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.[136]

Thus, as expressed by the Court in *The Schooner Exchange*, the absolute theory of sovereign immunity was premised upon a positivist view of state sovereignty.[137] Accordingly, nonconsenting foreign sovereigns were never subjected to suit in United States courts through the exercise of extraterritorial jurisdiction.

The positivism of Westphalia dominated the late nineteenth and early twentieth centuries.[138] In *The Case of the S.S. "Lotus"*[139] the Permanent Court of International Justice reaffirmed the superior status

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130. *Id.*
131. *Id.*
132. *Id.*
133. *See, e.g.*, Berizzi Bros. v. S.S. Pesaro, 271 U.S. 562 (1926); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).
134. 11 U.S. (7 Cranch) 116 (1812).
135. *Id.* at 117.
136. *Id.* at 136.
137. For a definition of positivism, see *supra* note 2.
138. CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 51 (P.E. Corbett trans., Princeton University Press 1968).
139. The Case of the S.S. "Lotus", 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

of the sovereign state in the international arena.[140] The court held that the right to exercise jurisdiction rests in the sovereignty of a state and that "[r]estrictions upon the independence of [s]tates cannot therefore be presumed."[141] Hence, positivism was premised upon the belief that international law permits all that it does not forbid.[142]

The horrors of World War II led to the establishment of the United Nations.[143] For a sovereign state, the price of participation in the United Nations was a relinquishment of sovereignty with respect to certain activities.[144] As states relinquished sovereignty in the interest of promoting peace and stability, positivism waned.[145] The weakening of positivism led to the expansion of universal jurisdiction[146] and the rec-

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140. *Id.*

141. *Id.* at 18.

142. *Id.*

143. The preamble to the United Nations Charter states: "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . do hereby establish . . . the United Nations." U.N. CHARTER pmbl.

144. DE VISSCHER, *supra* note 138, at 227-28. For example, article 104 of the Charter states: "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes." U.N. CHARTER art. 104. Further, article 2, paragraph 5 requires Members to give "the United Nations every assistance in any action it takes in accordance with the present Charter . . . ." *Id.* art. 2, para. 5.

145. In *Filartiga v. Pena-Irala*, the Second Circuit Court of Appeals addressed the expanding view of extraterritorial jurisdiction with respect to human rights violations. 630 F.2d 876, 890 (2d Cir. 1980). In support of the extraterritorial jurisdiction of the Alien Tort Statute, 28 U.S.C. § 1350 (1988), the court stated:

> In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made . . . . Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

Id.

146. The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 states: "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). The principle of universal jurisdiction has also been recognized in Article 105 of the Law of the Sea Convention with respect to piracy: "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft . . . and arrest the persons and seize the property on board. The Courts of the State which carried out the seizure may decide upon the penalties to be imposed." United Nations Convention on the Law of the Sea, art. 105, *reprinted in* The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea (United Nations 1983); *see also In re* Demjanjuk, 612 F. Supp. 544 (N.D. Ohio

ognition of some degree of international legal personality in organizations and to an even smaller degree in individuals.[147]

The dramatic changes in international law which followed World War II led to a re-evaluation of American sovereign immunity policy. In 1952, the State Department issued the Tate Letter,[148] which expressed the State Department's decision to adopt a restrictive theory of sovereign immunity.[149] Under a restrictive theory, foreign states are granted immunity with respect to public acts, *acta jure imperii*, but are denied immunity with respect to private or commercial acts, *acta jure gestionis*.[150] Further, the Tate Letter, while acknowledging that "a shift in policy by the executive cannot control the courts," emphasized the belief shared by some of the Supreme Court Justices that the courts should follow the executive branch decisions in the area of sovereign immunity because of the executive branch's unique responsibility for the conduct of foreign relations.[151] The State Department, therefore, would advise the Justice Department of all requests for immunity and of the Justice Department's decision with respect to each request.[152]

Subsequently, in an effort to remove the determination of immunity from the hands of the executive branch and place the determination in the hands of the judiciary,[153] Congress passed the Foreign Sovereign Immunities Act (FSIA).[154] The FSIA codified the restrictive theory of sovereign immunity.[155] Section 1605(a)(2) subjects foreign states to the jurisdiction of United States courts where the activity in question is commercial and has a direct effect within the United States.[156] A commercial activity is defined to include a single commer-

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1985) (approving Israel's request for extradition of an individual charged with committing crimes in Nazi concentration camps).

147. WALLACE, *supra* note 7, at 60, 65.

148. Letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to the Acting Attorney General (May 19, 1952), 26 DEP'T ST. BULL. 984 (1952), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-15 app. 2 (1976).

149. *Id.*

150. *Id.*

151. *Id.* at 714.

152. *Id.*

153. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604.

154. 28 U.S.C. §§ 1330(a)-(c), 1332(a)(4), 1391(f), 1441(d), 1602-11 (1988).

155. 28 U.S.C. § 1605(a)(2) (1988).

156. Section 1605(a)(2) denies immunity in any case:

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

cial act or a course of commercial conduct.[157] The commercial character of a government activity is determined by "the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[158] Hence, nature and not purpose is controlling.

G. *The Commercial Activities Exception: Dunhill and its Progeny*

In *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[159] four members of the Supreme Court majority supported a commercial activities exception to the act of state doctrine.[160] The controversy in *Dunhill* arose in 1960 when the Cuban government nationalized the assets of numerous companies located within Cuban territory.[161] Among the nationalized companies were five cigar manufacturers owned primarily by Cuban nationals and organized under Cuban law.[162] The companies exported large quantities of Havana cigars to customers in other countries.[163] In the United States, the principal importers of the Havana cigars were Dunhill, Saks & Co., and Faber, Coe & Gregg, Inc.[164]

After the nationalization, the importers paid the interventors[165] various amounts for preintervention shipments because they believed that the interventors had a right to collect the accounts receivable.[166] Additionally, the American importers continued to receive further shipments of cigars.[167] The ousted owners of the manufacturing companies fled to the United States where they brought actions against the American importers for trademark infringement and for the payment of the purchase price of all preintervention and postintervention shipments of

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Id.

157. Broadbent v. Organization of Am. States, 628 F.2d 27, 33-34 (D.C. Cir. 1980). Commercial activities include enterprises such as airlines, state trading companies, or mineral extraction companies. *Id.* at 34. An "activity customarily carried on for profit" is assumed to be commercial in character. *Id.* Also, since the purpose of the activity is irrelevant, contracts for military equipment and contracts to repair embassy buildings would also constitute commercial activities under the FSIA. *Id.* In contrast, the employment of diplomatic, civil service, or military personnel is governmental conduct. *Id.*

158. 28 U.S.C. § 1603(d) (1988).

159. 425 U.S. 682 (1976).

160. *Id.* at 705. Justice White was joined by Chief Justice Burger and Justices Powell and Rehnquist in Part III of his opinion. *Id.* at 684. Justice Stevens joined only parts I and II of the opinion. *Id.* at 715. The majority denied the application of the act of state doctrine by holding that there was insufficient evidence to prove that the event in question involved an act of state by the Cuban Government. *Id.* at 694.

161. *Id.* at 685.

162. *Id.*

163. *Id.*

164. *Id.*

165. The Court used the term "interventor" to refer to those operating the cigar companies on behalf of the Cuban government. *Id.*

166. *Id.*

167. *Id.*

cigars bearing their trademark.[168] The owners alleged that payments by the importers to the interventors did not satisfy the importers' debts to the rightful owners.[169] The Cuban interventors were allowed to intervene in the consolidated action.[170] The interventors sought payment for postintervention shipments.[171] The district court granted judgment to the owners against the interventors, and allowed the importers to set off their mistaken payments to the interventors for preintervention shipments against the amounts due from them for postintervention purchases.[172] Because Dunhill's preintervention payments exceeded its postintervention purchases, the district court granted Dunhill an affirmative recovery.[173] The Second Circuit Court of Appeals invoked the act of state doctrine and denied the affirmative judgment to Dunhill to the extent its claim exceeded its debt.[174]

The Supreme Court reversed the court of appeals and held that the act of state doctrine did not apply with respect to the interventors' obligations.[175] Four members of the majority supported a commercial activities exception to the act of state doctrine.[176] The Justices premised the exception upon two theories as explained below: (1) the act of state is analogous to sovereign immunity; and (2) there is broad international consensus regarding the applicable rules of commercial law.[177] Given the international consensus, a decision against a foreign sovereign's commercial act is unlikely to "touch very sharply on the 'national nerves' " of foreign sovereigns.[178]

1. Analogy Between Act of State and Sovereign Immunity

Justice White first argued the propriety of a commercial activities exception to the act of state doctrine by analogizing the act of state doctrine and sovereign immunity.[179] He noted that the Tate Letter, in embracing the restrictive theory of sovereign immunity, expounded the official policy of the FSIA.[180] Further, Justice White acknowledged the

168. *Id.*
169. *Id.*
170. *Id.* at 685-86.
171. *Id.* at 686.
172. *Id.* at 688.
173. *Id.*
174. *Id.* at 689.
175. *Id.* at 690.
176. *Id.* at 695. For a list of the Justices supporting the commercial activities exception, see *supra* note 160. Since only four Justices endorsed the exception, courts are divided regarding the validity of a commercial activities exception. *See infra* note 199.
177. *Dunhill*, 425 U.S. at 697-706.
178. *Id.* at 704.
179. *Id.* at 697-703.
180. *Id.* at 698.

State Department's 1975 "Bernstein letter," which expressed the State Department's position that the *Dunhill* case did not raise an act of state question.[181] The 1975 letter included the following statement:

> [S]ince 1952, the Department of State has adhered to the position that the commercial and private activities of foreign states do not give rise to sovereign immunity. Implicit in this position is a determination that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations, and that such adjudications are consistent with international law on sovereign immunity.[182]

Justice White suggested that the purpose of restrictive immunity was "to assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts whenever possible."[183] He noted that a commercial activity, which is susceptible to the jurisdiction of United States courts because of the restrictive theory of sovereign immunity, might still qualify as an act of state.[184] Under the act of state doctrine, however, the foreign sovereign would enjoy a form of immunity specifically denied them under sovereign immunity.[185] Thus, application of the act of state doctrine in cases involving commercial activities would undermine the policy underlying the adoption of a restrictive theory of immunity.[186]

Justice White further stated that there is a greater risk of embarrassment to the Executive Branch if the commercial activities exception is not recognized.[187] He warned that the denial of the commercial activities exception in act of state cases would result in an embarrassing inconsistency.[188] First, the courts would be granted jurisdiction through the restrictive theory of sovereign immunity.[189] The courts would then refuse to question the commercial act of the foreign sovereign, effectively denying a true review on the merits.[190]

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181. *Id.*

182. *Id.* at 707, app. 1 (Letter from Monroe Leigh, Acting Legal Advisor of the Department of State, to the Acting Solicitor General (November 26, 1975)).

183. *Id.* at 699.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 698.

188. *Id.* at 698. In *Mexico v. Hoffman,* the Court warned:

> Every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government. Hence it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs.

324 U.S. 30, 35 (1945).

189. *Dunhill*, 425 U.S. at 698.

190. *Id.*

2. Broad International Consensus Regarding the Applicable Rules of Commercial Law

Justice White also suggested that there is broad international consensus regarding the applicable rules of commercial law and that the broad consensus supports the adoption of a commercial activities exception to the act of state doctrine.[191] With respect to international comity concerns, Justice White distinguished governmental acts from commercial acts.[192] Little codification or consensus exists as to the rules of international law concerning the exercise of governmental powers such as military powers and expropriations.[193] In contrast, more discernible rules of international law exist with respect to the commercial dealings of private parties in the international market.[194] The *Sabbatino* Court suggested:

> [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than focus on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[195]

Further, the *Dunhill* Court noted a trend in other countries toward recognizing a restrictive theory of sovereign immunity.[196] Given the international consensus in the area of commercial dealings as well as the international trend towards restrictive theories of immunity, the rendering of a judgment with respect to a foreign sovereign's commercial act is unlikely to "touch sharply upon the nerves" of foreign sovereigns.[197]

Only three Justices joined Justice White in embracing the commercial activities exception contained in Part III of his plurality opinion in *Dunhill*.[198] Accordingly, much controversy exists regarding the viability of a commercial activities exception to the act of state doc-

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191. *Id.* at 704.

192. *Id.*

193. *Id.*

194. *Id.*

195. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

196. *Dunhill*, 425 U.S. at 704.

197. *Id.*

198. *See supra* note 160.

trine.[199] The Supreme Court has not addressed the issue since its decision in *Dunhill*.[200]

III. Analysis

Arguments in support of the act of state doctrine are numerous and complex. First, proponents of the doctrine argue that international law does not exist and that in the absence of an international rule of law courts must defer to the political branches to remedy international disputes.[201] Second, proponents contend that the act of state doctrine supports the separation of powers by maintaining institutional competency and preventing embarrassment to the executive in the conduct of foreign affairs.[202] Finally, proponents argue that the doctrine is supported by international comity.[203]

With the development of international law in the twentieth century, many of the theories in support of the act of state doctrine are losing force. International law is broadly recognized and is expanding.[204] Furthermore, as evidenced by Eastern European reform, a truly independent judiciary on the municipal level is essential to uphold the international rule of law.[205] United States courts are competent to apply the international rules of law where such rules exist. By applying existing rules of international law to a particular international dispute, a United States court is less likely to embarrass the executive or to touch upon the nerves of a foreign sovereign.[206] When such codification of rules is particularly solid with respect to commercial transactions, a blanket exception to the act of state doctrine is far less warranted. The blanket exception would deprive the courts of their proper role in the

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199. Some courts have suggested that *Dunhill* created a commercial activities exception. *See* Hunt v. Mobil Oil Corp., 550 F.2d 68, 79 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); Braka v. Bancomer, S.A., 589 F. Supp. 1465, 1471-72 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985); National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 640-41 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979). Other courts decline to rule definitively on the exception. *See* Braka v. Bancomer, S.A., 762 F.2d 222, 225 (2d Cir. 1985); Airline Pilots Ass'n, Int'l v. Taca Int'l Airlines, S.A., 748 F.2d 965, 970 (5th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 408 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48, 52 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

200. Recently, the Supreme Court made reference to the "possible exception" without ruling on it. *See* W.S. Kirkpatrick v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 404-05 (1990).

201. *See infra* text accompanying notes 208-10.

202. *See infra* text accompanying notes 231-34, 281-332.

203. *See infra* text accompanying notes 340-47.

204. *See infra* text accompanying notes 211-30.

205. *See infra* text accompanying notes 235-80.

206. Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 704 (1976).

resolution of international disputes by removing the determination of justiciability from the courts.[207]

A. *The Existence of International Law*

Where an international dispute arises in the absence of law, the unique remedy rests in diplomacy as exercised by the political branches of government: "[I]nternational disputes are of two distinct kinds, one of which, the justiciable or legal, is inherently susceptible of being decided on the basis of law, while the other, the non-justiciable or political, is not."[208] Arguably, an international rule of law is lacking because of the absence of an international legislature to create it, an international executive to enforce it, and an effective international judiciary to resolve disputes about it.[209] States obey international law voluntarily, and, ultimately, international law "always yield[s] to national interest."[210] Thus, the fundamental argument in support of judicial deference to the political branches in the area of foreign affairs is that international law does not really exist.

However, international law does exist, although the incidents of its enforcement often may be lacking.[211] State "subjection to [international] law is as yet imperfect, though it is real as far as it goes; the problem of extending it is one of great practical difficulty, but it is not one of intrinsic impossibility."[212] In the *Corfu Channel Case*,[213] Judge Alvarez of the International Court of Justice acknowledged: "We can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law founded on the individualist regime, according to which States were only bound by the rules they had accepted."[214] In reality, "nations have accepted important limitations on their sovereignty, . . . they have observed these norms and undertakings, [and] the result has been substantial order in international relations."[215] Furthermore, "*almost all nations observe almost all principles of international law . . . almost all of the*

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207. *See infra* text accompanying notes 344-47.

208. BRIERLY, *supra* note 2, at 366.

209. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1 (2d ed. 1992) [hereinafter HENKIN, INTERNATIONAL LAW].

210. LOUIS HENKIN, HOW NATIONS BEHAVE 25 (2d ed. 1979) [hereinafter HENKIN, HOW NATIONS BEHAVE].

211. Henkin explained: "It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." *Id.* at 47 (emphasis omitted).

212. BRIERLY, *supra* note 2, at 55.

213. United Kingdom v. Alberta, 1949 I.C.J. 4 (April 9, 1949).

214. *Id.* at 43.

215. HENKIN, HOW NATIONS BEHAVE, *supra* note 210, at 26.

time."[216] Regarding the absence of an effective international judiciary, Justice Powell, in a 1972 decision, suggested that "[u]ntil international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law."[217] The United States Supreme Court has played a prominent role in the development of international law.[218] For example, the Court has recognized its obligation to ascertain and administer international customary law.[219] In *The Paquete Habana*,[220] the Supreme Court stated: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[221] The *Paquete Habana* Court not only recognized the application of international law in United States courts, but also explored state practice to determine that a particular customary rule of law did in fact exist.[222]

Moreover, lower federal courts are often called upon to adjudicate international law cases, including cases brought by foreign nationals that raise issues of violations of international law.[223] The Alien Tort Statute grants federal courts jurisdiction in cases involving international violations of human rights against non-nationals.[224] For example, in *Filartiga v. Pena-Irala*,[225] the Second Circuit Court of Appeals addressed the status of torture as a violation of customary international law.[226] Nationals of Paraguay brought an action under the Alien Tort Statute in the Eastern District of New York for the wrongful death of their son who had been tortured to death by the Inspector General of the Police in Paraguay.[227] The district court dismissed the claim for

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216. HENKIN, HOW NATIONS BEHAVE, *supra* note 210, at 47.

217. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 775 (1972) (Powell, J., concurring).

218. *See* United States v. Alvarez-Machain, 112 S. Ct. 2188, 2205-06 (interim ed. 1992) (Stevens, J., dissenting) ("The way that we perform . . . in a case of this kind sets an example that other tribunals in other countries are sure to emulate.").

219. The Paquete Habana, 175 U.S. 677, 700 (1900).

220. 175 U.S. 677 (1900).

221. *Id.* at 700.

222. *Id.* The Court determined that customary international law prohibited seizure of fishing vessels during a time of war. *Id.*

223. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (relief granted for international human rights violations); *cf.* Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981) (relief denied because international law created no private tort recognized by United States law), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

224. 28 U.S.C. § 1350 (1988).

225. 630 F.2d 876 (1980).

226. *Id.* at 879.

227. *Id.* at 878.

lack of subject matter jurisdiction.[228] In remanding the case for adjudication on the merits, the Second Circuit Court of Appeals analyzed several United Nations resolutions, including the Declaration on the Protection of All Persons from Being Subjected to Torture, and concluding torture constituted a violation of customary international law.[229] The court also held that the violation was cognizable in United States courts under the Alien Tort Statute, and that jurisdiction was premised upon the constitutional power of Congress to define offenses against the Law of Nations.[230] In pure positivist terms, therefore, international law does exist and as such is the basis for adjudication in the domestic courts of the various nations, including those of the United States.

B. Separation of Powers

The act of state doctrine has constitutional underpinnings that implicate the separation of powers.[231] In part, the doctrine evolved from the notion that the courts lacked institutional competency in the area of foreign affairs.[232] Additionally, proponents contend that the doctrine supports the role of the executive branch as the sole voice in international relations and prevents embarrassment to the executive branch.[233] Still, recent Eastern European reformers, while acknowledging the importance of a separation of powers, also stress the necessity of maintaining independent domestic judiciaries as guardians of the international rule of law.[234]

1. An Independent Judiciary

Given the existence of a developing body of international law, the maintenance of independent domestic judiciaries is of paramount importance to the preservation of the international rule of law. Until an effective supra-national judiciary is established, including a supra-national criminal tribunal,[235] domestic courts are necessary forums for the

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228. *Id.*

229. *Id.* at 882-85.

230. *Id.* at 885-86 (citing U.S. CONST. art. I, § 8, cl. 10).

231. For a discussion of the separation of powers underpinnings, see *supra* notes 94-97 and accompanying text.

232. For a discussion of institutional competency with respect to foreign affairs, see *infra* notes 281-315 and accompanying text.

233. For a discussion of the sole voice and embarrassment doctrines, see *infra* notes 316-21, 333-39 and accompanying text.

234. For a discussion of the role of domestic courts in advancing international law, see *infra* notes 235-38 and accompanying text.

235. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277, states that persons charged with genocide shall be convicted by either

resolution of international legal disputes.[236] Thus, judicial deference on a domestic level may not be appropriate where individual liberty interests are at stake.[237] The growth of universal jurisdiction supports the modern notion that certain international human rights violations are punishable by domestic courts irrespective of international political considerations.[238]

The United States Constitution established an independent judiciary charged with the duty of protecting the constitutional order and upholding the rights of individuals.[239] For the Federalists, the complete independence of the judiciary was an essential part of securing the fundamental liberty interests of individuals.[240] The Federalists also believed that an independent judiciary was necessary to prevent abuses of power by the executive and legislative branches.[241] In structuring the Constitution, the framers rejected Montesquieu's model of legislative supremacy, preferring a judiciary with real and effective independence.[242]

Modern democracies also prefer the Federalists' notion of an independent judiciary over Montesquieu's conception of legislative supremacy.[243] Recently, the Conference on Security and Cooperation in Europe (CSCE) Seminar of Experts on Democratic Institutions delivered a report to the CSCE Council that endorsed the value of an independent judiciary.[244] The report stated:

> It was also broadly recognized that the independence and authority of the judiciary was a crucial element in safeguarding the rule of law and securing effective implementation of human rights and fundamental freedoms. An independent judiciary serves to uphold the integrity of other democratic institutions, reinforce their effectiveness, and prevent abuse of power.[245]

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competent State tribunals or international penal tribunals. HENKIN, INTERNATIONAL LAW, *supra* note 209, at 360. No international penal tribunal has been established. *Id.* at 360.

236. *See supra* text accompanying note 217.

237. Charney, *supra* note 55, at 813.

238. For a discussion of universal jurisdiction, see *supra* text accompanying note 146.

239. For a discussion of the role of the judiciary, see *supra* notes 25-33 and accompanying text.

240. THE FEDERALIST No. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

241. *Id.*

242. Clark, *supra* note 28, at 1798.

243. Clark, *supra* note 28, at 1798.

244. *Conference on Security and Cooperation in Europe: Report to the CSCE Council from the CSCE Seminar of Experts on Democratic Institutions*, 31 I.L.M. 374 (1992).

245. *Id.* at 377.

The Treaty of Rome, which established the European Court of Justice, also stressed the importance of an independent judiciary.[246] The Treaty requires judges to be "persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence."[247] The European Court judge's duty is to protect individual rights and interpret laws "irrespective of political considerations."[248]

The notion of an independent judiciary was prominent in the constitutional reforms of a number of civil law countries.[249] The countries of Austria, Belgium, Chile, Germany, Greece, Hungary, Italy, Portugal, Spain, Turkey, and to a limited extent, Switzerland have all adopted variations of Hans Kelsen's plan[250] for a constitutional court possessing the power of judicial review.[251] Moreover, Japan recognized judicial independence as early as 1891.[252]

The notion of an independent judiciary is of limited value, however, unless government is structured to guarantee real and effective independence. For example, a 1986 Polish political text asserted that the Polish judiciary's obedience to the Party did not contradict its independence.[253] Contrary to Montesquieu's model of separated powers, Poland espoused the Soviet model of government premised upon Lenin's thesis of the unity of state power.[254] Under the Soviet model, "the 'will of the working people' is the source of all power."[255] Since representatives are elected by the people and express the will of the people, a

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246. Eugene C. Austin, *The European Court of Justice: Last Hope for 1992*, 1990 B.Y.U. L. REV. 1631, 1640 (1990).

247. Treaty Establishing the European Economic Community, *signed* Mar. 25, 1957, 1 Common Mkt. Rep. (CCH) 151, art. 167(1) (1971).

248. Austin, *supra* note 246, at 1640.

249. Walter F. Murphy, *The 19th John M. Tucker, Jr. Lecture in Civil Law: Civil Law, Common Law, and Constitutional Democracy*, 52 LA. L. REV. 91, 134 (1991).

250. Hans Kelsen's Austrian system of judicial review is more limited in application than American judicial review. Rett R. Ludwikowski, *Searching for a New Constitutional Model for East-Central Europe*, 17 SYRACUSE J. INT'L L. & COM. 91, 169 (1991). The Austrian model reserves the right of judicial review to one special court. *Id.* The system favors "abstract review," a review initiated before the special court that is entirely independent of any particular case. *Id.* In contrast, the American system of judicial review is the most diffuse. ALLAN R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW 136 (1989). Under the American system, the power of review is vested in all ordinary courts. *Id.*

251. Murphy, *supra* note 249, at 134.

252. Harold See, *The Judiciary and Dispute Resolution in Japan: A Survey*, 10 FLA. ST. U. L. REV. 339, 346 (1982).

253. Stanislaw Frankowski, *The Independence of the Judiciary in Poland: Reflections on Andrzej Rzeplinski's Sadownictwo W Polsce Ludowej (The Judiciary in Peoples' Poland) (1989)*, 8 ARIZ. J. INT'L & COMP. L. 33, 33-34 (1991).

254. *Id.* at 34.

255. *Id.*

separation of powers is unnecessary.[256] The judiciary operates as a coercive arm of the Communist Party.[257] In theory, judges exercise functional independence because they are free from direct external pressure while deciding a particular case.[258] In practice, the narrowly defined independence is illusory because the judiciary's specific decisions necessarily reflect political subservience.[259]

Post-Stalinist Poland retained the subservience of the judiciary.[260] The Minister of Justice controlled all judicial appointments and removals.[261] Higher-level positions within the judiciary were reserved for trustworthy Party members.[262] Judges received unsatisfactory salaries, worked under inadequate conditions, and possessed low morale and self-esteem.[263]

The creation of Solidarity in August of 1980 brought the notion of an independent judiciary to the forefront of Polish political reform.[264] Polish judges, by an overwhelming majority, demanded the immediate rejection of the administrative appointments of judges by the Minister of Justice in favor of an electoral process.[265] The 1989 Round Table Agreement between Solidarity and the Communist Party espoused separation of powers as the foundation of state democratization.[266] The Agreement ensured judicial independence through the mechanisms of judicial appointment by the National Judicial Council and through a judge's irremovability and nontransferability.[267] On April 7, 1989, the Parliament amended the Polish Constitution to incorporate the main ideas of the Round Table Agreement.[268]

Similarly, prior to reunification, the German Democratic Republic (GDR) initiated constitutional reforms resulting in the establishment of an independent judiciary.[269] Although the 1968/74 Constitution emphasized the independence of the judiciary, a number of provisions suggested that the Supreme Court was ultimately responsible to the politi-

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256. *Id.* at 34-35.
257. *Id.* at 35.
258. *Id.*
259. *Id.*
260. *Id.* at 41.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* at 44.
265. *Id.*
266. *Id.* at 47.
267. *Id.* at 48.
268. *Id.*
269. *See generally* Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475 (1991).

cal organs.[270] The Volkskammer had complete power to select and remove judges at will.[271] Additionally, the constitutional text referred to "socialist legality," a phrase suggestive of the dominant role of the Communist Party in interpreting law.[272] In 1989, the Round Table draft proposed a new GDR constitution.[273] The draft recognized the "baleful history of misuse of the courts" and "foresaw strong assurances of judicial independence."[274] Later, in 1990, the new Volkskammer reforms criticized the susceptibility of the judges to political pressure from the Communist Party as one of the most problematic characteristics of the old GDR State.[275]

Recent East European reforms suggest that the existence of an independent judiciary is generally accepted as indispensable to the prevention of political abuses of power and to the protection of individual rights. Judicial deference to the political branches is no longer regarded as proper where individuals are aggrieved by violations of the law.[276] Yet, in an act of state case, an aggrieved party may be denied recovery in United States courts because of judicial deference, even though the aggrieved party exerts a claim cognizable under both municipal and international law. The party is left to seek redress through political channels. Such an absence of redress in the courts should be strictly limited because it undermines respect for the judiciary.[277] Additionally, because the courts will premise their judgments upon deference instead of upon the merits of a case through an independent application of the facts to the law, judgments may be erroneous.[278] Erroneous judgments also undermine respect for the courts.[279] Because the courts are inherently weak, such a reduction in respect for the courts necessarily subverts judicial independence.[280]

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270. *Id.* at 492. The 1968/74 Constitution was adopted in the GDR in 1968 and amended in 1974. *Id.* at 488. More clearly Stalinist than the 1949 Constitution that it replaced, the 1968/74 Constitution remained in force until the reunification. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 493. The Round Table established a drafting committee to respond to the need for political, economic, and social reforms after the fall of the Honecker regime in 1989. *Id.*

274. *Id.* at 494. Ultimately, the Volkskammer rejected the Round Table draft, but not until the Volkskammer had significantly amended the 1968/74 Constitution. *Id.* at 498-501. Significantly, the Volkskammer's first constitutional change eliminated the leading role of the Communist Party. *Id.* at 498.

275. *Id.* at 504. On March 18, 1990, a new, freely elected Volkskammer replaced the legislature which had been dominated by the Communist Party. *Id.* at 501.

276. Charney, *supra* note 55, at 808-09.

277. Charney, *supra* note 55, at 809.

278. Charney, *supra* note 55, at 809.

279. Charney, *supra* note 55, at 809.

280. Charney, *supra* note 55, at 809.

2. Institutional Competency

Justice Harlan's majority opinion in *Sabbatino* stated that the act of state doctrine involved "the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[281] The "doctrine's continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[282] The implication of Justice Harlan's statements is that the act of state doctrine applies to issues which are beyond the competence of the judiciary to implement a decision on the merits.

In response to Justice Harlan, Justice White's *Sabbatino* dissent challenged the notion that issues raised in act of state cases are beyond the competence of the Supreme Court.[283] Justice White stated, "I am dismayed that the Court has, with one broad stroke, declared the ascertainment and application of international law beyond the competence of the courts of the United States in a large and important category of cases."[284] Thus, a basic disagreement with respect to institutional competency underlies the dispute over act of state issues.

The institutional competency dispute may be broken down into smaller theoretical units. First, a court lacks competence if it does not possess expertise in the law.[285] Second, a court lacks competence absent manageable standards for adjudication.[286] Third, a court lacks competence if it is denied access to the facts in dispute.[287] Fourth, a court lacks competence if it is powerless to implement its decisions.[288]

a. Expertise in the Law

With regard to judicial competence, one argument in support of judicial deference is that the courts are ill-equipped to decide issues of international law.[289] International law cases are infrequent and the sources of international law are unfamiliar.[290] Hence, courts should defer to the political branches when issues of international law are raised.

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281. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).

282. *Id.* at 427-28.

283. *Id.* at 439 (White, J., dissenting).

284. *Id.*

285. For a discussion of expertise in the law, see *infra* notes 289-97 and accompanying text.

286. For a discussion of manageable standards of adjudication, see *infra* notes 298-307 and accompanying text.

287. For a discussion of access to the facts, see *infra* notes 308-12 and accompanying text.

288. International rules are enforced by domestic courts. *See supra* notes 217-30 and accompanying text.

289. Margaret A. Niles, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 STAN. L. REV. 327, 344 (1983).

290. Charney, *supra* note 55, at 809.

The facts, however, are contrary. Although cases are infrequent, United States courts have played a prominent role in the development of international law.[291] Also, American attorneys are well-equipped to argue international cases before the courts.[292] Under the Anglo-American system, the attorney's role is that of advocate.[293] The attorney's duty includes familiarizing the court with the relevant legal issues in a particular case.[294] Furthermore, the sources of international law are similar to domestic sources of law, and thus, are not beyond the cognizance of the courts.[295] For instance, the negotiating history of treaties is similar in form to domestic legislative history. While cases may exist where relevant sources of international law are truly inadequate rendering judicial abstention necessary, the vast majority of cases present issues where the relevant law is relatively settled and the relevant facts are available.[296] In cases where the relevant law is relatively settled, "[d]eference poses the risk that the court would adopt a rule that is contrary to the actual law; abstention may reflect an unjustified abdication of responsibility."[297] Therefore, the argument that judges should defer to the political branches because they lack expertise in international law is weak.

b. Manageable Standards for Adjudication

A second argument favoring judicial deference is that courts lack manageable legal standards which may be applied to international disputes.[298] Many international law issues remain unresolved and highly controversial. For example, regimes regularly refuse to acknowledge a state's right to nationalize property within its territory[299] or a peoples' right to self-determination.[300] Apart from the highly charged political

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291. For a discussion of the role of United States courts in the development of international law, see *supra* note 1 and accompanying text.

292. Charney, *supra* note 55, at 809.

293. GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 2-3 (1989).

294. *Id.* at 188-92.

295. Charney, *supra* note 55, at 809.

296. Charney, *supra* note 55, at 809.

297. Charney, *supra* note 55, at 810.

298. *See* Baker v. Carr, 369 U.S. 186, 211 (1962) (resolution of foreign affairs issues frequently turns on standards that defy judicial application).

299. More than any other issue, expropriation has invoked opposing viewpoints between developed and developing states. WALLACE, *supra* note 7, at 164. *See, e.g.*, Texaco Overseas Petroleum v. Libyan Arab Republic, 17 I.L.M. 1 (Int'l Arb. Tribunal 1978).

300. The United Nations Charter states as a purpose of the United Nations "[t]o develop friendly relations among nations based upon respect for the principle of equal rights and self-determination of peoples." U.N. CHARTER art. 1, para. 2.

disputes arising in conjunction with anticolonialism,[301] a wide variety of issues are being addressed, with international consensus resulting.[302]

One area of consensus and codification is the law of international commercial transactions.[303] An example of the codification of international commercial law is the Convention for the International Sale of Goods (CISG). As suggested in *Dunhill*, given the international consensus with respect to governing commercial rules, it is foreseeable that a sovereign may be party to a suit in the courts of another sovereign when they undertake acts in a private capacity.[304] Other areas of broad consensus and codification include the Law of the Sea,[305] the New York Convention on the Recognition and Enforcement of Arbitration Awards,[306] and civil aviation law.[307] Manageable judicial standards, therefore, exist with respect to many areas of international law.

c. Access to the Facts

A further argument favoring judicial deference to the political branches is that the courts lack access to the necessary facts.[308] Judges are not trained to uncover facts relevant to international disputes.[309] Moreover, judicial investigations may lead judges into the arena of diplomacy or require them to obtain sensitive or confidential communications that are usually possessed by the executive branch.[310] Again, under the Anglo-American system, the attorneys, not the judge, uncover the relevant facts.[311] Problems of proof are also not unique to international cases. Domestic disputes often involve some form of privilege, and problems of proof do not prevent courts from doing justice through the careful application of the available facts to the rules.[312]

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301. *See* Western Sahara, 1975 I.C.J. 12 (Oct. 16) (discussing the principle of self-determination for the purpose of bringing colonial situations to an end as expressed in the Declaration on the Granting of Independence to Colonial Countries and Peoples).

302. For example, the Law of the Sea Convention of 1982 codified principles of customary law regarding the sea. WALLACE, *supra* note 7, at 119-54. Other law-making conventions include: the 1944 Convention on Interstate Civil Aviation, the 1967 Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, and the 1963 Convention on Offenses and Certain Other Acts Committed on Board Aircraft. HENKIN, INTERNATIONAL LAW, supra note 209, at 840-45.

303. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976).

304. *Id.*

305. HENKIN, INTERNATIONAL LAW, *supra* note 209, at 1231-32.

306. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517.

307. *See* Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295 (1944).

308. Charney, *supra* note 55, at 810; Niles, *supra* note 289, at 344.

309. Charney, *supra* note 55, at 810.

310. Charney, *supra* note 55, at 810; Niles, *supra* note 289, at 344.

311. SHREVE & RAVEN-HANSEN, *supra* note 293, at 265-67.

312. Charney, *supra* note 55, at 810.

Hence, although courts lack access to facts in some international disputes, in most circumstances the lack of access does not prevent an adjudication on the merits.

d. The Power to Implement Decisions

A fourth argument favoring deference to the political branches is that courts lack the power to implement their international law decisions. Although effective "sanctions" against international law violators are missing, nations generally observe international law.[313] A preoccupation with sanctions is misplaced.[314] Nations will observe international law because they have an interest in, among other things, reputation and orderly international relations.[315]

3. Sole Voice

A further argument in support of judicial deference to the political branches is that the field of foreign affairs uniquely requires a sole voice in the development and exposition of international policy: "It is fundamental to our constitutional scheme that in dealing with other nations the country must speak with a unified voice."[316] Historically, the executive branch has possessed the sole voice.[317] Where court pronouncements conflict with those of the executive branch, the executive branch's effectiveness in international relations is reduced.[318]

Contrary to this logic, "a binding court judgment may be the best vehicle for forging a unified U.S. position."[319] Where United States courts expound upon a rule of law, the political branches have a certain obligation to adhere to that law.[320] Although the branches' adherence may suggest a powerful role for the courts in the area of foreign affairs, in reality, the courts only find and apply existing law to which the political branches are already bound.[321] Thus, judicial deference is not necessarily the most effective means to promote a unified voice in foreign affairs.

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313. HENKIN, HOW NATIONS BEHAVE, *supra* note 210, at 49.

314. HENKIN, HOW NATIONS BEHAVE, *supra* note 210, at 49.

315. HENKIN, HOW NATIONS BEHAVE, *supra* note 210, at 51-52.

316. Iraq v. First Nat'l City Bank, 353 F.2d 47, 50 (2d Cir.), *cert. denied*, 382 U.S. 1027 (1966).

317. Henkin, *Foreign Affairs*, *supra* note 42, at 287.

318. Charney, *supra* note 55, at 811.

319. Charney, *supra* note 55, at 811.

320. Charney, *supra* note 55, at 811.

321. Charney, *supra* note 55, at 811.

4. Uncertain Effects

Those opposed to judicial involvement in international affairs contend that court decisions may have unpredictable, adverse international effects.[322] Additionally, court orders may never be executed.[323] In reality, few cases raise the specter of significant international ramifications.[324] The resolution of a dispute over an international commercial transaction, for example, is unlikely to raise the specter of such ramifications because its resolution is unlikely to "touch sharply [up]on the . . . nerves" of a foreign sovereign.[325] Also, the fact that individual defendants may avoid legal obligations does not justify judicial abdication.[326]

5. Flexibility

Arguably, judicial involvement destroys the flexibility needed for the proper conduct of foreign relations. Where judicial decisions involve international matters, courts may bind the political departments, and thus, hinder their ability to interact with the international community.[327] Despite arguments in favor of deference in the interest of political expediency, the United States' interests are best protected by adherence to the international rule of law.[328] "[A] nation that observes law, even when it 'hurts,' is not sacrificing national interest to law; it is choosing between competing national interests . . . ."[329] This is true because "[n]ations have a common interest in keeping the society running and keeping international relations orderly."[330] Some flexibility may properly be relinquished in favor of order and stability.[331] International order and stability are long-term interests of the United States because they support the establishment of an international framework for common enterprise and mutual intercourse.[332]

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322. Charney, *supra* note 55, at 811; Niles, *supra* note 289, at 344 (war may be the ultimate consequence).

323. Charney, *supra* note 55, at 811.

324. Charney, *supra* note 55, at 811.

325. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976).

326. Charney, *supra* note 55, at 811.

327. Charney, *supra* note 55, at 812.

328. Charney, *supra* note 55, at 812.

329. HENKIN, HOW NATIONS BEHAVE, *supra* note 210, at 331.

330. HENKIN, HOW NATIONS BEHAVE, *supra* note 210, at 51.

331. HENKIN, HOW NATIONS BEHAVE, *supra* note 210, at 29.

332. HENKIN, HOW NATIONS BEHAVE, *supra* note 210, at 29.

6. Embarrassment Doctrine

Judicial deference to the political branches may also be required to prevent embarrassment to the executive branch.[333] Such embarrassment would arise out of conflicting viewpoints with respect to a particular controversy between the judicial and executive branches.[334] Although the United Kingdom recognizes the act of state doctrine, the embarrassment doctrine is peculiar to the United States and arises from the separation of powers.[335] In the United States, court pleadings, such as complaints and answers, are written; thus, possible embarrassment caused by references to foreign sovereigns can be immediately clear.[336] In contrast, in the United Kingdom the initial pleadings are oral and therefore less conspicuous.[337]

As suggested by Justice White in his *Sabbatino* dissent, the separation of powers does not compel the act of state doctrine where there is a significant body of international law with respect to a particular controversy.[338] If one presumes respect by all of the branches of government for the international rule of law, a greater degree of codification leads to a lesser risk of conflicting viewpoints between the different branches. Furthermore, the policy of invoking a blanket presumption of validity in cases in which the area of law is unresolved may serve to embarrass the executive who often looks to the courts to secure relief for American citizens.[339]

C. International Comity

In addition to separation of powers concerns, international comity also supports the act of state doctrine.[340] The doctrine is not, however, required by international law.[341] Moreover, with respect to commercial

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333. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 433 (1964).

334. *Id.*

335. Michael Singer, *The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice*, 75 AM. J. INT'L L. 283, 293 (1981).

336. *Id.*

337. *Id.*

338. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 466 (1964) (White, J., dissenting).

339. *Id.*

340. For a discussion of international comity, see *supra* notes 86-93 and accompanying text.

341. No rule of international law requires the act of state doctrine. *Sabbatino*, 376 U.S. at 421. No international arbitral or judicial decision recognizes the doctrine. *Id.* at 422. The doctrine has never been raised before an international tribunal by a party asserting that failure to apply the doctrine constituted a breach of international obligation. *Id.*

Courts, however, have exercised restraint in adjudicating expropriation claims against foreign states. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 reporters' note 12. The restraint has taken various forms. England, like the United States, recognizes the act of state doctrine. *See* Williams & Humbert, Ltd. v. W. & H. Trade Marks (Jersey)

disputes, the presumption that adjudication will touch upon the nerves of a foreign sovereign is usually without merit.[342]

The act of state doctrine, like sovereign immunity, is rooted in the notion of sovereignty and the accompanying notion of international comity.[343] It was once a reasonable assumption that any review of a foreign sovereign's acts within its own territory by the courts of another state would be viewed as an affront to the independence of the foreign sovereign.[344] Now, as a result of major developments in international law,[345] the strength of that assumption is waning. The political leaders of sovereign states are increasingly realizing that the improved development of international law is in their own best interests even though such a development requires a voluntary relinquishment of sovereignty.[346] Such relinquishment of sovereignty is evident in the growth of extraterritorial jurisdiction, including universal jurisdiction and the concomitant growth of the international legal personality of supranational organizations and individuals.[347]

D. The Commercial Activities Exception to the Act of State Doctrine as a Rule of Adjudication

Where cases directly impact upon foreign affairs, the issues are arguably nonjusticiable as political questions.[348] Such political questions include the existence or recognition of a foreign state, the granting of sovereign immunity, the determination of territorial boundaries of a foreign state, and the authorization of a state's representatives to negotiate with foreign sovereigns.[349] In contrast, where cases raise issues that the courts may resolve through the application of international law, the risk of adversely affecting executive branch diplomacy is

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Ltd., [1986] 2 W.L.R. 24 (H.L. 1985); Buttes Gas & Oil Co. v. Hammer, 1982 A.C. 888, 936-38 (H.L. 1981); A.M. Luther v. James Sagor & Co., 3 K.B. 532 (C.A. 1921). For a discussion of the act of state doctrine in England, see Singer, *supra* note 335, at 283. Italy narrowly construes the responsibility of states to alien investors. *See* Anglo-Iranian Oil Co. Ltd. v. S.U.P.O.R. Co., 1955 Foro It. I 256 (Trib. 1954). Germany applies public policy to avoid normal conflict of laws rules. *See* Soc. Minera El Teniente S.A. v. Aktiengesellschaft Norddeutsche Affinerie, 12 I.L.M. 251 (F.R.G. Super. Ct. 1973); *contra* Anglo-Iranian Oil Co., Ltd. v. Jaffrate, 1953 1 W.L.R. 246 (Eng. Sup. Ct. 1952). For a survey of foreign act of state cases, see William H. Reeves, *The Act of State - Foreign Decisions Cited in the Sabbatino Case: A Rebuttal and Memorandum of Law*, 33 FORDHAM L. REV. 599, 618-70 (1965).

342. *See supra* notes 338-39 and accompanying text.

343. For a discussion of international comity, see *supra* notes 86-93 and accompanying text.

344. The notion of positivism dominated the late nineteenth and early twentieth centuries. DE VISSCHER, *supra* note 138, at 51. For a discussion of positivism, see *supra* notes 2-3.

345. *See supra* notes 143-47 and accompanying text.

346. HENKIN, HOW NATIONS BEHAVE, *supra* note 210, at 26.

347. *See supra* notes 143-47 and accompanying text.

348. *See* Baker v. Carr, 369 U.S. 186 (1962).

349. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 462 n.20 (1964).

greatly reduced. Where the risk of adverse effect is great, the court may still defer to the express wishes of the executive branch. A more judicious approach, however, is best realized where courts actively define their own boundaries of competence instead of complete abdication of any judicial role.

Such a shift in judicial policy is supported by numerous developments discussed above. Subjecting foreign sovereigns to the jurisdiction of American courts with respect to their commercial activities may be warranted due to the degree of codification of international commercial law. A blanket commercial exception, however, is not warranted. Although some may view foreign affairs and international law as distinct areas of activity, in reality, they are interwoven. The courts thus play an active role in foreign affairs.[350] Where political concerns are overriding, the courts must defer to the executive branch; however, blanket abdications of the judicial role in international matters threaten to undermine the effectiveness of the court and to slow the development of international law. Therefore, as suggested by the *Sabbatino* Court, judges must apply the doctrine cautiously and on a case-by-case basis so as to balance the international rule of law with comity and the separation of powers.[351]

IV. CONCLUSION

Motivated by international comity, as well as by deference to the political branches in the field of foreign relations, the Supreme Court created the act of state doctrine.[352] As the force of positivism waned and the development of international law accelerated in the wake of World War II, the justifications supporting the act of state doctrine weakened. International comity and the separation of powers no longer justify a judicial abdication with respect to many of the purely commercial activities of a foreign sovereign. Still, blanket exceptions such as the commercial activities exception, while sometimes warranted by the current international legal landscape, are not proper rules of adjudication because they require an abdication of the judicial role.

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350. Henkin writes:

> Determination and application of international law are integral to the conduct of foreign relations and are the responsibility of the federal government. In the absence of federal statute, treaty, or authoritative executive action, international law is determined, 'made,' by the federal courts as though it were federal law, and their views bind the state courts . . . . [T]he Supreme Court can determine and establish a single, uniform rule of customary international law for state as well as federal courts.

HENKIN, CONSTITUTION, *supra* note 97, at 222-23 (footnotes omitted).

351. *See Sabbatino*, 376 U.S. 398, 437.

352. *See supra* note 5.

With the accelerated development and codification of international rules of law, domestic courts play an essential role in the interpretation and adjudication of international law. As a repository of international interpretive and adjudicative authority, United States courts must uphold the rule of law absent indisputable superseding political considerations. To uphold the international rule of law, United States courts must more affirmatively define the role of the courts with respect to particular disputes, and thus, preserve a real and effective judicial independence.

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