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## ***First National City Bank v. Banco Para El Comercio Exterior de Cuba: Act of State and Choice of Law Aspects of Suing Foreign Governmental Corporations***

In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*<sup>1</sup> (*Citibank*), the United States Supreme Court granted certiorari in a case fraught with difficult questions regarding the scope of the act of state doctrine. Specifically, the Court considered whether an American bank may counterclaim against a Cuban government trading company for the value of the American bank's assets expropriated by the Cuban central government. Writing for the Court, Justice O'Connor avoided the act of state issues by relegating them to the final footnote of the opinion.<sup>2</sup> The Court's summary treatment of the act of state doctrine marks a continued decline in the doctrine's scope and importance.

The dispute in *Citibank* arose out of Citibank's conversion of funds belonging to Banco Para El Comercio Exterior de Cuba (Bancec). The resolution of the dispute, however, centered on the relationship between Bancec and the Cuban central government. Despite Cuban legislation establishing the trading company as an autonomous juridical entity,<sup>3</sup> the Supreme Court treated the trading company as an alter ego<sup>4</sup> of the Cuban central government. The Court held that state trading companies are liable for the acts of their central government in the same situations as domestic subsidiaries are liable for the acts of their parent corporations.<sup>5</sup>

In April 1960, the Cuban revolutionary government passed legislation establishing Bancec as "[a]n official autonomous credit institution for foreign trade . . . with full juridical capacity . . . of its own . . ."<sup>6</sup> The Cuban government owned all of Bancec's stock, supplied all of its

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<sup>1</sup> 103 S. Ct. 2591 (1983).

<sup>2</sup> *Id.* at 2604 n.28.

<sup>3</sup> Art. 1, Cuban Law No. 793 (1960) translated in Brief for Petitioner at 2d, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 103 S. Ct. 2591 (1983).

<sup>4</sup> The term "alter ego" is used to indicate an interrelationship between two entities that justifies disregard of their separate legal status. *See* 1 W. FLETCHER, FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10 (perm. ed. 1983).

<sup>5</sup> 103 S. Ct. at 2598-2603.

<sup>6</sup> Art. 1, Cuban Law No. 793 (1960) translated in Brief for Petitioner at 2d, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 103 S. Ct. 2591 (1983).

capital and received all of its profits.<sup>7</sup> Cuba's Minister of State, Ernesto "Che" Guevara served as Bancec's president, and delegates from governmental ministries comprised Bancec's board of directors.<sup>8</sup>

In August 1960 Bancec agreed to purchase sugar from the Cuban national sugar company (INRA), and to sell it to the Cuban Canadian Sugar Company.<sup>9</sup> An irrevocable letter of credit issued by Citibank supported the sales agreement.<sup>10</sup> Cuba's central bank (Banco Nacional) presented Bancec's draft to Citibank for payment on September 15, 1960.<sup>11</sup> Two days later, however, Minister of State Guevara ordered Banco Nacional to nationalize Citibank's Cuban branches.<sup>12</sup> In response, Citibank credited Bancec's draft to Banco Nacional's account and converted the entire balance as partial compensation for the value of Citibank's expropriated Cuban assets.<sup>13</sup> Bancec brought suit in the United States District Court for the Southern District of New York to recover on its letter of credit, and Citibank counterclaimed for a setoff based on the loss of its expropriated assets.<sup>14</sup>

The *Citibank* controversy raises two issues with potentially far-reaching ramifications for the future safety of American investment abroad: first, whether the act of state doctrine bars American courts from examining the validity of a foreign law creating a putatively separate governmental corporation; and second, if American courts are not so barred by the doctrine, whether agencies like Bancec may be held liable as alter egos of their central government for the nationalization of foreign assets.

At trial, the district court brushed over Bancec's act of state defense and allowed Citibank's setoff.<sup>15</sup> The court viewed the Foreign Sovereign Immunities Act<sup>16</sup> (FSIA) as effecting a waiver of both sovereign immunities defenses and act of state defenses.<sup>17</sup> Relying upon *Banco Nacional de Cuba v. First National City Bank*,<sup>18</sup> the court then held that Bancec was an alter ego of the Cuban central government.

The Second Circuit Court of Appeals reversed the district court, distinguishing the *Banco Nacional* case on the ground that Banco Nacional

<sup>7</sup> 103 S. Ct. at 2593.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 2593-94.

<sup>11</sup> *Id.* at 2594.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 505 F. Supp. 412 (S.D.N.Y. 1980), *rev'd*, 658 F.2d 913 (2d Cir. 1981), *rev'd*, 103 S. Ct. 2591 (1983).

<sup>16</sup> 28 U.S.C. §§ 1602-11 (1976). For an excellent discussion of the FSIA, see von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978).

<sup>17</sup> 505 F. Supp. at 430.

<sup>18</sup> 478 F.2d 191 (2d Cir. 1973)(per curiam). In *Banco Nacional*, the Cuban bank was the obligor of a loan from Citibank. Citibank sold the collateral and realized more than the outstanding principal and interest. Banco Nacional sued to recover the excess. Citibank then attempted to setoff the value of its Cuban branches expropriated by Cuba through Banco Nacional.

played a direct role in the nationalization of Citibank's Cuban assets while Bancec had not.<sup>19</sup> The court of appeals acknowledged but did not decide the act of state issue. Instead, it held that American courts may not ignore statutory distinctions between foreign states and their instrumentalities unless the instrumentality played a "key role" in the conduct at issue in the suit.<sup>20</sup> Thus, because Bancec played no role in the nationalization, it could not be held liable to Citibank regardless of the applicability of the act of state doctrine.

At the Supreme Court, Bancec advanced three additional arguments against liability. First, Bancec asserted a sovereign immunities defense.<sup>21</sup> Bancec argued that the FSIA waived only the Cuban central government's immunity for the government's wrongful acts, not Bancec's immunity for the acts of other Cuban agencies. Second, Bancec argued that under ordinary choice of law rules, Cuban law rather than American law should govern the case.<sup>22</sup> Under Cuban law, Bancec could not be held accountable for the central government's liabilities.<sup>23</sup> Third, Bancec argued that the act of state doctrine barred American courts from examining the Cuban government's motivation for creating Bancec, and that without a finding of malevolent motivation, the Court could not invalidate the separate legal status of a foreign sovereign's instrumentality.<sup>24</sup>

The Supreme Court rejected the Second Circuit's "key role" test and all three of Bancec's additional arguments. Rather than require that an instrumentality play a key role in a foreign state's wrongdoing, the Court applied traditional principles of federal common law to determine whether to pierce Bancec's corporate veil.<sup>25</sup>

While the Court acknowledged that the law of the state of incorporation normally controls issues relating to the internal affairs of a corporation,<sup>26</sup> it refused to apply Cuban law in Bancec's case.<sup>27</sup> The Court

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<sup>19</sup> First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 658 F.2d 913, 919 (2d Cir. 1981), *rev'd*, 103 S. Ct. 2591 (1983).

<sup>20</sup> *Id.* at 918.

<sup>21</sup> Brief for Respondent at 5-6, First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 103 S. Ct. 2591 (1983).

<sup>22</sup> *Id.* at 20-21.

<sup>23</sup> Art. 1, Cuban Law No. 793 (1960) translated in Brief for Petitioner at 2d, First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 103 S. Ct. 2591 (1983).

<sup>24</sup> Brief for Respondent at 18-20, First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 103 S. Ct. 2591 (1983).

<sup>25</sup> 103 S. Ct. at 2601-02. The Court primarily looked to *Bangor Punta Operations Inc. v. Bangor & Aroostook R.R.*, 417 U.S. 703 (1974), for the corporations law applicable to *Citibank*. In *Bangor Punta*, Amoskeag Company purchased 98 percent of the stock of B&A Railroad from Bangor Punta. The stock was sold at a discount because the railroad had been mismanaged by Bangor Punta. After the sale, Amoskeag directed the railroad to sue Bangor Punta for mismanagement. Amoskeag itself lacked standing. Since Amoskeag stood to be the principal beneficiary of B&A's action, the Court pierced the subsidiary's corporate veil and rebuffed Amoskeag's attempt to gain standing through the guise of a proceeding in the name of its subsidiary. 417 U.S. at 713.

<sup>26</sup> 103 S. Ct. at 2597.

<sup>27</sup> *Id.*

used principles expressed in *Anderson v. Abbott*<sup>28</sup> to justify its rejection of Cuban law. In *Anderson*, the Court declined to apply Delaware corporations law to a Delaware corporation on the ground that by so doing, the corporation could circumvent federal legislative policy.<sup>29</sup> Similarly, in *Citibank*, the Court feared that the application of Cuban law would improperly frustrate the counterclaim exception to sovereign immunity mandated by the FSIA: "To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts."<sup>30</sup> The Court dismissed Bancec's act of state contention in the final footnote of the opinion:

Bancec does not suggest, and we do not believe, that the act of state doctrine, . . . precludes this Court from determining whether Citibank may set off the value of its seized Cuban assets against Bancec's claim. Bancec does contend that the doctrine prohibits this Court from inquiring into the motives of the Cuban Government for incorporating Bancec. . . . We need not reach this contention, however, because our conclusion does not rest on any such assessment.<sup>31</sup>

In the process of determining which law to apply in *Citibank*, the Court also definitively settled the choice of law controversy between advocates of federal law and advocates of state law in FSIA cases. The Court held that where state law provides a rule of liability governing private individuals, the FSIA requires application of that state law to foreign states.<sup>32</sup> Issues other than liability, however, such as the attribution of liability among entities of a foreign state, are determined under federal law.<sup>33</sup> After rejecting Cuban law and New York state law, the Court applied principles of corporations law "common to both international law and federal common law"<sup>34</sup> to determine whether liability for the expropriations could be attributed to Bancec.<sup>35</sup>

While applying federal common law to the attribution of liability question, the Supreme Court did not directly address the key act of state issues raised by the *Citibank* case, leaving the present scope and effect of

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<sup>28</sup> 321 U.S. 349 (1944).

<sup>29</sup> *Id.* at 365.

<sup>30</sup> 103 S. Ct. at 2597.

<sup>31</sup> *Id.* at 2604 n.28 (citation omitted).

<sup>32</sup> *Id.* at 2597 n.11.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2598. The Court asserted that the equitable principles applied in *Citibank* are recognized in international law as well as in federal common law. 103 S. Ct. at 2598. The Court cited *Concerning The Barcelona Traction, Light & Power Co., (Belg. v. Spain)* 1970 I.C.J. 3, in support of its assertion. In *Barcelona Traction*, the International Court of Justice declined to disregard the separation between a Canadian corporation and its Belgian stockholders. However, the court recognized the possibility of piercing corporate veils in international practice.

<sup>35</sup> The federal common law governing alter egos is beyond the scope of this note. For a discussion of this law, see 1 W. FLETCHER, FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 41 (perm. ed. 1983).

the doctrine open to question. The "traditional formulation" of the doctrine was first expressed by the Supreme Court in *Underhill v. Hernandez*:<sup>36</sup> "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."<sup>37</sup> The Court reaffirmed this formulation in *Banco Nacional de Cuba v. Sabbatino*,<sup>38</sup> stating that the doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."<sup>39</sup> Despite the Court's terse explications, mass confusion continues to bedevil both judicial application<sup>40</sup> and academic discussion<sup>41</sup> of the doctrine.

The Supreme Court has, on several occasions, addressed act of state questions arising out of the nationalization of American assets abroad. However, no decision prior to *Citibank* required the Court to determine when a separately incorporated instrumentality of a foreign government constitutes an alter ego of its central government.<sup>42</sup>

In *First National City Bank v. Banco Nacional de Cuba*,<sup>43</sup> a sharply divided Court faced a controversy factually similar to the one in *Citibank*. The *Banco Nacional* Court held that the act of state doctrine did not bar a counterclaim arising out of Banco Nacional's participation in Cuban acts

<sup>36</sup> 168 U.S. 250 (1897). *Underhill*, which was actually a sovereign immunities case, involved a Venezuelan military dictator who allegedly refused to grant a passport to a U.S. citizen in an effort to coerce him to stay in Venezuela.

<sup>37</sup> *Id.* at 252.

<sup>38</sup> 376 U.S. 398 (1964). In *Sabbatino*, Banco Nacional brought an action for conversion of documents of title to sugar which were previously expropriated by Cuba. The defendant was the bankruptcy receiver of the former owner of the sugar. The receiver obtained the documents without paying Banco Nacional. The district court granted summary judgment on the ground that Banco Nacional had no right to the documents since the expropriation violated international law. The Supreme Court reversed on the ground that the act of state doctrine precluded American courts from inquiring into the legality of the Cuban expropriation. Congress responded by passing the Hickenlooper Amendment. Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 310(d)(4), 78 Stat. 1009 (1964) (current version at 22 U.S.C. § 2370(e)(2) (1982)). The Amendment prohibits U.S. courts from declining to reach the merits of an expropriation case on the basis of the act of state doctrine if the expropriated property finds its way back to the United States. On remand, *Sabbatino* succeeded once again in the only case to date which turned on the Hickenlooper Amendment. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

<sup>39</sup> 376 U.S. at 401.

<sup>40</sup> Compare *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir.), *cert. denied*, 454 U.S. 1163 (1981) (antitrust action against OPEC held non-justiciable under the act of state doctrine); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 715 (1976) (Powell, J., concurring) (act of state doctrine is a variant of the political question doctrine), with *Alfred Dunhill of London, Inc.*, 425 U.S. at 705 n.18, and *id.* at 726-28 (Marshall, J., dissenting) (majority of Justices on the *Dunhill* Court recognized that the doctrine is actually a choice of law rule).

<sup>41</sup> See, e.g., Dellapenna, *Suing Foreign Governments and Their Corporations: Choice of Law*, 87 COM. L.J. 129, 134 (1982) ("One is tempted at this point to paraphrase Voltaire's famous quip about the Holy Roman Empire — 'neither Holy, nor Roman, nor an Empire' for this supposed rule of law is not necessarily linked to Acts, nor does it only serve State interests, nor would anyone but a Supreme Court Justice have the temerity today to call it a doctrine").

<sup>42</sup> *Citibank*, 103 S. Ct. at 2598 n.12.

<sup>43</sup> 406 U.S. 759 (1972).

of expropriation. Although the case failed to produce an act of state rule which could command a majority, each of the four Justices who issued opinions agreed that the separation of powers provides the rationale for the doctrine.<sup>44</sup> Justice Rehnquist's plurality opinion adopted the "Bernstein exception" to the act of state doctrine.<sup>45</sup> This "exception" allows courts to disregard the doctrine if the State Department issues a memorandum stating that judicial inquiry into the validity of a foreign state's act will not hinder American foreign relations. A majority of the Justices, however, expressly rejected the Bernstein exception.<sup>46</sup>

The rule expressed in Justice Douglas' concurring opinion in *Banco Nacional* was explicitly applied by the district court in *Citibank*.<sup>47</sup> Douglas argued that the applicability of the act of state doctrine should be governed by "consideration[s] of fair dealing."<sup>48</sup> Under these principles, a foreign sovereign waives act of state defenses to counterclaims up to the amount of the foreign sovereign's original claim. Justice Powell rejected Douglas' argument and the Bernstein exception as violative of the separation of powers.<sup>49</sup> He concurred in the result on the ground that the act of state doctrine should not be implicated unless the court finds that failure to apply the doctrine would interfere with the "delicate foreign relations conducted by the political branches."<sup>50</sup> Justice Brennan's dissent, joined by three other Justices, rejected all judicially devised exceptions to the act of state doctrine.<sup>51</sup>

In *Alfred Dunhill of London, Inc. v. Republic of Cuba*,<sup>52</sup> the Supreme Court again refused to apply the act of state doctrine. The majority held that Cuba's mere refusal to honor an obligation, without more, did not constitute an act of state.<sup>53</sup> Four Justices went on to urge the creation of a commercial exception to the doctrine, stating: "[T]he concept of the act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities."<sup>54</sup> A majority of the Justices, however, rejected the commercial exception posited by the *Dunhill* plurality.<sup>55</sup>

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<sup>44</sup> See Note, *Adjudicating Acts of State in Suits Against Foreign Sovereigns: A Political Question Analysis*, 51 FORDHAM L. REV. 722, 732 (1983).

<sup>45</sup> 406 U.S. at 768 (plurality opinion) (the exception takes its name from the case in which it was first applied, *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954)).

<sup>46</sup> *First Nat'l*, 406 U.S. at 772-73 (Douglas, J., concurring); *id.* at 773 (Powell, J., concurring); *id.* at 790 (Brennan, J., dissenting). Some lower courts continue to apply the Bernstein exception. See, e.g., *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 658 F.2d 903, 911 (2d Cir. 1981).

<sup>47</sup> 505 F. Supp. at 430.

<sup>48</sup> 406 U.S. at 771 (Douglas, J., concurring).

<sup>49</sup> *Id.* at 775 (Powell, J., concurring).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 778 (Brennan, J., dissenting).

<sup>52</sup> 425 U.S. 682 (1976).

<sup>53</sup> *Id.* at 694.

<sup>54</sup> *Id.* at 695 (White, J., concurring).

<sup>55</sup> *Id.* at 715 (Stewart, J., concurring); *id.* at 725-30 (Marshall, J., dissenting). Lower

With this scant stock of Supreme Court precedent, the Court set out to decide *Citibank*. The Court's rejection of the Second Circuit's "key role" requirement for attributing liability to foreign state entities accords with the principles which undergird the practice of piercing corporate veils. In effect, the key role test eliminates the possibility of piercing the corporate veil. Under the key role test, liability extends to an independent foreign state entity only when the entity is independently liable as a joint tortfeasor. This test could allow the corporate form to unfairly insulate foreign states from legal responsibility.<sup>56</sup> By repudiating the key role test, the Supreme Court provided lower courts with sufficient flexibility to avoid this potential inequity.<sup>57</sup>

The argument that the FSIA prohibited attribution of the Cuban government's liabilities to Bancec is unsupported by authority. The House report on the FSIA expresses an intent not to affect the "substantive law of liability."<sup>58</sup> In both cases previous to *Citibank* which required the Supreme Court to discuss the FSIA, the Court declined to find any implications of the Act beyond the narrow issue of sovereign immunity.<sup>59</sup> The *Citibank* decision reaffirms the earlier narrow interpretations of the act.

In deciding that FSIA cases are governed by state rules of liability, but federal choice of law rules, the Court departed from most previous lower court holdings.<sup>60</sup> The choice of law provisions in the FSIA and the Federal Torts Claims Act<sup>61</sup> (FTCA) are substantially the same.<sup>62</sup> The FTCA has been interpreted as mandating both state rules of liability and state choice of law rules.<sup>63</sup> As a result, lower courts have applied both sets of state rules to actions under both statutes.<sup>64</sup> The Court in *Citibank* recognized the potential harm to American foreign relations latent in

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courts have split on the commercial exception issue. *Compare* *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380-81 (5th Cir. 1980)(applying the exception), *with* *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1359-60 (9th Cir. 1981)(rejecting the exception).

<sup>56</sup> See *Citibank*, 103 S. Ct. at 2597.

<sup>57</sup> See *De Letelier v. Republic of Chile*, 567 F. Supp. 1490, 1495 (S.D.N.Y. 1983)(following *Citibank* while holding the Chilean national airlines liable for a judgment against the Chilean central government).

<sup>58</sup> H.R. REP. NO. 1487, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6627.

<sup>59</sup> The two cases were: *Dames & Moore v. Regan*, 453 U.S. 654 (1981)(holding that the FSIA did not prohibit the President from suspending private causes of action pursuant to the agreement freeing the American hostages in Iran); *Verlinden B.V. v. Central Bank of Nigeria*, 103 S. Ct. 1962 (1983)(upholding the constitutionality of the FSIA's grant of jurisdiction to federal courts in certain cases between foreign nationals).

<sup>60</sup> *Compare* *De Letelier v. Republic of Chile*, 502 F. Supp. 259, 266 (D.D.C. 1980)(treating the choice of law provisions in the FSIA like the choice of law provisions in the Federal Torts Claims Act), *with* *Citibank*, 103 S. Ct. at 2597 n.11 (treating the two choice of law provisions differently).

<sup>61</sup> 28 U.S.C. §§ 2671-80 (1976).

<sup>62</sup> 1 J. MOORE, MOORE'S FEDERAL PRACTICE § 700.180 (1980). *Compare* 28 U.S.C. § 2674 (1976) *with* 28 U.S.C. § 1606 (1976).

<sup>63</sup> *Richards v. United States*, 369 U.S. 1 (1962).

<sup>64</sup> *De Letelier*, 502 F. Supp. at 266.



parochial and divergent state choice of law rules for FSIA cases.<sup>65</sup> This concern, absent in FTCA cases, justifies the dissimilar treatment.<sup>66</sup>

The most intriguing aspect of the *Citibank* case is its treatment of the act of state doctrine. Both Bancec's brief and the Court's final footnote miss the central act of state issue raised in *Citibank*. Both demonstrate a misunderstanding of the doctrine itself. The act of state doctrine is not a justiciability doctrine which "precludes" a court from reaching the merits of a case.<sup>67</sup> Rather, it is a super choice of law rule which requires American courts to treat as valid and binding foreign legislative acts and judicial decisions regarding certain transactions within the borders of the foreign state.<sup>68</sup> The central, unaddressed issue in *Citibank* is whether the Cuban law establishing Bancec as a separate juridical entity is binding upon American courts under the act of state doctrine.

None of the exceptions to the act of state doctrine applied by the Court in the past removes *Citibank* from the dictates of the doctrine. First, the Hickenlooper Amendment,<sup>69</sup> passed by Congress to mitigate the effect of the act of state doctrine, fails to control the *Citibank* case because the issue in *Citibank* is the juridical independence of Bancec, not the title to nationalized property. The Hickenlooper Amendment only affects cases in which the ownership of property located in the United States is at issue.<sup>70</sup> Second, a legislative determination of a governmental corporation's power to sue and be sued constitutes more than a "purely commercial act" within the meaning of the *Dunhill* plurality's commercial exception. Third, although the State Department provided a "Bernstein letter,"<sup>71</sup> none of the courts hearing *Citibank* were willing to rely on the uncertain validity of the Bernstein exception. Only the counterclaim exception, proposed in Justice Douglas' concurring opinion in *Banco Nacional*, would remove *Citibank*'s counterclaim from the traditional scope of the doctrine.<sup>72</sup>

In effect, the *Citibank* decision creates a new exception to the act of state doctrine. The decision at least signals to lower courts that the independent status of state trading companies should be determined by

<sup>65</sup> *Citibank*, 103 S. Ct. at 2597 n.11.

<sup>66</sup> The classic argument for special treatment of international choice of law questions is Justice Harlan's opinion in *Sabbatino*, 376 U.S. 398 (1964).

<sup>67</sup> *But cf. Citibank*, 103 S. Ct. at 2604 n.28 (implying that the doctrine does preclude adjudication on the merits).

<sup>68</sup> *See, e.g., Dunhill*, 425 U.S. at 705 n.18; *id.* at 726 (Marshall, J., dissenting); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 428 comment c (Tent. Draft No. 4, 1983); Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 178 (1967); Kirgis, *Act of State Exceptions and Choice of Law*, 44 U. COLO. L. REV. 173 (1972).

<sup>69</sup> *See supra* note 38.

<sup>70</sup> *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972).

<sup>71</sup> 505 F. Supp. at 430.

<sup>72</sup> *First Nat'l*, 406 U.S. at 771 (Douglas, J., concurring). The dissenters in *Dunhill* reluctantly embraced the counterclaim exception in an attempt to avoid adoption of the commercial exception. 425 U.S. at 733 (Marshall, J., dissenting).

reference to ordinary federal common law principles rather than to legislative acts of foreign states. The decision may also portend the development of a general counterclaim exception to the act of state doctrine.<sup>73</sup>

The confusion surrounding the act of state doctrine cannot be quelled without an examination of the web of policy considerations which relate to the doctrine.<sup>74</sup> Early act of state cases justified invoking the doctrine by citing the need for mutual respect between nations.<sup>75</sup> The justification in more recent cases focuses on respect for the special role of the President and Congress in foreign relations.<sup>76</sup> This separation of powers rationale recognizes the embarrassment to the political branches which would flow from a judicial determination contrary to stated foreign policy. As long as the courts refuse to determine the legality of a foreign state's acts, the courts will never validate an act which the State Department protests. Difficulties with the doctrine arise, however, when the political branches are unwilling to respond to a foreign act for political reasons, but rely on the courts to examine the legality of the act.

Because the act of state doctrine has the effect of extending full faith and credit to certain acts of foreign states,<sup>77</sup> the considerations justifying full faith and credit also support the act of state doctrine. Like the full faith and credit clause, the act of state doctrine functions to permit reliance on the finality of decisions, prevent waste of governmental decision-making resources, and promote concord between states.<sup>78</sup>

These theoretical policy considerations translate into factors which may palpably affect the safety of American foreign investment. The viability of American multinational corporations depends upon recognition of their separate juridical status by foreign courts.<sup>79</sup> The *Citibank* decision provides precedent for foreign courts which wish to disregard the independent status of American corporations in order to hold them responsible for the real or imagined wrongdoings of the United States government.<sup>80</sup> The *Citibank* decision also creates fear among foreign state trading companies that their American assets might be seized to compen-

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<sup>73</sup> Some lower courts have already applied the counterclaim exception. See, e.g., *Mendez v. Saks & Co.*, 485 F.2d 1355, 1374 (2d Cir. 1973).

<sup>74</sup> For an excellent attempt at unraveling the rationale for the act of state doctrine and other FSIA related doctrines, see Dellapenna, *Suing Foreign Governments and Their Corporations: Choice of Law (pts. 1-9)*, 86 COM. L.J. 210, 346, 438, 486 (1981), 87 COM. L.J. 8, 129, 244, 303, 375 (1982).

<sup>75</sup> *Underhill*, 168 U.S. at 250.

<sup>76</sup> See *supra* note 44 and accompanying text.

<sup>77</sup> See R. LEFLAR, *AMERICAN CONFLICTS LAW*, 136 n.57 (3d ed. 1977); cf. authorities collected at *supra* note 67.

<sup>78</sup> See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 288-89 (1980) (White, J., concurring) (refusing to apply the full faith and credit clause because the original adjudicating state had insufficient interest in the subsequent case).

<sup>79</sup> See Hadari, *The Structure of the Private Multinational Enterprise*, 71 MICH. L. REV. 729 (1973).

<sup>80</sup> Brief Amicus Curiae of the International Center for Law in Development at 16, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 103 S. Ct. 2591 (1983).

sate for wrongdoings unrelated to the trading company's activities.<sup>81</sup> This fear makes the United States a less attractive trading partner for state trading companies,<sup>82</sup> and makes state trading companies less attractive risks for investors.<sup>83</sup> Counterbalancing the economic advantages of the act of state doctrine is the fact that the doctrine, by insulating acts of foreign states from judicial scrutiny, may encourage expropriation.<sup>84</sup>

At bottom, the economic arguments for and against the act of state doctrine are unpersuasive. The security of American investment abroad will depend upon extrinsic forces — revolutionary fervor, American foreign policy, international economic conditions — not upon American precedent putatively justifying expropriation or fear of unfavorable American judicial reaction.<sup>85</sup> Moreover, the economic evils avoided by evading the act of state doctrine may be avoided through other means more consonant with the American constitutional system. International arbitration treaties<sup>86</sup> and arbitration clauses in foreign investment agreements<sup>87</sup> may stipulate away difficult choice of law issues like those raised by the act of state doctrine. In addition, action by the political branches under the International Claims Settlement Act<sup>88</sup> (ICSA) can provide compensation when the expropriating state is not otherwise willing to compensate.

The *Citibank* case itself is an example of the potential effectiveness of action under the ICSA. The ICSA created a claims commission to apportion the American assets of certain foreign nations among persons requiring compensation for property expropriated by those foreign nations. The ICSA precluded Cuba from actually recovering any money from Citibank by freezing Cuban assets in the United States.<sup>89</sup> By refusing to apply the act of state doctrine, the Court merely allowed Citibank to retain assets which otherwise would have reverted to the Foreign Claims Settlement Commission for distribution among all parties injured by Cuban expropriations.

The real damage caused by the *Citibank* decision is to the integrity of the American judicial system<sup>90</sup> and to the mutual respect among na-

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See McMathias, *Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform*, 12 LAW & POL'Y INT'L BUS. 369 (1980).

<sup>85</sup> See Henkin, *supra* note 68, at 186.

<sup>86</sup> See The Convention on Settlement of Investment Disputes between States and Nationals of Other States, *entered into force* Oct. 14, 1966, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (1966).

<sup>87</sup> See generally *International Arbitration: A Symposium*, 5 N.C. J. INT'L L. & COM. REG. 169 (1980).

<sup>88</sup> 22 U.S.C. § 1620-45 (1982).

<sup>89</sup> 22 U.S.C. § 1643 (1982).

<sup>90</sup> *Cf.* Swan, *Act of State at Bay: A Plea on Behalf of the Elusive Doctrine*, 1976 DUKE L.J. 807 (1967).

tions.<sup>91</sup> *Citibank* and other recent act of state cases bring into question the impartiality of American courts. In these highly politicized cases, the Supreme Court has gone to great lengths to find against America's enemies, but has failed to develop a clear rationale for its decisions.<sup>92</sup> The reputation of American courts for impartiality should not be risked. That reputation is itself a valuable inducement to trade with the United States. The erosion of the act of state doctrine also retards the growth of the trust among nations necessary for the development of a strong international legal system. By refusing to respect the governmental acts of foreign states, the United States encourages other states to disregard American governmental acts. Viewed in this light, *Citibank* represents a small victory of national egoism over enlightened self-interest.

Two unlikely events could rectify the unfortunate result in *Citibank*. Legislative or judicial action reinstating the traditional act of state doctrine would repair the integrity of the American judicial system, set an example of respect among nations, and require little of the Court's precious decision-making resources. Alternatively, judicial recognition of the act of state doctrine as a choice of law rule which in effect acts as an international full faith and credit clause, could also lead to a satisfactory solution to the act of state controversy. Lower courts, aware of the nature of the doctrine, could apply principles developed in the Supreme Court's full faith and credit decisions to decide act of state cases.<sup>93</sup> Unfortunately, the *Citibank* decision lessens the likelihood that either of these salutary approaches will govern future act of state disputes.

—MARK ANDERSON FINKELSTEIN

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<sup>91</sup> See Henkin, *supra* note 68, at 187-89.

<sup>92</sup> The opinions issued in *First Nat'l Citibank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) and *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) clearly support this conclusion.

<sup>93</sup> Particularly instructive are the Court's decisions in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980) and *Nevada v. Hall*, 440 U.S. 410 (1979)(California allowed to apply its own law to determine the extent of Nevada's sovereign immunity).

