1989

The Foreign Sovereign Immunities Act and Act of State

Malvina Halberstam
Benjamin N. Cardozo School of Law, halbrstm@yu.edu

wrongful death action, was a person who was never in Russia (i.e., the effect on her was felt in the United States) did not, in the judge's mind, establish a direct effect in the United States.

Compare this outcome, however, with the outcome in a breach of contract claim or a tort claim on behalf of a corporation. In those cases, the courts routinely decide that the direct effect on the corporation occurs where the financial effects are felt. If the standard is financial effects on a corporation in tort or contract cases, why is it not financial effects on a decedent's family? The answer appears to be that the courts are reluctant to try cases that would create controversy with foreign governments. The same problem exists with respect to the nexus requirement for noncommercial torts. There, the statute explicitly states that the injury must be in the United States. With very few exceptions, American courts have held that not only the injury but also a substantial part of the wrongful conduct must be in the United States. This substantial part of the wrongful conduct standard is nonstatutory but widely followed and is an example of court reluctance to hear controversial cases.

With more time, much more could be said about the difficulties courts have encountered in construing the Foreign Sovereign Immunities Act. In particular, the key term "commercial activity" is not really defined in the Act. Congress indicated only that the "commercial" quality of an act is to be determined by its nature, and not by its purpose. Suffice it to say here that courts have proven unable to disregard completely the purpose of an act, and thus courts have continued to look to the purpose of a state's activities to determine whether the act in question is commercial.

THE FOREIGN SOVEREIGN IMMUNITIES ACT AND ACT OF STATE

*by Malvina Halberstam**

The Act of State Doctrine

The classic statement of the act of state doctrine, generally quoted, is from the Supreme Court decision in *Underhill v. Hernandez.* The Court there said, "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" (168 U.S. 250, 252 (1897)). In that case, the doctrine was used to bar an action in a U.S. court against the General of a revolutionary army in Venezuela for an injury the plaintiff allegedly suffered in a military action in that country. The act of state doctrine was reaffirmed and substantially expanded and transformed by the Supreme Court in *Sabbatino.* The Court there said,

> [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 [376 U.S. 398, 428 (1964)].

The *Restatement* similarly states,

> [C]ourts 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 judgement on other acts of a governmental character done by a foreign state within its own territory and applicable there [*Restatement (Third)*, sec. 443].

The *Sabbatino* and *Restatement* formulations are, I believe, somewhat misleading. Under the act of state doctrine, unlike the political question doctrine, the court does

*Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, New York.

not dismiss the action. It decides the case, but applies the foreign law. In *Sabbatino*, Cuba instituted an action in a U.S. court to force a U.S. national to pay Cuba for sugar Cuba had confiscated from another U.S. national precisely because he was a U.S. national. The district court found that the Cuban law violated international law—because, inter alia, it was discriminatory—and refused to apply it. The Supreme Court reversed. It invoked the act of state doctrine to justify requiring a U.S. citizen in the United States to make payment to Cuba for sugar that Cuba had confiscated from another U.S. national. In *Sabbatino* the act of state doctrine was transformed from an abstention doctrine, which it had been in *Underhill*, to an enforcement doctrine. However, the Court continued using the abstention language of *Underhill*.

The words, "the judicial branch will not examine . . . " or "courts in the United States will generally refrain from examining . . . " create the impression that the act of state doctrine is a judicial abstention doctrine. A more correct formulation would be "a U.S. court will enforce a foreign Act of State . . . etc., even if it violates international law." The problem is not merely semantic. The abstention language has led some courts to treat the act of state doctrine—like the political question doctrine—as jurisdictional. Thus, the court of appeals in *OPEC* stated, "The act of state doctrine is similar to the political question doctrine in domestic law" (649 F.2d 1355, 1358 (9th Cir. 1981)), and later in the opinion, "The decision to *deny access* to judicial relief is not one we make lightly" (*id.* at 1360 (emphasis added)). Finally, the court concluded, "The issue of whether the FSIA allows jurisdiction in this case need not be decided, since a judicial remedy is inappropriate regardless of whether jurisdiction exists" (*id.* at 1362).

That, of course, is incorrect. A court can only determine whether the act of state doctrine applies to the issues if it has jurisdiction in the first place. If the defendant has immunity under the FSIA, the court does not have jurisdiction over the parties. Not all courts have made this mistake; the Court of Appeals for the D.C. Circuit did not. In remanding a case that the district court had dismissed on act of state grounds, the Court of Appeals for the D.C. Circuit said,

> a further development of the jurisdictional facts may establish that neither the District Court nor this Court have jurisdiction under the FSIA to pass on Millen's claims at all. Obviously if after the limited fact finding necessary to determine the jurisdictional facts it appears that there is not subject matter jurisdiction, then neither the act of state question nor any questions relating to the adequacy of the claims need be reached.[1]

However, as Professor Kirgis noted in an editorial comment in the *American Journal of International Law* recently, even the Court of Appeals for the Second Circuit, which frequently has act of state cases, and the Office of the Legal Adviser, whose attorneys are generally very knowledgeable in such matters, have on occasion treated the act of state doctrine as an abstention doctrine.

The Foreign Sovereign Immunities Act

While sovereign immunity and the act of state doctrine are analytically distinct—the former dealing with jurisdiction and the latter with the substantive law to be applied to the merits of the controversy—they have common historical roots and similar policy justifications. As many of you know, and as I have set forth in an article in the

[1]*See, e.g.*, Millen Industries Inc. v. Coordinating Council for North American Affairs, 855 F.2d 879, 882 (D.C. Cir. 1988).

Journal,[2] I think the act of state doctrine is undesirable for many reasons, including that it impedes the development of international law by municipal courts and forces U.S. courts to become parties to the violation of international law by foreign states. But I think its application is particularly inappropriate in those cases where Congress has decided to deny foreign states immunity in U.S. courts. Forcing a foreign state into a U.S. court is generally a far greater intrusion on its sovereignty than refusing to apply its law in a particular case. Therefore, it makes little sense to deny a remedy based on act of state in those cases where Congress has decided to force a foreign sovereign into U.S. courts in order to provide a remedy.

The Foreign Sovereign Immunities Act of 1976 does not deal with the application of the act of state doctrine. In the discussion of section 1605(a)(3), which denies immunity where "rights in property taken in violation of international law are at issue," the House report states,

> The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the prompt, adequate, and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable [H.R. 1487, 94th Cong., 2d Sess. (1976)].

A footnote explains,

> The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the act of state doctrine may be improperly asserted in an effort to block litigation.
>
> . . . .
>
> The committee has found it unnecessary to address the act of state doctrine in its legislation since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the Act of State doctrine . . . . The conclusions of the committee are in concurrence with the position of the government in its *amicus* brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:
>
> "[U]nder the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine" [*id.*].

The implication clearly is that Congress did not find it necessary to address act of state because it believed the courts would "reject improper assertion of the Act of State" doctrine, as the committee thought the Supreme Court had done with respect to commercial activity in *Dunhill* (425 U.S. 682 (1976)). To eliminate any doubt on the point, the committee noted that it agreed with the State Department that it would "frustrate the purpose of the FSIA to permit sovereign immunity "to reenter through the back door under the guise of the Act of State doctrine." Nevertheless, that is exactly what the lower federal courts have done in a number of cases. They found that the FSIA denied immunity and then held that the act of state doctrine barred the court from considering the validity of the foreign act on the merits. For example, in the *Cubazucar* case (652 F.2d 231 (2d Cir. 1981)) the court held that an agency of the Cuban Government was entitled to collect a $32,000 debt from a U.S. national even

[2]Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AJIL 68 (1985).

though Cuba had confiscated the national's property, including a bank account with a balance of over $90,000 (*id.* at 234 and note 6), on the ground that the act of state doctrine barred the court from considering the validity of the taking (*id.* at 237).

The ABA Proposal

In 1986 Congress considered amendments to the FSIA, developed and proposed by the ABA, which would have eliminated the act of state doctrine as a defense in actions brought under the FSIA for breach of contract or for expropriations in violation of international law. Mark Feldman, who, as Deputy Legal Adviser and Acting Legal Adviser from 1974 to 1981 participated in the drafting of the FSIA, testified on behalf of the ABA in support of the amendments. The Department of State took a somewhat equivocal position. Elizabeth Verville, a Deputy Legal Adviser and Acting Legal Adviser, noted that "[t]he Department of State has consistently articulated a very skeptical view of the Act of State doctrine" and that the State Department "believe[s] these proposals have merit." She also stated, however, that there is a "need for further study, not only by the government, but by scholars and private practitioners."[3]

The only testimony in opposition to the act of state amendment was by an attorney in private practice who stressed that he was appearing in his individual capacity, "and not as a representative of [his] firm or any other organization" (*Hearings*, at 209). He expressed the belief that elimination of the act of state doctrine was undesirable and used the *Braka* case (589 F. Supp. 1465 (S.D.N.Y. 1984), aff'd 726 F.2d 222 (2d Cir. 1985)) to illustrate his point. That case involved an action by U.S. citizens who had purchased certificates of deposit from a Mexican bank to get the higher rates of interest available in Mexico. Subsequently, as a result of an economic crisis in Mexico, the Mexican Government issued regulations that did not permit the repayment of these certificates in dollars, but required their repayment in pesos at a rate that resulted in a substantial loss to the plaintiffs. The district court and court of appeals held that there was no immunity under the FSIA but that recovery was barred by the act of state doctrine.

But the result in *Braka* would have been exactly the same if the act of state doctrine had not applied. The act of state doctrine bars a court from considering the validity of a foreign act under international law. Elimination of the act of state doctrine would permit a court to consider whether the foreign act violates international law. But, if it determines that it does not violate international law—it would still apply the foreign law.

The district court emphasized in *Braka* that, "the mechanisms used by Mexico were *conventional devices of civilized nations* faced with severe monetary crises" (589 F. Supp., at 1472). They were, therefore, clearly not a violation of international law. As Mr. Angulo, the attorney who opposed elimination of the act of state doctrine, noted in his statement, "the imposition of exchange controls, such as these imposed by Mexico, has been expressly held not to be an 'expropriation' or 'taking' " (*Hearings*, at 217). Thus, if the act of state doctrine were eliminated, a court would consider the validity of the Mexican currency regulation under international law, determine that it was not a violation of international law but "a conventional device of civilized nations," and apply the Mexican law.

There is apparently a belief that if the act of state doctrine is eliminated the foreign law would not apply, even if it is consistent with international law. That would be

[3]*See Hearings on H.R. 3137 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 89 (1986), at 22 [hereinafter *Hearings* in text].

true only in those situations in which the foreign law was not the governing law under present day choice-of-law rules. That is because the act of state doctrine—in addition to requiring application of the foreign law even though it violates international law—also incorporates the traditional choice-of-law rules under which the law of the situs governs. This is not always the case under modern choice-of-law rules. Even so, I think that in most of the banking cases in which act of state has been applied, the foreign law would have applied under presently applicable choice-of-law principles as well. But if there are cases in which the foreign law would not be the governing law under present day choice-of-law rules, it is not clear why the older choice-of-law principles, which have otherwise been rejected by the courts, should apply in those cases.

Another case that is cited in support of continuation of the act of state doctrine is the *OPEC* case (649 F.2d 1354 (9th Cir. 1981)). However, in that case too, the result should not have been any different if the act of state doctrine had not applied. An agreement by a group of states to regulate prices and set quotas on their natural resources is not a violation of international law. There appears, however, to be some apprehension that in the absence of the act of state doctrine a U.S. court would apply U.S. antitrust laws to the agreement. I very much doubt that Congress intended U.S. antitrust laws to apply to agreements between foreign states. However, whether, and the extent to which, U.S. antitrust laws should apply extraterritorially are policy questions that should be resolved by the executive and Congress, through diplomacy and/or legislation, not by the judiciary on an ad hoc basis, through application of the act of state doctrine.

The proposed amendment died in committee. I have mixed views on that. On the one hand, it seems particularly inappropriate to apply the act of state doctrine to bar relief in those cases where Congress has determined to deny sovereign immunity in order to provide a remedy. On the other hand, act of state and foreign sovereign immunity are analytically distinct doctrines and should be treated separately. Amending the FSIA to eliminate act of state problems would have furthered the confusion between them. Moreover, the proposed amendment would have eliminated act of state doctrine only where the foreign state was a defendant, with the anomalous result that where the action was between private parties the act of state doctrine would still apply.

Conclusion

The act of state doctrine has shown remarkable resilience. I think that is due to the confluence of several factors: (1) the extreme reluctance of the courts to adjudicate cases that touch upon foreign affairs; (2) the misconception by some courts and jurists that it is an abstention doctrine, comparable to the political question doctrine; (3) the fear by some publicists that if U.S. courts consider the validity of foreign acts under international law they will apply Western views of international law and not give sufficient weight to Third World and Socialist views of international law; and (4) the reluctance by practicing attorneys to have to litigate what law applies and whether the foreign law is consistent with international law when they can avoid doing that simply by invoking the act of state doctrine.

I do not think these factors justify retaining the act of state doctrine. I think it should be eliminated either judicially, as it was created, or legislatively, perhaps with a reverse *Bernstein* exception—a possibility raised by Elizabeth Verville in her testimony on the FSIA amendments (*Hearings*, at 35).

Short of that, I think that the act of state doctrine and the Foreign Sovereign Immunities Act should be interpreted consistently so that litigants are not denied a remedy

in U.S. courts in those cases where Congress has already determined that they should be afforded a remedy. However, that reasoning should apply regardless of whether the foreign state is a party to the action or not. If act of state is not a defense when the foreign state is a party to the action, *a fortiori*, it should not be a defense when it is not a party to the action.

At the very least, the act of state doctrine should be modified to parallel the political question doctrine. That is, if deciding an action or a counterclaim requires a determination of the validity of a foreign act of state, the court should dismiss the case. This would, at least, avoid use of the U.S. courts to aid and abet foreign states in violating international law and would eliminate the most outrageous application of the act of state doctrine: the use of U.S. courts to enforce foreign laws that confiscate property of U.S. nationals, often precisely because they are U.S. nationals, in violation of international law.

REMARKS BY STEFAN RIESENFELD*

The principal question of the *Amerada Hess* case was whether there were any remedies left, outside of the Foreign Sovereign Immunities Act, which would permit a private person to get redress in U.S. courts against a foreign government. In *Amerada Hess*, the Court, in my mind, conclusively closed the door and held that the only relief a person may get against a foreign government is under the Foreign Sovereign Immunities Act. The question is, putting aside the Supreme Court decision, was it possible to have any doubts before *Amerada Hess*? Quite obviously, the parties in that case thought that there was still some authority in existence under which a private citizen could get redress against a foreign nation in U.S. courts for a gross violation of international law.

The basis for this belief rested in the factual setting of *Amerada Hess*. During the Falkland Islands controversy between the United Kingdom and the Republic of Argentina, a neutrally owned tanker was attacked and severely crippled. The tanker was scuttled, resulting in the loss of both the tanker and the fuel contained therein. The owners of the tanker and fuel (separate parties) sought relief in U.S. courts for a tort in violation of the law of nations, namely, violation of the rights of neutrals. It was thought that there was sufficient precedent for a neutral to get compensation for an unprovoked violation of neutrality and that there was sufficient interest in the domestic courts of the international community to provide for such redress. That was the basic intellectual structure of that case.

There was some case law to support this view. In particular, in *the Santissima Trinidad*, a case decided shortly after the *Schooner Exchange*, the Supreme Court held that there were circumstances, not of a commercial nature but where there was a gross violation of neutrality, under which a private owner could get redress for the damages he had suffered. In *the Santissima* there was a taking of a Spanish vessel and its cargo by a ship of war belonging to what was then an insurgent government called the United Provinces of the Rio de la Plata (now Argentina). That vessel, which was outfitted and its armor strengthened (in violation of the rules of neutrality) in Baltimore and then sold to the future Argentinian Government, captured two Spanish vessels which were brought to the port of Buenos Aires. The cargo from those vessels, however, was brought to the port of Baltimore. In Baltimore, the consul of Spain, in the name of the owners of that cargo, filed a libel against the cargo, alleging that it was taken unlawfully on the high seas by two formerly American, now Argentinian, ves-

*Professor of Law, University of California at Berkeley School of Law.