COMMENT

AMERICAN OIL INVESTORS’ ACCESS TO DOMESTIC COURTS IN FOREIGN NATIONALIZATION DISPUTES

The right of a foreign sovereign to nationalize property located within its borders is no longer seriously questioned, even though its actions may have enormous impact on the individual investor and his native country. Generally accepted international law has, however, imposed certain limitations upon the free exercise of the state’s power when the interests of aliens are adversely affected. In recent years, interest has focused on the issues raised by foreign expropriation as a result of nationalization, both actual and threatened, of the enormous oil deposits in many resource-rich countries.

Nationalization of foreign crude oil producing facilities has occurred with limited frequency throughout the world since the 1950’s. Today, the threat of future nationalizations on a more extensive scale has become an imminent fear of the major oil investors. In the Middle East, for example, the embargo on oil shipments to the United States instituted following the October 1973 Arab-Israeli war reemphasized the growing determination of oil-rich countries to assert increasing control over their natural resources. Dominion over oil deposits has, in fact, become an increasingly important political priority for the leaders of many Arab countries.

1 The partial nationalization of Aramco interests in Saudi Arabia, for example, was alone sufficient to account for the entire decline of $2.5 billion in the real United States gross national product for the second quarter of 1974. N.Y. Times, Aug. 5, 1974, at 33, col. 1.

2 For a discussion of the restrictions on the sovereign’s power to nationalize, see Vicuna, Some International Law Problems Posed by the Nationalization of the Copper Industry by Chile, 67 AM. J. INT’L L. 711 (1973).

3 “Expropriation” and “nationalization” will be used interchangeably in this Comment. For slight technical differences, see id. 719-21.


5 See, e.g., Oil & Gas J., Sept. 17, 1973, at 46 (example of fears in one uniquely militant Arab state); cf. BUSINESS WEEK, Feb. 2, 1974, at 50.


7 J. Campbell & H. Caruso, The West and the Middle East 45-52 (1972); F. Rouhani, A History of O.P.E.C. 3-28 (1971); Bergsten, The Threat Is Real, 14 FOREIGN POLICY 84 (1974); Breckenfeld, How the Arabs Changed the Oil Business, FORTUNE, Aug. 1971, at 113. Such aspirations are also shared by the leaders of oil- and mineral-wealthy...
Of course, not all nationalizations of private property violate international private or public law, the law of the nationalizing state, or the laws of the investor's domicile. Many nationalizations occur, in fact, pursuant to a mutual agreement for prompt and adequate compensation reached prior to or immediately following the action. Other nationalizations of foreign-owned property are, however, in contravention of material terms of contractual agreements between the expropriating state and the foreign investors, or in violation of the applicable domestic laws or of recognized principles of international law.

Where such illegal nationalizations have occurred, political remedies available through the diplomatic machinery have been the dominant, if not exclusive, method of conflict resolution between the investor's government and the expropriating sovereign. To aid the investors themselves, semi-public and public insurance programs have been authorized by Congress to protect American-owned foreign investment from the risks of expropriation. Private negotiation between the investor and the expropriating sovereign, with only limited direct involvement or none at all by the American government, has also led to at least temporary resolution and satisfaction of some investor claims following expropriations of substantial property interests.

nations in other parts of the world. See Leigh, Expropriation of Foreign-Owned Investment, in Symposium: Private Investors Abroad 197 (V. Cameron ed. 1972); Levy, Oil Power, 49 FOREIGN AFFAIRS 652 (1971). For example, the President of Venezuela—the world's third leading oil exporter following Saudi Arabia and Iran—recently announced that an early take-over of foreign oil property is a "certainty." N.Y. Times, Mar. 12, 1974, at 12, col. 3.

8 See, e.g., I. Foighel, Nationalization: A Study in the Protection of Alien Property in International Law (1957); G. White, Nationalisation of Foreign Property (1961); B. Wortley, Expropriation in Public International Law (1959). In the case of Venezuela, it is clear that every effort has been made to assure an orderly process of nationalization. OIL & GAS J., Aug. 26, 1974, at 63-64.

9 See R. Lillich, The Protection of Foreign Investment 167 (1965); G. White, supra note 8, at 265-69.


11 These insurance programs do not, for the most part, provide insurance for investment protection in the Middle East. Iran is the exception to the rule; insurance is available there on a project-by-project basis. Egypt may become eligible but is presently ineligible. Overseas Private Investment Corporation Country List (Investment Insurance and Finance Program), Nov. 1, 1973. An amendment to the bill extending the OPIC for three years, which would have prohibited OPIC protection for foreign oil investments, was recently defeated in the House of Representatives. 120 CONG. REC. 43,946 (daily ed. May 16, 1974).

12 An example of partial government intervention is the Brazilian seizure of certain International Telephone and Telegraph Company telephone lines and facilities, which
Although not often pursued because of numerous historical complexities, another avenue of redress for an aggrieved American investor is in access to the judicial apparatus. This Comment will explore the present and potential role of American courts as a forum for the resolution of conflicts and satisfaction of claims arising out of the rapidly increasing number of expropriations. It focuses in particular on the expanding role of American courts in providing a meaningful system of remedies for private investors who seek to challenge nationalizations of oil producing and refining facilities, particularly by Middle Eastern sovereigns. It is a case study of the progress to date in what one authority has labeled "the effort in certain capital exporting countries to create limited judicial remedies which would serve to bolster the customary international law." However, before examining the implications of increased access to judicial remedies, it is necessary to understand the underlying character of the relationship between the American oil investor and the foreign state.

I. THE PETROLEUM INDUSTRY AND THE FOREIGN SOVEREIGN

A. The Relationship of Contractual and Property Rights

The unique legal element of the foreign oil exploration and exportation industry is the "concession agreement," the legal document through which foreign private investors have traditionally gained access to the natural resources of foreign lands. Under the usual long term concession agreement, a foreign investor or a consortium of foreign investors acquires exclusive rights of exploration, extraction, transportation, storage, utilization, and exportation over extensive areas and all the crude oil discovered and produced in those areas during the term of the agreement. This bundle of contractual rights granted from the

13 For a more limited focus by way of example on related issues, see Lowenfeld, Act of State and Department of State: First National City Bank v. Banco Nacional de Cuba, 66 AM. J. INT'L L., 795, 806-10 (1972).  
14 Leigh, supra note 7, at 197.  
15 See, e.g., H. Steiner & D. Vagts, supra note 10, at 371; Note, From Concession to Participation: Restructuring the Middle East Oil Industry, 48 N.Y.U.L. REV. 774, 776-77.
public domain to the private investor represents the most sub-
stantial portion of the property interest sought to be protected
against nationalization. Because of the desire of the developing
Arab societies to attract foreign investors at a time when the
potential return was unfathomed, these agreements were origi-
nally written and sold under terms which, at least with the
benefit of hindsight, were extremely favorable to the private
parties. The host country received no ownership interest in the
oil to be produced. Compensation tended to be in the form of a
package containing an "up front" cash bonus, rents, royalties,
and a reserved right to a small percentage of the oil produced
for meeting the domestic energy needs of the host.

More recent changes in bargaining conditions, specifically
the progressive decline of "the bargaining power of the capital
exporting countries . . . as the gap between supply and demand
for oil was widened," have produced modifications in the terms
of the original agreements but not, for the most part, in the
underlying institutional relationships between the companies
and the governments.

The first of these major changes in the traditional legal
structure was effectuated on January 3, 1973, when four Persian
Gulf oil producing states, Abu Dhabi, Kuwait, Qatar, and Saudi
Arabia, entered into new "participation" agreements with their
concessionaires significantly amending and reforming the terms
of their former concession agreements. Under the new agree-
ments, the four states, for the first time, each acquired an im-
mediate twenty-five percent ownership interest in the major con-
cessions within their areas, along with a degree of local corpo-
rate control and a planned graduated increase in their owner-
ship interest up to fifty-one percent by 1982. The agreements
have been further modified in light of the 1973 energy crisis,
with Kuwait's ownership interest, for example, already having
reached sixty percent. The other countries are negotiating for an
immediate increase to an even larger share.

(1973). See also H. CATTAN, THE LAW OF OIL CONCESSIONS IN THE MIDDLE EAST AND
NORTH AFRICA 19-27 (1967).

16 See, e.g., AM. SOC'y OF INT'L L., 1967 PROCEEDINGS 81-84 (1967); Note, supra note
15, at 776 nn.4 & 5, 777.


18 Leigh, supra note 7, at 244.

19 The Comment makes no reference to the changing pricing and marketing rela-
tionships between Western concessionaires and the Arab states. See generally M. ADELMAN,
THE WORLD PETROLEUM MARKET (1972).

20 For a detailed analysis of these new agreements, see Note, supra note 15.

3; id. June 11, 1974, at 1, col. 3.
But even with the substantial modification of the terms of these agreements, the basic contractual relationship between the foreign sovereign and the oil investors has remained largely unaffected. The legal character of the oil concession has been described as a "State contract which is *sui generis*" and which "can be said to combine elements of private and public law which are knitted together to create a relationship intended to exploit a State resource for the mutual benefit of the parties."22 Perhaps the most thorough judicial review of the essential legal character of concession agreements is to be found in the *Saudi Arabia v. Arabian American Oil Co.* (Aramco),23 involving the reach of that concession agreement to protect the concessionaires' exclusive right of transport. The international arbitration tribunal rejected Saudi Arabia's characterization of the concession agreement as a state law and concluded:

In its capacity as first concessionaire, Aramco enjoys indeed exclusive rights which have the character of acquired or "vested" rights and which cannot be taken away from it by the Government . . . . The principle of respect for acquired rights is one of the fundamental principles both of public international law and of the municipal law of most civilized States. . . .

In the Hanbali school of Islamic law, respect for previously acquired private rights, and especially for contractual rights, is a principle just as fundamental as it is in other legal systems of civilized States.

This follows from the fact that valid contracts bind both parties and must be performed, for rights resulting from agreements concluded for due consideration are absolutely secure . . . .

. . . .

Since Aramco's Concession is a concession for the development of national wealth, *which is contractual in character*, and not a public service concession, the rights and obligations of the concessionary Company are in the nature of acquired rights and cannot be modified by the granting State without the Company's consent.24

Contractual characteristics of the newer participation agreements are equally clear. Both agreements create a contractual

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24 Id. 205-06, 227 (emphasis added).
bond between the investor and the host state with vested rights in the investor for the term of the agreement.

With the concession agreement representing the most significant part of the investors' property rights, the ownership of the physical investments represents the balance. These investments include wells, storage tanks, pipelines, ports, and other incidentals such as housing and office facilities. This investment can represent huge monetary sums. For example, the net value in 1971 of the physical assets of Aramco (the largest Arabian concessionaire) was estimated at $1.266 billion. The relationship between the value of assets and the remaining income potential from the value of the oil in the concession area varies with concessions, but the case of Aramco serves to illustrate that even the staggering value of physical assets (property) is dwarfed by the value of the crude oil underlying the concession contract. In just one year, 1973, income from the concessions was sufficient for Aramco to pay the Saudi Arabian government $7.6 billion in oil revenues and income taxes.²⁵

B. The Effect of Nationalization

In addition to changes in the terms of the underlying contracts between the corporations and the state, the change in bargaining conditions has led, in such nations as Libya and Algeria, to full nationalization of certain smaller oil companies' interests²⁶ and to nationalization of fifty-one percent of the crude production and assets of the major oil companies.²⁷ It has also led in certain contexts to absolute denials of the validity of the underlying concession agreements.²⁸ When nationalizations occur, the form and reach of the decrees may thus differ. One may reach a

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²⁵ Mosely, The Richest Oil Company in the World, N.Y. Times, Mar. 10, 1974, § 6 (Magazine), at 22. Detailed statistical ratios may be found in M. ADELMAN, supra note 19.

²⁶ Wall Street J., June 12, 1973, at 17, col. 1 (quoting Libyan leader Muammar el-Qaddafi after nationalization of the Bunker Hunt concession to Sarir oil field: "The right to nationalize comes under our sovereignty over our land. We can do whatever we want with our oil.").

²⁷ OIL & GAS J., Sept. 10, 1973, at 44 (reporting all major oil companies' assets nationalized in Libya to 51%); High Stakes in Libya, PETROLEUM PRESS SERV., July 1973, at 244. For an argument that nationalization may not be in the interest of some Arab countries, such as Iran (where it failed in the early 1950's) and Saudi Arabia, see A. FORD, supra note 4; Note, supra note 15, at 781, 788-90.

²⁸ In the recent "participation" negotiations, for example, the Persian Gulf states argued that the principle of rebus sic stantibus was applicable to the concessions. This principle of international law states that if the relations between the parties, or circumstances relevant to a treaty, change substantially, one party may declare the treaty at an end. Note, supra note 15, at 796.
virgin field and the underlying concession agreement only; another may reach both the rights covered by the concession agreement and the physical assets of the investors involved, but only to a set percentage of production (say, fifty-one percent).

Total nationalization is a third possibility. For example, the June 11, 1973 Libyan nationalization of Nelson Bunker Hunt’s fifty percent interest in the Sarir oil field followed the earlier nationalization in 1971 of British Petroleum’s fifty percent share of the field. The Hunt nationalization, as summarized by Libya’s Revolutionary Command Council in the nationalization statute, illustrates the impact of total nationalization:

The rights . . . under Concession Agreement No. 65 shall be nationalized and the ownership of all funds, rights, assets and shares of Milton [sic] Bunker Hunt related to the said concession agreement shall be turned over to the State. This particularly includes all the rights related to the installations and facilities for exploratory drilling, the extraction of oil and gas, and transportation, utilization, refining, storage, exportation and other assets and rights related to the said concession agreement.

The day after the nationalization, Hunt declared that he did not have “any choice but ‘to pursue all available legal remedies.’” The remainder of this Comment will examine the probable suc-

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29 See Lowenfeld, supra note 13, at 809-10 n.60 (example of Iraqi nationalization of 1961).
30 For example, see 13 INT’L LEG. MAT’LS 60 (1974) for the September 1, 1973 Libyan decree nationalizing the interests of Exxon Corporation, Mobil Oil Corporation, Texaco Incorporated, Chevron, and Royal Dutch Shell. For subsequent nationalization of the remaining 49% interests of some of the above corporations, see N.Y. Times, Mar. 31, 1974, § 1, at 46, col. 5.
Following the ruling favorable to British Petroleum, the Libyan government committee, formed to determine the amount of compensation, offered BP $96.5 million from which an unspecified amount of taxes and royalties would be deducted. BP has no representation on the committee. The company’s valuation of its seized property is in excess of $250 million. OIL & GAS J., Nov. 5, 1973, at 34. BP and Libya recently reached an agreement on the compensation to be paid for the nationalization. Wall Street J., Nov. 22, 1974, at 15, col. 2.
cess of such efforts to obtain compensation within the judicial system.

II. ACCESS TO THE JUDICIARY

A. The Act of State Doctrine and a Limited Legislative Response

Since the Supreme Court's formulation of the "act of state doctrine" near the turn of the century in *Underhill v. Hernandez*, the courts of the United States have consistently refused to "sit in judgment on the acts of the government of another [country] done within its own territory." "Redress of grievances," in the words of the *Underhill* court, were properly to "be obtained through the means open to be availed of by sovereign powers as between themselves."

Even into the twentieth century, the Court continued to adhere to its view that involvement in foreign expropriation is reserved to the executive and not a proper subject for the judiciary. In 1964, the Court reached its high water mark in judicial conservatism. It proclaimed in *Banco Nacional de Cuba v. Sabbatino* that "the [j]udicial [b]ranch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . 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."

Apparently dissatisfied with the Court's hands-off policy, Congress enacted an amendment to the 1961 Foreign Assistance Act in 1964. The amendment legislatively opened access to the courts in a limited number of cases which would otherwise have been barred by the *Underhill* and *Sabbatino* rule. Under the statute, there are essentially two factual contexts in which the "act of state doctrine" will not bar examination of the validity of

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34 168 U.S. 250 (1897).
35 Id. at 252.
38 Id. at 428.
39 22 U.S.C. § 2370(e)(2) (1970). This "Second Hickenlooper Amendment," known as the Sabbatino Amendment, was passed by Congress in direct response to the Supreme Court's decision in *Sabbatino*.
a foreign sovereign's taking. The first is the classical case in which the amendment applies directly: property expropriated without just compensation is sold by the expropriating nation to a third party who attempts to market the identifiable property in the United States, and the original owner discovers the property and brings suit to replevy it. Second, even if the underlying property is not found in the United States, the amendment applies to identifiable, traceable proceeds from the sale of allegedly expropriated property if the proceeds are located in this country. In these two situations, the statute requires that 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 to property is asserted ... based upon or traced through a confiscation or other taking ... by an act of that state in violation of the principles of international law, including the principles of compensation ... .

The amendment is expressly not applicable "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." This critical aspect of the legislative reaction to the Supreme Court's jurisdictional bar is succinctly summarized in the Senate Report:

The effect of the amendment is to achieve a reversal of presumptions. Under the Sabbatino decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a
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foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy. 44

However, it is not Presidential intervention but narrow judicial interpretation of the statutory words "claim of title or other rights to property" which has resulted in the statute's being applied in only one case. 45

Thus, the Sabbatino Amendment offers a potential remedy—though a narrow and limited one—for the oil concessionaire whose interests have been nationalized. It allows a possessory action in the nature of replevin for return of seized oil

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45 Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968), aff'g 272 F. Supp. 836 (S.D.N.Y. 1965). See Mazaroff, supra note 40. In essence, the courts which have addressed the problem have concluded that the Sabbatino Amendment was intended to exclude all contract claims. For example, in Menendez v. Saks Co., 485 F.2d 1355 (2d Cir. 1973), cert. granted sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 416 U.S. 981 (1974) (No. 73-1288), the Second Circuit reaffirmed a prior narrow reading of the statute by holding that the amendment, especially in its 1965 version, was intended to exclude all contract claims. The opinion emphasized the 1965 modification of the amendment which added the words "to property" after "other rights." 485 F.2d at 1272. The court cited the earlier decision of the New York court of appeals in French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968), holding both that a claim for a breach of contract is not a "claim of title or other right to property" within the meaning of the amendment and that the repudiation of a contractual obligation does not amount to a "confiscation or taking" as those terms are used within the statute. The French court asserted:

It is plain enough upon the face of the statute—and abundantly clear from its legislative history—that Congress was not attempting to assure a remedy in American Courts for every kind of monetary loss resulting from actions, even unjust actions, of foreign governments. The law is restricted, manifestly, to the kind of problem exemplified by the Sabbatino case itself, a claim of title or other right to specific property which had been expropriated abroad.

Id. at 57-58, 242 N.E.2d at 712, 295 N.Y.S.2d at 444-45.

A recent decision from the District Court for the Central District of California, factually distinguishable because of its antitrust implications but otherwise analogous, also affirmed this view. Judge Pregerson concluded that the exception to the act of state doctrine embodied in the Sabbatino Amendment "is by its terms extremely narrow . . . . Plaintiff's assertion that the Amendment in effect pulled the rug out from under the act of state doctrine in all cases is groundless." Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 381 F. Supp. 92, 112 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972). See also 110 Cong. Rec. 19,559 (1964) (remarks of Senator Hickenlooper); id. 23,680 (1964) (remarks of Congressman Adair); Hearings on a Draft Bill to Amend the Foreign Assistance Act of 1961 Before the House Comm. on Foreign Affairs, 89th Cong., 1st Sess. 607, 1235, 1247 (1965).
which may be shipped to the United States either by a third party purchaser or by an instrumentality of the expropriating state. However, since the concession agreements and the successor participation agreements are essentially contracts, any claim sounding in breach or repudiation would fail to come within the strict terms of the amendment. This is the conclusion reached by the Second Circuit:

[A] claim for a breach of contract is not a "claim of title or other right to property" within the meaning of the Hickenlooper [Sabbatino] Amendment and the repudiation of a contractual obligation does not amount to a "confiscation or other taking" as those terms are used in the statute. . . . [W]e are persuaded by the legislative history, and particularly by Congress' insertion in 1965 of the phrase "claim of title or other right," that the intent was to exclude all contract claims from the amendment.

For purposes of Sabbatino Amendment jurisdiction in the concession agreement context, it is therefore critical to determine the portion of the oil to which the concessionaire had a "title right," as opposed to a mere contract right, at the time of nationalization. Although the issue has never been explored in an American court, it has arisen in foreign jurisdictions. Looking to the law of the nationalizing state, courts in Japan and Italy have held that at most the concessionaire may assert a claim of title to oil above ground, already extracted, at the moment of the nationalization decree. In certain instances the decision is

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46 See text accompanying note 40 supra.
47 See text accompanying notes 23-25 supra.
49 Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, [1953] I.L.R. 305 (High Court, Tokyo, First Civil Affairs Section 1953).
51 However, a Singapore court gave a concessionaire title when oil was extracted by the occupying Japanese army and subsequently seized by the British as war booty. Whyatt, C.J., reasoned:

[The oil in the reservoirs was under the control of the appellants [concessionaires] to the extent that it was capable of being under control and they were in fact dealing with it was fully and completely as any owner could deal with oil trapped in an underground reservoir. Accordingly I reach the conclusion that the appellants were in actual possession of the oil in the reservoirs at the time of the Japanese invasion.

based on the common law of the state; more recently, courts have relied on statutes.

The latter trend is evidenced by the 1973 British Petroleum decision. The case involved the attachment by BP of oil shipped to Italy from its nationalized Sarir field in Libya by a third party purchaser. The court rejected BP's claim to the oil, conceding that it had been extracted from the Sarir field but concluding that it had been extracted not by BP but by the successor Libyan company. The court supported its holding by reference to Libyan statutory law:

Article 812, sub-paragraph 2, of the Libyan Civil Code, provides that the ownership of the land includes the space above and below the sub-soil, so that it may be usefully enjoyed above and below, subject as provided by the special legislation regarding quarries and mines.

Such rule must, however, be read in conjunction with that of Article 1 of the Libyan Petroleum Law No. 25 of 12/4/1955, by virtue of which all petroleum lying in the Libyan subsoil in its natural state is deemed to be property of the Libyan state.

The Italian court thus concluded that the bundle of concession rights allowed BP "to acquire the ['property'] ownership of the crude oil only at the time of extraction." All other interests were contractual in nature.

The Sabbatino Amendment's failure to reach contractual claims thus severely limits its value as a vehicle of access to the domestic courts. Moreover, even with respect to above-ground crude oil, the concessionaire would likely face numerous chal-


Consequently, in accordance with the Persian legal system, in view of the non-autonomous nature of the minerals before extraction . . . it is clear that the holder of the Concession cannot acquire the ownership of such mineral products prior to their extraction. Prior to extraction, the ownership of the mineral (a future commodity, not yet in existence, and not a fruit) was vested in the owner of the mine, in respect of which the holder of the Concession had a mere jus adquirendi, which could be converted into a right of ownership only by the exercise of the right of extraction and acquisition granted to the said Company.

\[53\] British Petroleum Exploration Co. (Libya) v. Astro Protector Compania Naviera, 13 INT'L LEG. MAT'LS 106 (1974) (Civ. Ct., Syracuse, Feb. 15, 1973) (petitioner's transl.). The case is now on appeal. High Stakes in Libya, PETROLEUM PRESS SERV., July 1973, at 244. Another hearing on oil shipped from BP's nationalized Libyan fields is scheduled in Athens before a Greek court, but no decision has yet been reported.

\[54\] 12 INT'L LEG. MAT'LS at 113.

\[55\] Id. 114.
lenges based on legislative ambiguities before a claim of title to seized oil would be allowed by an American court. For example, the amendment allows the courts to make a determination only in cases in which the "act of that state [is] in violation of the principles of international law, including the principles of compensation . . . ."56 Does this reference to "compensation" mean that Congress wanted to confine the inquiry to questions relating to the adequacy or existence of compensation under international law? Commentators have argued against such a restrictive reading.57 A broader international law standard would allow concessionaires to argue that the seizure is in violation of international law "when the purpose for the seizure of the property is to retaliate against the homeland of those aliens and when the result of such seizure is to discriminate against them only."58 This is the position which Bunker Hunt has taken with respect to its Sarir field:

This act of nationalization was publicly described by the Libyan government as "a warning to the oil companies to respond to the demands of the Libyan Arab Republic" and "a warning to the United States to end its recklessness and hostility to the Arab nation."

Thus, this action, which applied only to Hunt, was clearly discriminatory, punitive, coercive in nature and without a valid public purpose. As such it was a clear violation of international law . . . .59

57 Bleicher, The Sabbatino Amendment in Court: Bitter Fruit, 20 STAN. L. REV. 858 (1968), argues that the meaning of the word "including" in the Amendment should not mean "conclusively defined as," but should be viewed as an illustrative reference, "added to ensure that American courts will apply principles of international law in relation to expropriation problems, even though they might feel it unwise to do so." Id. 862, 863. In this way, judges could present their decisions as a "reasoned development of principles endorsed by the international community." Id. 864. See also Mazaroff, supra note 40, at 794-97.


58 This standard, in addition to the lack of adequate compensation, was adopted by the Second Circuit in Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 864 (2d Cir. 1962) (emphasis omitted). The standard was left undisturbed by the Supreme Court, which argued, however, that international law is unsettled as to a minimum standard for "valid" nationalizations. 376 U.S. 398, 428-30 (1964). It was again applied in the case's final decision. Banco Nacional de Cuba v. Farr, 393 F.2d 186 (2d Cir. 1966).

59 This statement is from a notice published by Bunker Hunt in major international newspapers following nationalization of the field. See, e.g., Wall Street J., July 10, 1973, at 37, col. 3.
The amendment further leaves unclear what standard of compensation should be viewed as sufficient, that set forth in the first Hickenlooper Amendment or the less rigid, internationally accepted standard requiring only "prompt, adequate and effective" compensation.

The other basic cloud over the significance of a Sabbatino Amendment in rem action is the uncertainty with respect to executive intervention. In the simplest terms, executive silence allows the court to adjudicate the merits notwithstanding the act of state doctrine. The executive, however, has the option of filing a suggestion with the court "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 ...." In this way, the executive may stop the court from asserting jurisdiction. In a diplomatic context as delicate and tense as that arising out of the Middle East, it is possible that the executive would exercise the option.

Another problem arises if the oil is shipped to the United States by an instrumentality of the seizing state, rather than by a third party: the seizing state may enter a defense of sovereign immunity. This defense allows the foreign sovereign to claim an immunity similar to that held by the domestic sovereign. The defense relates to the sovereign's right not to have itself or

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60 22 U.S.C. § 2370(e)(1) (1970). The statute mentions "speedy compensation for [the expropriated] property in convertible foreign exchange, equivalent to the full value thereof, as required by international law ...."


63 Lowenfeld, supra note 13, at 803-10 (focusing on the "Sabbatino suggestions" from the perspective of problems faced by the State Department). However, when the oil from the Sarir field was offered for sale in this country, the State Department applied significant pressure on prospective buyers, suggesting that they could be held liable in American courts. In a press release the Department said it "has declined to block suits in American courts in pursuit of goods claimed to be hot. Its so declining is clearly consistent with the will of the U.S. Congress ...." Statement of Department of State, transmitted to Subcomm. on Multinational Corporations of Senate Comm. on Foreign Relations, May 7, 1974 (reproduced in 13 INT'L LEG. MAT'LS 767, 780 (1974)).

64 It has been held that the Sabbatino Amendment is restricted entirely to the act of state doctrine. It thus deals only with cases in which there is no other bar to jurisdiction. The amendment cannot, therefore, deny the foreign defendant its defense of sovereign immunity. American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary, 257 F. Supp. 622, 626 (D.N.J. 1966), noted in 8 HARV. INT'L L.J. 357 (1967).

65 As originally formulated, the foreign sovereign's immunity was presumed to be given by the implicit consent of the domestic sovereign. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). Situations exist, however, in which such
its instrumentalities subjected to the jurisdiction of the court, rather than to its privilege not to have American courts question its acts within its own territory. The in rem jurisdiction previously acquired would have to be relinquished should the defense be successful.

Mechanically, the seizing state would have the option of seeking a suggestion of immunity from the State Department; if it were successful, the courts would almost certainly honor the suggestion. Predicting the State Department's probable response to a request for a suggestion of immunity in this kind of case is, however, a matter of political prognostication. As Judge Wisdom noted in a recent Fifth Circuit decision,

the degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second guess the executive. . . . [I]n the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves. Will granting immunity serve as a bargaining counter in complex diplomatic negotiations? . . . Will it preclude a significant diplomatic advance; perhaps a detente between this country and one with whom we are not on the best speaking terms? These are questions for the executive, not the judiciary.

Because of the serious adverse effect that denial of immunity may have on relations with the state seeking the suggestion, the State Department has tended to grant it when it is requested.

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66 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 438 (1964). That both doctrines have bases in comity of nations is apparent. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972) (Rehnquist, J.). Until recent years, however, they remained distinct doctrines relating respectively to jurisdiction and justiciability. Beginning with Justice White's singular dissent in Sabbatino, a merger of the two has been attempted, with the prominent role for the executive in granting or withholding immunity extended to the area of act of state. In First National City Bank, Justice Rehnquist explicitly drew on sovereign immunity cases for his reasoning, while Justice Douglas applied Republic of China, a sovereign immunity case, without discussion of the implications.


68 Spacil v. Crowe, 489 F.2d 614, 619 (5th Cir. 1974) (citation omitted).

Notwithstanding Judge Wisdom's view, the executive is presently seeking to transfer to the courts the sole responsibility for determining when immunity should be granted.\(^7\) The executive could accomplish this by refusing to act on any request for a suggestion. If no suggestion was then before the court, it would weigh the issue of sovereign immunity de novo. In these contexts, there has been an increasing tendency within the Department of State and in the courts to deny claims for sovereign immunity for suits involving "commercial" activities of sovereigns.\(^7\) On the other hand, the Second Circuit stated in \textit{Vic-tory Transport Inc. v. Comisaria General}\(^7\) that although the distinction between acts which are \textit{jure imperii} (public acts of the sovereign to be afforded immunity) and those which are \textit{jure gestionis} (commercial acts not to be afforded immunity) may not be precisely defined, acts "such as nationalization" are, nevertheless, \textit{jure imperii}. While there has been some disapproval of this view among commentators,\(^7\) no judicial opinion has challenged it.

Assuming that all of the jurisdictional bars may be overcome and the aggrieved concessionaire is given his day in court, the investor should still anticipate substantial procedural problems and substantive defenses. With some careful planning, these may be mitigated. For example, there is some question whether an action to recover specific fungible property such as oil may be maintained successfully.\(^7\) Related thereto is a problem of identification and tracing—was the oil in controversy extracted prior to the expropriation and from fields to which the plaintiff had

\(^7\) The State Department has found that it cannot deny a claim of immunity without risking adverse effects on foreign relations. Thus the Administration has sought legislation transferring to the courts the responsibility for determining whether a claim of immunity should be honored. See H.R. 3493, 93d Cong., 1 Sess. (1973). The bill would take the State Department out of the business of suggesting immunity to the courts. Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1 Sess. 34 (1973).


72 336 F.2d 354, 360-61 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).


73 \textit{Id.} 900 (raising the same question); \textit{see} J. WHITE & R. SUMMERS, \textit{Uniform Commercial Code} 192-96 (1972); \textit{cf.} \textit{Uniform Commercial Code} § 2-716, Comment 2 (on the expanding availability of specific performance: "The test of uniqueness [required for specific performance] . . . must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation . . . ").
concession rights? The identification problem may be further complicated if the oil properly within the Sabbatino Amendment's reach is commingled with oil to which no "claim of title" may be sustained by the concessionaire.\(^7\)

The third party may also seek to exert the "good faith purchaser defense."\(^7\) To combat this defense, wide notice of the seizure and the concessionaire's claim of title to the oil affected must be given the business community. Such notices have been placed in newspapers such as the *Wall Street Journal* and the *New York Times*.\(^7\) In the recent Bunker Hunt Libyan nationalization, as in previous cases, such notices seem to have deterred marketing of any of the seized oil in the United States. Such notices

\(^7\) *See* Reeves, *The Sabbatino Case and the Sabbatino Amendment: Comedy—or Tragedy—of Errors*, 20 Vand. L. Rev. 429, 444 (1967).

\(^7\) Uniform Commercial Code § 9-307(i); J. White and R. Summers, *supra* note 74, at 940-43.

\(^7\) The Bunker Hunt notice as published in the Wall Street Journal, July 10, 1973, at 37, col. 3, read:

ANNOUNCEMENT BY NELSON BUNKER HUNT

Contrary to established principles of international law, the Libyan government on June 11, 1973, formally purported to nationalize the assets of Nelson Bunker Hunt in relation to Concession 65 and the Sarir Field in Libya. This followed a de facto expropriation on May 24, 1973.

This act of nationalization was publicly described by the Libyan government as "a warning to the oil companies to respond to the demands of the Libyan Arab Republic" and "a warning to the United States to end its recklessness and hostility to the Arab nation."

Thus, this action, which applied only to Hunt, was clearly discriminatory, punitive, coercive in nature and without a valid public purpose. As such it was a clear violation of international law, the contractual obligations of the Libyan government, and the arbitration proceedings presently pending between the parties.

Hunt has protested to the Libyan government against the action and has reminded that government that its unlawful acts are incapable of terminating rights under the Concession.

In this time of energy shortages, it should be noted that the Libyan action against Hunt and, earlier, against British Petroleum, has removed from legitimate international commerce over 400,000 barrels of oil per day. Since Hunt was the largest single exporter of low sulphur Libyan crude oil to the United States, the burden of the Libyan action will be felt by the American people.

The attention of all those who may be concerned with these developments, whether as purchasers or sellers of oil, oil products or otherwise, is drawn to the continuance of Hunt's rights. It is Hunt's intention to assert those rights wherever and whenever necessary against those who infringe them, including anyone dealing in or with oil extracted from the Sarir Field, its products or proceeds. This warning applies equally to dealings in or with so-called "royalty oil" or "cost crude oil", of which there is none. Legal title to all oil from Sarir Field and Concession 65 rests in B.P. Exploration Company (Libya) Ltd. and Nelson Bunker Hunt.

For another "notice," see *N.Y. Times*, May 3, 1972, at 73, col. 6 (by Basrah Petroleum Co., Ltd.—a British company whose North Rumalia oil fields were nationalized by Iraq in 1961).
should therefore be publicized quickly. In the Bunker Hunt case, the company waited a full thirty days. Such a time gap could have been fatal if a third party had bought the oil in the interim.

The monetary recovery possible via the Sabbatino Amendment exception to the act of state doctrine is limited, and the procedure is clouded by a string of uncertainties. Nonetheless, the availability of potential recourse to the courts and the risk of incurring legal and storage costs while shipments of oil are tied up pending resolution of the controversy serves as an effective deterrent to the marketing of the seized oil in the United States. The value of the remedy decreases, of course, as the demand for oil continues to outstrip supply and competitive prices for the oil are available worldwide. The failure of nationalized oil concessionaires successfully to sustain suits attaching seized oil wherever shipped has also undercut the potential deterrent value of the remedy.\(^7\)\(^8\) Should foreign courts render decisions more favorable to oil investors in the future, the value of the Sabbatino Amendment as a deterrent to nationalization might improve, although its value as a source of financial recovery would remain insignificant in terms of the total investment.\(^7\)\(^9\)

**B. First National City Bank and its Progeny**

In contrast to the numerous obstacles confronting a litigant proceeding under the Sabbatino Amendment, the Supreme Court's recent decision in *First National City Bank v. Banco Nacional de Cuba*\(^8\)\(^0\) may have signalled a new relationship between the judiciary and the executive in the protection of the property interests of Americans deleteriously affected by the acts of foreign governments within their own territories. Emerging

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\(^7\) The only successful attachment was in an English colonial court. Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary), [1953] I.L.R. 316 (Aden Sup. Ct. 1953). *But cf.* Braden Copper Co. v. Groupement d’Imporation des Metaux (Ct. of Extended Jurisdiction, Paris, Nov. 29, 1972), 12 *INT’L LEG. MAT’LS* 182, 189 (1973) (court orders Chilean corporation to segregate proceeds of sale of copper shipped to France and produce them if a court-appointed master finds that Chile has not equitably indemnified Braden, a subsidiary of Kennecott Copper Company, for seized mines. Proceedings were later postponed. *N.Y. Times*, Jan. 11, 1973, at 58, col. 1).

\(^8\) See *High Stakes in Libya*, 40 *PETROLEUM PRESS SERV.*, July 1973, at 244. For a recent decision supportive of oil investor interests, *see* note 31 *supra*. *See also* text accompanying note 25 *supra*.

court of appeals interpretations of the case's three opinions support the view that access to judicial forums may have been expanded by the decision to controversies previously barred by the act of state doctrine. Paradoxically, the Court itself may, to some extent, have accomplished through judicial intervention what Congress failed to effect through legislative action.

In First National City Bank, the American bank loaned a predecessor of Banco Nacional $15 million secured by United States bonds. When the Castro government seized power in Cuba, all of the branches of First National City were expropriated. First National City sold the collateral bonds in response and was sued by Banco Nacional for an alleged excess in principal and interest. By way of setoff and counterclaim, First National City asserted the right to collect damages as a result of losses sustained in the nationalization. The lower court allowed the counterclaim but was reversed by the Second Circuit. The Supreme Court vacated the judgment and remanded to the court of appeals to consider a letter filed on behalf of the Department of State recommending that the act of state doctrine not be applied. Notwithstanding the views of the executive branch, the Second Circuit adhered to its earlier determination. Again the Supreme Court reversed, holding that when the executive "expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts."

Prior to First National City Bank, the courts served as "shields," reinforcing the primacy and exclusivity of the executive for redress of wrongs suffered by Americans at the hands of sovereigns; the courts' new role may be more amenable to characterization as "swords" in the hands of the executive. The extent to which the judiciary, by opening its doors to judicial

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81 Justice Rehnquist delivered the judgment of the court, in which Chief Justice Burger and Justice White joined. Justices Douglas and Powell concurred only in the result. Justice Brennan wrote a dissenting opinion joined by Justices Stewart, Marshall, and Blackmun.


83 See text accompanying notes 34-38 supra.

84 See 406 U.S. at 789-90 n.13 (Brennan, J., dissenting) (citations omitted):

Similarly, when the Judicial Branch has abided by an Executive determination of foreign sovereignty, the consequence has been merely to require or deny the application of various principles governing the attributes of sovereignty.
relief, will in fact function as marshall to an executive\textsuperscript{86} wishing
to deter foreign expropriation of American property is, however,
far from settled. It nevertheless seems clear that \textit{First National City Bank} has created, in addition to the replevy
action available under the Sabbatino Amendment,\textsuperscript{87} a second
category of cases in which the act of state doctrine will not bar
examination of the validity of a foreign sovereign's taking. According to the Court, the doctrine may not be used as a
pre-emptive defense against a counterclaim for damages in
a case where the expropriating sovereign acts as plaintiff in
an American court seeking proceeds from the sale of the sov-
ereign's property properly within the possession of defendant
prior to the expropriation.

Critical, however, to the successful limitation on the act of
state doctrine in \textit{First National City Bank} was the Court's reliance
\footnotesize{\ldots In no event has the judiciary necessarily been called upon to assess a claim
under international law. The effect of following a "Bernstein letter," of course,
is exactly the opposite—the Judicial Branch must reach a judgment despite the
possible absence of consensus on the applicable rules, the risk of irritation to
sensitive concerns of other countries, and the danger of impairment to the
conduct of foreign policy.

For an explanation of the origin of the "Bernstein letter" exception, see note 88 infra.

Commentators have generally criticized this evolution of executive "control" over
the judiciary, recognizing the court's lack of sensitivity to separation of powers and the
need for the court to define for itself what is a political question. They cite with approval
Justice Brennan's dissent in \textit{First National City Bank}, which noted that "[t]he Executive
Branch, however extensive its powers in the area of foreign affairs, cannot by a simple
stipulation change a political question into a cognizable claim." 406 U.S. at 788-89. See,
\textit{e.g.}, Delson, \textit{The Act of State Doctrine—Judicial Deference or Absention?}, 66 Am. J. Int'l L. 82,
93 (1972) ("If there is a question of judicial deference involved in the act of state doctrine
it is a deference to the overriding policy of judicial abstention, not to Executive
suggestions. . . . To construe the act of state doctrine as \textit{compelling} such judicial deference to
political decisions would be to ignore the purpose of the doctrine in securing the separa-
tion of powers."); Lowenfeld, supra note 13, at 795 ("The objective of protecting overseas
private investments was not furthered; and the relation between the Executive Branch
and the Judiciary was pushed in the wrong direction."); Note, 14 Harv. Int'l L.J. 131
(1973) [hereinafter cited as Harvard Note] ("If the Executive obtains unbridled discretion
to decide when a question involving foreign relations is within the competence of the
Judiciary, judicial independence is unavoidably compromised." Id. 142. "To revise our
governmental structure in favor of the relative monopoly of a single branch in such a
broad area of societal interaction seems an unnecessary measure, and the Bernstein
exception as enunciated by the \textit{Citibank} [\textit{First National City Bank}] Court represents an unwar-
tanted extension of Executive influence." Id. 144). \textit{See also} Note, 3 Denv. J. Int'l L. &
Policy 117 (1973). \textit{Contra}, Leigh, supra note 7, at 245 ("There appears to be less likeli-
hood than ever that political or economic sanctions will be employed to support the
security of investment or to promote fair settlements in expropriation cases. Under these
circumstances, judicial determination of title to movable property expropriated without
compensation in one country and sold in another, offers one of the few promising
possibilities for introducing a measure of badly needed stability in international commer-
cial and economic relations.").

\textsuperscript{87} See text accompanying note 40 supra.}
on the intervention of the executive via a "Bernstein letter" from John R. Stevenson, Legal Advisor to the Department of State. The letter to the Supreme Court sitting in the case for the first time said that recent events had convinced the Department that the "act of state doctrine" should not bar consideration of a defensive counterclaim or offset when three conditions exist: "(a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine." The Stevenson letter concluded, "The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set off against the Government of Cuba in this (First National City Bank) or like cases.

With this background, it is important to understand the positions of the five Justices comprising the majority. Because he spoke for a plurality in rendering the judgment, Justice Rehnquist's opinion is probably of greatest significance. Although he recognized the Sabbatino Court's concern for the "separation of powers" and replied to the earlier, historically

88 The "Bernstein letter" exception to the act of state doctrine prior to First National City Bank was allowed only in the cases of its origin. Two cases were involved: Bernstein v. Van Heyghen Freres, 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947), and Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375 (2d Cir. 1954). Both cases involved attempts by the plaintiff, Bernstein, to attach insurance proceeds of property owned by him but expropriated by the Nazi German government. In the first case Judge Learned Hand held that the act of state doctrine precluded an examination of the validity of the Nazi taking. In the second case counsel for Bernstein submitted a press release from the Department of State which "relieve[d] American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." Id. at 376. Thereupon the court of appeals held that the doctrine did not bar consideration of the merits.

89 The text of the Stevenson letter is printed in the Second Circuit's second decision in First National City Bank, 442 F.2d at 536-38.

90 400 U.S. 1019 (1971).

91 One commentator on First National City Bank clarified this by saying: "The 'recent events' referred to were apparently the increase in expropriations of assets of U.S. nationals by foreign governments." Harvard Note, supra note 86, at 137 n.30.

92 442 F.2d at 537.

93 Id. at 538.

94 In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-28 (1964), Justice Harlan wrote for the majority of eight:

If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its 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.

Justice Rehnquist asserted in First National City Bank, 406 U.S. at 768, that the Court's "holding is in no sense an abdication of the judicial function to the Executive Branch."
dominant concern with "international comity," his opinion set forth a new basis for application of the act of state doctrine which removed the question of justiciability from the courts:

The act of state doctrine is grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government. We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called Bernstein exception to the act of state doctrine. We believe this to be no more than an application of the classical common-law maxim that "[t]he reason of the law ceasing, the law itself also ceases" . . .

Justice Powell's opinion went further. While seeking to protect to some degree the Sabbatino Court's concern with the separation of powers by expressly rejecting Bernstein per se, he would reserve only a "pseudo discretion" in the courts. It is pseudo because the potential denial of access turns only on a concern that the judiciary will interfere with the conduct of delicate foreign relations. This concern could not exist in any case in which the court was in possession of a "Bernstein letter." Justice Powell therefore appears to be much more a proponent in general terms of extending the role of domestic courts in the adjudication of international law conflicts than is Justice Rehnquist. He asserted:

I do not agree . . . that balancing the functions of the judiciary and those of the political branches compels the judiciary to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law. Such a result would be an abdication of the judiciary's responsibility to persons who seek to resolve their grievances by judicial process. . . . I am not prepared to say that international law

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95 406 U.S. at 765-67.
96 Id. at 767-68 (citation omitted).
97 Id. at 773 (Powell, J., concurring in the judgment).
may never be determined and applied by the judiciary where there has been an "act of state." Until international tribunals command a wider constituency, the courts of the various countries afford the best means for the development of a respected body of international law. . . .

Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to hear cases such as this.

Thus, four members of the Court no longer see the act of state doctrine as an absolute bar to jurisdiction in American courts. Joining these four, Justice Douglas would also approve some relaxation in the inflexibility of the act of state doctrine. However, the First National City Bank holding is more limited because Justice Douglas' opinion, necessary to forge a majority, relied solely on the counterclaim logic of National City Bank v. Republic of China. Upon its second and final remand in First National City Bank, the Second Circuit did not interpret the split opinions but noted only that the Supreme Court decision had held that "the act of state doctrine [does] not bar consideration of the merits." The court of appeals then determined that the Cuban expropriation of the bank's Havana branch violated international law and that the bank's proceeds from the sale of Cuban collateral asserted as a counterclaim could be retained.

The interesting question which now remains is whether the lower federal courts will rely on the four Justices and extend the First National City Bank holding beyond its factual limits, thereby opening greater access to the courts. In order to forecast with any assurance the future availability of United States

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98 Id. at 774-76.
99 Id. at 770 (Douglas, J., concurring in the result). Justice Douglas' reasoning was criticized by Justice Powell, id. at 774, where he asserted, "Although attracted by the justness of the result he reaches, I find little support for MR. JUSTICE DOUGLAS' theory that the counterclaim is justiciable up to, but no further than, the point of set off."
100 348 U.S. 356 (1955). The Republic of China had commenced a suit against National City Bank to recover deposits allegedly wrongfully withheld. The bank counterclaimed against the government of the Republic. The government interposed a defense of sovereign immunity. In an opinion for the Court, Justice Frankfurter held it would be "unconscionable" to allow the Republic of China to invoke the jurisdiction of the United States courts while invoking the preemptive defense of sovereign immunity to fend off counterclaims.
101 478 F.2d 191, 192 (2d Cir. 1973).
102 For a discussion of the potential broad readings and extensions of the "Bernstein letter" basis of the opinion, see Harvard Note, supra note 86, at 142.
domestic courts to investors claiming an expropriation in violation of international law, the judicially denoted limits of the First National City Bank exception to the act of state doctrine must be sketched.

In affirming a lower court decision denying access to the federal court on the basis of the act of state doctrine, the Ninth Circuit asserted in a footnote that the First National City Bank decision, which was decided during the pendency of the appeal before it, "is limited to the facts of that case." Although it is arguable that the critical missing element in the factual pattern presented to the Ninth Circuit was the lack of an affirmative intervention by the executive, the court nonetheless seemed reluctant to apply the plurality position of First National City Bank broadly.

On the other hand, in a recent Second Circuit case, Menendez v. Saks Co., the holding in First National City Bank was more liberally construed. The Menendez court held that an offset in the form of counterclaim should be allowed where the sovereign refused to return proceeds wrongfully received for property sold prior to the expropriation. Proceeds from the sale of similar property shipped to the United States after the expropriation (cigars manufactured in Cuba) were held by a New York collecting bank and claimed by the original owners. The court directed the importers to pay the owners for pre-expropriation shipments and directed the importers to pay the intervenors (Cuba) for post-expropriation shipments, with interest, subject to the offset in favor of the importers for payments mistakenly made to the intervenors. Because the counterclaim was larger than the offset's amount, the offset was allowed in full.

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105 The court held in Menendez that "accounts receivable" are generally not seized by the state through nationalization, noting that the act of state doctrine, which applies to a foreign state's seizure of property located within its territory does not protect a foreign state's attempted seizure of debts owed by persons outside of the foreign state's territory. For purposes of the act of state doctrine, a debt is not located within a foreign state unless that state has the power to enforce or collect it. 485 F.2d at 1364; see also, e.g., Tabacalera Severino Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), cert. denied, 393 U.S. 924 (1968); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), cert. denied, 383 U.S. 1027 (1966).
It is important to note the critical ways in which the facts of Menendez differed from those in First National City Bank. In Menendez, the nationalized cigar factories were owned by Cuban nationals who subsequently fled to the United States. It is settled law that nationalization of property owned by subjects of the sovereign is not a violation of international law.  

The act of state being examined in Menendez was not, as it was in First National City Bank, the taking itself, but Cuba's assertion that the expropriation reached unpaid accounts receivable for cigars shipped prior to expropriation and its refusal to return payments received therefrom. Thus, in refusing to apply the act of state bar, the court indicated that First National City Bank applies not only to the actual expropriation, but also to related actions by the sovereign.

In addition, Menendez seems to have expanded First National City Bank in certain other limited ways. First, Menendez broadened the scope of executive intervention via a "Bernstein letter" by applying it not only to the specific case before the court but also to subsequent like cases.  

In addition, this case incorporates counterclaims for "unjust enrichment" (a quasi-contractual type of claim) into the class of adjudicable claims.

Although it is the least clear, the third extension by the Menendez court is potentially the most significant. It is possible to read Menendez as extending the reach of First National City Bank to allow access to domestic courts in cases questioning the validity of acts of sovereigns even where the actions involved do not violate international law.

The Menendez court held in relevant part that the Cuban government's claim to the owners' accounts receivable as part of the expropriation of the factory to which the accounts were due was improper; that Cuba's refusal to reimburse the owners for amounts paid the state by mistake for pre-expropriation shipments was an act of state; and that the counterclaims for reimbursement were allowable up to the limit of Cuba's direct claim. Because of the assumption that seizure of its own nationals'...
property by a state does not violate international law, the court did not examine that particular act. Its holding focused only on the Cuban refusal to reimburse. But in denying the validity of Cuba's actions, the court made no effort to determine whether they violated principles of international law. Thus a broad reading of the Menendez opinion supports the argument that the case frees the First National City Bank exception to the act of state doctrine from one of its fundamental underpinnings: that the act of state being challenged in the litigation for which access to the court is sought must violate international law.

C. Additional Considerations

The newly expanded First National City Bank—Menendez exception to the act of state doctrine may offer the American owner of a nationalized foreign oil concession hope, in certain circumstances, of a substantial recovery through the courts. Under the present state of the law, however, three essential limitations on the availability of the exception to the act of state doctrine emerge from First National City Bank: the act of state must be in violation of international law; the State Department must send a "Bernstein letter" informing the court that the foreign policy needs of the United States do not necessitate application of the doctrine; and the investor must frame the issue of validity in the form of a counterclaim against a petitioning foreign sovereign. Nevertheless, it is clear that, at a minimum, the new judicial exceptions to the act of state doctrine allow for the protection of a broader range of oil investors' interests than does the Sabbatino Amendment. The holding in Menendez, for example, makes the exception applicable to claims based on both strict breach theory and quasi-contractual causes of action. First National City Bank itself allowed the exception in a fact situation involving seizure of both physical assets and contractual obligations. The First National City Bank—Menendez exception thus could allow a decision based on the merits adjudicating both

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112 But see text accompanying notes 110-11 supra.
113 See Carlston, Conversion Agreements and Nationalization, in SELECTED READINGS ON PROTECTION BY LAW OF PRIVATE FOREIGN INVESTMENTS 273 (1964); Leigh, supra note 7, at 225.
114 485 F.2d 1355, 1372-74 (2d Cir. 1973).
the validity of a foreign sovereign's seizure of all physical assets expropriated and the investors' rights under the nationalized or repudiated concession agreement.

As a result of Justice Douglas' opinion in City Bank, the critical issue in future litigation could well be the counterclaim limitation. But even assuming that an adjudication free of the act of state doctrine can proceed only if the cause of action is brought in a counterclaim context, the foreign investor may still find circumstances in which substantial recoveries may be available. From this perspective, one goal of the oil investor should be to posture himself in relationships in which property of various Arab oil producing states is in the legal possession of the investor or parties friendly to him. In the event of a nationalization, such property may be converted. In any subsequent action by the sovereign to recover that property, the losses resulting from the nationalization may be counterclaimed.

While such an approach would have been highly unrealistic a few years ago, there is now reason to believe that sophisticated "nationalization deterrence" planning may prove to be successful. The critical factor giving life to this alternative is the recent expansion of interest among Arab states in investment in American enterprises and securities. Substantial sums of Arab money are, in fact, already deposited in American banks. The counterclaim has thus become an increasingly valuable deterrent force as the amount of American investment in Arab interests is "collateralized" by Arab property in the United States which the investor may seize without recourse to legal proceedings.

Ingenuity will be required to develop such interrelationships. Joint ventures in American refining plants offer one approach. Assigning interests in Arab holdings to American banks as security in other investor commercial activity will make possible actions in a third party intervenor capacity following a nationalization if the bank holds Arab cash deposits which are set off and the Arab state contests the setoff in American courts. Only Justice Douglas' opinion grafted the counterclaim requirement to the majority consensus in First National City Bank. Should the counterclaim requirement be read out, the investors'
potential remedy options could expand significantly. The aggrieved American party could attach the nationalizing state's property in the United States even though that property had no direct relation to the claim. With the excision of the counterclaim requirement, the "Bernstein letter" rationale could be elevated from the dominant to the controlling principle for judicial waiver of the act of state doctrine. Even if direct actions would be proper, any such suit based on in rem or quasi-in rem jurisdiction might be faced with a claim of sovereign immunity. Because the factors involved in granting an exception to the act of state doctrine and rejecting a foreign state's request for a suggestion of immunity are logically indistinguishable, it would be inconsistent for the Department to grant such a suggestion in a case it had described as fit for exception from the doctrine. This would then leave the issue of sovereign immunity to the discretion of the court. It is not clear whether the executive's immunity would be sufficient to reverse Victory Transport's characterization of "acts of nationalization" as jure imperii (state entitled to sovereign immunity). If no request for a suggestion has been made, it is even less clear whether the court could draw any inferences from or attach any presumptions to a letter from the Department waiving the act of state doctrine. This is an area of the law greatly in need of refinement in light of the increasing

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121 See generally Harvard Note, supra note 86, at 142.
122 However, reading the counterclaim requirement out of the First National City Bank case may not necessarily mean that the requirement would be eliminated in practice. In the Stevenson version of the "Bernstein letter" in First National City Bank, the setoff requirement for jurisdiction and the amount of the counterclaim as a limit on the recovery were both expressly incorporated as conditions on the State Department's suggestion that application of the act of state doctrine was not required by the needs of American foreign policy. This letter is reproduced in the Second Circuit's decision, 442 F.2d at 536-38. The archetypal "Bernstein letter" had no such limitation, but rather stated in the broadest terms that it was the executive's policy "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." 20 DEPT OF STATE BULL. 592 (1949). For some insights into the thinking within the Department at the time, see Metzger, supra note 36, at 890 n.30.

It is noteworthy that the original "Bernstein letter" was written in reference to a foreign government not then extant and with which America was at war at the time of the act in controversy. Whether either or both of these criteria would be conditions precedent to the Department's writing a similar letter is a matter for political evaluation. It is highly unlikely, though, that such a broad letter would be drafted, considering the character of our contemporary foreign policy toward the Arab oil producing states. See, e.g., President Nixon Visits Five Middle East Nations, 71 DEPT OF STATE BULL. 77 (1974).

123 See New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955) (property unrelated to claim was immune from foreign attachment). But see Lowenfeld, supra note 71, at 908 (citing 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 709 (1968) (trend toward quasi-in rem jurisdiction being upheld where attachment is merely for jurisdiction, not execution)). See also text accompanying notes 64-73 supra.
levels of commercial investment in the United States by foreign state trading and investment instrumentalities. To date, however, there is no reported federal case involving a defense of sovereign immunity to a claim based on an attachment of property unrelated to the specific controversy.\footnote{125}

Finally, should Menendez' apparent waiver of the need to allege that the act of state whose validity is to be challenged is in violation of some principle of international law be affirmed or left undisturbed by the Supreme Court,\footnote{126} the grounds on which the nationalization could be attacked would be greatly expanded and the number of controversies which would qualify for a hearing might substantially increase. The difficulty of proving that the nationalizing state did not meet an international minimum standard in its actions may be significantly greater than, for example, sustaining the posture that it was "unjustly enriched" at the offered rate of compensation.\footnote{127}

III. Conclusion

Both the Sabbatino Amendment and the First National City Bank—Menendez doctrine offer the oil investor expanding, but still limited, access to American courts in his search for possible remedies following a nationalization of foreign investments. If further expanded to allow for attachment of unrelated property in the United States of a commercial character owned by the nationalizing state, the doctrine could have a significant deterrent effect on future Middle Eastern nationalizations. The Arab states seeking outlets for foreign investment of accumulated capital are as interested as the American investor in the security of their investments. Fair play would demand that if Arab investments are to be secure in the United States, American investments in the Middle East should be as protected. It appears that the most direct way to guarantee this result would be to expand the availability of both the commercial activity exception to the sovereign immunity defense and the First National City Bank—Menendez exception to the act of state doctrine. By so doing, the nationalizing state could not, in the words of Justice Douglas in First National City Bank, "have its cake and eat it too."\footnote{128}

\footnote{125} Lowenfeld, \textit{supra} note 71, at 924.
\footnote{128} 406 U.S. 759, 772 (1972) (Douglas, J., concurring in the result).