

Abuses of the Act of State Doctrine

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Courts are confused and divided regarding the scope of the act of state doctrine. Some foreign nations have capitalized on this phenomenon by utilizing acts of state to declare liability on the part of whatever parties the foreign nations choose. These foreign nations then sue in the United States seeking to domesticate their determinations of liability while preventing American courts from inquiring about the veracity of the determinations even where evidence exists that the determinations were made in violation of principles of fairness and due process.

Foreign nations are using the act of state doctrine as the vehicle to preclude American courts from assessing the foreign nations' claims

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on the merits. The United States should be cognizant of the dangers posed to American policies and interests by permitting these abuses of the doctrine to continue unabated. Furthermore, the contradicting caselaw leads many courts to believe themselves bound to rigidly apply the act of state doctrine while simultaneously abhorring doing so because of the conflict with traditional notions of fairness and justice.

This Article analyzes the act of state doctrine and its legal parameters and afterward proceeds to examine cases that have misapplied the act of state doctrine and the implications of those decisions. The Article proposes that the solution to these abuses of the act of state doctrine is a legislative amendment prohibiting a foreign nation from employing the doctrine when that foreign nation avails itself of the American judiciary by suing in the United States.

I. INTRODUCTION

The act of state doctrine precludes American courts from questioning the validity of acts¹ conducted by a foreign sovereign² within that foreign sovereign's borders.³ In other words, acts of state done by a foreign sovereign within that sovereign's borders are deemed valid as

1. These acts are typically in the form of a government decree, resolution, or any public action the government takes. In essence, it is the government of a given country exercising its sovereign power within its own borders. See *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990) (defining an act of state as “the official act of a foreign sovereign performed within its own territory”); see also *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 693–94 (1976) (holding that agents of the Cuban government could not simply act within the scope of their general authority but rather must have been invested with sovereign authority).

2. The act of state doctrine applies only to “the public acts a recognized foreign sovereign power committed within its own territory.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); see also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (concluding “[r]ecognition is a ‘formal acknowledgement’ that a particular ‘entity possesses the qualifications for statehood’ or ‘that a particular regime is the effective government of a state.’” (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a (AM. LAW INST. 1987))).

3. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 (AM. LAW INST. 2018).

a rule of decision.⁴ Grounded on principles of international comity,⁵ the Supreme Court in *Underhill v. Hernandez* made the “classic American statement”⁶ of the act of state doctrine:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.⁷

Indeed, comity was of such importance in the 1964 Supreme Court decision *Banco Nacional de Cuba v. Sabbatino* that the Court held absent a treaty or other unambiguous agreement, there was no exception to the act of state doctrine for the confiscation of property by a foreign sovereign government within its own borders—even though the confiscation violated customary international law.⁸ Despite its salience, the act of state doctrine is a judicially created concept;⁹ and therefore, it is subject to modification or supersedence by statute or newer judicial determinations.¹⁰

4. See *W.S. Kirkpatrick & Co.*, 493 U.S. at 409.

5. The Supreme Court used international comity as another rationale for the act of state doctrine in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918). The Court stated:

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly ‘imperil the amicable relations between governments and vex the peace of nations.

Id. at 303–04.

6. *Sabbatino*, 376 U.S. at 416 (referring to the *Underhill* passage as the “classic American statement”).

7. 168 U.S. 250, 252 (1897).

8. See *Sabbatino*, 376 U.S. at 428.

9. See *First Nat’l City Bank v. Banco Nacional de Cuba (Citibank)*, 406 U.S. 759, 762 (1972).

10. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 cmt. h (AM. LAW INST. 2018).

Over time, caselaw has developed regarding when and under what circumstances the act of state doctrine applies. The legislature has also enacted statutes providing for exceptions to the doctrine, allowing American courts to question a foreign sovereign's acts.¹¹ Unfortunately, time has not eased the confusion regarding when courts should apply the act of state doctrine and continues to produce cases with unfair results.¹² Although exceptions to the act of state doctrine have been judicially and statutorily created to allow claims to be heard on their merits, courts have not reached a consensus on which exceptions should be recognized.¹³

Foreign sovereign nations have increasingly availed themselves of the American judicial system and in many cases initiate suits as plaintiffs.¹⁴ This Article focuses on the act of state doctrine as it pertains to foreign sovereigns as plaintiffs but will first provide a general background on the doctrine. Where a foreign sovereign brings a suit in the United States, alleging liability on the part of some party, the foreign nation can claim that through an act of state within that foreign nation's own borders, it has determined liability on the part of that party. The foreign sovereign can further contend that the American court cannot assess the validity of that foreign nation's determination of liability because the determination arose from an act of state within the foreign nation's own borders, and thus the foreign nation need not present any proofs. In essence, the foreign nation is requiring that the American court without question: (1) believe the foreign nation that

11. See, e.g., 22 U.S.C. § 2370(e)(2) (2018); see also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 cmt. h (AM. LAW INST. 2018) (regarding the Second Hickenlooper Amendment which requires courts, "when resolving claims of title to property, not to invoke the act of state doctrine and instead to determine whether the foreign-sovereign act at issue violated principles of international law, including the principles of compensation applicable to expropriations").

12. Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 365 (1986) ("The courts have been unable to determine its scope or to construct a consistent scheme for its application. This confusion has produced cases with unfair results"). Despite the passage of over thirty years since Bazylar's analysis, the act of state doctrine is in even worse shape than ever as will be further discussed later in this Article.

13. See *id.* at 368.

14. See Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism,"* 73 WASH. & LEE L. REV. 653, 655 (2016).

the defendant is liable and (2) believe that the defendant is liable for the amount the foreign nation so declares. A few questions arise: in such a situation, where the foreign sovereign initiated the lawsuit and availed itself of the American court, has the foreign sovereign waived its sovereign immunity? Does the act of state doctrine preclude the American court from questioning that foreign nation's determination of liability? As a matter of principle, do American courts need to accept, without requiring proofs, such determinations of liability from a foreign nation? Should courts simply decline to adjudicate such a case?

This Article provides a legal analysis of the act of state doctrine and pertinent case law in an attempt to answer these questions. Part I explores the underlying policy reasons for the doctrine. Part II provides an understanding of the current general application of the doctrine. Part III briefly discusses the exceptions to the doctrine. Part IV addresses the problems that arise when foreign sovereigns, as plaintiffs, seek to shelter behind the act of state doctrine to preclude adjudication of a case on its merits. Finally, Part V concludes that the United States legislature should amend the Foreign Sovereign Immunities Act so that any foreign sovereign that initiates a lawsuit in the United States automatically forfeits the ability to assert the act of state doctrine. Such a statutory provision would likely abate the widespread misapplication of the act of state doctrine as it pertains to foreign sovereign plaintiffs.

II. POLICY REASONS FOR THE ACT OF STATE DOCTRINE

The act of state doctrine requires the balancing of two competing policy views: on the one side, separation of powers and international comity, and on the other, the furtherance of international law. Courts that emphasize the separation of powers and comity policies often will not hear cases that implicate the act of state doctrine and instead defer elsewhere.¹⁵ For example, courts that favor the separation of powers view tend to abstain from adjudicating cases that implicate the act of state doctrine because such a view posits that the court is not competent to adjudicate such a case. Thus, the judiciary must defer to the executive branch because of the executive's authority regarding

15. Comity is generally defined as “[a] principle or practice among political entities (as countries, states, or courts of different jurisdictions), whereby legislative, executive, and judicial acts are mutually recognized.” *Comity*, BLACK’S LAW DICTIONARY (11th ed. 2019).

foreign policy and foreign relations.¹⁶ Similarly, many courts that favor the international comity view use it as an abstention doctrine and instead defer the cases to foreign courts.¹⁷ Conversely, courts that favor the furtherance of international law tend to adjudicate the cases.¹⁸ Courts, however, must attempt to balance the desire to further international law in an increasingly globalized world with principles of comity and separation of powers.¹⁹

In *Sabbatino*, Justice Harlan, writing for the majority, determined that the act of state doctrine “arises out of the basic relationship between branches of government in a system of separation of powers.”²⁰ The Court further held:

However offensive to the public policy of this country and its constituent States an expropriation of this kind may be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application.²¹

Justice Rehnquist, writing for the plurality opinion in *First National City Bank v. Banco Nacional de Cuba* (famously known as *Citibank*), instead determined that the act of state doctrine “has its roots, not in the Constitution, but in the notion of comity between independent sovereigns.”²² The reality is that the act of state doctrine has roots in both

16. See, e.g., *Hunt v. Mobil Oil Corp.*, 550 F. 2d 68, 78–79 (2d Cir. 1977).

17. See, e.g., *Royal & Sun All. Ins. Co. of Can. v. Century Int’l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006).

18. See generally *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979).

19. See *Sage Int’l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 905 (E.D. Mich. 1981) (stating that the “appropriate inquiry goes to general separation of powers and foreign relations concerns.”).

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

21. *Id.* at 436–37. See also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 cmt. h (AM. LAW INST. 2018). The *Sabbatino* holding was partially overturned by Congress through the Second Hickenlooper Amendment. This statement was included for the purpose of conveying the Court’s policy reasoning.

22. 406 U.S. 759, 765 (1972).

separation of powers and comity.²³ Notably, in *Sabbatino*, the Court determined three factors must be balanced:

[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . for the political interest of this country may, as a result, be measurably altered.²⁴

In other words, the balancing test involves considerations of international law, separation of powers, and international comity. Most courts then understand they have judicial discretion in deciding when deference is warranted, whether to the executive or foreign nations. The real issue is the discrepancy among courts as to the amount of discretion they believe they have in making such a determination and whether said discretion permits (to what degree, if any) inquiry into a foreign nation's acts of state.

In *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, the Supreme Court unanimously held that a federal court should “accord respectful consideration” to a foreign sovereign’s “submission” on the meaning and interpretation of its own law “but is not bound to accord conclusive effect to the foreign government’s statements.”²⁵ The Supreme Court overturned the Second Circuit Court of Appeals which had erroneously held that “the foreign government’s statements could not be gainsaid” and that “federal courts are ‘bound to defer’ to a foreign government’s construction of its own law, whenever that construction is ‘reasonable.’”²⁶ Although this holding does

23. See *Sage Int’l, Ltd.*, 534 F. Supp. at 903–04.

24. *Sabbatino*, 376 U.S. at 428.

25. 138 S. Ct. 1865, 1869 (2018). This was a class action antitrust case alleging Chinese sellers had agreed to fix price and quantity of vitamin C. The Chinese Ministry of Commerce filed an *amicus* brief stating the alleged price and quantity fixing was a pricing regime mandated by the Chinese Government.

26. *Id.* at 1869–70 (citing *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 189 (2016)).

not specifically address the act of state doctrine, the Supreme Court reasoned comity did not translate to American courts being required to defer to foreign governments' statements regarding the meaning and interpretation of their own laws. Part II will further discuss whether the rationale in this case should extend to not accord conclusive effect to foreign governments' acts of state.

Deference policies by the courts can adversely affect the United States and the United States' policies and interests. Excessive deference to the executive "enables a litigant with political influence to enlist the Executive to intercede on its behalf and tarnishes the image of the American judiciary as an independent branch of the government."²⁷ By the same token, extreme deference to foreign nations allows the political influence of foreign governments to obstruct the judicial process. Furthermore, excessive receptiveness to international considerations in the interest of advancing international law turns the American judiciary into a global judiciary which can conflict with the Executive branch and impede the Executive's role in foreign relations. Professor Michael Bazylar noted:

[V]irtually every court decision involving an international transaction has the potential of interfering with the foreign policy interests of the United States. When a foreign government is directly involved as a party and a suit is decided against it, there is obviously the potential for embarrassment to the executive branch. On the other hand, if the court's judgment is in favor of the foreign sovereign, the result may be contrary to the goals of the Executive. Indeed, United States foreign policy may be affected even when the foreign sovereign is involved only indirectly in the transaction: our foreign policy is wide-ranging and involves not only national defense but also international commerce.²⁸

It is worthwhile to understand the underlying policies of the act of state doctrine to properly assess how it is currently applied and how such application can be improved while keeping in line with the spirit of the doctrine.

27. Bazylar, *supra* note 12, at 328.

28. *Id.* at 367.

III. APPLICATION OF THE ACT OF STATE DOCTRINE

As discussed in the Introduction, “the act of state doctrine when applicable bars a court from questioning the validity of the foreign act on the ground that it did not comply with that sovereign’s own legal requirements, international law, or U.S. law or policy.”²⁹ The doctrine constitutes federal common law and therefore precludes both state courts and federal courts from “examining the validity of a foreign official act performed within the foreign sovereign’s territory.”³⁰ Notably, although international law requires that nations recognize some sort of foreign immunity,³¹ it does not require that nations recognize the act of state doctrine.³²

Cases in which the act of state doctrine is an issue vary significantly in terms of facts and pertinent laws. These cases can include expropriation of property by foreign governments, contractual disputes between corporations engaged in business with foreign governments or instrumentalities of foreign governments, bribery of foreign officials under the Foreign Corrupt Practices Act (“FCPA”),³³ antitrust under the Sherman Act,³⁴ torture, terrorism, tort cases under the Alien Tort Claims Act,³⁵ and the list goes on. Furthermore, those foreign sovereigns can be plaintiffs or defendants. They can even be indirectly implicated, such as when a foreign company in litigation in the United States has ties or a contractual relationship with a foreign government. Another such instance is when an American business operating in a

29. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 cmt. a (AM. LAW INST. 2018).

30. *Id.* at cmt. b.

31. The enforceability of international law is not a topic of this Article.

32. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 reporter’s note 3 (AM. LAW INST. 2018).

33. *See* 15 U.S.C. § 78dd-1 (2018) (prohibiting the attempt to bribe or the bribing of foreign officials, political parties, or any person which would use the bribe to bribe foreign officials or political parties).

34. *See* 15 U.S.C. § 1 (2018). The Sherman Act contains no territorial limitation, stating in relevant part, “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” *Id.*

35. *See* 28 U.S.C. § 1350 (2018) (granting jurisdiction to United States federal courts over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”).

foreign nation bribes a foreign official, implicating the FCPA, and although the foreign nation is not directly involved in such a suit, the American company can assert an act of state doctrine defense because the bribery of a foreign government official calls into question the foreign official's act in the acceptance of the bribe. Application of the doctrine thus varies depending on the type of case at issue. As noted in the Introduction, this Article does not conduct an analysis on the myriad of cases that implicate the act of state doctrine. Instead, it focuses on cases where a foreign nation is a plaintiff seeking to enforce a foreign government act of state which purports to determine liability, legal conclusions, or facts which the foreign sovereign relies upon to make its claims.

When the act of state doctrine applies, it precludes adjudication of a case on the merits. Preclusion occurs because the case hinges on the factual circumstances surrounding the act of state at issue. For the policy reasons discussed in Part I, courts may not wish to inquire into such circumstances. However, proper resolution of such an issue necessitates inquiry into the act of state to obtain a proper determination of the facts. While it is typically not the role of American courts to question the validity of acts by a foreign nation conducted within that nation's own borders, in certain situations, such as where a plaintiff foreign nation commenced suit in the United States, inquiry into the respective acts of state should be allowed in the interest of judicial resolution. Indeed, the various exceptions to the act of state doctrine often permit inquiry, but the confusion of courts regarding the applicability of the doctrine, and the differing opinions on the extent of judicial discretion to determine whether adjudication of a case is proper under the circumstances, leads to considerably different and often unjust results.³⁶ Thus, courts should be given clearer guidance on the applicability of the act of state doctrine when a foreign sovereign initiates a lawsuit of its own volition in the United States.

Many foreign nations do not give deference to other sovereigns regarding the applicability of the act of state doctrine. These nations

36. Professor Don Wallace stated, "this confused and outmoded doctrine frustrates the normal operation of the courts . . . and produces injustice in individual cases." *The International Rule of Law Act: Hearing on S. 1434 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 97th Cong. 22 (1981) (statement of Professor Don Wallace, Chairman of the International Law Institute, Georgetown University Law Center).

have determined international law is of more importance than comity and deference to other nations; thus, these foreign courts are not required by their respective country's laws to abstain from reviewing other nations' acts of state.³⁷ As discussed in Part I, international comity, in the interest of foreign relations, is one of the underlying rationales for the act of state doctrine in the United States.³⁸ Yet, the United States Department of State wrote in a letter to the Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba* advocating for the act of state doctrine to not bar adjudications of cases on the merits under international law.³⁹ The Department of State noted that English law, from which the United States' act of state doctrine derives, "does not require British courts to abstain from reviewing state acts under international law."⁴⁰ The State Department then added, "[i]n general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy."⁴¹ In other words, if these countries experience no hinderances to their foreign relations despite said countries' lack of an act of state doctrine equivalent, then the United States would likewise not experience said hinderances. This is furthered by the Executive itself, through the Department of State, stating that adjudication of acts of state under international law would not impede foreign relations.⁴² To be sure, American courts should consider whether reviewal of acts of state might impede foreign relations, but the courts should not assume that

37. See, e.g., *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 709 (1976) (Appendix 1 to Opinion of the Court).

38. *Citibank*, 406 U.S. 759, 765 (1972).

39. *Dunhill*, 425 U.S. at 710 ("As far as can be determined, this exercise of the judicial function in foreign jurisdictions has not caused serious foreign relations consequences for the countries concerned.").

40. *Id.* at 709–10.

41. *Id.* at 710.

42. *Id.* at 709–10. The Executive itself has been inconsistent with its opinion on the act of state doctrine based on what is politically expedient. In *Sabbatino*, for example, the Executive urged the application of the doctrine in its full force, but in *Dunhill*, the Executive urged the opposite, insinuating the act of state doctrine should be abolished. What matters is not so much the Executive's opinion on the doctrine at a given time, but rather the soundness of the evidence and reasoning for the opinion. See *infra* note 43 for additional discussion on the Executive's reasoning provided to the Court in *Dunhill*.

reviewal of acts of state will automatically hinder foreign relations.⁴³ Indeed, it could be said that a given nation heeding international law and adjudicating cases on the merits provides for an impartial procedure and thus lends credibility to the judiciary of that nation, which in turn furthers foreign relations with a majority of nations who benefit from the impartiality of said judiciary.

Presumably, foreign nations determined they need not blindly defer to other nations' acts of state because an adjudication on the merits is the most equitable way to handle a case that implicates foreign sovereigns' acts of state. International comity and separation of powers are therefore poor justifications for the act of state doctrine in its current form. The United States' current deference to other nations in its application of the act of state doctrine—barring adjudication of cases on the merits by precluding American courts from questioning the validity of foreign acts—is not in line with other civilized nations' treatment of the act of state doctrine. Both in the interest of fairness and because inquiry into foreign acts of state has not been shown to hamper those nations' foreign relations, the United States should follow suit. At the very least, courts should prohibit applicability of the act of state doctrine as to foreign nation plaintiffs availing themselves of American courts and instead allow inquiry into foreign acts of state.

IV. EXCEPTIONS TO THE ACT OF STATE DOCTRINE

The act of state doctrine is not inflexible.⁴⁴ Indeed, there are several judicial and statutory exceptions to the doctrine that bar its application in certain circumstances and as a result allows an American

43. An alternative way of viewing the fact that foreign nations' courts are not prohibited by a doctrine similar to the American act of state doctrine is that a double standard exists. Foreign courts can inquire American acts of state, but American courts cannot inquire into foreign acts of state. If the rationale for the existence of the act of state doctrine is that without the doctrine foreign relations would be impaired, from the perspective of this rationale, at least, the act of state doctrine is needless. Put differently: what changed? Meaning, did the foreign nations who inquired into acts of state referred to in *Dunhill*, which experienced no impairment to their foreign relations at the time of the *Dunhill* case in 1976, somehow begin experiencing such impairment in the present time?

44. See *Citibank*, 406 U.S. 759, 763 (1972) ("It is clear, however, from both history and the [o]pinions of this Court that the doctrine is not an inflexible one.").

court to judge the validity of an act of state of a foreign nation.⁴⁵ The courts, however, have not reached a consensus as to which exceptions are recognized, and of those recognized, under what circumstances the exceptions apply.⁴⁶

The most well-known exceptions to the act of state doctrine are the following:⁴⁷ (1) the Bernstein exception, which applies when the Department of State issues a letter to the court stating that the Department of State has no objection to a decision on the merits;⁴⁸ (2) the commercial activity exception, which applies when a foreign government's activities are commercial in nature;⁴⁹ (3) the treaty exception, which applies when the issue is governed by a "treaty or other unambiguous agreement regarding controlling legal principles";⁵⁰ (4) the fraud exception, which applies when the acts of a foreign government were induced by fraud or corruption;⁵¹ and (5) the expropriation exception, also known as the property situs exception, which applies when expropriated property or the situs of property is located in the United States.⁵² Additionally, the *Restatement (Fourth) of the Foreign Relations Law* discusses potential indirect exceptions to the act of state doctrine regarding foreign-court judgments:

45. See JEFFREY L. KESSLER & SPENCER W. WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 11:5 (2d ed. 2019) (referencing some of the exceptions to the doctrine).

46. Bazylar, *supra* note 12, at 368.

47. This is neither an all-inclusive list nor an in-depth explanation of the exceptions.

48. See *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (allowing Bernstein to proceed with his action upon receipt of a letter from the Department of State informing the court it had no objections to an adjudication on the merits based on a separation of powers rationale).

49. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695–97 (1976).

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

51. See *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 909–10 (E.D. Mich. 1981) (noting "support exists for the proposition that corrupt activity by foreign sovereigns is beyond the umbrella of the Act of State Doctrine" and that "to shield such activity would be violative of the spirit of the [Foreign Corrupt Practices] Act" (citing 15 U.S.C. §§ 78dd-1 to -2 (2018))).

52. See 28 U.S.C. § 1605(a)(3) (2018).

Except as provided in [sections] 483-484 and [section] 489, a final, conclusive, and enforceable judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, is entitled to recognition by courts in the United States.⁵³

Note, however, that the act of state doctrine is different from the doctrine governing recognition and enforceability of foreign-court judgments in the United States.⁵⁴ This Part will later discuss the implications in instances where acts of state purport to determine liability, legal conclusions, or the factual underpinnings of a claim, which is normally the purpose of a court judgment. In such instances, the act of state doctrine can be contended to preclude inquiry into said determinations. Indeed, herein the doctrines intertwine.

The exceptions to foreign judgments provide that foreign judgments within the exceptions either must not or should not be recognized⁵⁵ and enforced⁵⁶ in the United States. Section 483 of the *Restatement* provides exceptions, namely, where an American court *cannot* recognize a judgment of a foreign court if: “the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness.”⁵⁷ For obvious reasons, American courts are wary to assess the competency of

53. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (AM. LAW INST. 2018).

54. *See id.* § 441 reporter’s note 9 (noting the rationale of the “nonapplicability” of the act of state doctrine to foreign-court judgments as the difference between the two doctrines).

55. Recognition of a judgment occurs when a court concludes that a certain matter has already been decided and therefore need not be litigated further. *See* Robert B. von Mehren & Michael E. Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 LAW & POL’Y INT’L BUS. 37, 38 (1974).

56. Enforcement occurs when a party is accorded the relief that was awarded by the court issuing the judgment. A judgment must be recognized before it is enforced. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 reporter’s note 3 (AM. LAW INST. 2018).

57. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 (AM. LAW INST. 2018). *See, e.g.*, HSBC USA, Inc. v. Prosegur Paraguay, S.A., No. 03 Civ. 0336, 2004 WL 2210283, at *4 (S.D.N.Y. Sept. 30, 2004) (finding that Paraguay’s judicial system precluded any chance at a fair trial due to corruption); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1413 (9th Cir. 1995) (finding that the Iranian judicial system lacked procedural due process); *see also* Timothy G.

foreign judicial systems.⁵⁸ The mandatory nature of section 483 differs from the discretionary nature of section 484. Section 484 permits discretionary nonrecognition⁵⁹ of a foreign court's judgment if: "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; [or] the specific proceeding in the foreign court leading to the judgment was not compatible with fundamental principles of fairness."⁶⁰ Another distinguishing feature is that section 484 applies to a specific case before a specific court, as opposed to section 483 which requires that the entire judicial system be implicated.⁶¹ In other words, under section 483 an instance of unfairness in a single proceeding allows for nonrecognition of the foreign judgment without needing to implicate the entire judicial system.

If there is "substantial doubt about the integrity of [the rendering] court," then "a showing of corruption in the particular case that

Nelson, *Down in Flames: Three U.S. Courts Decline Recognition to Judgments from Mexico, Citing Corruption*, 44 INT'L LAW. 897, 897 (2010) (discussing three cases where American courts refused to recognize Mexican judgments because the judgments were the product of bribery or other corrupt conduct).

58. See, e.g., *Chevron Corp. v. Donziger*, 833 F.3d 74, 129 (2d Cir. 2016) (refusing to assess the institutional adequacy of the Ecuadorean judicial system); *Osorio v. Dow Chem. Co.*, 635 F.3d 1277, 1279 (11th Cir. 2011) (refusing to affirm the trial court's finding that Nicaraguan tribunals were systematically inadequate).

59. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 484 reporter's note 1 (AM. LAW INST. 2018) ("[S]ome States have chosen to make all of the grounds for nonrecognition mandatory."). The Restatement then cites the following statutes and provides the following explanatory parentheticals:

GA. CODE ANN. § 9-12-113(b) (2018) (making all grounds for nonrecognition in the 2005 Uniform Act mandatory); MASS. GEN. LAWS ch. 235, § 23A (2019) (making the discretionary grounds for nonrecognition in the 1962 Uniform Act mandatory and adding lack of reciprocity as a mandatory ground); OHIO REV. CODE ANN. § 2329.92 (West 2019) (making the discretionary grounds for nonrecognition in the 1962 Uniform Act mandatory and adding lack of reciprocity as a discretionary ground).

Id.

60. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 484(g)–(h) (AM. LAW INST. 2018). There are other discretionary grounds for nonrecognition under this section, but these grounds are irrelevant to this analysis.

61. See *id.* § 484.

had an impact on the judgment rendered” is required.⁶² Additionally, courts should not recognize a foreign judgment if the specific proceeding in the court leading to the judgment “was not compatible with fundamental principles of fairness.”⁶³ The standard for fundamental fairness is that the procedures of that specific proceeding be compatible with “the requirements of due process of law.”⁶⁴ Due process in turn refers to “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations” and that the foreign procedures are “fundamentally fair.”⁶⁵

Note, however, that the *Restatement’s* exceptions regarding foreign judgments apply to final judgments by a foreign *court*. The issue therefore becomes whether the exceptions also apply to acts of state that determine liability or other legal conclusions, which essentially function as judgments of a court. The rationale behind the foreign-judgments recognition doctrine, of course, is because a foreign court of law already adjudicated the case on the merits, the party seeking recognition of a final judgment should not have to relitigate the case. Conversely, a unilateral act of state determining liability is not within the spirit of foreign-judgment recognition. A unilateral determination of liability innately lacks due process because the defendant could not make its case as the defendant would otherwise be able to before an impartial tribunal prior to a determination of liability.

The *Restatement* seems to indicate that, at least in some occasions, administrative determinations of liability can be recognized but are therefore subject to the same requirements of judicial impartiality, due process, and fundamental principles of fairness as foreign-court judgments.⁶⁶ The reasoning appears to be that where a foreign government assumes the role of the judiciary by issuing judgments under the guise of governmental decrees, resolutions, or other acts of state, the foreign sovereign should not be entitled to automatic recognition and the requirements of fundamental fairness and due process for recognition should apply. Additionally, even administrative determinations of

62. *Id.* at cmt. i.

63. *Id.* at cmt. j.

64. *Id.* at reporter’s note 9.

65. *Id.* (quoting *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000)).

66. *See id.* §§ 441 reporter’s note 9, 481 reporter’s note 6; *see also* discussion *infra* Section IV.B.2.

liability confirmed by judicial decisions are subject to the same requirements.⁶⁷ Therefore, the act of state doctrine does not apply to foreign-court judgments nor administrative determinations of liability and cannot be used to sidestep requirements of fairness and due process and preclude inquiry into the determinations.⁶⁸

The *Restatement* only references acts of state as administrative determinations of liability and does not mention acts of state which make determinations of facts to be relied upon in litigation in the United States or acts of state which make legal conclusions. Nevertheless, the same rationale rendering the act of state doctrine inapplicable for administrative determinations of liability should extend to determinations of facts and legal conclusions. Such determinations of facts and legal conclusions should be subject to the same requirements of fairness, impartiality, and due process. However, because of the similarity between the act of state doctrine and the foreign-judgment recognition doctrine, it is understandable that when acts of state purport to determine liability, legal conclusions, or the factual underpinnings of claims why many courts believe themselves bound by the act of state doctrine to afford conclusive effect to these determinations—or at the very least, precluded from inquiring into these acts of state and abstain from adjudication.⁶⁹

Although the *Restatement* does not explicitly provide for an exception to the act of state doctrine, in that it explicitly allows for inquiry into the validity of a foreign sovereign's acts of state, it does provide grounds for nonrecognition of an act of state without necessarily assessing the act's validity. The question then arises: does nonrecognition simply mean abstention from judgment on the validity of a foreign act of state? Posed differently, if an American court refuses to recognize a foreign act of state, would nonrecognition thereby not imply the act of state is invalid as a whole? At the very least, does this not imply the act of state is invalid as applied in the United States under American law, even if no judgment has been made as to the validity of the act within a foreign nation's own borders? Presumably, if the act of state

67. See *id.* § 441 reporter's note 9 (“[A]n administrative determination of liability by a foreign state, whether or not it has been confirmed by a judicial decision, is not subject to the act of state doctrine for purposes of a suit in a court in the United States to enforce that liability.”).

68. See *id.*

69. See discussion *infra* Section IV.B.

determining liability or other legal conclusion was valid, it would be recognized in the United States. This is important because, as conveyed above, a foreign sovereign that determines liability through an act of state is not entitled to automatic recognition of such determination if any of the exceptions outlined above apply. In such an instance, the foreign sovereign is precluded from relying on acts of state and instead must prove its claims through an adjudication on the merits if it wishes to maintain the case.

V. FOREIGN SOVEREIGNS AS PLAINTIFFS

Foreign sovereigns initiating suits in the United States often have legitimate interests in the adjudication of those cases. Sometimes, however, government officials have political vendettas against particular persons and use frivolous lawsuits as a harassment tactic. In other instances, officials of a government confiscate assets or seek money judgments from businesspersons or companies for personal enrichment. To note the obvious, governments are entities comprised of people—people with all-too human traits. Even if the foreign nation has a legitimate claim, it might not take the risk of adjudicating a case on the merits if it foresees a losing outcome. Unfortunately, there is no true deterrent to prevent abuses of the American judicial system by foreign sovereigns. Indeed, a foreign sovereign's funds to pursue lawsuits, or any venture for that matter, come from that country's taxpayers—it does not cost the government officials who are pursuing the case a dime out of their own pockets. One could argue nonrecognition where warranted does not go far enough. As the doctrine currently stands, foreign nations can take a gamble to see if they can succeed in domesticating their administrative determinations of liability in the United States, and if they fail, there is no true loss. American courts not recognizing the determinations of liability changes nothing if the foreign sovereigns are ultimately immune from consequences of the judgments. Therefore, regardless of the motivations of a foreign government for commencing a lawsuit in the United States, the issue becomes: what rights and privileges should a foreign sovereign retain when it avails itself of the American judiciary?

A. *Relationship Between the Act of State Doctrine and the Foreign Sovereign Immunities Act*

The act of state doctrine is intertwined with the Foreign Sovereign Immunities Act (“FSIA”) of 1976. Although conceptually similar (and thus the reason for much confusion), the act of state doctrine and the FSIA are fundamentally different. In short, the FSIA primarily addresses sovereign immunity, which prevents American courts from exercising jurisdiction over a foreign nation.⁷⁰ The act of state doctrine, on the other hand, “does not deprive a court of jurisdiction but instead requires that a foreign act of state be deemed valid as a rule of decision.”⁷¹ An alternative explanation is that sovereign immunity “addresses the sovereign character of the *foreign nation*” whereas the act of state doctrine “addresses the sovereign character of the *acts*.”⁷² In fact, “[a] finding that a foreign [nation] is not entitled to immunity . . . does not preclude application of the act of state doctrine.”⁷³ Therefore, “[a] foreign state may waive one doctrine without necessarily waiving the other.”⁷⁴ Since immunity is a jurisdictional defense, when a foreign nation avails itself of an American court, the foreign nation has obviously waived its immunity because the foreign nation submitted itself to American jurisdiction when the foreign nation initiated the lawsuit in the United States.

70. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 reporter’s note 3 (AM. LAW INST. 2018).

71. *Id.* See also *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) (noting that “[u]nlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits”).

72. 3 VED P. NANDA & DAVID K. PANSIUS, *THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS* § 13:22 (2014).

73. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 reporter’s note 3 (AM. LAW INST. 2018). See also *Altmann*, 541 U.S. at 700–01.

74. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 reporter’s note 3 (AM. LAW INST. 2018). See also *id.* (noting that the foreign sovereign “waived sovereign immunity but did not waive the right to invoke the act of state doctrine” (citing *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164–67 (D.C. Cir. 2002))).

The FSIA also provides general exceptions to foreign immunity.⁷⁵ For example, with respect to counterclaims, the foreign sovereign forfeits sovereign immunity when it initiates a lawsuit.⁷⁶ Such forfeiture is contingent on any of three specified provisions. First, the foreign state should not be given immunity with respect to any counterclaim “for which a foreign state would not be entitled to immunity under section 1605 or 1605A . . . had such claim been brought in a separate action against the foreign state.”⁷⁷ Second, even when the foreign state would otherwise be entitled to immunity, if the counterclaim arises out of the same “transaction or occurrence that is the subject matter of the claim of the foreign state,” then the foreign state forfeits immunity.⁷⁸ Third, the foreign state will not receive immunity “to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.”⁷⁹ The rationale for the immunity forfeiture is that:

Certainly, if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before the

75. See 28 U.S.C. § 1605(a) (2018) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case (1) in which the foreign state has waived its immunity either explicitly or by implication . . . ; (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; (3) in which rights in property taken in violation of international law are in issue and that property . . . is present in the United States . . . or that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States; . . . (5) in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States . . . ; (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration . . . under the laws of the United States . . .”).

76. See *id.* § 1607.

77. *Id.* § 1607(a).

78. *Id.* § 1607(b).

79. *Id.* § 1607(c).

United States courts while avoiding any obligation to litigate any claims against it that arise from that same transaction or occurrence.⁸⁰

Although this rationale pertains to immunity, fundamentally a jurisdictional matter, if the rationale is that the foreign state in benefiting from litigation in the United States cannot avoid its obligation to litigate claims borne out of a counterclaim, should the rationale not extend to also prohibit the foreign state from benefiting from litigation in the United States while avoiding its obligation to litigate the very claims and facts at issue in the suit? In other words, should the rationale not extend to prohibit foreign sovereigns benefiting from the United States judicial system from claiming applicability of the act of state doctrine and thus inhibiting the trier of fact from performing its job as the fact-finder regarding the claims at issue?

B. Case Studies

The following cases display the injustice and conflict with international law that result from misapplication of the act of state doctrine. Furthermore, application of the act of state doctrine in these cases created the paradoxical situation in which the American courts felt forced to presume the validity of the foreign nations' acts of state—acts of state which are prohibited under international human rights law and customary international law.⁸¹

1. *Federal Treasury Enterprise Sojuzplodoimport v. Spirits International B.V.*

Federal Treasury Enterprise Sojuzplodoimport v. Spirits International B.V. involved the rival claims to trademarks by the Federal Treasury Enterprise Sojuzplodoimport (“FTE”), an agency of the Russian Federation, and by Spirits International, successors in interest to a Soviet enterprise.⁸² Initially, a Soviet state enterprise (essentially pre-

80. 14A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3662.3 (4th ed. 2014).

81. See *infra* note 111.

82. 809 F.3d 737, 740 (2d Cir. 2016).

privatization Spirits) owned the trademarks.⁸³ With the collapse of the Soviet Union, many enterprises were privatized, including Spirits.⁸⁴ The FTE alleged that Spirits “unlawfully misappropriated and commercially exploited” the trademarks.⁸⁵ The FTE’s claims in a prior suit “were either dismissed on the merits, voluntarily dismissed, or dropped”⁸⁶ Subsequently, the Russian Federation issued a decree⁸⁷ directing that the Federal Agency for State Property Management transfer the rights of the Russian Federation in the trademarks to the FTE in Russia.⁸⁸ In other words, the Russian Federation’s contention was that the trademarks were the Russian Federation’s to give—not Spirits’—because Spirits purportedly never had legal ownership post-privatization.⁸⁹ Pursuant to the decree, an assignment was executed, which purportedly transferred the rights in and title to the trademarks from the Russian Federation to the FTE.⁹⁰

The Second Circuit Court of Appeals held that the governmental decree and assignment “were indisputably acts of a foreign government” and that the United States court could not inquire into the validity of the assignment under Russian laws, much less declare that the executive branch of the Russian government violated its own law.⁹¹ The Court reasoned that “[s]o long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws.”⁹² The Second Circuit found the district court erred in concluding the act of state doctrine did not apply when the act of the sovereign concerned a United States trademark on the basis the trademark

83. *See id.* at 741.

84. *Id.*

85. *Id.* at 740.

86. *Id.*

87. The Russian Federation Decree ordered: “[State Property Management] is to conclude with [FTE] an agreement on transferring to the said enterprise the rights of the Russian Federation to trademarks containing verbal designations ‘Stolichnaya’ and/or ‘Stoli’ used on the territory of the United States (on all territories subject to the jurisdiction of the United States of America).” *Id.* at 742.

88. *See id.* at 740.

89. *See id.*

90. *See id.*

91. *Id.* at 743.

92. *Id.* (quoting *Banco de Espana v. Fed. Reserve Bank of N.Y.*, 114 F.2d 438, 444 (2d Cir. 1940)).

is a property interest located within the United States.⁹³ In other words, the Court found the expropriation (confiscation of property) or property situs exception to the act of state doctrine did not apply even though the situs of the trademarks was in the United States on the basis of the Lanham Act. The Second Circuit reasoned the Russian Federation's decree did "not purport to decide the merits issue of whether [Spirits] and its licensees . . . violated the Lanham Act by misappropriating the [trademarks]."⁹⁴ Instead, "the validity of the Assignment determines only FTE's statutory standing to assert such claims as the Russian Federation may have. That is a question of Russian law decided within Russia's borders, rather than a matter of U.S. law with a situs in the United States."⁹⁵

The Court seemed to imply that the decree only gives standing to the FTE—that the decree did not decide the issue of misappropriation or infringement of the trademarks on the merits. However, such standing would stem from a decree that does more than just give standing under Russian law—it gives standing under American law, implicates United States law and interests, and conveys ownership in the trademarks because standing is contingent on the ownership of the trademarks. Therefore, giving effect to the validity of the decree had an adverse effect to Spirits on the issue of ownership and standing, which unduly affected the litigation of the case at hand. Interestingly, the Court also decided that the confiscation exception did not apply because the Russian decree "works no confiscation, in form or effect; rather, it *transfers* whatever rights the Russian Federation may already have in the [trademarks] to FTE."⁹⁶ Ironically, in making such a statement, the Court is inquiring into the validity of the Russian decree in violation of the act of state doctrine that the Court purports to abide by.

The Court additionally considered whether international comity alone, separate from the act of state doctrine, precluded inquiry into acts by a foreign sovereign.⁹⁷ The Court noted that comity ordinarily precludes such inquiry but that "courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or

93. *See id.*

94. *Id.* at 744.

95. *Id.*

96. *Id.*

97. *See id.* at 742–43.

prejudicial to the interests of the United States.”⁹⁸ The Court then concluded that extending comity to the Russian Federation’s decree “would undermine no policy or interest of the United States, which has no stake in which instrumentality of the Russian Federation asserts trademark claims over the [trademarks].”⁹⁹ However, one could argue the United States has an interest in the furtherance of international law as it pertains to the right to due process when the lawsuit is in American courts. The United States also has an interest in maintaining a credible and fair judicial system. The extension of comity to the Russian decree results in the removal of Spirits’ ownership of the trademarks without due process; and such a result is in violation of American principles of fundamental fairness and due process, which adversely impacts the credibility and character of the American judiciary. Additionally, removal of Spirits’ ownership in the trademarks negatively impacts American licensees and companies in business with Spirits. The removal also negatively impacts American consumers, all of which affect the American economy. Therefore, giving effect to the decree does undermine American interests and policies.

It is difficult to look past the facts of the case. Spirits, a private company, was the purported then-owner of the trademarks. The Russian Federation clearly wanted the FTE, an agency of the Russian Federation itself, to be the owner of the trademarks. A court in Russia held that Spirits was not validly privatized under Russian law, so that ownership of the trademarks remained with the Russian Federation. When the Russian Federation brought suit in the United States and availed itself of American courts, the American district court dismissed the FTE’s lawsuit for lack of standing to sue as “registrant” under the Lanham Act. The survival of the trademark infringement allegations brought by the FTE hinged on the FTE’s standing, which in turn hinged on ownership of the trademarks. In response to the dismissal of its suit, the FTE essentially rigged the game. Unsatisfied with the results of the American judiciary, the FTE obtained a governmental decree in Russia to transfer the rights from the Russian Federation to the FTE, even though in practice this was a confiscation (if Spirits was indeed the owner of the trademark) of Spirits’ trademark.

98. *Id.* at 743 (quoting *Pravin Banker Assoc., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 854 (2d Cir. 1997)).

99. *Id.*

For purposes of this analysis, it does not matter whether Spirits was indeed the owner or not under Russian law. What matters is the status quo, as far as the United States was concerned, was that Spirits was the owner. Therefore, to change the status quo and remove from Spirits ownership and adversely affect licensees and the American companies with which Spirits conducted business, the most equitable course of events would have been to adjudicate the case on the merits, subject to the FTE presenting proof that Spirits was not the rightful owner. Since the FTE, an agency of the Russian Federation, initiated the suit and sought to benefit from the American judicial system, change the status quo, and adversely affect the defendant in the process, the proper determination should have been that the FTE automatically waived the possible applicability of the act of state doctrine when it initiated the suit and availed itself of American courts.

2. *Republic of Ecuador v. Dassum*

In *Republic of Ecuador v. Dassum*, the Isaiases were administrators of Filanbanco, an Ecuadorean bank that “experienced a liquidity crisis as part of a widespread national financial crisis” in 1998.¹⁰⁰ That same year, the bank was nationalized and placed into restructuring under the control of the Agencia de Garantía de Depósitos (“AGD”), an agency analogous to the Federal Deposit Insurance Corporation (“FDIC”) in the United States.¹⁰¹ Ten years later, the AGD issued an administrative resolution determining the Isaiases liable for the bank’s losses and ordering the seizure of all their assets of properties.¹⁰² In 2009, the AGD¹⁰³ sued the Isaiases in circuit court in Miami, Florida.¹⁰⁴

The trial court granted summary judgment for the Isaiases, whereupon it was reversed and remanded by the appellate court in *Isaias I*. The *Isaias I* Court conceded that the Isaiases took advantage

100. *Republic of Ecuador v. Dassum (Isaias I)*, 146 So. 3d 58, 60 (Fla. Dist. Ct. App. 2014).

101. *Id.* at 59–60.

102. *Id.* at 60.

103. The Republic of Ecuador substituted the AGD as the party plaintiff in 2010. *Id.* at 60 n.4.

104. *Id.* at 60 (seeking in the complaint alleged-outstanding liabilities of around \$200 million).

of opportunities that were available to present to the Ecuadorean banking authorities that Ecuador's claims regarding their alleged misconduct were "pretextual or even factually incorrect."¹⁰⁵ The appellate court further acknowledged that the Isaiases claimed that Ecuador's confiscatory acts were based on a political persecution but that the Isaiases failed to make a conclusive showing.¹⁰⁶

Yet, although relevant to the claim of political persecution and the resulting denial of due process, the Court in *Isaias I* did not reference Ecuador's Constitutional Mandate 13 referred to by the trial court. In fact, neither appellate court in *Isaias I* nor *Isaias II* makes a single mention of Mandate 13 in the entirety of both opinions and footnotes.¹⁰⁷ In its order granting the Isaiases' motion for summary judgment, the trial court found that Ecuador did not give the Isaiases an opportunity to challenge the Ecuadorean resolution determining liability.¹⁰⁸ Mandate 13 was an Ecuadorean decree that forbade any Ecuadorean judge by threat of imprisonment from hearing any appeal by the Isaiases regarding the confiscation of their assets.¹⁰⁹ The trial court

105. *Id.* at 62.

106. *See id.*

107. After the *Isaias I* court remanded the case, a three-day bench trial occurred, and the trial court entered a final judgment for the Isaiases. Ecuador appealed, thus giving rise to *Isaias II*. *See* Republic of Ecuador v. Dassum (*Isaias II*), 255 So. 3d 390, 394 (Fla. Dist. Ct. App. 2017).

108. *See* Republic of Ecuador v. Dassum, No. 09-34950 CA-40, at 10 (Fla. Cir. Ct. May 31, 2013) (order granting defendants' motion for summary judgment) ("Without a judgment of liability recognizable under U.S. law, Ecuador's attempt to seize the Defendant's property in the U.S. is inconsistent with U.S. law and policy. Moreover, Ecuador removed the Defendants' opportunity to challenge . . . liability.>").

109. *See id.* at 10 n.40. Ecuador's Mandate 13 states:

To declare that Resolution AGD-UIO-GG-2008-12 of July 8, 2008, issued by the General Manager of the [AGD] is not subject to constitutional *amparo* proceedings or others of a special nature, and if, in fact such proceedings are initiated, they will be closed and cannot suspend or prevent enforcement of the above-cited resolution. The judges or magistrates who take over the hearing of any class of constitutional action related to this resolution and those who receive it for enforcement, implementation or carrying it out in full compliance will have to reject it under pain of dismissal from office and without prejudice to the criminal liability they may incur.

Id.

stated, “Ecuador’s enactment of Mandate 13, Art. 2 represents a violation of several of the most foundational underpinnings of U.S. law and policy, including due process, judicial review, and the independence of the judiciary to act with fairness and impartiality.”¹¹⁰

The Human Rights Committee of the United Nations, in hearing a case involving the same parties and facts and regarding the same acts of state, determined Ecuador’s Mandate 13 was in complete violation of basic principles of justice and due process.¹¹¹ The U.N. Human Rights Committee decision merits highlighting because it confirms the trial court’s opinion regarding the nature of Mandate 13. Surely, the appellate court should have discussed Mandate 13 at least once in either *Isaias I* or *Isaias II* regarding the effect of Mandate 13 on the applicability (or inapplicability) of the act of state doctrine. Nevertheless, the Court in *Isaias I* reversed and remanded the final summary judgment for the Isaiases for further proceedings, holding:

[Ecuador] claims to be a creditor with a claim for money damages against the Isaiases based on their allegedly wrongful acts and omissions in Ecuador. The validity and extent of any such claim are subject to proof as in any claim by a foreign sovereign against one of its citizens residing in the United States. The Florida trial court is not obligated to give preclusive effect to the findings of Deloitte and the AGD, and it will not interfere with [Ecuador’s] sovereignty or the foreign relations of the United States if the Florida court rules for or against [Ecuador’s] claims here in Florida after considering the proof put forward by [Ecuador].¹¹²

110. *Id.* at 10.

111. U.N. Human Rights Comm., *International Covenant on Civil and Political Rights*, ¶ 7.4, U.N. Doc. C/116/D/2244/2013 (June 22, 2016) (“[T]he Committee considers that the issuance of Constitutional Mandate No. 13, which expressly forbade the filing of actions for the protection of constitutional rights or others of a special nature against the actions of the AGD and included the instruction to remove from the bench, without prejudice of any potential criminal liability, any judges who would hear this type of actions, violated the [Isaiases’] right, under Article 14(1) of the Covenant, to a process with due guarantees for the determination of their rights or obligations of a civil nature.”).

112. *See Isaias I*, 146 So. 3d 58, 62–63 (Fla. Dist. Ct. App. 2014).

At trial, instead of presenting proofs in support of Ecuador's claims, Ecuador presented only one witness, an expert in Ecuadorean law, with the sole purpose of authenticating Ecuador's various acts of state, namely the resolutions at issue.¹¹³ The Isaiases, on the other hand, "presented witnesses and bank records in an attempt to prove they committed no wrongdoing and did not cause any loss to Filanbanco."¹¹⁴ The trial court once more ruled for the Isaiases, and Ecuador again filed an appeal.¹¹⁵ In a stunning turn of events, the appellate court in *Isaias II* held:

113. See *Isaias II*, 255 So. 3d 390, 394 (Fla. Dist. Ct. App. 2017) (explaining the procedural history of the case).

114. *Id.* This is an example of the act of state doctrine's application in this case cutting against basic principles of American jurisprudence. First, the plaintiff bears the burden of proof and must prove the allegations the plaintiff contends occurred did in fact occur and are attributable to the defendant. The defendant is presumed not liable until the plaintiff meets the requisite burden of proof. Although the burden of proof is not on the defendant to prove non-liability, but rather on the plaintiff to prove defendant's liability, here, it appears the Isaiases were treated as if the burden of proof was on them to prove non-liability. Second, because the plaintiff bears the burden of proof, the plaintiff must also prove its case by the corresponding standard. However, it is impossible to meet that standard if the plaintiff does not even present evidence to support its case, as happened here.

The caveat is if the plaintiff, such as Ecuador in the present case, had been seeking to enforce a foreign-court money judgment, it need not retry its case but rather simply get the judgment recognized and enforced by the United States court if it was a foreign-court judgment that was final, conclusive, and enforceable. However, an act of state determining liability is not a court judgment—no trial on the merits occurred. The analysis should end there and the case tried on the merits. Ecuador must therefore establish that its act of state was not a unilateral determination of liability, but rather a judgment borne from a court of law. If Ecuador was able to do so, the burden would then shift on the party opposing recognition to prove one of the grounds for nonrecognition as discussed in Part III of this Article, e.g., § 483 or § 484. Nevertheless, even if Ecuador purported to pass such an act of state as a foreign-court judgment, and the United States court could somehow justify treating the act of state as a court judgment, it need comport with the basic requirement of due process of law. See *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir. 1995) (citing *Hilton v. Guyot*, 159 U.S. 113, 205–06 (1895) (stating that a foreign judgment cannot be enforced if obtained in a manner that did not comport with the basics of due process)).

115. See *Isaias II*, 255 So. 3d at 394.

To avoid any further confusion, the proceedings on remand shall be limited solely to the issue of damages. Because an act of state determined that the Isaiases are liable, [Ecuador] is not required to prove the Isaiases' liability regarding the losses to Filanbanco. In other words, the Isaiases' liability for the losses to Filanbanco has been established in [Ecuador's] act of state . . . and pursuant to the act of state doctrine, no court in this country may find otherwise.¹¹⁶

In a footnote of the *Isaias II* opinion, the Court explained that Ecuador did not need to prove *both* liability and damages on remand, as liability has already been determined by the act of state and a finding of no liability would be in violation of the act of state doctrine.¹¹⁷ Rather, the only claim that was “subject to proof” was the “amount of indebtedness, if any, owed by the Isaiases to [Ecuador].”¹¹⁸

The Isaiases were deemed liable by the appellate court in *Isaias II* on the basis of the act of state doctrine in spite of the evidence presented to the trial court that revealed the Isaiases were denied due process and were not liable, which would necessitate inquiry into the acts of state at issue. It turns out, according to *Isaias II*, proving a claim means the foreign nation as plaintiff need only authenticate the act of state that determined the defendant's liability. Indeed, the *Isaias II* holding seems to be contradictory to the holding in *Isaias I* regarding the claims being subject to proofs. This scenario is akin to the hypothetical posed in the Introduction of this Article, where a foreign sovereign unilaterally declares culpability, and in spite of evidence that such determination was conducted in violation of international law and traditional notions of fundamental fairness and due process by “civilized nations,”¹¹⁹ the foreign sovereign is deferred to on the basis of the act of state doctrine. Deference seems to occur even though the result

116. *Id.* at 397.

117. *See id.* at 397 n.10.

118. *Id.*

119. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 484 reporter's note 9 (AM. LAW INST. 2018) (defining due process as “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations” (quoting *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000))).

of said deference is at odds with basic principles of fairness and policies of the United States and the international community alike.

The denial of the Isaiases' access to due process in Ecuador should have given the *Isaias II* appellate court pause. At the very least, the court should have realized it was not bound by the act of state doctrine—namely, that nonrecognition of Ecuador's determination of liability was an option available to the Court because of Ecuador's violations of due process.¹²⁰ Indeed, the Court was permitted to utilize this option pursuant to the *Restatement (Fourth) of the Foreign Relations Law* as discussed in Part III of this Article. In other words, it seems the Court believed itself bound to apply the act of state doctrine rigidly; and therefore, the Court believed it had no ability to refuse to recognize Ecuador's determination of liability through Ecuador's act of state as is permissible per sections 483 and 484 of the *Restatement*. Moreover, one could argue that the enactment of a constitutional mandate such as Ecuador's Mandate 13 compromised the Ecuadorean judicial system as a whole, requiring mandatory nonrecognition of the administrative determination of liability.¹²¹

Interestingly, the *Isaias I* Court noted in a footnote of its opinion that Ecuador's resolutions were not eligible for recognition under Florida's Uniform Out-of-country Foreign Money-Judgment Recognition Act.¹²² Taken with the *Isaias II* holding, this suggests that Ecuador's resolutions instead receives recognition as to the determination of liability through the act of state doctrine. However, the *Restatement (Fourth) of the Foreign Relations Law* states that "an administrative determination of liability by a foreign state, whether or not it has been

120. See *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) ("Nations are not inexorably bound to enforce judgments obtained in each other's courts.").

121. On July 9, 2008, the "Asamblea Constituyente" (Constituent Assembly) proposed the enactment of a constitutional mandate explicitly and specifically targeting the Isaiases by name. This formed the predicate of Mandate 13 which was enacted later that same day. The proposal is a matter of public record in Ecuador.

122. See *Isaias I*, 146 So. 3d 58, 62 n.7 (Fla. Dist. Ct. App. 2014) ("The terms 'judgment' and 'foreign court,' used repeatedly within Florida's Uniform Out-of-country Foreign Money-Judgment Recognition Act, make it clear that [Ecuador]'s banking authority's resolutions at issue in the present case would not be eligible for recognition under the Act.").

confirmed by a judicial decision, is not subject to the act of state doctrine for purposes of a suit in a court in the United States to enforce that liability.”¹²³ The *Restatement* further notes that

a handful of State-Court decisions have indicated that a final, conclusive, and enforceable administrative determination can be eligible for recognition if the administrative body employed proceedings generally consistent with due process, at least if the person opposing recognition had an opportunity to obtain judicial review.¹²⁴

The trial court determined that the Isaiases were not given an opportunity to obtain judicial review and, moreover, that the AGD and Ecuador proceedings were inconsistent with notions of due process.¹²⁵ Yet, the appellate courts in *Isaias I* and *Isaias II* held that the act of state doctrine applied and that the Isaiases were liable because Ecuador determined so through an act of state. Indeed, the *Restatement* notes that the Court in *Isaias II* misapplied the act of state doctrine.¹²⁶

Simply put, when a determination of liability is made, whether by a foreign-court judgment or an act of state, if it was made inconsistent with notions of due process then recognition should not be granted. Thus, if a foreign sovereign seeks to have a determination of liability recognized and enforced in the United States, it must pass judicial scrutiny. If evidence indicates that the determination was arrived upon through proceedings inconsistent with due process, then this necessitates inquiry into the act of state as to whether it comported with notions of fairness and due process. Put differently, in such a circumstance the act of state doctrine does not apply, and the claim need be adjudicated on the merits. The opinion of *Isaias II* is murky at best, and on at least one occasion, the act of state doctrine caused the Court to engage in legal gymnastics. It is apparent with the erroneous *Isaias*

123. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 reporter’s note 9 (AM. LAW INST. 2018).

124. *Id.* § 481 reporter’s note 6 (citing *Alberta Sec. Comm’n v. Ryckman*, 30 P.3d 121, 126–27 (Ariz. Ct. App. 2001); *Regierungspräsident Land Nordrhein Westfalen v. Rosenthal*, 17 A.D.2d 145, 148 (N.Y. App. Div. 1962)).

125. *See Republic of Ecuador v. Dassum*, No. 09-34950 CA-40, at 10 (Fla. Cir. Ct. May 31, 2013) (order granting defendants’ motion for summary judgment).

126. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 reporter’s note 9 (AM. LAW INST. 2018).

I and *Isaias II* application of the act of state doctrine that American courts are in need of guidance regarding the limitations of the doctrine.

C. Problems That Arise When Cases Are Not Adjudicated on the Merits

As the *FTE* and *Isaias* cases demonstrate, rigid application of the act of state doctrine can cause tragic outcomes. Such rigidity leaves the door open for savvy foreign nations to abuse the doctrine in their present and future litigation within the American legal system. Attempts to bypass an impartial judicial determination by unilaterally issuing acts of state to declare a party's liability or unilaterally determining legal conclusions prejudicial to a defendant should not be entertained by the American judiciary. Although judicial and statutory exceptions to the act of state doctrine exist, and though there are many in-depth secondary sources of literature on this matter, courts nevertheless apply the doctrine inconsistently.¹²⁷ Unfortunately, many judges do not have much interaction with international considerations, which further exacerbates the inconsistency of the doctrine's application, often leading to unfair results such as those discussed. Rigid application of the act of state doctrine curtails due process because it prevents an adjudication of a case on the merits. This is contrary to American public policy and traditional notions of fairness and due process. Comity or separation of powers do not constitute sufficient rationales for affording foreign sovereign plaintiffs the ability to hide behind acts of state. Indeed, if defendants are abused through unfair judicial proceedings or are forced to spend an inordinate amount of money litigating a case where a foreign sovereign, by contrast, has near infinite resources, this abuse can affect these defendants' livelihoods and further implicate human rights.

It is worth noting that an American administrative body such as the Internal Revenue Service ("IRS") cannot simply issue a resolution finding a given person in the United States liable for tax evasion, bring suit in a domestic court, and contend that because it has unilaterally determined liability, and because the administrative body is an agency of the federal government, that the administrative determination of liability must be taken as true and no court can conclude otherwise. That

127. See generally Bazzyler, *supra* note 12.

defendant can contest this determination in court and is entitled to an adjudication on the merits. Therefore, if an American agency is precluded from this type of action, why should foreign nations be held to a lower standard?¹²⁸ International comity is a poor excuse to discard all notions of justice. In these circumstances, defendants litigate against foreign nations on an uneven playing field. The foreign sovereigns can claim applicability of the act of state doctrine, issue acts of state resolutions on a whim, and contend that questioning the validity of said resolutions is precluded by the act of state doctrine.

Surely, foreign sovereigns often commence suits in American courts for valid reasons. Is there a deterrent for abuses, though?¹²⁹ Any party bringing a suit with a valid claim should be confident in adjudicating the case on its merits. Cases are rarely a simple matter of law. Rather, cases live and breathe on the relevant facts. Fairness dictates facts, which determine the outcome of cases and need to be established by an impartial fact finder: the trial court or jury. There is little reason to afford foreign sovereign plaintiffs an act of state defense to preclude fact-finding. Note, this Article is not proposing American courts act as a global judiciary and randomly inquire into foreign acts of states. Rather, such inquiry should be permissible as to the acts of state at issue when foreign sovereigns seek to benefit from the American judiciary by filing suit in the United States. Indeed, the existence of the doctrine in its current application incentivizes and enables foreign nations to initiate questionable lawsuits for ill-intentioned reasons.

The act of state doctrine was created by the judiciary to maintain American judicial credibility.¹³⁰ Allowing foreign sovereigns to compel American courts to submit to a system in which foreign sovereigns'

128. Interestingly enough, in researching for this Article, the seminal cases regarding the act of state doctrine (which often resulted in rather unfair outcomes) involved countries with already strained foreign relations—e.g., Cuba, Russia, Iran, Ecuador, Iraq, China, Venezuela. Permitting these countries to benefit from the American system while they can abuse the act of state doctrine simply because of comity is fruitless. Allowing their claims to be deemed valid without proofs will neither improve their relations with the United States nor make them more receptive to American efforts. The integrity of the American judicial system should not be collateral because of foreign policy concerns.

129. *See, e.g., Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1411–13 (9th Cir. 1995) (concluding that a sister of former Shah could not obtain a fair trial in Iran).

130. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428–30, 434–35 (1964).

claims are not subject to proof defeats this very purpose. Susan Morrison argues that limiting the act of state doctrine is ill-advised because “the price to be paid . . . is, *inter alia*, the already dubious reputation of the United States in the eyes of sovereign States whose policies are being examined.”¹³¹ However, when those foreign sovereigns abuse the act of state doctrine to dodge an examination of their claims on the merits, those foreign nations make a mockery of the American judicial system, which is more damaging to the integrity and reputation of the American judiciary for it taints the confidence of Americans and those foreign nations that look up to the American judiciary. Appeasing foreign nations—which do not respect and are determined to abuse the American judiciary—is not worth the price of losing domestic and international credibility. Furthermore, as discussed in Part II, other foreign nations do not have an act of state doctrine equivalent, often inquiring into other nations’ acts of state. Thus, foreign nations have no leg to stand on if they were to complain about “dubious reputation[s].”¹³²

Realizing that foreign nations regularly prosecute and persecute political opponents, successful entrepreneurs, or any type of person or entity for any type of reason is easy. Most of the time, these things occur within those nations’ own borders and do not affect the United States or American nationals. On occasion, though, these foreign nations bring suits against their own nationals living in the United States. Sometimes foreign sovereigns even sue American citizens and companies conducting business with that foreign sovereign or in that foreign sovereign’s borders. The dangers posed by the misapplication of the act of state doctrine are not distant dangers of no concern to Americans. Indeed, Americans should well be concerned of the endless possible ramifications and should seek to rectify these abuses and limit the act of state doctrine.

Suppose an American company, such as Tesla, has a factory in China for producing vehicles.¹³³ Tesla’s business success is contingent

131. Susan M. Morrison, Comment, *The Act of State Doctrine and the Demise of International Comity*, 2 *IND. INT’L & COMP. L. REV.* 311, 335 (1991).

132. *Id.*

133. This hypothetical is not posed as an accurate legal analysis of the implications of patent law under American law, the United States International Trade Commission, or the World Intellectual Property Organization. The hypothetical simply aims to convey how the act of state doctrine can seep into other areas of law and

on the heightened technology of its vehicles compared to its competitors' vehicles. Tesla has spent a fortune developing said technology to acquire this comparative advantage. Tesla procures a patent for that technology in the United States. A Chinese competitor virtually copies Tesla's technology and would normally be infringing on Tesla's patent. The Chinese government, however, has an interest in the success of Chinese companies. In fact, in this hypothetical, the Chinese government has an ownership interest in the company at issue. Therefore, China issues a resolution—an act of state—unilaterally determining that Tesla copied the Chinese company's technology. China initiates a lawsuit in the United States seeking an injunction that shuts down Tesla's factory and vehicle production that utilizes the supposed "stolen" technology. To make matters worse, China could also sue for money damages that arose because of Tesla's "theft." China asserts that an examination on the merits is impermissible by the act of state doctrine on the theory that China, through an act of state, has already established the facts surrounding the "theft" and the liability. Therefore, the United States must accept China's determination both as to the facts and liability; and the American court only needs to issue the injunction and order Tesla to pay money damages. What happens to Tesla? What are the ramifications to the American economy and to American consumers? Considering the trend of increased globalization, what are the potential ramifications to any person or company with increasing foreign contacts?

VI. PROPOSAL TO LIMIT THE ACT OF STATE DOCTRINE

Since its inception, there have been many proposed recommendations to the act of state doctrine that tackle the doctrine in its entirety. Some proposals are in the form of completely new legislation, some as amendments to existing legislation. Others urge the Supreme Court to make a conclusive determination. Some proposals have been tame, some have been zealous, and some are in between.

For instance, Professor Michael Bazylar contends that because other legal doctrines cover that which the act of state doctrine covers,

highlight the confusions courts may experience in a similar scenario to the hypothetical, which can lead to misapplications of the act of state doctrine. Furthermore, the hypothetical aims to convey that such misapplication is not exclusive to foreign nationals but can also affect American residents and citizens.

the act of state is not only confusing but also moot.¹³⁴ Although he makes compelling arguments, the act of state doctrine is so engrained in American jurisprudence that it is unlikely it is ever abolished. Indeed, it has been over thirty years since his proposal, yet the act of state doctrine is alive and well. Arguably, the act of state doctrine is in an even greater state of disarray since such time.

Another recommendation is a relatively recent bill proposed in Congress to amend the Sherman Act regarding oil producing cartels. The proposed bill stated that “[n]o court of the United States shall decline, based on the act of state doctrine, to make a determination on the merits in an action brought under this section.”¹³⁵ Although this is a step in the right direction, it is obviously a narrow limitation to the act of state doctrine as it falls under the Sherman Act and is only concerning oil cartels.

For the reasons given in this Article, the act of state doctrine needs to provide for a clear exception when a foreign sovereign initiates a lawsuit in the United States. Such exception must be unambiguous and apply to all courts, state and federal, across jurisdictions, so that when a foreign sovereign initiates a lawsuit in the United States courts are not confused and can properly apply the doctrine. First, it is important to note that the act of state doctrine can be displaced by federal statutory law.¹³⁶ Although the Supreme Court can clarify, standardize, and limit the act of state doctrine, it is likely that due to principles of separation of powers the Court will abstain and defer to the legislative branch. Therefore, the FSIA should be amended to include a provision that reads:

Where a foreign sovereign state, or any administrative body or instrumentality of a foreign state, initiates a suit in the United States, and thus avails itself of American courts, it forfeits sovereign immunity if applicable and

134. See Bazzyler, *supra* note 12, at 396. Bazzyler suggested legislative abolishment of the act of state doctrine by stating the following: “[t]he act of state doctrine shall not be available as a bar to consideration of any case on the merits in any court of the United States.” *Id.* at 397.

135. No Oil Producing and Exporting Cartels Act, S. 3214, 115th Cong. § 7A(b) (2018). While proposed in 2018, there has been no further action on the proposed bill.

136. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 cmts. h & j (AM. LAW INST. 2018).

cannot claim, for any reason, applicability of the act of state doctrine. The act of state doctrine must not preclude adjudication of the case or claims on the merits.

Such proposal is fully in line with principles of separation of powers and international comity. Through this legislative enactment, the courts would be notified, unequivocally and in simple terms, that deference is unnecessary in cases where a foreign sovereign is a plaintiff; and thus, the courts should proceed on this explicit permission to adjudicate such claims on the merits.

One could argue that a more optimal solution is not to limit the act of state doctrine in the manner proposed above, but instead to create a provision that explicitly allows foreign sovereigns suing in the United States to use acts of state to determine liability, legal conclusions, or facts so long as these determinations comport with the same requirements of fairness, impartiality, and due process that foreign-court judgments are subject to. This position is arguably more in line with principles of comity to foreign nations. However, this proposal allows and incentivizes foreign nations to be more discrete than Russia and Ecuador were in the *FTE* and *Isaias* cases in the abuses of due process. Foreign nations can overcome this minor hurdle (the requirements of fairness, impartiality, and due process) by creating sham proceedings that seem to grant due process.¹³⁷ This in turn shifts the burden onto defendants to prove the likelihood of violations of fairness, impartiality, and due process, where if the foreign nation successfully and rather easily paints a false narrative, the defendants would likely fail. Obtaining any sort of evidence to make such a showing is no easy feat.

Indeed, it could be said Russia and Ecuador were confident and careless in the *FTE* and *Isaias* cases because of the current state of the act of state doctrine. Yet, if the only limitations are the same requirements as recognition of foreign-court judgments, the limitations would fall short of their purpose and would be easily overcome and abused by willing foreign nations. It is unlikely, for example, that Ecuador would

137. A foreign nation can guarantee constitutional protections such as due process “on paper,” but this does not mean that said nation will abide by such guarantees. *See, e.g.,* *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 138 (2d Cir. 2000) (finding that despite Liberia guaranteeing an independent judiciary, “[t]hroughout the period of civil war, Liberia’s judicial system was in a state of disarray and the provisions of the Constitution concerning the judiciary were no longer followed”).

have enacted a public resolution like Mandate 13, which would make it easier for Ecuador to avoid scrutiny under the due process standard. The argument further falters in that American courts would remain confused as to the amount of support defendants need to provide for allegations of violations of fairness, impartiality, and due process. Courts would additionally remain wary of adjudicating cases where they first need to conclude a likely violation on the part of a foreign sovereign before being able to even hear the claims on the merits. This is no small determination required of a court, and many courts might be intimidated from ruling in such a manner. Thus, courts would remain confused and divided.

Instead, the proposal of this Article does not put courts in the abstruse situation of having to make such determinations just to be able to inquire into foreign acts of state and adequately adjudicate cases. Additionally, the proposal does not allow the possibility for foreign sovereigns to abuse the act of state doctrine. It is a simple determination: if the plaintiff is a foreign nation and wishes to benefit from American courts, then this proposed provision would apply to that foreign nation. Furthermore, the proposal is in line with the rationale discussed in Section IV.A regarding sovereign immunity forfeiture where foreign nations availing themselves of the American judicial system should not benefit while avoiding obligations to litigate claims against them. In fact, this proposal is laxer than that of sovereign immunity under the FSIA, as it is not regarding counterclaims, but rather the *very* claims brought by the plaintiffs themselves of their own volition. Indeed, if a foreign sovereign does not wish to have acts within its own borders assessed, then the foreign sovereign need not avail itself of the American judicial system.

VII. CONCLUSION

Some courts use the act of state doctrine to abstain from adjudicating difficult cases involving foreign nations. In other circumstances, the doctrine is used to preclude courts from fulfilling their role as the finder of fact because the act of state doctrine prohibits the questioning of the validity of acts done by a foreign nation within its own borders. American courts are at risk of both losing credibility and being taken advantage of when foreign nations are deferred to in circumstances that

warrant examination of the claims brought on the merits for fair adjudication. To that end, a legislative amendment to the Foreign Sovereign Immunities Act like the one proposed would solve the many problems discussed.
