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NOTE

Act of State and Political Question Doctrines: Judicial Prudence or Abdication?

Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, 577 F.2d 1196 (5th Cir. 1978)

For the fifty-eighth time since 1971,[1] Occidental of Umm al Qaywayn, Inc. instituted suit in an attempt to recoup a portion of the one hundred million dollar deficit suffered as a result of the loss of their Persian Gulf oil concession. This particular suit was brought against, *inter alia*, an American corporation currently in possession of the disputed concession area. The claim was for conversion and was based on two separate diversity actions and an in rem action in admiralty. The United States District Court for the Western District of Louisiana granted defendant's motion for summary judgment on the diversity actions, holding that the "act of state doctrine" prevented the court from reaching the merits, and further, that the Hickenlooper Amendment[2] did not prevent the abstention. The lower court dismissed the admiralty action by ruling that the conversion, if it took place, happened at the site of the well-head and not on the ocean. On appeal to the United States Court of Appeals for the Fifth Circuit, *held*, dismissed in part, reversed in part: The conversion claim presented is non-justiciable as it contains a political question.

The significance of the Court of Appeals' decision is heightened by its grant of an injunction against all pending and further litigation in state and federal courts. The injunction was stayed pending Supreme Court disposition.[3] Occidental of Umm al Qaywayn (Occidental) filed its petition for a writ of certiorari on December 6, 1978.[4]

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1. Occidental of Umm al Qaywayn, Inc. v. Cities Serv. Oil Co., 396 F. Supp. 461, 464 (W.D. La. 1975), *dismissed in part, rev'd in part sub nom.* Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, Etc., 577 F.2d 1196 (5th Cir. 1978). The district court opinion hereinafter will be cited as *Cities Serv. Oil*. The court of appeals case hereinafter will be cited as *A Certain Cargo*.
2. 22 U.S.C. § 2370(e)(2) (Supp. V 1975).
3. *A Certain Cargo*, 577 F.2d at 1205. Federal courts are usually precluded from enjoining pending state action. Because of the political question, however, the court stated, "we deem it necessary to enjoin state proceedings in order to effectuate our judgment that the issue is one committed to the executive. Such an injunction also is necessary to aid the jurisdiction of the Supreme Court to finally resolve the question of the existence of a political question." *Id.* at 1205-1206 n.18.
4. Petitioner's Brief for Certiorari, Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, No. 78-910, __U.S.__ (1978).

The full facts of this case, although bizarre, are important, as they illustrate a problem faced by many American corporations that participate in transnational trade. It is the problem of the American business trapped by shifting territorial claims of foreign sovereigns.

The Trucial Sheikdoms, by treaty, were under the protectorate of Great Britain until November 30, 1971. During this time, Britain had control of the Sheikdoms' international intercourse, defense, and internal relations. Important to this case are two of the Sheikdoms: Umm al Qaywayn (Umm) and Sharjah.[5] On November 18, 1969, plaintiff obtained from the Sheik of Umm al Qaywayn a concession granting it the exclusive right to explore and extract oil underlying the territorial and offshore waters of Umm. The boundaries of this concession conformed to the treaty Umm had entered into with Sharjah under British auspices in 1964. The plan was approved by the British Foreign Office as required under the treaty. On December 29, 1969, Sharjah granted Buttes Gas and Oil Company a similar concession in Sharjah's territorial waters; this plan was also approved by the British. Occidental and Buttes worked in cooperation, exchanging information from seismic tests in their respective areas, until March 1970. At this time, Occidental's exploratory tests showed the existence of large amounts of oil within its concession area about nine miles off the island of Abu Musa. The island of Abu Musa and its surrounding waters are the center of this suit's dispute.

Occidental contends that Buttes induced Sharjah to unilaterally extend its own territorial sea from the "accepted" three miles to twelve miles, thus including the Abu Musa waters. On April 7, 1970, Sharjah and Buttes executed an amendment to their original concession contract to include the extended area. This amendment was made pursuant to an unpublished Sharjah decree backdated to September 10, 1969. The backdated fraudulent territorial water decree[6] and subsequent concession amendments were not accepted by the British Foreign Office, which also rejected Buttes' request to com-

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5. Today both nations, together with the other Trucial Skeikdoms, comprise the United Arab Emirates.

6. The allegation was made by the plaintiff in *Cities Serv. Oil*, 396 F. Supp. at 465. The district court granted the defendant's motion for summary judgment, which was affirmed on appeal. *A Certain Cargo*, 577 F.2d at 1196. Under FED. R. CIV. P. 56, in granting defendant's motion for summary judgment it is deemed that all facts alleged by the plaintiff are true. Moreover, this fact was established by the district court in the earlier antitrust suit of Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 111 (C.D. Cal. 1971), *aff'd* 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

mence drilling in the area contained in Occidental's concession. Adding to the confusion, the nearby country of Iran on May 28, 1970, informed Occidental that it should desist from drilling in the area because it claimed that Abu Musa was an Iranian possession and was within the Iranian twelve-mile territorial sea. At this point, Great Britain suspended all drilling in the area. Plaintiff alleges that Buttes, in an attempt to procure the area for itself, conspired with Sharjah, induced Iran to claim sovereignty, and finally, induced the British to coerce the Sheik of Umm to terminate the lease.[7] When the British protectorship expired in 1971 (Iran and Sharjah had reached an accord on the division of Abu Musa), Iran landed troops on the island and patrolled its waters; Umm was unable to defend the area. Buttes commenced drilling on the continental shelf, and, as expected, found rich deposits of oil. In June 1973, the Sheik of Umm completely terminated Occidental's concession for failure to make the rent payments.

Litigation on this set of facts reached the courts in California[8] for the first time in 1971, when Occidental charged defendant Buttes Oil Co. with a violation of the Sherman Anti-Trust Act.[9] The district court in that case found sufficient anticompetitive effects on United States commerce to support jurisdiction, but it refrained from ruling on the merits because of the "act of state doctrine." Under this doctrine a forum court will not question the acts of a foreign sovereign done within that sovereign's territory.[10] The classical approach to the doctrine was enunciated by the Supreme Court in *Underhill v. Hernandez*:[11] "Every sovereign state is bound to respect the independence of every other 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."[12]

Because of the act of state doctrine's applicability, the antitrust case[13] was dismissed for failure to state a claim upon which relief could be granted. The instant case was brought for conversion when

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7. This was accomplished by having the British Royal Air Force buzz the home of the Sheik by airplanes, surround his house, and threaten to exile him. It was also stated that the Royal Navy boarded Occidental's sea-going equipment under force. Occidental v. Buttes Gas & Oil, 331 F. Supp. at 99-101.

8. *Id.* at 92.

9. 15 U.S.C. §§ 1-7 (1973).

10. Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

11. 168 U.S. 250 (1897).

12.. *Id.* at 252.

13. Occidental v. Buttes Gas & Oil, 331 F. Supp. at 92.

the oil extracted by Buttes[14] was imported into the United States. Defendant moved for dismissal and/or summary judgment claiming that, *inter alia*, "the act of state doctrine precludes inquiry into the acts of foreign states called into question and resolution of the issues would require adjudication of a boundary dispute between foreign nations."[15] The district court observed:

> Throughout this litigation defendants have treated as an unassailable rule of law the premise that a United States court cannot decide a case involving the private rights of private parties to property if the adjudication of those rights requires a collateral determination of any kind with respect to boundaries. We do not read the jurisprudence to be that all embracing.[16]

Despite this statement, summary judgment was granted on act of state grounds since "the entire fabric of the complaint is woven out of attacks on the validity of, or questioning the reasons for, the acts of Sharjah, Iran or Umm."[17] The Court of Appeals of the Fifth Circuit[18] upheld the District Court's granting of summary judgment on the ground that "the question presented is political" as "it is necessary to determine the sovereign ownership of the portion of the continental shelf from which the oil was extracted."[19]

Although the final outcome was the same in both the District Court and the Court of Appeals,[20] the reasoning advanced by the latter court took a significant shift. The appellate court declined to hear the merits, not on the familiar act of state restraint, but because the decision involved a political question. This shift is significant in two respects: (1) The use of the political question doctrine may reflect a belief that the act of state doctrine is no longer a viable mechanism by which a court may avoid adjudication of sensitive questions. As will be discussed below in Section I, there has been a gradual erosion

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14. The appellate court mistakenly states that the oil in 1974 was extracted by Occidental. 577 F.2d at 1200. See the facts as established by the district court in *Cities Serv. Oil*, 396 F. Supp. at 465, 472; *see also* Petitioner's Brief for Certiorari at 9, Occidental v. A Certain Cargo, No. 78-910, ___ U.S. ___ (1978).

15. *Cities Serv. Oil*, 396 F. Supp. at 466.

16. *Id.* at 468.

17. *Id.* at 469.

18. *A Certain Cargo*, 577 F.2d at 1196.

19. *Id.* at 1203.

20. The district court did not reach the merits and dismissed on the basis of act of state grounds. *Cities Serv. Oil*, 396 F. Supp. at 461. The court of appeals also failed to reach the merits because of the presence of a political question. *A Certain Cargo*, 577 F.2d at 1196. Although there were two different bases for dismissal, they involved similar prudential notions of judicial self-restraint.

in the traditional act of state doctrine, creating justiciable exceptions where the foreign state is acting in its commercial capacity; (2) The shift to the political question doctrine may also indicate an important overall trend for international disputes by providing an alternative means for the court to avoid addressing the merits of such disputes. This is particularly true if the doctrine is accepted outside the tortious conversion area. The Court's use of the political question doctrine will be discussed in Section II.

I. THE ACT OF STATE DOCTRINE AND INTERNATIONAL RELATIONS: GRADUAL ACCEPTANCE OF THE COMMERCIAL EXCEPTION

A. *Developments Leading to Sabbatino*

As mentioned above, the progenitor of the act of state doctrine is *Underhill v. Hernandez.*[21] The Court refused to examine the false imprisonment charges brought by an American citizen against a Venezuelan revolutionary whose government subsequently was recognized by the United States. At the Second Circuit level, the court stated that in "considerations of comity, and of the highest expediency,"[22] it would refuse to sit in judgment on the acts of a sovereign done within its own territory. It should be noted that the Supreme Court rather summarily assented to the lower court's reasoning and with the exception of the opening paragraphs and one short passage, dealt primarily with the problems of political revolt, warfare, and individual liability.[23]

American Banana Co. v. United Fruit Co.[24] was the next significant link and was the first time that the Court had to grapple with the dual components of the act of state doctrine and antitrust infringements. The plaintiff's interest began with a Mr. McConnel, who started a banana plantation and railroad in Panama; the defendant banana company threatened that he must either merge with the defendant's Latin American operations or leave the area. Induced by the defendant, an American corporation, the Governor of Panama recommended that Costa Rica administer the territory through which the McConnel railroad was to pass. While Costa Rica interfered with

21. 168 U.S. 250.
22. 65 F. 577, 579 (2d Cir. 1895).
23. 168 U.S. 250.
24. 213 U.S. 347 (1909).

McConnel's operations, Panama revolted and became independent of Costa Rica. The plaintiff, an American corporation which bought McConnel's plantation, alleged that the defendant instigated a Costa Rican invasion and confiscation of the plantation and railroad. Plaintiff charged the defendant with violation of the Sherman Act[25] and sued to enjoin the defendant's monopolization and restraint of the importation of bananas into the United States. The Supreme Court dismissed the case in a two-pronged ratiocination. First, the Court laid down a strict territorial limit to the Sherman Act, stating that the alleged actions must have taken place within the United States.[26] The second prong asserted a conflict of laws principle: the refusal of one state to interfere with the sovereign acts of another state done within its own territory.[27]

The first part of the holding is no longer valid,[28] as was recently reiterated in *Wells Fargo v. Wells Fargo Express Company.*[29] In discussing extraterritoriality, the court stated that it "should be gauged not so much by the locus of the activity sought to be reached . . . as by the nature of its effect on that commerce which Congress may regulate. . . . [A]lthough foreign activities must of course have *some* effect on United States' foreign commerce before they can be reached we disagree with the district court's requirement that the effect must be substantial."[30] The second part of the holding of *American Banana* has also been limited, as the act of state doctrine is no longer found to totally preclude judicial intervention in international cases alleging breach of the antitrust laws. "[T]he courts have

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25. *Id.* at 353.

26. Justice Holmes, speaking for the majority, stated:

> The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operations and effect to the territorial limits over which the lawmaker has general and legitimate power . . . . We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned. *Id.* at 357.

27. The Court asserted that to hear this action "would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." *Id.* at 356.

28. Erosion of this concept can be seen in United States v. American Tobacco Co., 221 U.S. 106, 134 (1911); United States v. Pacific & A. Ry. & Nav. Co., 228 U.S. 87, 105-06 (1913); Thomsen v. Cayser, 243 U.S. 66, 88 (1917); United States v. Sisal Sales Corp., 274 U.S. 268, 275-76 (1927); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598-99 (1951); Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 704-05 (1962). *See also* Victor, *Multinational Corporations—Antitrust Extraterritoriality and the Prospect of Immunity,* 8 J. INT'L L. & ECON. 11 (1973); Comment, 21 J. PUB. L. 151 (1972).

29. 556 F.2d 406 (9th Cir. 1977).

30. *Id.* at 428.

sought to expand the scope of the application of the Sherman Act by distinguishing sovereign acts from those of a private party."[31] Two facets of the private party exception have emerged. The first one is the compulsion doctrine.[32] Antitrust penalties will not be imposed on an American corporation operating overseas for violation of the Sherman Act if the alleged violation was done pursuant to direct orders of a foreign sovereign.[33] The second facet is that mere approval, toleration, or acknowledgment by a foreign sovereign will not prevent application of the antitrust regulations to an American corporation.[34]

Much confusion about the applicability of the act of state doctrine has resulted from these variations and limitations. As illustrated by *Occidental v. A Certain Cargo*, particular problems arise when the private American defendant has induced the sovereign to act in a manner contrary to American antitrust regulations. It has been argued that courts should not, through a separation of powers device,[35] shield private parties from antitrust liability when they seek to hide behind foreign law.[36] Indeed, several courts have been unwilling to permit a defense based on alleged governmental actions which are shown to have been arranged by the defendant in order to further its own monopolistic schemes.

In *United States v. Sisal Sales Corp.*,[37] the Court found that a violation of the antitrust laws occurred where as a part of an anticompetitive conspiracy, the defendant induced the government of Mexico to pass discriminatory legislation aimed at the defendant's American competitors. The Supreme Court rejected the defendant's act of state

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31. 17 VA. J. INT'L L. 311, 313 (1977).

32. K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 82 (1958); Davidow, *Antitrust, Foreign Policy and International Buying Cooperation*, 84 YALE L. J. 268 (1974). Anticompetitive practices compelled by foreign nations are not restraints of commerce as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce.

33. International Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970). *But see id.* at 1297 n.14, "[t]he effect of showing the order to be induced is to establish a conspiracy, which would bring the present case within *Sisal Sales.*"

34. *See* United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. Watchmakers of Switzerland Info. Center, Inc., [1963] Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1963), *modified*, [1965] Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965).

35. Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964).

36. Fugate, *Antitrust Jurisdiction and Foreign Sovereignty*, 49 VA. L. REV. 925 (1963).

37. 264 U.S. 268 (1927).

defense which was based on the *American Banana* opinion. The Court held that a conspiracy to monopolize, formed in the United States for purposes of securing monopoly control over certain raw material shipments to the United States, would not be immunized simply because one element of the conspiracy involved action taken by foreign officials.[38] In 1962, the Supreme Court reiterated this reasoning in *Continental Ore Co. v. Union Carbide*,[39] where the Court was careful to point out that although the Canadian government permitted the defendant's anticompetitive conduct, the disputed act was not that of the Canadian government itself. Nor was the private defendant's action equivalent to the act of a sovereign.[40] It has been stated that implicit in these Supreme Court decisions "is the conclusion that the act of state doctrine does not apply if the foreign governmental officials were mere pawns in a private conspiracy, rather than a major moving force behind the scheme."[41] Thus, in a fact situation analogous to *American Banana*, the Court shifted the focus to the private defendant's actions, thereby negating the need to invalidate the actions of a foreign sovereign.

The many strands of the act of state doctrine were brought together by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*.[42] In this case, Banco Nacional, the plaintiff, a financial agent of the Cuban government, filed suit for conversion against Farr, Whitlock & Co., a commodity broker, for the wrongful taking of sugar and bills of lading. The defendant insisted that the sugar did not belong to Cuba, but to the sugar company. The company had incorporated in Cuba but the majority of stock belonged to American citizens. It was alleged that the expropriation by Cuba did not vest proper title in that government, for the taking was contrary to international law. The Supreme Court invoked the act of state doctrine and upheld the validity of the expropriation. The Court stated that Cuba had acted in its sovereign capacity and American courts would refrain from sitting in judgment on this action. Explicit in the decision was the judicial fear that the Court's interference would un-

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38. Davidow, *supra* note 32; Comment, *supra* note 28.
39. 370 U.S. 690 (1962).
40. *Id*. In this case the plaintiff asserted that the defendant conspired to restrain trade and monopolize commerce in vanadium. Defendant allegedly induced a wartime purchasing agent of the Canadian government to eliminate plaintiff from the Canadian market.
41. Davidow, *supra* note 32, at 283.
42. 376 U.S. 398 (1964).

necessarily imperil the political branches' ability to conduct foreign relations.[43] On behalf of the majority, Justice Harlan stated:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[44]

Three explanations for the doctrine, as formulated and applied by American courts, were expounded:[45] (1) respect for the sovereign's right of self government, within its own territory; (2) concern that title to property in international commerce would be rendered less stable by judicial interference in this area; and (3) concern with judicial encroachment on foreign relations matters which are the responsibility of the executive branch.

The *Sabbatino* court did not completely rule against judicial examination of sovereign acts. The Court recognized that it had an obligation to the litigants to do justice and to foster the rule of law in the international arena.[46] The Court set up a balancing approach, stating that "the greater the degree of . . . consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . . [T]he less important the implications of an issue are for our foreign relations, the weaker the justifications for exclusivity in the political branches."[47] The majority opinion explicitly rejected "laying down or reaffirming an inflexible and all-encompassing rule."[48] The holding in this case has given lower federal courts much difficulty. The district court in *Occidental v. Buttes*[49] understood *Sabbatino* to be a reaffirmation of the classic act of state doctrine of *Underhill* and *American Banana*. In dismissing the case, the California district court utilized "the holding

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43. The Constitution does not expressly call for the act of state doctrine; rather it arises from the constitutional division of power into three separate branches. Indeed, the doctrine may be characterized as a judicial creation, an "assertion of the judiciary's own power under the Constitution." Henkin, *supra* note 35, at 815. According to Professor Bickel, the court's self limitation practice is its most preservative virtue. *See generally*, A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

44. Sabbatino, 376 U.S. at 428.

45. *See* 14 HARV. INT'L L. J. 131 (1973).

46. *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 58, 273 (1976) [hereinafter cited as *1975 Supreme Court Term*].

47. Sabbatino, 376 U.S. at 428.

48. *Id.*

49. 331 F. Supp. at 92.

of *American Banana* that has endured . . . . [T]he act of state doctrine bars a claim for antitrust injury flowing from sovereign acts allegedly induced and procured by the defendant."[50] This interpretation is relatively unique, as *Sabbatino* subsequently has been generally limited to the narrow fact situation of expropriation.[51] There was a legislative attempt to confine the holding even further through the enactment of the Hickenlooper Amendment.[52] The courts, in turn, have interpreted the Hickenlooper Amendment to apply only when the nationalized property was taken contrary to international law, and, additionally, when the property or its traceable proceeds have come within American borders.[53]

The next significant Supreme Court decision dealing with the act of state doctrine came in 1972, in *First National City Bank v. Banco Nacional de Cuba* (Citibank).[54] Here the Court allowed a counterclaim to be filed against a Cuban bank by an American bank for damages occasioned when the American institution's property was expropriated. It should be noted that the counterclaim did not exceed the sovereign's original claim. The Court's growing lack of consensus on the act of state doctrine was very evident in *Citibank*. The plurality opinion, written by Justice Rehnquist, with the concurrence of Chief Justice Burger and Justice White, held that this area demanded deference by the judicial branch to the political branches,[55] and that this requirement arose from the separation of powers aspect of American government and from the need to "effectuate general notions of comity among nations."[56] In finding that the act of state doctrine was not a bar to the counterclaim, Justice Rehnquist recognized the propriety of the conduct taken by the State Department on

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50. *Id.* at 110.

51. *See* Timberlane Lumber Co. v. Bank of America, 549 F.2d 592 (9th Cir. 1976); Leigh and Sandler, *Dunhill: Toward a Reconstruction of Sabbatino*, 16 VA. J. INT'L L. 685 (1976); 17 VA. J. INT'L L. 311 (1977). *See also* Falk, *The Complexity of Sabbatino*, 58 AM. J. INT'L L. 935 (1964).

52. 22 U.S.C. § 2370(e)(2) (Supp. V 1975), provides in part:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination of the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state . . . based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law.

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

54. *Id.*

55. *Id.* at 765.

56. *Id.* at 762.

behalf of the Executive branch in advising the Court that the act of state doctrine need not be applied to the instant situation.[57] In dismissing the counterclaim, Douglas' concurrence emphasized equitable notions, thereby avoiding the act of state doctrine;[58] Justice Powell went as far as to say that perhaps *Sabbatino* and the act of state doctrine were being interpreted too broadly.[59] The doctrine should not be construed in such a manner as to force the court to "eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law."[60]

It was within this framework that *Occidental v. Buttes Oil Co.*[61] and the district court opinion in *Occidental v. A Certain Cargo*[62] were rendered. Both these cases were summarily dismissed on act of state grounds, since the respective courts felt the resolution of the dispute would necessarily involve deciding a territorial dispute among foreign nations. The courts in both instances took the view that they were "precluded from piercing the veil of sovereign action by the 'act of state doctrine,' "[63] which, despite some uncertainty from the Supreme Court, they understood to be a viable judicial tool.

B. *The Dunhill Environment*

The uncertainty over the proper role of the act of state doctrine was conspicuously brought to the fore in *Alfred Dunhill of London, Inc. v. Republic of Cuba.*[64] Cuba had expropriated the businesses and assets of its five leading cigar manufacturers and appointed "interventors" to run the businesses. Business went on as usual after the confiscation, with the interventors continuing to ship cigars to the American importers. The United States firms still sent payments to Cuba, including payment for some tobacco which had been shipped before the expropriation. The former owners of the seized businesses

57. *Id.* at 764. This exception to the act of state doctrine is commonly called the "Bernstein exception." Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaat-Maatschappij, 210 F.2d 375 (2d Cir. 1954). The "Bernstein exception" has apparently been rejected as only three justices in *Citibank* utilized the "exception" and six justices rejected its application. Additionally, as one commentator has noted, the letter written by the State Department in *Dunhill* was not taken as a "binding statement, but as a guide to analyze the impact of the case on foreign policy." *1975 Supreme Court Term, supra* note 46, at 269 n.21.

58. First Nat'l City Bank, 406 U.S. at 770-73 (Douglas, J., concurring).

59. *Id.* at 774 (Powell, J., concurring).

60. *Id.* at 775.

61. 331 F. Supp. 92.

62. 396 F. Supp. 461.

63. 577 F.2d at 1200.

64. 425 U.S. 682 (1976).

brought suit against United States importers in the United States District Court for the Southern District of New York to recover the money paid to the interventors. The interventors brought a collateral action to intervene, claiming that they were the rightful owners of all money paid or still owed on all shipments of cigars. The District Court ruled that the former owners were entitled to the money due before the expropriation, and the interventors were due all payments for tobacco shipped after the confiscation. The District Court rejected the interventors' arguments that the refusal to repay the former owners was an act of state; the Second Circuit reversed,[65] stating that such a refusal was indeed an act of state.

In a 5-4 decision, the Supreme Court held that the Cuban interventors had not sufficiently established that they were exercising sovereign power and thus failed to prove an act of state.[66] Despite this narrow holding, very broad implications for the future of the act of state doctrine were contained in the opinion. A plurality of four justices clearly felt that the act of state doctrine should be limited to a nation's sovereign acts, state *qua* state, and that immunity should not be granted to purely commercial acts of a foreign government.[67] Justice White articulated this view. He set forth substantial precedent for a commercial versus governmental distinction recognized in American law. He then analogized this area to the similar doctrine of restrictive sovereign immunity, which refuses to extend *immunity* in a suit to a state which is acting as an entrepreneur.[68] Quoting from

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65. 485 F.2d 1355 (2d Cir. 1973).

66. 425 U.S. at 694-95. The Court found that "the only evidence of an act of state other than the act of non-payment by the interventors was 'statement by counsel for the interventors, during trial, that the Cuban Government and the interventors denied liability and had refused to make repayment.'" *Id.* at 694.

67. *Id.* at 695-706.

68. *See* Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d. 354 (2d Cir. 1964). This case involved an alleged breach of a shipping contract by a Spanish government agency engaged in shipping wheat. The court took note of "the increasing entry of governments into what had previously been regarded as private pursuits." *Id.* at 357. The Second Circuit Court of Appeals applied a:

> [r]estrictive theory of sovereign immunity [in order] . . . to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interests of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hinderance of defending the propriety of such acts before foreign courts. *Id.* at 360.

See Baker, *Antitrust Remedies Against Government Inspired Boycotts, Shortages, and Squeezes*, 61 CORNELL L. REV. 911 (1976). *See also* Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1 (1976).

Ohio v. Helvering,[69] the plurality opinion noted that, "[w]hen a state enters the marketplace seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader." Justice White concluded that the compelling justification for narrowing the scope of sovereign immunity is also present and persuasive in limiting the act of state doctrine:

> Participation by foreign sovereigns in the international commercial market has increased substantially in recent years. . . .The potential injury to private businessmen—and ultimately to international trade itself—from a system in which some of the participants in the international market are not subject to the rule of law has therefore increased correspondingly.[70]

Adding more uncertainty to the status of the act of state doctrine is the fact that the Supreme Court in *Dunhill* specifically asked for argument on whether its holding in *Sabbatino* should be reconsidered,[71] leading one to believe that the Court was unsure of the continued validity of the act of state doctrine. The Court unfortunately failed to reach the question, thereby perpetuating the ambiguous nature of the doctrine.

In analyzing the status of the act of state doctrine following *Dunhill*, even the most restrictive reading of the case must recognize the added burden of proof the party invoking the doctrine must carry in governmental-commercial activities.[72] Additional impetus for restricting the scope of the act of state doctrine has come from the Foreign Sovereign Immunities Act of 1976,[73] which embodies the distinction between public acts and private or commercial acts. The House Committee on the Judiciary, Jurisdiction of U.S. Courts in Suits Against Foreign States,[74] warned that the restrictive doctrine of sovereign immunity could be undercut if courts refused to adopt a similarly restrictive view of the act of state doctrine. In so doing, the Committee endorsed the position taken by the State and Justice Departments in their *amicus curiae* brief to the Supreme Court in *Dunhill*;[75] these departments also urged the Court to limit the scope

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69. 292 U.S. 360, 369 (1934).
70. Alfred Dunhill, 425 U.S. at 703.
71. Memorandum Decision, Alfred Dunhill of London, Inc. v. Republic of Cuba, 422 U.S. 1005 (1975).
72. *See 1975 Supreme Court Term*, *supra* note 46.
73. 28 U.S.C. §§ 1602-1611 (1976).
74. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 20 n.1 (1976).
75. *See* Timberg, *supra* note 68.

of the act of state doctrine to conform to the restrictive theory of sovereign immunity. As stated by Monroe Leigh,[76] legal advisor to the State Department, the department was strongly opposed to permitting sovereign immunity to re-enter through the back door, under the guise of the act of state doctrine. Additionally, in a letter to the Solicitor General, reprinted in *Dunhill*, Mr. Leigh stated, "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."[77]

The *Dunhill* approach—the flexible balancing of different interests and the judicial examination of the nature of the questioned foreign activity—has more recently been seen in a 1976 court of appeals case, *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*[78] In this case, the defendant bank had conspired to restrain and monopolize the Honduran lumber trade to a few select individuals financed and controlled by the bank.[79] The bank, pursuant to Honduran law, had an "embargo" put on plaintiff's property.[80] The Ninth Circuit Court of Appeals held that the act of state doctrine did not apply to immunize defendant's behavior. The court stated "[w]hile we do not wish to impugn or question the nobility of a foreign nation's motivation, we are necessarily interested in the depth and nature of its interest."[81] The court was willing to look behind the sovereign facade to see what motivated the state's action. It concluded that there was no indication that the Honduran actions reflected a studied policy or "sovereign decision that Timberlane's efforts should be crippled or that the trade with the United States should be restrained."[82] "It is apparent that the [act of state] doc-

76. Leigh and Sandler, *supra* note 51, at 694.
77. Alfred Dunhill, 425 U.S. at 710.
78. 549 F.2d 597 (1976).
79. *Id.* at 601.
80. Under Honduran law an 'embargo' on property is [a] court-ordered attachment, registered with the Public Registry, which precludes the sale of the property without a court order. Honduran law provides, upon embargo, that the court appoint a judicial officer, called an 'interventor' to ensure against any diminution in value of the property. In order to paralyze the Timberland operation . . . the interventor, since accused of being on the payroll of the Bank, [used] guards and troops . . . to cripple and, for a time, completely shut down Timberlane's milling opeation. *Id.* at 604-605.
81. *Id.* at 607.
82. *Id.* at 608.

trine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government."[83]

Timberlane thus demonstrated the viability of the commercial exception to the act of state doctrine. This was further reinforced by *Bokkelen v. Grumman Aerospace Corp.*,[84] which showed that courts are competent to delineate between activity which is peculiarly sovereign and that which is commercial in nature.

In 1976, *Hunt v. Mobil Oil Corp.*[85] was filed. The case was dismissed on act of state grounds, but could also have been denied review because of the presence of a political question. The plaintiff Hunt, an oil producer in Libya, brought suit against other Libyan and Persian Gulf Oil producers for antitrust violations. Hunt had entered into an agreement with defendant Mobil to collectively oppose Libyan and OPEC demands, and pursuant to this agreement, Hunt rejected certain Libyan terms. Libya retaliated by nationalizing Hunt's holdings. Hunt alleged that the defendants induced this Libyan action. The case was dismissed as being non-justiciable, and the court reaffirmed what it felt was the traditional act of state doctrine, which precluded American courts from "inquiring into the validity of the *public* acts of a recognized foreign sovereign power."[86] The court stated that even the appellants "conceded on the oral argument of this appeal that the nationalization of Hunt's properties was not a purely commercial act within the *Dunhill* exception."[87] The court placed great emphasis on the fact that the expropriation was politically motivated, and, as such, triggered a need for the foreign relations expertise which is constitutionally vested in the Executive Branch. It even quoted Libyan president al-Qadhafi, on the occurrence of the confiscation, as saying, "the time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless of the cost."[88] Thus, this case also involves the most orthodox aspects of judicial abstention and the political question doctrine. This was not a contract or economic squabble, but a political

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83. *Id.* at 606.

84. 432 F. Supp. 329 (E.D.N.Y. 1977). This case involved the Brazilian government's denial of import licenses to prevent farm-type, cropdusting planes from coming into the country. The court distinguished between the activity that a business is capable of, and the type of activity normally considered to be within a government's power.

85. 410 F. Supp. 10 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 432 U.S. 904 (1977).

86. 550 F.2d at 73, quoting Sabbatino, 376 U.S. 398.

87. 550 F.2d at 73.

88. *Id.*

war, and the enemy was not one slighted corporation, but American interests in general. The court found no validity in the plaintiff's assertion that "Libya, like Hunt, was a 'victim' of the conspiracy,"[89] for "the action taken here is obviously only an isolated act in a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants."[90]

It is within this framework that the appellate decision was reached in *Occidental v. A Certain Cargo*. The perimeters of the act of state doctrine, used as a basis for dismissal in the 1975 (pre-*Dunhill*) lower court decision, were no longer clearly defined. In analyzing the factual situation presented by *Occidental* vis-à-vis the act of state doctrine, the facts appear more similar to those in *Timberlane*, than in *Hunt*. In the instant case, there was no apparent political reason to harm Occidental; Sharjah had seemingly replaced one American corporation with another. The Sharjah relationship with Buttes had no apparent sovereign overtones; rather, the country's actions were of a commercial nature. The lack of politics involved in the relationship seems to lend credence to the idea that Sharjah would not be affronted if an American court ordered an American corporation to share profits from the concession area with another American corporation. Thus, the instant case would fall squarely within the commercial exception. But the Fifth Circuit Court of Appeals in *Occidental* upheld the district court's dismissal "on the slightly different ground that the question presented is political."[91] This allowed the court to ignore the *Dunhill* line of cases which legitimize the commercial exception concept. Although the last word has not been spoken on the act of state doctrine, its classical interpretation seems to be in suspension.

Occidental and the Advent of the Political Question Doctrine

A careful examination of the facts as established by the Court of Appeals reveals that the date of the alleged conversion was "at the time the interest was passed, 1969."[92] Yet Occidental possessed an undisputed property right in the lease with Umm at that time, for Umm and Sharjah had entered into an agreement under British auspices, which defined Umm's continental shelf. It is imperative to re-

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89. *Id.* at 78 n.14.
90. *Id.* at 78.
91. *A Certain Cargo*, 577 F.2d at 1198.
92. *Id.* at 1202.

member that under the treaty with Great Britain, which was to be in force until November 31, 1971, Great Britain had complete control over the area and over all agreements made by Sharjah and Umm. This treaty was recognized by the United States.

Umm's continental shelf extended, with the assent of Sharjah, to the three mile territorial sea of Abu Musa.[93] Occidental and Umm entered into the lease for the exploration and extraction of oil in November 1969. This was approved by the British. Sharjah and Buttes subsequently came to a similar agreement in December 1969, which was also approved by the British. By an unpublished, fraudulently backdated, unilateral decree, Sharjah attempted to increase its territorial waters from three miles to twelve.[94] The British were made aware of Buttes' intention to drill in this area pursuant to the decree extending Sharjah's territorial sea. Both the decree and Buttes' desire to drill in Occidental's concession area were rejected by the British. Iran's claim to Abu Musa was not made known until May 28, 1970. An earlier claim dating from the nineteenth century did not contain any mention of ownership of Umm's continental shelf. Thus, the 1969 Occidental-Umm lease, giving Occidental free use of the continental shelf, was undisputed at the time of the alleged conversion. Although the Court of Appeals states that in order to maintain a successful conversion action, Occidental must establish its right to possession at the time of the alleged conversion — 1969 — the Court nonetheless appears to ignore the very facts which would satisfy such a requirement. Thus, the Court's haste to discuss the political question doctrine may have been factually unnecessary. Further, such factual inconsistencies may weaken the viability of the Court of Appeals decision if successfully brought to the attention of the Supreme Court on certiorari.

The political question rationale[95] advanced by the *Occidental* court is a concept of judicial self-limitation, similar to the act of state

93. *Id.* at 1199.

94. *Id.*

95. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 71 n.1 (1978). There are generally three recognized views on political questions: (1) The classical Marbury v. Madison interpretation, which states that unless the issue was specifically prohibited by the text of the Constitution the court should adjudicate all cases that come before it; (2) The prudential outlook, which holds that if the determination of the issue would cause the court to "compromise important principles or if it would undermine the court's authority," the court should refrain from entertaining the suit; (3) The functional analysis, which deals with the problem of acquiring information necessary for deciding the merits of the case, or the need for uniformity including respect for the other branches of government. *Id.* at 71-72 n.1.

doctrine and amenable to similar criticism. As recognized in the case of *Baker v. Carr*,[96] the "most definitive pronouncement"[97] by the Supreme Court on political questions, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[98] It is also erroneous for the Appellate Court to manufacture a political question, thereby rendering the case non-justiciable, because of judicial reluctance to decide a difficult case. An examination of the facts of the controversy clearly reveals a cognizable claim untouched by the elements which the Court believed gave rise to a political question. The Supreme Court in *Baker* enunciated a test to determine what issues contain a political question and should thus be dismissed as non-justiciable:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[99]

Clearly, a conversion suit brought by one American national against another does not fulfill these requirements, as will be demonstrated by the following analysis of the *Baker* criteria in the context of the *Occidental of Umm* case. The Federal Constitution does not relegate this area to any other branch; indeed, as was stated by Chief Justice Marshall, "it is, emphatically, the province and the duty of the judicial department, to say what the law is."[100] Nor is the court precluded from issuing the relief sought. Nevertheless, the court felt the case could not be resolved without a determination of "the sovereign ownership of the portion of the continental shelf from which the oil was extracted. Although sovereigns are not directly involved, a judicial pronouncement on the sovereignty of Iran or Sharjah would be unavoidable."[101]

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96. 369 U.S. 186 (1962).
97. *A Certain Cargo*, 577 F.2d at 1203.
98. *Id.* at 211.
99. *Id.* at 217.
100. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
101. *A Certain Cargo*, 577 F.2d at 1203.

Despite the court's strong reliance on this argument as a basis for nonjusticiability, the inquiry is superfluous to this action because of the nature of the relief requested. Occidental is not suing for a return of the converted drilling site; rather, Occidental is seeking damages to compensate for the time, money, and effort it expended in the exploration and commencement of proceedings to extract the oil. There is no need for an American court to resolve the question of ownership of the continental shelf in 1978, because the alleged conversion occurrred in 1969, and in accordance with the treaty governing the situation at that time, Occidental had a vested property right in its lease with Umm. In addition, the potential for upsetting foreign sovereign powers would not be present should the court order one American corporation to share its profits with another American corporation. The court is not asked to take the concession away from Buttes and replace its services with those of Occidental; the requested relief thus does not necessitate a policy determination of "non-judicial discretion."[102] Further, a decision of this nature would not be disrespectful to any coordinate branch of government, because it is the judicial function to adjudicate "all cases, in law and equity, arising under this constitution, [and] the laws of the United States."[103] The abdication of judicial responsibility exhibited by this court is unwise precedent for the future. American corporations should not be allowed to induce a foreign sovereign to take action which would be contrary to American law if performed directly by the corporations. Not only does this establish an unstable foundation for American investments and businesses abroad, but it weakens the general efficaciousness of American law.

Justice Powell, in his concurring opinion in *Dunhill*, articulated the view that it is the province of the Court to "decide for itself whether deference to the political branches of government requires abstention."[104] This would appear to be the sentiment of a majority of the Court, as six justices did reject the "Bernstein exception" in the *Citibank* case.[105] One distinguished commentator has gone so far as to suggest that the entire Court has rejected the "Bernstein exception."[106] Oblivious to this Supreme Court pronouncement, the *Occidental* court placed undue reliance on a State Department letter which calls for judicial abstention. The Fifth Circuit Court of Appeals,

102. Baker v. Carr, 369 U.S. at 217.
103. U.S. CONST. art. III, § 2.
104. Alfred Dunhill, 425 U.S. at 715 (Powell, J., concurring).
105. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).
106. *1975 Supreme Court Term*, *supra* note 46, at 269 n.21.

citing the 1954 *Bernstein* case inaccurately, declared it was "clear that whether the state department believes that judicial action would interfere with its foreign relations is germane to whether a court may decide actions involving foreign relations."[107] This extra-judicial determination violates the separation of powers of the three branches because it results in the State Department (as a subdivision of the executive branch) dictating to the judiciary what cases they should hear or abstain from hearing. This appellate holding not only violates the separation of powers doctrine, it also fails to correspond to the factual situation of the instant case—a conversion action between two domestic corporations, with U.S. law applicable to U.S. nationals.[108]

Another element of the *Baker* test is absent in *Occidental v. A Certain Cargo*, as there is no emergency situation which would require unquestioning adherence to a political decision already made. Finally, enforcement of American tort law will not cause embarrassment domestically or abroad. Thus, this court "cannot reject as 'no lawsuit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."[109]

The multi-pronged test of *Baker* has been criticized as being "imprecise" and "vague":

> [The] supposed guideposts do not clarify what a political question is or how a court should test a controversy for political question elements. Instead, they serve as useful tools of expediency for judges to exploit once they have determined on other unarticulated grounds that they do not want to decide the merits of the controversy.[110]

The validity of this criticism is borne out by the *Occidental* opinion. Taking every tenet of the *Baker* test into consideration, one could easily conclude that the *Occidental* controversy did not present a bona fide political question. Shorn of all unnecessary facts, the instant case presents a conversion claim for damages brought by one private

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107. *A Certain Cargo*, 577 F.2d at 1204 n.14.

108. This claim is one involving two American citizens. The State Department in this situation should defer to the court's legal opinion, and actively support obedience by American citizens to American law, whether situated within the United States or abroad. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 577 (1966).

109. Baker v. Carr, 369 U.S. at 217.

110. Jackson, *The Political Question Doctrine: Where Does It Stand After Powell v. McCormack, O'Brien v. Brown, and Gilligan v. Morgan*, 44 U. COLO. L. REV. 477, 505 (1973).

party against another. The peripheral issues of territorial waters and boundaries are extraneous to the basic question which remains: can the appellant show "that at the time of the conversion (1969) it was entitled to possession of the res?"[111] Occidental should be given the opportunity to prove its case.[112]

The political question doctrine is a judicial technique of avoidance—most legitimate where there is a clear textual commitment to another branch, or where the governing substantive law is in a state of flux:

> Political society survives and grows in the tension between principle and expediency, and even though it may be firmly committed to the rule of principle, there must be room for the temporary compromise and the "expedient muddling through." A court that would unconditionally enforce absolute principle would destroy this dynamic balance. But at the same time, the court could not legitimate necessary but unprincipled political decisions, or imperfect approximations of principle, without violating its own "raison d'etre."
>
> In the face of this dilemma, the court should be able to escape from the alternative between validation and invalidation . . . .[113]

Yet where the court possesses all the requisite elements necessary to render a decision, it should not abdicate its responsibility to provide the plaintiff with a forum in which to bring his suit. It is this responsibility which the *Occidental* court shirked by straying into the pitfall of the political question doctrine "which can easily be misunderstood as drawing the line between law and politics."[114]

One factor the court considered in its finding of non-justiciability was the proper extent of a nation's territorial sea. Although this issue was not necessary to a determination of the suit, the court, by refusing to litigate the point, aided the faction which demands a twelve-

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111. *A Certain Cargo*, 577 F.2d at 1202 n.10.

112. *See* Judge Van Graafeiland's dissent in Hunt v. Mobil Oil, 550 F.2d at 81.
> [D]omestic corporations play a variety of roles in the affairs of foreign nations, some of which may be forbidden under our laws. Where, as here, the wrong complained of is the role played rather than the possible political reaction thereto, I think it wrong to predicate an act of state [or political question] defense upon the face of the pleadings. A complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

113. Scharpf, *supra* note 108, at 534.

114. Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 473 (1976).

mile territorial sea. By finding a political question, the court in reality "perpetuat[es] the supposed lack of consensus so damaging to customary international law. Its decision creates expectations throughout the world, expectations which unfortunately will work in many areas to undercut the international standard."[115]

In addition, the court mistakenly stated that there were no manageable standards to be applied and that it would be "in a judicial no-man's land [should it] purport to decide the legality of Sharjah's unilateral extension of its territorial waters or Iran's twelve mile limit."[116] The standards to be applied by the court should be those established by the executive branch. As pointed out by the appellants, "when Sharjah purported to extend its territorial sea to twelve miles around Abu Musa in 1970, the United States proclaimed that it 'reserves its rights and those of its nationals in all areas . . . seaward of the traditional three mile limit.'"[117] Supplementing this executive stance is the fact that the treaty which established Umm's continental shelf in 1964 was created under British supervision, pursuant to the 1958 Convention on the Continental Shelf.[118] The United States is a party to this treaty,[119] thus allowing the court to employ the treaty guidelines as a standard for deciding the case. The appellants, moreover, pointed out that the appellee, Buttes,

> for the first time on appeal raised the novel contention that the tiny island of Abu Musa possesses a continental shelf of its own expanding beyond the limits of its territorial waters. But neither Iran nor Sharjah has ever claimed an independent continental shelf for Abu Musa. Buttes lacks the standing and capacity to assert sovereign rights unclaimed by the sovereigns themselves.[120]

Through the utilization of the political question doctrine, the Court purported to exhibit both an understanding of its own institutional limitations, and the proper respect for the sphere of power reserved to another branch. In reality, however, it is only creating a "decisional vacuum, in which the claims of the parties can never be

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115. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 33 (1970).

116. *A Certain Cargo,* 577 F.2d at 1205.

117. Petitioner's Brief For Certiorari at 15, Occidental v. A Certain Cargo, No. 78-910,___U.S.___(1978).

118. Convention on the Continental Shelf of April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 312.

119. *Id.*

120. Petitioner's Brief For Certiorari at 17-18 n.8, Occidental v. A Certain Cargo, No. 78-910,___U.S.___(1978).

adjudicated, regardless of merit."[121] The facts of *Occidental of Umm al Qaywayn v. A Certain Cargo* do not necessitate a finding of political question as decided by the Fifth Circuit Court of Appeals. That outcome was reached through the Court's self-limitation theory which allows it to avoid adjudicating a difficult case.

The use of the political question doctrine, in cases involving international disputes, must be confined in much the same manner as has occurred with the defenses of sovereign immunity and act of state. The legitimate use of any of these doctrines occurs only where the nature of the action involved is truly sovereign. The opportunity to clarify and define the appropriate uses of the act of state and political question doctrines was handed to the Supreme Court when Occidental filed its petition for a writ of certiorari on December 6, 1978.[122] It is time for the Supreme Court, and for courts of the future, to refuse to be overawed by international complexities and to instead focus judicial attention on existing disputes between American parties.

Anne Martragono*

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121. *Id.* at 25.

122. *Id.* Even if the political question doctrine is upheld by the Supreme Court, the case may well be distinguished in light of the narrow fact situation of tortious conversion claims which require an initial determination of property rights.

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