THE AMERICAN ACT OF STATE DOCTRINE

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ABSTRACT

The act of state doctrine, as the Supreme Court has enunciated it, directs American courts to decide cases on the assumption that acts of foreign governments taken in their own sovereign territory have the legal effect they purport to have. In the leading case of Banco Nacional de Cuba v. Sabbatino, the Court applied that principle to a Cuban expropriation decree concerning property located in Cuba, finding the decree effective to transfer title whether or not Cuba’s expropriation had violated international law. The act of state doctrine is not a principle of immunity or abstention, nor does it require courts to assume that foreign sovereign acts are consistent with any relevant legal duty. The doctrine is wholly about validity. Although the Court’s current statements of the doctrine are quite clear, its content is obscured by its history. The case that usually is taken as the doctrine’s source was about immunity, not validity. Later act of state cases made the doctrine a principle of validity, and immunity is now addressed under other statutory and common-law rules. Although the Court’s formulation is clear, a number of lower court decisions have seriously misapplied the doctrine, treating it as a rule of abstention or as a requirement that foreign government acts be assumed to comply with applicable duties— for example, those imposed by federal statutes. Those cases are inconsistent with the Supreme Court’s holdings and rely on a version of the act of state doctrine that conflicts with established principles of immunity, abstention, statutory construction, and public international law.

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I. INTRODUCTION

A page of history may be worth a volume of logic, but in a system of case law, a convoluted history can obscure doctrinal logic. Something similar may have happened with the American act of state doctrine. As propounded by the Supreme Court of the United States, the doctrine is clear and narrowly focused, and performs an important function in the law of foreign relations. But in large part because of a quirk of case-law history, the doctrine is subject to serious misconstruction. As misconstrued, it conflicts with other legal principles and leads to irrational results. Lower courts often misunderstand the doctrine, reaching results that are justified neither by the Supreme Court’s cases nor by more general principles.

Part II of this Article first describes the doctrine as the Court now states it, and reviews the case law development. This Part emphasizes that under the currently authoritative decisions the doctrine is about validity, not legality in any other sense. When it applies, the act of state principle requires that American courts give to foreign official acts in foreign sovereign territory the juridical force that those acts purport to have. In Banco Nacional de Cuba v. Sabbatino, the Court treated as effective Cuba’s decree expropriating sugar located in Cuba, without regard to whether the expropriation violated international law. The distinction between validity and compliance with applicable duties,
which is on display in *Sabbatino*, is crucial to understanding the doctrine’s substance.

Part II then discusses the act of state doctrine’s case law development and the confusion that it has engendered. The decision that the Court now regards as the doctrine’s origin, *Underhill v. Hernandez*,\(^2\) almost certainly was not an act of state case in today’s sense. Rather, it turned on the jurisdictional immunity in American courts of foreign officials with respect to their official acts. That protection from judicial proceedings, often referred to as immunity *ratione materiae*, is a bar to adjudication, not a principle of substantive non-liability. Today the Court calls it foreign official immunity: the principle that individuals are not subject to foreign jurisdiction for acts they perform on behalf of their own governments. Only later, in cases after *Underhill* that involved foreign acts of confiscation, did the Court articulate the principles regarding validity that it now calls the act of state doctrine. There is thus a substantial discontinuity between the case said to be the doctrine’s origin, and the doctrine as it now stands.

Part III describes the confusion into which the lower courts have sometimes fallen. Some lower court decisions describe the doctrine as one of abstention, pursuant to which courts do not decide cases that are within their jurisdiction. Some lower courts also have concluded that under the act of state doctrine, American courts are barred from concluding that a foreign official act violated a duty, including a duty imposed by a federal statute like the Sherman Act. Neither view is warranted under the Supreme Court’s cases. The Court has made clear that the doctrine does not call for abstention, but supplies a rule of decision by which courts are to decide on the merits. That rule of decision requires that courts treat foreign sovereign acts as legally effective. It does not determine whether foreign sovereign acts, or private acts that are related to them, comply with applicable legal duties.

Part IV briefly discusses the act of state doctrine that appears in British cases, a doctrine that differs significantly from its American namesake. British courts include principles of official immunity *ratione materiae* in the act of state category. The Supreme Court of the United States treats those principles under a different rubric.

Part V argues that the principles the American lower courts sometimes attribute to the act of state doctrine have no place in the larger system of foreign relations law. As the Supreme Court now explains it,

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2. 168 U.S. 250 (1897).
the doctrine performs a choice of law function: it instructs American courts to accept the answers to legal questions that are provided by foreign sovereign acts in foreign territory. As a choice of law principle, the doctrine complements and does not conflict with rules about sovereign and official immunity, nor with substantive rules that apply to the acts of foreign sovereigns. By contrast, were the doctrine to provide immunity, to require abstention, or to interfere with substantive rules that govern the acts of foreign sovereigns, it would displace the legal norms that deal with those topics. The doctrine as it appears in the Supreme Court’s cases thus performs an important function, while the doctrine that appears in some lower court cases disrupts the applicable law.

II. THE SUPREME COURT’S ACT OF STATE DOCTRINE

This Part describes the act of state doctrine as the Supreme Court now expounds it, focusing on the only two cases in the last several decades in which the Court has dealt in depth with the doctrine’s content. It then explains that the case that is conventionally described as the origin of the act of state doctrine was not seen as an act of state case by the Justices who decided it. The doctrine as it now exists arose later.

A. The Contemporary Act of State Doctrine

Two cases together set out the Supreme Court’s current act of state doctrine: Banco Nacional de Cuba v. Sabbatino\(^3\) and W.T. Kirkpatrick Co. v. Environmental Tectonics Corp.\(^4\) Kirkpatrick, in which the Court found the doctrine inapplicable, is more recent, and states the doctrine’s content and limits quite clearly. Sabbatino applied the doctrine and therefore provides the classic example of its operation. A case after Sabbatino that also dealt with Cuban expropriations, Alfred Dunhill of London, Inc. v. Republic of Cuba,\(^5\) confirms the scope of the doctrine as understood in Sabbatino. All the earlier cases that are today characterized as resting on act of state principles must now be understood as they are explained by the Court’s more recent decisions.

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1. Banco Nacional de Cuba v. Sabbatino

In *Sabbatino*, the Supreme Court held that under the act of state doctrine, American courts must give legal effect to certain exercises of legal power by foreign governments, even if those exercises of power are contrary to international law. The Court thus rested the doctrine on the distinction between validity and lawfulness, as it found that foreign law could be binding in U.S. courts even if that law violated international norms.

*Sabbatino* involved a dispute about title to a cargo of sugar originating in Cuba. Sabbatino was a court-appointed receiver of the assets of C.A.V., a Cuban corporation principally owned by U.S. residents. While the sugar was in Cuba and was owed by C.A.V., the Cuban government issued a decree purporting to nationalize the sugar and other assets owned by American interests. Banco Nacional de Cuba, an instrumentality of the Cuban government, claimed title on the basis of the nationalization decree. Sabbatino claimed title through C.A.V. Both appeared in the U.S. District Court for the Southern District of Manhattan, seeking to recover the proceeds of the sale of the cargo in Morocco, which had been paid to Farr, Whitlock & Co., a sugar broker operating in New York.6

In the Court’s view, the actions of the Cuban government while the sugar was still in Cuba “must be regarded for these purposes to have constituted an effective taking of the sugar, vesting in Cuba C.A.V.’s property right in it.”7 The question then was whether “the rights acquired by Cuba are enforceable in our courts,” a question that depended on the act of state doctrine.8 In setting out the basic outlines of that doctrine, the Court discussed two formative cases, *Oetjen v. Central Leather Co.* and *Ricaud v. American Metal Co.*, which were especially pertinent because they involved disputes over ownership of property that had been nationalized by a foreign government.9 In both,

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7. *Id.* at 414.
8. *Id.* at 415.
9. Those two cases, decided on the same day, were *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918), and *Ricaud* v. *American Metal Co.*, 246 U.S. 304 (1918). Both cases, which this Article discusses in more detail below, involved seizures of private property by insurrectionary forces in Mexico loyal to a government that eventually was recognized by the United States. In *Sabbatino*, the Court quoted a passage from *Oetjen* explaining that “[t]he principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of the court, such as we have here[.]” *Sabbatino*, 376 U.S. at 417 (quoting 246 U.S. at 303-04).
the foreign title had been sustained without further inquiry.\textsuperscript{10}

The Court then turned to the respondents’ argument that the case should constitute an exception to the ordinary act of state rule. One reason urged was that Cuba’s seizure of the property, unlike the Mexican expropriations involved in \textit{Oetjen} and \textit{Ricaud}, violated international law.\textsuperscript{11} After discussing the source of the act of state principle and its place in the American legal hierarchy, the Court rejected that argument.\textsuperscript{12} Carefully circumscribing its holding, the Court stated that:

\[\text{W}e \text{ decide only that the 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 the 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.}\textsuperscript{13}

The Court was quite clear that the act of state doctrine required sovereign acts to be treated as legally operative, and be given effect in the courts of other sovereigns, whether or not the act in question violated duties imposed by international law. As it explained, the substance of international law concerning expropriation of property owned by aliens was a matter of debate.\textsuperscript{14} The Court was quite disturbed by the prospect of addressing that thorny issue. “It is difficult to

\begin{footnotesize}
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\item Oetjen, 246 U.S. at 297; Ricaud, 246 U.S. at 304.
\item Sabbatino, 376 U.S. at 420.
\item The Court found that the doctrine is not a requirement of international law, nor is it derived from the Constitution. \textit{Id.} at 421-23. It does, however, have constitutional underpinnings, because it rests on the courts’ unwillingness to take steps that interfere with the executive’s conduct of foreign relations. \textit{Id.} at 423-24. The Court also stated that the doctrine was one of federal common law, binding on state as well as federal courts. \textit{Id.} at 424-27. As this Article explains below, \textit{infra} notes 92-108 and accompanying text, it is likely that the case in which the Court found the “classic statement of the act of state doctrine,” was initially regarded as resting on the jurisdictional immunities of states and their officials under international law, and not principles governing the legal effect of foreign official acts in this country. \textit{Id.} at 415. Continuing to call \textit{Underhill} an act of state case after the doctrine had ceased to be one of non-decision and had become a source of principles by which to decide cases on their merits as in \textit{Oetjen}, \textit{Ricaud}, and \textit{Sabbatino} may well have contributed to the confusion regarding the doctrine’s source. The jurisdictional immunities of states and their officials are governed by international law. \textit{See, e.g.}, United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, U.N. Doc. A/59/508 (not yet in force).
\item Sabbatino, 376 U.S. at 428.
\item \textit{Id.} at 428-29.
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imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.”  

As a result, it concluded that “the act of state doctrine is applicable even if international law has been violated.”

The Court’s analysis demonstrates that an act can violate a legal duty but at the same time be legally effective. An act of expropriation that was inconsistent with the applicable law, here international law, nevertheless could pass title. The Court kept separate the questions of Cuba’s power to transfer title and its potential liability for a possible violation of international law. It explained that finding an exception to the act of state principle would “render uncertain titles in foreign commerce, with the possible consequences of altering the flow of international trade. If the attitude of the United States courts were unclear, one buying expropriated goods would not know if he could safely import them into this country.”

While title was governed by the act of state principle, compensation for the expropriation might be obtained through diplomatic negotiations, negotiations in which the United States might or might not take the position that the act of nationalization violated international law.

In the context of the act of state doctrine, “invalid” and “illegal” thus are not synonyms. A government’s act can be illegal, in the sense of inconsistent with the government’s obligations under international law, and nevertheless not invalid and hence legally effective. Given the sovereignty of states, this arrangement is quite common in international law. For example, the General Agreement on Tariffs and Trade (GATT), implemented through the World Trade Organization (WTO), imposes duties on governments concerning aspects of their domestic law, including especially tariffs. The WTO has an enforcement process, in which one state can complain that another is in breach of its

15. Id. at 430.
16. Id. at 431. The Court also rejected the argument that however disputed the international law governing expropriation may have been, the circumstances “[made] it patently clear that this particular expropriation was in violation of international law.” Id. at 433. That approach would only postpone difficult and controversial line-drawing to later cases. Id.
17. Id. at 433-34.
18. Id. at 432 (explaining that the executive branch, in negotiations, might refrain from alleging a breach of international law).
duties. If the WTO adjudicator concludes that a breach has taken place, it directs the losing party to implement its report. That implementation may involve changes in domestic law, which the WTO adjudicatory system does not itself bring about. The WTO does not, however, seek to treat the tariff as ineffective, or order the state involved to do so; if the tariff remains in place, private parties must continue to pay it. If the offending state does not implement the WTO decision, the WTO then may authorize injured states to take retaliatory measures that otherwise would themselves violate the GATT. A tariff that produces permissible retaliation is thus valid and illegal.

The distinction also appears in private law. A classic example arises from an agent’s power to bind the agent’s principal, even contrary to instructions given to the agent but unknown to any third party with whom the agent deals. Suppose, for example, that P communicates to T that A will be P’s agent for a particular real estate transaction. That communication will create apparent authority in A. P may also give A private instructions, for example not to pay more than some specified amount for the property. If A and T then enter into a contract at a higher price, P will be bound to T. A also will have breached a duty owed to P and may be liable for damages. A’s action on P’s behalf will be illegal but valid.

As stated in Sabbatino, the act of state doctrine is a rule of unwritten federal law (often called federal common law), subject to override by Congress. In response to that case, Congress modified the rules American courts are to apply to expropriations that are alleged to violate international law. While Sabbatino remains the Court’s leading act of state case, its actual result thus has been undercut by later legislation.

20. See id. at 120-24 (describing WTO dispute settlement process).

21. See id. at 140. As Trebilcock and Howse explain, losing parties have a reasonable time within which to implement the WTO decision, and one reason for delay is the time needed to adopt new legislation. Id. If the WTO decision itself in effect annulled offending domestic law, no such delay would be required or necessary. As Professor Rachel Brewster has pointed out, the delays in the WTO process give states an incentive to prolong it. Rachel Brewster, The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement, 80 GEO. WASH. L. REV. 102, 103-04 (2011).

22. SeeTREBILCOCK & HOWSE, supra note 19, at 140-41.


24. See id. at 146. “It is not at all inconsistent for an agent to be clothed with a certain power, but, at the same time to be under instructions and thus a duty to his principal that he shall not use the power in a particular proscribed way.” Id. at 144.

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A few years after Sabbatino, the Court decided another case arising out of Cuban expropriations, Alfred Dunhill of London, Inc. v. Republic of Cuba. In Alfred Dunhill the Justices’ discussion of the act of state doctrine shows that they understood it to establish the validity of foreign government’s legal acts.

Before nationalizing the sugar at issue in Sabbatino, the government of Cuba had nationalized the private Cuban firms that were the main exporters of Cuban cigars. Alfred Dunhill of London and other tobacco-importing firms accordingly made payments for Cuban cigars to the parties named by the government of Cuba to receive the nationalized assets. The expropriated owners claimed that those payments should have been made to them and sued three firms that had purchased the expropriated cigars, including Dunhill, in U.S. court. The government of Cuba and the parties it had named to receive the cigars intervened in that litigation, which ultimately came before the Supreme Court. Under Sabbatino, it was clear that Cuba’s nationalization of the exporting firms would be treated as valid. However, some of the payments were for cigars that had left Cuba prior to the nationalization decrees. Once the Cuban parties had joined the suit, Dunhill and the other importing firms made claims against them for payments made with respect to pre-expropriation cigars, payments the importers said were made in error and should be returned under quasi-contract principles.

The Court of Appeals for the Second Circuit concluded that the Cuban parties’ failure to pay the money demanded of them by the importers, and their denial of any liability, constituted repudiation by Cuba of its obligation to pay. The Second Circuit found that repudiation was an act of state, and the quasi-contractual obligation had its situs in Cuba, so the act of repudiation had to be treated as legally binding and eliminating the contractual obligation under Sabbatino.

27. Id. at 685.
28. Id. at 685-6.
29. Id. at 685-6.
30. Id. at 685-6.
31. Id. at 687.
32. Id. at 688-690. In the Second Circuit, the case was Menendez v. Saks & Co., 485 F.2d 1355 (1972).
33. Dunhill, 425 U.S. at 689 (quoting Menendez, 485 F.2d at 1371).
The Supreme Court reversed, although a majority formed only on a relatively narrow ground.\(^{34}\) Speaking for the Court on this point, Justice White found that the Cuban parties had not demonstrated that the earlier expropriation of the cigar companies was followed by “a second and later act of state involving the funds mistakenly paid” to the Cubans who were named to receive the cigars and were called intervenors.\(^{35}\) The intervenors’ refusal to return the demanded funds was not enough to constitute an act of state. By itself, that refusal did “not necessarily assert anything more than . . . that the preintervention accounts receivable were theirs and that they had no obligation to return payments on those accounts.”\(^{36}\) Refusing to pay did not show that the intervenors “had been invested with sovereign authority to repudiate all or any part of the debts incurred” by the businesses they operated.\(^{37}\) With no act of state proven on the record, the act of state doctrine was not implicated.

The Court’s analysis underlines that the state acts with which the doctrine is concerned are juridical acts that purport to have legal effects and hence can be valid or invalid. The intervenors’ refusal to pay was in one sense an action of the Cuban government, for which they were agents. That refusal could be lawful or unlawful, a breach of duty or not, but was neither valid nor invalid because it did not purport to change legal relations. The refusal was not an act of state within the meaning of the doctrine because it was not, as the Court explained, an expropriation of the claim for payment. “No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due three foreign importers.”\(^{38}\) That was the kind of act of state the Court looked for but did not find. The act of state doctrine at issue in *Dunhill* was not a rule of non-liability for government actions, but one of validity of juridical acts of government.\(^{39}\)

\(^{34}\) Id. at 691.

\(^{35}\) Id.

\(^{36}\) Id.

\(^{37}\) Id. at 692-93.

\(^{38}\) Id. at 695.

\(^{39}\) Justice White in *Dunhill* spoke for only four Justices in concluding that “the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.” Id. Justice Stevens, who joined the majority in finding that no act of state had been shown, did not join in that part of Justice White’s opinion and did not otherwise address the issue. Id. at 715. The case thus left open the question whether the act of state doctrine has a commercial function exception. Four Justices

The Court’s most recent discussion of the act of state doctrine makes clear that the doctrine attributes validity, and only validity, to foreign government acts taken in foreign sovereign territory. It also states explicitly that the validity of foreign sovereign acts is to be used in deciding cases on the merits, and so establishes that the doctrine is not a barrier to merits decisions, as a principle of jurisdiction or abstention would be.

W.S. Kirkpatrick Co. v. Environmental Tectonics Corp. was a private civil RICO action in which Environmental Tectonics claimed that W.S. Kirkpatrick Co. (Kirkpatrick) had injured it through a violation of the Foreign Corrupt Practices Act (FCPA). According to Environmental Tectonics, Kirkpatrick had obtained a defense contract with the Nigerian government by bribery in violation of the FCPA, and the contract would have gone to Environmental Tectonics but for the bribe.

The district court granted summary judgment to the defendant, concluding that the act of state doctrine required dismissal because an inquiry into alleged bribery of Nigerian officials could embarrass the Nigerian government or interfere with the conduct of U.S. foreign relations. The court of appeals for the Third Circuit reversed, relying on a letter from the State Department’s Legal Adviser saying that such an inquiry would not produce embarrassment or interference.

The Supreme Court affirmed, but not on the basis of the Third Circuit’s reasoning. According to the Court, the factual predicate for application of the act of state doctrine was not present, so it was unnecessary to inquire into detail into the doctrine’s purpose or possible exceptions to it. The Court’s opinion concluded with a

dissented, joining an opinion by Justice Marshall that found an act of state and rejected the argument that the act of state doctrine does not apply to governmental acts taken in a commercial context. Id. at 715-16. Justice Marshall’s opinion also shows that the act of state doctrine concerns the validity of foreign government actions. For example, he contrasted the act of state doctrine with sovereign immunity. Unlike sovereign immunity, the act of state doctrine “exempts no one from the process of the court.” Id. at 726. Rather, it “commands that the acts of a sovereign nation committed in its own territory be accorded presumptive validity.” Id.
succinct statement of the doctrine’s content and its place in the process of deciding cases:

Courts of the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid.  

The doctrine, the Court explained, had no application in Kirkpatrick, because “the validity of no foreign government act is at issue.”

Three features of the doctrine emerge clearly from Kirkpatrick. First, the act of state doctrine is a rule of decision, not a bar to decision. The Court explained that in every case in which the doctrine applied, “the relief sought or the defense interposed would have required a court of the United States to declare invalid the official act of a foreign sovereign performed within its own territory.” When a doctrine keeps a defendant from interposing a defense, it allows the suit to go forward, and may be part of the grounds on which a plaintiff prevails on the merits. That, as the Court recognized in Kirkpatrick, is what happened in Sabbatino. Banco Nacional was the plaintiff, seeking to recover funds held by Farr, Whitlock & Co. “In Sabbatino, upholding the defendant’s claim to the funds would have required a holding that Cuba’s expropriation of goods located in Cuba was null and void.” Because that defense was unavailing, Banco Nacional was able to obtain relief.

46. Id. at 409.
47. Id. at 410.
48. The Court quoted the phrase “rule of decision” in distinguishing one of its seminal act of state cases: “Nothing in the present suit requires the Court to declare invalid, and thus ineffective as ‘a rule of decision for the courts of this country[,]’ Ricaud v. American Metal Co., 246 U.S. 304, 310 (1918).” Id. at 405. A foreign sovereign act, because it is treated as valid and effective, becomes a rule of decision for U.S. courts.
49. Id.
50. Id. at 405-06.
51. In similar fashion, the claimants in Ricaud, 246 U.S. 304, and Oetjen v. Central Leather Co. 246 U.S. 297 (1918), successfully asserted title to property on the basis of Mexican seizures that were deemed valid under the doctrine. W.S. Kirkpatrick, 493 U.S. at 405. Those cases too were resolved on the merits, using the valid foreign official act as a rule of decision.
Second, the doctrine operates only when the case turns on the validity or invalidity of a foreign official act. It is not implicated when one possible outcome would logically imply that a foreign official act was invalid, if that implication is not itself a component of the reasoning underlying the result. For that reason, the Court found it irrelevant that, if the plaintiff prevailed by showing bribery, a judgment in its favor would entail the conclusion that a contract had been invalid under Nigerian law. The defendant relied on just that line of reasoning, and the Court responded that “[a]ct of state issues only arise when a court must decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine.”\textsuperscript{52} That was so in \textit{Kirkpatrick}, because the legal status of the contract under Nigerian law “is simply not a question to be decided in the present suit[.]”\textsuperscript{53}

Third and perhaps most important is that the Court used “valid” and “invalid” in the standard legal sense, meaning legally operative and inoperative. A valid or legally operative act, like a duly executed will, is given effect by the courts in appropriate cases. An inoperative act, like a will that fails the requirements for proper execution, is disregarded by the courts. The Court explained that in the case before it nothing called for the courts to “declare invalid, and thus ineffective as ‘a rule of decision’” any act of the Nigerian government.\textsuperscript{54} To say that a purported legal act, like expropriating sugar or making a contract, is ineffective as a rule of decision is to say that it is legally inoperative, and so to be disregarded. Conversely, the validity guaranteed by the act of state doctrine is legal effectiveness. In discussing the application of the doctrine in \textit{Sabbatino}, the Court explained, “upholding the defendant’s claim to the funds would have required a holding that Cuba’s expropriation of goods located in Havana was null and void.”\textsuperscript{55} Nullity and voidness too are about legal effectiveness. As explained above, a legal act can violate a duty without being null and void, as when an agent exceeds private instructions. The concepts of validity and of legality in the sense of complying with duty are distinct, and the Court in \textit{Kirkpatrick} was concerned with the former.

“Valid” has a technical legal sense in which it is routinely used and in which the Court deliberately used it, as shown by its statement that no party had asked that an act of the Nigerian government be declared

\textsuperscript{52} Id. at 406.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 405 (quoting \textit{Ricaud}, 246 U.S. at 310).
\textsuperscript{55} Id. at 405-06.
legally ineffective. Valid can be used less technically, to mean illegal in a broader sense that includes both ineffectiveness and violation of duty. Perhaps in the interest of clarity, the Court in *Kirkpatrick* described its four leading act of state precedents in terms that spoke even more clearly to whether a sovereign act was operative. As to *Underhill v. Hernandez*, it said that “holding the defendant’s detention of the plaintiff to be tortious would have required denying legal effect to ‘acts of a military commander representing the authority of the revolutionary party as government, which afterwards succeeded and was recognized by the United States.’” Discussing the next two canonical cases, *Oetjen v. Central Leather Co.* and *Ricaud v. American Metal Co.*, it explained that “denying title to the party who claimed through its purchase from Mexico would have required declaring that government’s prior seizure of the property, within its own territory, legally ineffective.” In *Sabbatino*, “upholding the defendant’s claim to the funds would have required a holding that Cuba’s expropriation of goods located in Havana was null and void.” “Invalid” may be slightly ambiguous on this point. “Legal effect” is not unclear, nor are “legally ineffective” and “null and void.”
By contrast with “valid” and “invalid,” the words “legal” and “illegal” generally have the broader sense that “valid” and “invalid” usually do not. To say that an act is illegal may be to say that it is void, as an unconstitutional statute is said to be illegal. That label is also often applied to acts that conflict with duties, as in saying that arson is illegal. Only the latter meaning is in play in discussing physical as opposed to juridical acts, like setting a fire as opposed to passing a statute. Someone who says that the defendant’s act of firing a building was illegal cannot mean that the act does not have the legal effect it purports to have, because firing a building, unlike signing a document, purports to have no legal effect. This ambiguity in the standard use of “legal” and “illegal” is especially important with respect to official government acts when their compliance with international law is relevant. Governments regularly perform juridical, not physical, acts; indeed, a government as such can act only juridically, because a government is not a physical entity, only its agents are. In Sabbatino, the Court treated the expropriation as legally effective without deciding whether it complied with Cuba’s duties under international law.62

When a word is multivalent in that way, context frequently will disambiguate it. The Court’s opinion in Kirkpatrick does so. Petitioners in that case, the Court noted, pointed out “that the facts necessary to establish respondent’s claim will also establish that the [Nigerian] contract was unlawful.”63 In the next sentence, the Court said that, according to petitioners, the payment they were alleged to have made “would, they assert, support a finding that the contract is invalid under Nigerian law.”64 Later in that paragraph, the Court explained that whether petitioner was right about Nigerian law did not matter, because whatever the facts may suggest “as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the preset suit.”65

Did the Court mean “unlawful” and “invalid” and “legality” all in the sense of compliance with duty? It did not, because “[t]he act of state doctrine is not some vague doctrine of abstention but a ‘principle of decision’ binding on federal and state courts alike.”66 In order to provide a principle of decision, a legal act that purports to bind in a case must be valid in the sense of legally operative, and a sovereign act

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64. Id.
65. Id.
66. Id. (emphasis added) (quoting Sabbatino, 376 U.S. at 427).
can supply a principle of decision whether or not it complies with any duty, as Cuba’s act in *Sabbatino* did. By contrast, when a sovereign act is measured against a duty under international law and is consistent with it, international law, not the sovereign act, supplies the rule of decision; the sovereign act is judged under the rule of decision. When the context is set by the question whether a sovereign act supplies a rule of decision, the answer is about effectiveness, and “valid” and “lawful” and “legal” are all used in the sense that bears on that question.

The act of state doctrine operates when a court must decide whether to give its purported legal effect to a potentially binding foreign sovereign act. It states the circumstances under which the court is to do so. Whether that sovereign act violated any duty is irrelevant, and for that reason, if the question is whether a sovereign act violated a duty, the act of state doctrine is irrelevant. That is the teaching of *Sabbatino* and *Kirkpatrick*.

4. References to the Act of State Doctrine after *Kirkpatrick*

The Court has not had occasion to apply the act of state doctrine since *Kirkpatrick*, but has discussed the doctrine in two cases that this section will discuss. In *Republic of Austria v. Altmann*, the Court made a statement that may seem to undercut *Sabbatino* and *Kirkpatrick*. “Unlike 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.” In *Sabbatino*, Banco Nacional de Cuba relied on the doctrine to support its claim for relief, not a defense. If the doctrine provides a defense, it is hard to see how a plaintiff can take advantage of it.

Statements in cases are made in the context of the dispute before the court, and in *Altmann* the Republic of Austria was the defendant. Altmann claimed that valuable paintings on display in Austria were

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67. When a court in an arson prosecution concludes that the defendant set fire to an uninhabited structure he owned himself, because he likes to watch fires, the law of arson, and not the act of firing, supplies the rule of decision.

68. While a legal act like expropriation can be subject to both rules about validity and rules about duty, as with a legally effective expropriation that violates international law, a physical act is not subject to rules about validity. An allegedly tortious damage to property cannot supply a rule of decision. Such an act thus cannot, in principle, be presumed to be valid under the act of state doctrine in the sense in which the Court used the word “valid.” An alleged tort can, however, be legal in the sense of in compliance with the duties imposed by the law of tort.


70. *Id.* at 700.
hers by inheritance, having been “seized by the Nazis or expropriated by the Austrian Republic after World War II.”\textsuperscript{71} Austria claimed sovereign immunity, and Altmann sought to take advantage of the Foreign Sovereign Immunity Act’s (FSIA) exception for cases involving property taken in violation of international law.\textsuperscript{72} Austria responded that when the relevant events took place, the law of sovereign immunity had no such limitation on immunity, so that applying the statutory exception to the case would make the FSIA retroactive, which federal statutes are presumed not to be.\textsuperscript{73} The Court, deciding only the question of retroactivity, concluded that because the FSIA is a jurisdictional and not a substantive statute, its application depends on the time of the lawsuit, not the time of the conduct at issue therein.\textsuperscript{74} Having resolved that issue, the Court left to the lower courts the question whether Altmann’s claim qualified under the exception.

The discussion of the act of state doctrine appeared in a section identifying issues that the decision left open. The Court pointed out that it did not “have occasion to comment on the application of the so-called ‘act of state’ doctrine to petitioners’ alleged wrongdoing.”\textsuperscript{75} It then explained that the issue was not resolved because the doctrine “provides a foreign state with a substantive defense on the merits.”\textsuperscript{76} The Court’s main point was that act of state issues arise with respect to the merits, not jurisdiction.\textsuperscript{77} In Altmann, the doctrine would be relevant to Austria’s defense, because Austria was the defendant. In Sabbatino, by contrast, the state instrumentality relying on the validity of a foreign sovereign act was the plaintiff. In arguing on the merits that it had good title to the paintings, Austria would indeed rely on the Court’s act of state cases, because “[u]nder that doctrine, the courts of one state will not question the validity of public acts (acts \textit{jure imperii}) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the

\begin{thebibliography}{9}
\bibitem{Altmann} Id. at 680.
\bibitem{FSIA} 28 U.S.C. § 1605(a)(3) (2012) (exception to sovereign immunity for certain cases “in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States”).
\bibitem{Altmann2} \textit{Altmann}, 541 U.S. at 686.
\bibitem{Altmann3} Id. at 700.
\bibitem{Altmann4} Id.
\bibitem{Altmann5} Id.
\bibitem{Altmann6} This statement represents another rejection of the suggestion that the doctrine is one of abstention.
\end{thebibliography}
litigants has standing to challenge those acts.”

Before the Court, Austria pressed a different understanding of the act of state doctrine, one this Article argues is not found in the cases. It maintained that foreign expropriations were sovereign acts “for which, prior to the enactment of the FSIA, sovereigns expected immunity.” For that reason, the Republic maintained, applying the FSIA’s exceptions to events that occurred before the statute was passed would constitute the kind of retroactive application that the courts assume Congress generally does not provide. The Court’s response was that “because the FSIA in no way affects application of the act of state doctrine, our determination that the Act applies in this case in no way affects any argument petitioners may have that the doctrine shields their alleged wrongdoing.” The argument that U.S. courts are required to treat as valid foreign expropriations thus was available to Austria on remand. In that case, that argument would arise as part of a defense.

In Samantar v. Yousuf, the Court once again discussed the act of state doctrine, and once again said that it was “distinct from immunity, and instead ‘provides foreign states with a substantive defense on the merits[.]’” Samantar had been a high official of the government of Somalia. When that government collapsed, he fled the country and

78. Altmann, 541 U.S. at 700. (footnote omitted). An act jure imperii is a sovereign act, as opposed to an act by a government in its capacity as property owner or party to a commercial contract.
79. Id. at 701.
80. Id.
81. Id.
82. It is possible but unlikely that Justice Stevens meant to imply that the act of state doctrine would be, and not just be part of, a defense in the sense of meaning that Austria’s acts had to be taken as in compliance with applicable duties. As in Sabbatino, the parties disputed title to property, so the legal effectiveness of transfers of title was central to the case. Justice Stevens said that under the doctrine “the courts of one state will not question the validity” of foreign sovereign acts in foreign territory, and quoted a passage from Sabbatino that also used “validity” in the sense that refers to effectiveness, because Sabbatino was about effectiveness. Altmann, 541 U.S. at 700-01 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 441 (1964)). Justice Stevens also explained that private parties who want redress for sovereign acts must seek it “through diplomatic channels,” Id. at 700 n.20, which is what the expropriated sugar owners in Sabbatino had to do. The Court’s description of the act of state doctrine is clearly incorrect, strictly speaking, in at least one respect. It does not provide foreign states with a substantive defense on the merits, see id. at 700, because it does not operate when a state itself is sued. All the Court’s act of state cases have involved either non-state parties, as in Kirkpatrick, or a state instrumentality as a plaintiff, as in Sabbatino.
84. Id. at 322 (quoting Altmann, 541 U.S. at 700).
became a resident of Virginia. Yousuf and other plaintiffs, natives of Somalia, sued Samantar for damages arising from alleged human rights violations by Somali military forces under Samantar’s command. Samantar argued that although he was an individual sued for damages to be paid from his own funds, he enjoyed the immunity of a state under the FSIA. The Supreme Court concluded that the statute codified the immunity only of states themselves and other legal persons who are their agencies, not the immunity of natural persons like Samantar. The immunity of former officials of foreign governments, it concluded, continues to be governed by unwritten principles.

The act of state doctrine entered the Court’s reasoning due to an argument of Samantar that may seem like a play on words. “Petitioner urges that a suit against an official must always be equivalent to a suit against the state because acts taken by a state official on behalf of a state are acts of the state.” The Court explained that it had “recognized, in the context of the act of state doctrine, that an official’s acts can be considered the acts of the foreign state, and that ‘the courts of one country do not sit in judgment’ of those acts when done within the territory of the foreign state.” At that point the Court said that the act of state doctrine is distinct from immunity and provides a substantive defense on the merits, but that there are indeed circumstances in which “the immunity of the foreign state extends to an individual for acts taken in his official capacity.” But that does not mean that the FSIA codified the immunity of foreign officials that derives from their official status, as opposed to the immunity of states themselves. Foreign official immunity might exist but be left to the common law, which the Court concluded it had been by the FSIA.

The Court in Samantar mentioned the act of state doctrine only to distinguish it from immunity. In saying that the doctrine provides a defense on the merits, it had no occasion to distinguish between providing a defense by itself and being part of a defense by ensuring the validity of a foreign sovereign act. Under Sabbatino and Kirkpatrick the latter is the more precise formulation.

85. Id. at 308-09.
86. Id. at 308.
87. Id. at 309.
88. Id. at 324-25.
89. Id. at 322.
90. Id. (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).
91. Id. at 322.
The connection between the act of state doctrine and immunity, however, is in fact as close as Samantar, the defendant, said, though not for the reason he gave. As I will explain below, the very first case that is now understood to have been decided under the act of state doctrine, *Underhill v. Hernandez*, very likely was understood by the Court that decided it as resting on common-law official immunity derived from common-law sovereign immunity. But as the Court said in *Samantar*, the act of state doctrine as expounded in *Sabbatino* and *Kirkpatrick* is not one of immunity. A confusion arises because *Underhill* once was the latter kind of case, but has since been re-explained as being about the validity of foreign official acts that supply rules of decision. That discontinuity in the Court’s account of its own cases underlies much of the confusion in the lower courts regarding the act of state doctrine.

**B. “Act of State,” Jurisdictional Immunity, and Validity before Sabbatino**

According to *Kirkpatrick*, the Court has several times relied on the act of state doctrine, and every time it did so, it treated as valid an act of a foreign government. That is now the Court’s authoritative account of its prior cases. That account is correct as to two of the formative cases, but it is much less clearly so of the decision the Court now regards as the headwaters of the act of state river. Much of the confusion in the lower courts, which this Article discusses in Part III, very likely derives from the Court’s statements that *Underhill v. Hernandez* belongs in the act of state line of cases.

1. *Underhill v. Hernandez*

The Court today says that *Underhill v. Hernandez* contains “[t]he classic American statement of the act of state doctrine[.].”*93* *Underhill*, however, very likely was not regarded by the Justices who decided it as focusing on the validity of a foreign official act. Rather, that case implemented the jurisdictional immunity of foreign states as it extended to suits against officers sued personally for official acts, or acts of state.*94* It is especially important to understand what that case meant.

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94. With respect to individuals, as opposed to governments themselves, international law distinguishes between status-based immunities (*ratione personae*) and conduct-based immunities (*ratione materiae*). Status-based immunities shield incumbent officials (such as diplomats and heads of state) from foreign legal proceedings that...
in its own day and what it means today as an example of the act of state doctrine, because Underhill supplies an often-quoted and often-misunderstood passage: “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.” The Underhill Court, as I will explain, almost certainly meant that the courts of one sovereign would accord jurisdictional immunity to foreign officials in suits involving official acts, just as they would give jurisdictional immunity if the defendant were the sovereign itself. Not sitting in judgment meant not exercising jurisdiction. It did not mean treating foreign official acts as substantively lawful. If Underhill is understood as an act of state case in the Court’s current sense, that passage means that the courts of one sovereign will not disregard juridical acts that are valid under the law of another sovereign. So read as it was in Kirkpatrick, Underhill, like Sabbatino, is about validity and not breach of duty.

George Underhill, an American citizen, had resided in Bolivar, Venezuela during political upheavals in that country in 1892. According to Underhill, he was mistreated by insurgent forces under the command of General Jose Manuel Hernandez. Underhill returned to the United States, and in 1893 was residing in New York City when General Hernandez came there. Underhill and his wife sued Hernandez in New York state court, stating tort claims for unlawful detention and battery during the occupation of Bolivar by Hernandez’ forces. Underhill had been operating a water works and machinery repair

would interfere with their ability to conduct international relations. Conduct-based immunities shield certain acts performed by incumbent officials who do not have status-based immunity (such as consular officials) from foreign legal proceedings relating to those acts. They also shield former foreign officials from legal proceedings based on certain acts performed in their official capacity during their tenure in office.

Chimène I. Keitner, Adjudicating Acts of State, in FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS 49, 50 (John Norton Moore ed., 2013) (footnotes omitted). Professor Keitner’s important study shows that Underhill, when it was decided, was part of the development of doctrine governing immunity ratione materiae. Id. at 61-63.

95. Underhill, 168 U.S. at 252.

96. The Court in Sabbatino identified sovereign immunity as a possible alternate ground for the decision in Underhill. Sabbatino, 376 U.S. at 430. In my view that was the only ground, if sovereign immunity is taken to include official immunity ratione materiae, as far as Chief Justice Fuller and his colleagues were concerned.


business in Bolivar. He maintained that Hernandez’ troops detained him in his home, demanding that he continue both operations and refusing to let him leave.\textsuperscript{99} Hernandez removed the case to the United States Circuit Court for the Eastern District of New York under the alien diversity jurisdiction, and prevailed in that court.\textsuperscript{100} That judgment was affirmed by the Circuit Court of Appeals, which was in turn affirmed by the Supreme Court.\textsuperscript{101}

The court of appeals discussed the law as it then stood at considerably more length than did the Supreme Court. The immunity of sovereigns in the courts of other sovereigns, the court of appeals explained, reflected “[c]onsiderations of comity, and of the highest expediency.”\textsuperscript{102} Citizens of the state complained against had redress “by an appeal to the courts or the other departments of their own government.”\textsuperscript{103} Foreign citizens could look to their own governments to obtain satisfaction through negotiations or other measures, “but it would imperil the amicable relations between governments, and vex the peace of nations, to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states.”\textsuperscript{104} The court was discussing immunity from jurisdiction and not any presumption of substantive lawfulness of government acts, nor the question whether foreign official acts were to be treated as presumptively valid. That was made especially clear when the court of appeals turned from the immunity of sovereigns to the derived immunity of their officers: “Influenced by these reasons, and because the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers, courts and publicists have recognized the immunity of public agents from suits brought in foreign tribunals for acts done within their own states in the exercise of the sovereignty thereof.”\textsuperscript{105}

\textsuperscript{99} Underhill v. Hernandez, 65 F. 577, 578-579 (2d Cir. 1895), aff’d, 168 U.S. 250 (1897).

\textsuperscript{100} See Keitner, supra note 94, at 62 & n.77. At that point the Circuit Courts were still trial courts, as they had been under the Judiciary Act of 1789, but Congress had created intermediate appellate tribunals, the Circuit Courts of Appeals. Only later would the trial-level Circuit Courts be eliminated.

\textsuperscript{101} See Underhill v. Hernandez, 65 F. 577 (2d Cir. 1895), aff’d, 168 U.S. 250 (1897).

\textsuperscript{102} Id. at 579.

\textsuperscript{103} Id.

\textsuperscript{104} Id.

\textsuperscript{105} Id.
After that classic statement of the immunity of officers ratione materiae, the court turned to an extensive discussion of the leading cases on which it relied. Because Hernandez had been in command of military forces at the time in question, the court of appeals noted that “[c]onspicious among the acts which are sheltered by this principle of international law are those of military officers in command of the armed forces of the state.” The court “conclude[d] that the acts of the defendant were the acts of the government of Venezuela, and, as such, are not properly the subject of adjudication in the courts of another government.” That the governing principle was one of immunity from suit, and not a substantive defense, was underlined at the very end of the opinion, when the court of appeals noted that the trial court, although right on the merits, may have misstated the law. “If the trial judge, in directing a verdict for the defendant, enunciated a rule which, to its full extent, may not obtain, because it implies that the defendant would not be civilly responsible, even in a court of Venezuela, for any act done by him as a military commander, his disposition of the case was proper, and the result is not affected by his expression of an erroneous opinion.” When the defendant enjoys immunity, the court does not address the merits.

Reviewing that opinion, Chief Justice Fuller said that, “the circuit court of appeals was justified in concluding ‘that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.’” The Court’s formulation of the principle in terms of adjudication thus was not a way of saying that foreign official acts would be treated as lawful and judgment given on the merits; it was a way of expressing the jurisdictional immunities of states and their officers. The Court meant immunity, and not justification on the merits, when it said that “[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority . . . must necessarily extend to the agents of

106. Id. at 579-83.
107. Id. at 581.
108. Id. at 583.
109. Id. Professor Keitner gives further details about the cases leading up to Underhill. As she explains, those cases and Underhill itself “underscore the close connection between conduct-based immunity and what came to be known as the act of state doctrine.” Keitner, supra note 94, at 63. I will argue that there was in fact a substantial substantive discontinuity, despite the continuity of terminology. Underhill when decided was about immunity and had nothing to do with validity, as the act of state doctrine does.
110. Underhill, 168 U.S. at 254.
governments ruling by paramount force as a matter of fact.”

It is thus virtually certain that the Court’s often-quoted statement that “the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory” meant exactly what it said: disputes involving such acts are not subject to adjudication. That does not mean that the state conduct involved was necessarily lawful, as the next sentence shows. “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.” Grievances arise from unlawful acts, and redress may rest on a judgment that an act was unlawful. That judgment is left to other tribunals. Sovereign immunity means that states do not have to show or even argue that their acts are lawful. It means that the claim that they are unlawful must be pursued in some forum other than the courts of another sovereign, be that other forum the courts of the state complained against or some international process for the resolution of disputes.

When it was decided, Underhill rested on immunity. Today, a case with similar facts would be decided under the common-law principles discussed in Samantar v. Yousuf, in which the Supreme Court held that foreign officer immunity is governed by federal common law, not the Foreign Sovereign Immunities Act. Because Underhill rested on a jurisdictional immunity, the Court in that case did not have to inquire

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111. Id. at 252.
112. Id.
113. Id.
114. The same principles, sometimes expressed in almost the same words, continue to prevail in Anglo-American discussions of state immunity under international law. “It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself. The diplomatic representative of the foreign state in the forum state is also afforded the same immunity in recognition of the dignity of the state which he represents.” R. v. Bow St. Magistrate, Ex parte Pinochet Ugarte (No. 3), [2000] 1 AC 147 (HL) 201. As that passage makes clear, state immunity under international law, including the derived immunity of individuals who act for a state, consists of exemption from jurisdiction, not of an assumption that conduct is lawful. To pronounce the act of another state lawful would be to adjudicate on that conduct, albeit favorably.
116. The Court concluded that the Foreign Sovereign Immunities Act did not eliminate jurisdiction in a suit against an individual, and that any immunity the defendant might have would be governed by the common law. Id. at 325-26.
into the validity of any official act, because it did not have to consider the merits at all. That fact raises a question of considerable doctrinal importance: does the Court’s continued characterization of Underhill as an act of state precedent mean that the act of state doctrine includes principles of immunity, or other grounds that lead courts to decide before considering the merits?

It does not, because the Court in Kirkpatrick described Underhill in terms of validity, aligning it with Sabbatino. Although that was apparently not the ground on which the Court relied in Underhill, reasoning based on presumed validity was available to decide the earlier case in favor of Hernandez. Underhill did not dispute the basic principle of sovereign immunity. Nor did he deny the authority of a military commander, engaged in internal hostilities, to requisition private property or to conscript residents for public service. Rather, his argument was that as far as he knew, Hernandez was a criminal leading an armed band and not a legitimate military officer entitled to make requisitions on private property. The Court in Underhill responded by explaining that combatants engaged in actual belligerency are entitled to the privileges of belligerents under the law of war, and that in any event the faction Hernandez represented was ultimately recognized as the legitimate government by the United States executive. It was therefore “idle to argue that the proceedings of those who thus triumphed should be treated as the acts of banditti, or mere mobs.”

For the Court that decided Underhill, that point bore on Hernandez’ official immunity. Hernandez’ status as an official also supports a conclusion on the merits that rests on the Sabbatino presumption of validity, and that is the reasoning the Court in Kirkpatrick attributed to its earlier decision. As a legitimate military commander, Hernandez had the legal power to issue orders to requisition private property and to require that services be performed for the public benefit. With the water works requisitioned and his own services conscripted, Underhill’s rights were much more limited than they had been. To disregard the consequences of Hernandez’ orders, and so to treat him and his

117. “Neither Mr. Underhill nor any of his witnesses could have any knowledge of the authority under which the defendant acted . . . . He came with an armed rabble of different nationalities, having no distinctive uniform, national or otherwise, and by mere force took possession and control of an insignificant City of Venezuela . . . . His acts were arbitrary and entitled to no greater sanction so far as the evidence discloses than those of Captain Kidd on the high seas or the Buccaneer Morgan when he captured and devastated Panama.” Brief for Plaintiff in Error at 2, Underhill v. Hernandez, 168 U.S. 250 (1897).

118. Underhill, 168 U.S. at 253.
soldiers as mere bandits thus would have “required denying legal effect to ‘the acts of a military commander representing the authority of the revolutionary party as government.’”119 As far as the Court in Kirkpatrick was concerned, Underhill “stand[s] for the proposition that a seizure by a state cannot be complained of elsewhere—i.e., the sense of being sought to be declared ineffective elsewhere.”120 Had the Court in Underhill proceeded to the merits, it would have been justified in using the validity of Hernandez’ acts of confiscation and conscription as a rule of decision. On the merits, the Court would have had to find that Hernandez’ order was legally ineffective in order to give judgment for Underhill. Considered as a ruling on the merits, Underhill is thus an application of the act of state doctrine as now understood, because the Court relied on Hernandez’ official status in denying Underhill relief. Underhill’s reliance on Hernandez’ official status and its outcome thus are consistent with a decision under the current act of state doctrine. As that is the reasoning that the Court now attributes to Underhill as an act of state case, that is what it now means as an act of state case. Whether it should also be relied on as a precedent governing official immunity, which is what it was when decided, is a nice question not relevant here.

Whether Underhill was really about the lawful powers of military commanders or only about the immunity of officials, it certainly was not about the applicability to foreign official acts of United States statutes. There is no indication that Underhill relied on American substantive law. His complaint does not mention any federal statute.121 In the district court, Underhill introduced expert testimony concerning the law of Venezuela, and offered as evidence Venezuelan statutes and the Venezuelan constitution.122 Choice of law rules as they stood at the time would have selected the law of Venezuela, the place of the alleged torts. Indeed, Underhill resembles Sabbatino in that the Court left open the possibility that Hernandez’ conduct was substantively unlawful, insofar as its opinion remitted Underhill to Venezuelan

119. W.S. Kirkpatrick v. Envtl. Tectonics Corp., 493 U.S. 400, 405 (1990) (quoting Underhill, 168 U.S. at 254). One might also say that Underhill turned on the privileges of combatants but not on the powers of commanders under the law of war, on the assumption that General Hernandez did not have to take any official act requisitioning Underhill’s property and commanding his public service, but was simply privileged to use the waterworks and force Underhill to operate it, without any separate steps similar to the decree in Sabbatino. The Court in Underhill did not explore the issue.

120. W.S. Kirkpatrick, 493 U.S. at 407.


122. Id. at 15-36 (testimony and documents).
courts or diplomatic redress.\textsuperscript{123} When the court finds that the defendant enjoys a jurisdictional immunity, it does not decide the merits. That is what happened in \textit{Underhill}.

2. The Court’s Transition from Immunity to Validity

\textit{Underhill} did not mention any principle called the act of state doctrine, it involved validity only potentially, and it involved substantive lawfulness only barely if it all. Among the cases that the Court now characterizes as resting on the act of state doctrine, the next two in chronological order did turn on validity and not substantive lawfulness, and very much resembled \textit{Sabbatino}. Those cases, \textit{Oetjen v. Central Leather Co.}\textsuperscript{124} and \textit{Ricaud v. American Metal Co.},\textsuperscript{125} are the true font of the act of state doctrine as it now exists.

\textit{Oetjen}, like \textit{Sabbatino}, was a dispute about ownership arising out of a seizure by a foreign government in a foreign country. It was an action to replevy a shipment of hides sent from Mexico to the United States.\textsuperscript{126} The government seizure was by Pancho Villa himself, acting on behalf of the revolutionary Carranza government, in opposition to the provisional government of General Huerta. In 1913, military forces under General Villa’s command took the city of Torreon. Villa imposed a military contribution on the residents. Many inhabitants of Torreon paid in cash, in order to avoid seizure of their property.\textsuperscript{127} One Martinez, a supporter of Huerta and dealer in hides, however, “fled the city and failed to pay the assessment imposed upon him.”\textsuperscript{128} To satisfy that obligation on Villa’s orders, “the hides in controversy were seized, and on January 3, 1914, were sold in Mexico to the Finnegan-Brown Company.”\textsuperscript{129} They were paid for in Mexico, shipped to the United States, and sold to the Central Leather Company. While the hides were in Central Leather’s possession in New Jersey, Oetjen, Martinez’ assignee, replevied them in a New Jersey state court.\textsuperscript{130}

\textit{Oetjen} argued that Villa’s seizure of the hides was inconsistent with the 1907 Hague Convention respecting the Laws and Customs of War...
on Land, a treaty to which the United States and Mexico were parties.\textsuperscript{131} As a result, according to Oetjen, Villa was without power to pass title, which remained with Martinez.\textsuperscript{132} The Court expressed considerable doubt about Oetjen’s argument on the merits of the treaty, but rested its decision on different grounds.\textsuperscript{133} The Court explained that the executive branch had recognized the government for which Villa acted as the lawful government of Mexico, and that recognition of a revolutionary government “is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.”\textsuperscript{134}

With the premise that Villa had acted for the Mexican government in place, the Court then relied on what later cases would call the act of state doctrine, though \textit{Oetjen} did not use that label. The action of the government of Mexico in “seizing and selling in Mexico . . . the property in controversy, as the time owned [by] and in the possession of a citizen of Mexico” was “not subject to reexamination and modification by the courts of this country.”\textsuperscript{135} The Court quoted \textit{Underhill’s} statement that the courts of one sovereign do not sit in judgment on the acts of another, and explained:

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it 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.”\textsuperscript{136}

\textsuperscript{131} \textit{Id.} at 301. Because Oetjen relied in part on a treaty of the United States, the case was within the Supreme Court’s appellate jurisdiction.

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} The Court doubted whether internal conflicts were covered by the Hague Convention, and whether the Convention forbade the kind of military contribution that Villa levied. \textit{Id.} at 301-302.

\textsuperscript{134} \textit{Id.} at 302-03.

\textsuperscript{135} \textit{Id.} at 303.

\textsuperscript{136} \textit{Id.} at 303-04.
AMERICAN ACT OF STATE DOCTRINE

Like *Underhill*, *Oetjen* did not involve the application of a federal statute to transactions outside the United States. As in *Sabbatino*, one claimant to property argued that an act of expropriation violated the expropriating government’s obligations under international law, and the Court found that compliance with international law was irrelevant. *Oetjen* did rely on the act of state doctrine as set out in *Kirkpatrick*. *Oetjen* could prevail only if an American court found that the juridical act of another sovereign in that sovereign’s territory did not have the legal effect it purported to have of transferring title. The Central Leather Company’s title, conversely, depended on the validity of the transfer by Mexico. When the Court in *Oetjen* referred to the validity of the act of a sovereign state, it meant validity in the same sense as that used in *Kirkpatrick*. The question was whether General Villa’s purported expropriation was legally effective.

*Oetjen* relied on and quoted *Underhill*, but the result in *Oetjen*, and the act of state doctrine as the Court now understands it, do not follow just by logical inference from the jurisdictional immunities of sovereigns. *Oetjen* did not involve a claim against a sovereign, but a collateral challenge to the legal effectiveness of a sovereign’s act. No jurisdiction was asserted over a foreign sovereign or an official thereof for a sovereign act. Nor could the principle that one sovereign does not sit in judgment on the acts of another be applied in a case between two private parties. In that litigation context, one private party claims under such an act and another’s claim requires that the act be disregarded. If in such a case the court simply takes no position on the question, and thereby does not sit in judgment, it cannot decide the case before it. *Oetjen* did turn on respect for other states’ sovereignty, however, specifically their territorial sovereignty. The amicable relations between governments, which the Court sought to further, do rest on states’ willingness to accept one another’s control of their territory. Taking as valid the act of the territorial sovereign follows readily from that goal of international law.

*Oetjen* thus can be seen in retrospect as an innovation. It used the principles underlying a rule of non-decision, found in *Underhill*, to derive a rule of decision. *Oetjen* is, however, continuous with *Underhill* as the Supreme Court today understands the latter case.

The day it decided *Oetjen*, the Court applied the same principles in *Ricaud v. American Metal Co.*[^137^] *Ricaud* was another ownership dispute arising out of a seizure by the Carranza forces in the Mexican civil war.

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The property at issue was a shipment of lead bullion, held in bond by the federal collector of customs in El Paso. General Pereyra, like Pancho Villa a commander of the ultimately victorious Carranza forces, seized the lead in 1913. When seized, the lead was in the possession of the Penoles Mining Company, a Mexican corporation. General Pereyra sold the bullion to Ricaud, a defendant below, who in turn sold it to Barlow, another defendant in the lower court, who brought it into the United States at El Paso. The American Metal Company, asserting that it purchased the metal from the Penoles Mining Company before it was seized, claimed the lead and sought an injunction directing the collector not to deliver it to the other claimants.138

Ricaud was exceptionally clear that the doctrine it applied was a rule of decision, not of abstention or lack of jurisdiction. The court of appeals had certified three questions to the Supreme Court, the first of which was whether,

[a]ssuming that the bullion in suit was seized, condemned, and sold for war supplies by the Constitutionalist forces in revolution in Mexico . . . had the District Court of the Western District of Texas, into which the said bullion had been imported from Mexico, jurisdiction to try and adjudge as to the validity of the title acquired by and through the said seizure?139

After noting that the case was within the diversity jurisdiction, and that the United States had recognized the Carranza government, the Court cited Underhill and other cases for the proposition that “the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory.”140 By “sit in judgment on the validity of,” the Court meant, “refuse to treat as a rule of decision.” It went on: “This last rule, however, does not deprive the courts of jurisdiction once acquired over a case.”141 Instead, once a foreign sovereign act has been shown, the rule requires that “the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction, but is an exercise of it.”142 Therefore, “giving effect to

138. *Id.* at 305-06.
139. *Id.* at 307-08.
140. *Id.* at 309.
141. *Id.*
142. *Id.*
this rule is an exercise of jurisdiction which requires that the first question be answered in the affirmative.” The court of appeals asked whether the district court should abstain from deciding the case because it turned on an act of state, and the Supreme Court said the case should be decided.

The Court also indicated that in accepting the validity of the Mexican seizure and resulting transfer of title, it was not deciding whether the original owner’s rights had been violated. Any such rights of an American citizen “can be asserted only through the courts of Mexico or through the political departments of our government.” The Court thus left open the possibility that although the expropriation was valid, it violated Mexico’s duties under international law. As in Sabbatino, its reasoning assumed that a foreign sovereign act can be legally effective in that country and this one, but unlawful under international law or indeed the domestic law of the other state.

The act of state doctrine as the Court now expounds it originated in Oejten and Ricaud, not Underhill. That doctrine attributes validity to certain foreign sovereign acts, but does not deal with their compliance with any legal duty.

III. THE ACT OF STATE DOCTRINE IN THE LOWER COURTS

As applied in Sabbatino and explained in Kirkpatrick, the act of state doctrine is reasonably clear and quite narrow in scope. When the doctrine is applied, American courts will accept as valid, and use as a rule of decision, a foreign sovereign’s legal act performed in the other state’s territory. They will do so without asking whether the foreign sovereign act violated some duty, and in particular will not ask whether it violated a duty imposed on the foreign state by international law.

Despite that clarity in principle, the Court sowed the seeds of confusion. First, the terminology is potentially opaque. “Valid” has its technical meaning of legally operative, and “legal,” when applied to a foreign sovereign act, has a restricted meaning of “valid.” “Legal” does not mean “consistent with applicable duties”; “illegal” does not mean “inconsistent with such duties.”

Perhaps more important as a source of confusion is the inclusion of Underhill as a germinal case. Although Kirkpatrick assimilated it to a

143. Id.
144. Id. at 310. As noted above, the Court in Oejten had said that the seizure probably accorded with the international law of war, supra note 133, but it formally left that question open, to be resolved through other channels.
doctrine under which foreign sovereign acts are valid and provide a rule of decision, Underhill reads as if the Court did not reach the merits, which in fact it did not. Without proper regard to Kirkpatrick, one might thus regard Underhill as still standing for a principle of non-decision or abstention. And because Underhill was a tort case, one that did not overtly involve the legal effectiveness of a sovereign act, one might think that insofar as it states a rule of decision, that rule is one of legality in the sense of compliance with duty.

As this Part will show, those seeds of confusion have borne fruit. In a number of cases decided after Kirkpatrick, lower courts have made both of the errors just described. They have understood the act of state doctrine as one of non-decision and have sometimes failed to resolve on the merits claims that should have been so resolved. They have also understood the doctrine as one attributing to foreign sovereign acts not validity, but compliance with applicable duties. Following that reasoning, they have decided claims on that ground that should have been adjudicated without that assumption.

Part III.A discusses cases decided by the courts of appeals, reviewing where appropriate the opinions of both the trial and appellate courts. Part III.B treats several district court decisions that did not come before a court of appeals and that also apply a form of the act of state doctrine not found in the Supreme Court’s precedents. 145

A. The Act of State Doctrine in the Courts of Appeals

This Part deals with four court of appeals cases, from the Fifth, Ninth, and D.C. Circuits. In two of them, the court’s misperception of the act of state doctrine led to an incorrect application. In one, the standard was incorrect but the result conformed to the Supreme Court’s principles. In the other, the D.C. Circuit decided the case correctly under the doctrine, but used language that led district courts in that circuit to apply the wrong norm.

1. Spectrum Stores v. Citgo

Perhaps the most striking decision concerning the act of state doctrine is Spectrum Stores v. Citgo, 146 in which the Fifth Circuit held that

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145. This discussion of the doctrine in the lower courts will be confined to cases decided after Kirkpatrick, and pre-Kirkpatrick cases relied on after it was decided. Kirkpatrick substantially clarified or modified the doctrine, so there are lower court opinions that might have been correct when written but that cannot now be reconciled with the Supreme Court’s cases.

146. Spectrum Stores v. Citgo, 692 F.3d 938 (5th Cir. 2011).
the act of state doctrine barred a suit under the Sherman and Clayton Acts by private plaintiffs against non-state defendants. The court of appeals also concluded that the suit was barred by the political question doctrine. Id. at 949-54. In my view that result too was highly doubtful, but that issue is not explored here.

The court of appeals described the act of state principle as a close relative of the political question doctrine, and said that it applied in Spectrum Stores because adjudication of the suit would “call into question the acts of foreign governments.” The court found that a judgment for plaintiffs would do that, and would require that it “sit in judgment of the acts of foreign sovereigns in their own territories,” because “[t]he granting of any relief . . . would effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories.”

That conclusion has no foundation in the act of state doctrine. Nothing in the plaintiffs’ claim questioned the validity of foreign sovereigns’ legal acts governing production of oil in their territories. The plaintiffs did not, for instance, ask that they be allowed to produce...
more oil in an OPEC country than that country permits; no plaintiff was subject to any such foreign law. The plaintiffs could have prevailed even if every sovereign decision by the OPEC countries was perfectly valid and effective in their territories. Even if they had to show an antitrust violation by a government in order to prevail, which they likely did not, the plaintiffs had no concern, for example, with whether individuals involved in oil production in Saudi Arabia were obliged to comply with the Saudi government’s decisions concerning how much to produce. As far as it is possible to tell, the court simply assumed that the OPEC government decisions created binding obligations in the legal systems of the countries involved. Validity was not at issue.

The court of appeals, moreover, went beyond overlooking the distinction between validity and breach of duty, a distinction it did not address. It relied on the effect of a judgment on foreign oil production decisions even if that effect was mediated through a decree against non-governmental defendants. The court of appeals seems to have believed that the act of state doctrine bars relief against private defendants when that relief would have consequences similar to those of a judgment against a government, based on the conclusion that the government had violated a duty. Exactly how the Fifth Circuit came to that conclusion is not set out. It may have reasoned in two steps: first substituting violation of duty for invalidity in the act of state doctrine and then extending the principle to judgments that have the same practical effect. However the conclusion was reached, it is not consistent with the Supreme Court’s cases. The act of state doctrine is not a bar on adjudication on the merits based on general concerns about disrupting U.S. foreign policy by showing disrespect to foreign sovereign acts. It is much more specific than that and is not a threshold limitation at all.

The court of appeals’ reasoning apparently rested on a broad reading of Underhill, which it quoted at the beginning of its act of state analysis, and its analogy with the political question doctrine. As explained above, when considered as an act of state precedent, Underhill must be handled with care. In particular, it must be understood as a case about validity, as it is described in Kirkpatrick. Insofar as it is understood to set out a threshold bar on adjudication, Underhill is a case about the immunities of foreign officials for their official acts. As

152. The court of appeals also did not consider the possibility that its own earlier act of state cases had to be reconsidered in light of Kirkpatrick, and that case’s stress on validity.

153. See id. at 954 (quoting Underhill’s statement that the courts of one country will not sit in judgment on the acts of other governments done in their territory).
such, it has no bearing when the defendants are not governmental actors.

While the Fifth Circuit did not explicitly say that plaintiffs could prevail only if they showed that governments violated a federal statute, the district court did so.\footnote{154} The district court’s decision thus rested explicitly on an elision of the distinction between invalidity and violation of duty. The district court set out the analysis found in \textit{Kirkpatrick}, but substituted illegality in the sense of violation of duty for invalidity in the sense of voidness.\footnote{155} The plaintiffs had taken care not to sue any sovereign.\footnote{156} That did not matter, the court found, because the actual defendants could have violated the antitrust laws only if the governments with which the cooperated did so:

\begin{quote}
[A]n agreement by any defendant to assist the foreign sovereign members of the alleged conspiracy to reach and/or implement their crude oil production decisions could not constitute a violation of the Sherman Act unless entering such an agreement would also be a violation of the Sherman Act by the foreign sovereigns.\footnote{157}
\end{quote}

For that reason, the court could not decide the case “unless the court rules on the legality of the decisions and agreements reached by foreign sovereigns regarding the production of crude oil within their own territories.”\footnote{158} A violation of the Sherman Act through production


\footnote{155. The move from invalidity to illegality in the sense of violation of duty is on display in the district court’s formulation of the issue. It began by quoting the passage from \textit{Kirkpatrick} in which the Court explained that the act of state doctrine operates when a court is required to declare an official act invalid. \textit{Id.} at 588 (quoting W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 407 (1990)). The district court then explained that plaintiff sought to avoid the doctrine by not naming any government as a defendant, so that “the Court need not pass on the legality of any acts taken by foreign sovereigns in order to find the defendants liable for price fixing.” \textit{Id.} (footnote omitted) (quoting plaintiffs brief in opposition to motion to dismiss). The illegality of which the plaintiffs complained, as they said, was price fixing, which breaches duties imposed by the federal antitrust statutes. The court moved from invalidity to illegality in the other sense apparently without noticing the difference.

156. Plaintiffs stressed that they sought relief only against non-sovereign entities such as oil companies. \textit{Id.} at 581. (Corporations chartered in the United States and owned by a foreign sovereign are not foreign states within the meaning of the Foreign Sovereign Immunities Act. 28 U.S.C. § 1603(b)(3) (2012).)

\footnote{157. \textit{Id.}}

\footnote{158. \textit{Id.}}
decisions and agreements would be a breach of duty under the act, a failure to comply with its ban on conspiracies in restraint of trade. The court was not using “legality” in the sense of validity. It never discussed the difference between invalidity and breach of duty.

The district court, like the court of appeals, also appears to have regarded the act of state principle as a threshold rule that keeps courts from addressing the merits. Its discussion of the doctrine begins by quoting defendants’ statement that the doctrine “bars claims that require a U.S. court to inquire into the validity of a foreign nation’s sovereign acts[.]” The court did not question that characterization, but assumed it to be correct in applying the doctrine. For example, later in the opinion, it explained that “the outcome of plaintiff’s claims, if allowed to continue, would turn upon the legality” of sovereign acts. Under Sabbatino, claims that turn on the legality of sovereign acts must be allowed to continue, on the assumption that the sovereign act in question was legally effective. Had a claim that turned on the validity of a sovereign act not been able to continue, Banco Nacional would not have been able to prevail, as it did in that case.

Plaintiffs in Spectrum Stores stated causes of action under the Sherman and Clayton Acts. Neither the district court nor the court of appeals considered whether either of those statutes entitled the plaintiffs to relief. Nor did they discuss this question: how could a non-jurisdictional, judge-made rule like the act of state doctrine prevent a court from deciding whether a federal statute gave the plaintiffs a right to recover? As this Article later explains, the act of state doctrine as the Supreme Court expounds it does not contradict federal statutes that way, because it answers a choice of law question that no federal statute addresses. But considered as an assumption that foreign governments have complied with duties, the doctrine can provide an answer to a question that only the substantive law involved can answer. The doctrine as expounded in Spectrum Stores points courts to the wrong question and keeps them from answering the right one.

159. Id. at 580 (footnote omitted) (quoting Defendant’s Motion to Dismiss).
160. Id. at 584.
161. It may be that the plaintiffs too misunderstood the act of state doctrine, and so did not explain it properly. If that is so, the Fifth Circuit’s analysis was badly incomplete because of a failure of the adversary process. The important point, for purposes other than the decision in that case, is that it was badly incomplete.
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2. World Wide Minerals v. Republic of Kazakhstan

Just as contrary to Kirkpatrick is the D.C. Circuit’s decision in World Wide Minerals v. Republic of Kazakhstan,\(^{162}\) which affirmed in relevant part a district court decision based on similarly erroneous reasoning. Like the district court, the D.C. Circuit applied the doctrine to find that a government had not breached a contractual duty without regard to the validity of the government acts that led to the breach. The court thus dismissed on act of state grounds claims as to which the act of state doctrine were irrelevant.\(^ {163}\)

World Wide Minerals (World Wide) entered into a series of agreements with the government of Kazakhstan and one of its instrumentalities, providing that World Wide would manage formerly state-owned uranium production facilities and market Kazakh uranium elsewhere.\(^ {164}\) With those agreements in place, World Wide entered into a contract to supply uranium to an American customer.\(^ {165}\) Kazakhstan never granted World Wide the export license needed to take uranium out of the country, and as a result World Wide terminated its contract to sell uranium in this country.\(^ {166}\) After the relationship between World Wide and the Kazakh government deteriorated further, the latter nationalized World Wide’s assets in that country.\(^ {167}\)

World Wide sued Kazakhstan on a number of substantive theories, seeking damages and a declaratory judgment.\(^ {168}\) The D.C. Circuit concluded that Kazakhstan had waived its sovereign immunity as to two of its four agreements with World Wide, and so took jurisdiction of the claims arising from those contracts. Those were two damages claims and the request for a declaratory judgment.\(^ {169}\)

The court then turned to the act of state doctrine, which it characterized as a “threshold objection.”\(^ {170}\) It explained that “[t]he gravamen of


\(^{163}\) As explained presently, the act of state doctrine may have barred one of the plaintiff’s claims, its request for a declaratory judgment.

\(^{164}\) World Wide Minerals, 296 F.3d at 1157-58.

\(^{165}\) Id. at 1158.

\(^{166}\) Id. at 1158.

\(^{167}\) Id. at 1158-59.

\(^{168}\) Id. at 1159.

\(^{169}\) Id. at 1164.

\(^{170}\) Id. The court then went on to quote the passage in which Kirkpatrick explains that the act of state doctrine is a rule of decision that tells courts how to decide cases. Id. at 1165. Perhaps it meant that Kazakhstan made the objection at the threshold.
Count I is a claim that Kazakhstan breached the Management Agreement by ‘failing to issue an export license’ to World Wide.”171 That decision was “a sovereign act,” the court explained.172 “Because the relief sought here would require us to question the ‘legality’ of Kazakhstan’s denial of the export license by ruling that denial a breach of contract, the act of state doctrine applies.”173 To breach a contract is to violate a duty, and a breach is illegal in the sense that it fails to comply with the duty to perform. Validity was not at stake. Indeed, had the denial of the license been legally inoperative, World Wide would have had no claim for breach, because it would have been allowed to export uranium from Kazakhstan. Far from requiring a premise of invalidity, World Wide’s claim for breach rested on the assumption that Kazakhstan’s act was operative, albeit also inconsistent with its duty under the contract. The D.C. Circuit was not using “validity” and “legality” in the sense in which those words were used in Kirkpatrick.

World Wide’s other remaining claim for damages was based on Kazakhstan’s acts of expropriation.174 The court explained that “this transfer and alleged conversion were accomplished pursuant to an official decree of the Republic of Kazakhstan . . . . That kind of expropriation of property is the classic act of state addressed in the case law.”175 Sabbatino, the court said, bars any inquiry into the validity of such a decree. “Because [the count in the complaint based on the alleged expropriation] would require the court to undertake just such an examination, we affirm its dismissal.”176 Again, the court of appeals mistook compliance with duty for validity. Although World Wide Minerals involved an alleged expropriation, the question before the court of appeals was not the question before the Supreme Court in Sabbatino. World Wide was not seeking to assert title to assets it formerly held in Kazakhstan, the way Sabbatino asserted title to the sugar despite Cuba’s nationalization decree. World Wide’s damages claim was logically consistent with, and indeed rested on, the assumption that it had lost its property interests in Kazakhstan; that is why it sought damages by way of compensation for that loss. The court could have found the alleged expropriation to be valid but illegal because of the contract, and given World Wide damages, without doubting Kazakhstan’s power to deter-

171. Id.
172. Id.
173. Id.
174. Id. at 1166.
175. Id.
176. Id.
mine title to assets located in Kazakhstan. The court of appeals should have rejected Kazakhstan’s argument under the act of state doctrine and should have resolved the merits of World Wide’s claims for damages due to breach. Its confusion of illegality under the law of contract with validity caused it to resolve the act of state issue, and possibly the case, incorrectly.

Both of the main confusions concerning the act of state doctrine appear in the district court’s opinion in the case. Like the court of appeals, the district court treated the act of state doctrine as a principle of compliance with duty, not validity, even though it used the latter word in some passages. World Wide, the court explained, indicated “that its damages were caused by the inability to obtain an export license for uranium and the nationalization of property.” As a result, the court reasoned, “[i]f liability were attributed to Kazakhstan for the alleged damages suffered by World Wide, Kazakhstan would be faced with a judgment that designated its denial of the export license as invalid.” The premise is true but the conclusion false, because World Wide’s damages claim was consistent with the conclusion that the denial of the license was valid but breached Kazakhstan’s duty under

177. World Wide also sought a declaration that it had the right to export uranium from Kazakhstan. The court found that claim to be barred by the act of state principle. “If anything, the [declaratory judgment] sought in Count XI challenges the validity of Kazakhstan’s actions even more directly, as it asks the court to declare that, despite the absence of a license, World Wide had ‘the right to market Kazakhstan uranium.” Id. at 1165 n.19 (citation omitted) If that claim for relief asked a U.S. court to determine that the refusal of a license was inoperative under Kazakh law, so that World Wide was free to remove uranium from the country despite what the Kazakh government said, then it did indeed run afoul of the act of state doctrine, as the court of appeals said it did. Here too, however, the court of appeals elided the distinction between invalidity and breach of duty. At one point, it took World Wide to be asking for a declaration that it had a right under the contract to export uranium, so that denial of the license was a breach. Id. at 1164 n.18. On that reading, the declaratory judgment requested would not have required a finding of invalidity, and so would not have offended the doctrine. A few paragraphs later, however, after the statement that holding the denial to be a breach would be to find it illegal, came the footnote saying that the requested declaration would be an even more direct challenge to validity, id. at 1165 n.19, which seems to contrast a finding of breach with a declaration that World Wide had the right to export uranium. That contrast suggests that the court understood the requested declaration to be that World Wide had the right to export uranium under Kazakh law, because the denial of the license was inoperative. Such a declaration would violate the act of state doctrine, because the denial of the license was a sovereign act done in foreign sovereign territory. Had the court of appeals been following Kirkpatrick, it would have seen a sharp distinction between those two understandings of the requested declaration, and would have had to decide which was correct.

179. Id. at 104.
180. Id.
the contract. The court regarded “invalid” as synonymous with “illegal,” but a central point of *Sabbatino* is that they are not the same. When the court said that the claim for damages against Kazakhstan involved “the legality of the government actions[.]” it was correct, but when it said that “the validity of the contract is at issue in this case[.]” it was not.

Besides mistaking the relevant meaning of validity, the district court described the act of state principle as if it were like the jurisdictional immunity of foreign official’s *ratione personae*, a rule that keeps courts from deciding cases on the merits. It called the act of state principle “a doctrine of abstention” and said that it “bars consideration of claims when the resolution of a case turns on the legality or illegality of official actions taken by a foreign state in its own territory.” Abstention principles keep courts from resolving the merits, as does the jurisdictional immunity of foreign officials. The act of state doctrine, however, does not bar the consideration of claims. It made possible Banco Nacional’s successful claim to the sugar in *Sabbatino*. Validity provides a rule to be applied in a decision on the merits. That is what World Wide Minerals was entitled to in the case.

3. *Riggs National Corp. v. IRS*

Courts sometimes describe the act of state doctrine as a principle of abstention, which it is not, and then apply it correctly, using it to identify the rules with which to decide the case before them. The D.C. Circuit did that in *Riggs National Corp. v. IRS*, which involved the foreign tax credit. Riggs lent to the Central Bank of Brazil as part of an international lending program to rescue Brazil from a debt crisis. It arranged for a “net” loan, under which the Central Bank would be responsible for paying Brazilian taxes on interest payments to Riggs. Riggs sought a foreign tax credit for those payments, and the Commissioner challenged the claimed credit on the grounds that the Central Bank of Brazil, an instrumentality of the Brazilian government, had no jurisdiction.

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181. *Id.*

182. *Id.* (citation omitted).

183. *Id.* (citation omitted).

184. *Riggs National Corp. v. IRS*, 163 F.3d 1363 (D.C. Cir. 1999). The court explained in a footnote that the act of state doctrine does not deprive courts of jurisdiction, but “functions as a doctrine of abstention.” *Id.* n.5 (citation omitted). Having said that, the court neither denied jurisdiction nor abstained. Apparently the court regarded the doctrine as one of abstention because it requires that American courts abstain from deciding for themselves whether a foreign official act was valid. *Id.* at 1368. That is an unusual form of abstention, which normally refers to abstention from deciding a case or granting a remedy.
obligation to pay the taxes itself. Riggs relied on a ruling by Brazil’s Minister of Finance holding that the Central Bank was required to pay tax on such transactions. When the Commissioner argued that the Brazilian Minister’s ruling was incorrect under Brazilian law, Riggs relied on the act of state doctrine. To adopt the Commissioner’s view, Riggs maintained, would be to treat as legally ineffective a foreign official act that purported to be binding under foreign law.

The D.C. Circuit agreed with Riggs, in what was very likely a correct application of the act of state doctrine. The court began its discussion, however, by explaining that “[t]he doctrine directs United States courts to refrain from deciding a case when the outcome turns upon the legality or illegality (whether as a matter of U.S., foreign, or international law) of official action by a foreign sovereign performed within its own territory.”

The court of appeals decided the case on the merits, thereby belying its own incorrect introductory explanation. It concluded that under the act of state doctrine the Minister’s order to the central bank had to be treated as effective under Brazilian law, at least until it was overturned by a Brazilian court. The court was also at pains to point out that the result of that order under Section 901 of the Code was a question of U.S. law, one that could be resolved in the Commissioner’s favor without “run[ning] afoul of the act of state doctrine.”

Although the D.C. Circuit did not abstain from reaching the merits in Riggs National Corp., its formulation of the doctrine apparently misled the district court in Virtual Defense and Development International v. Republic of Moldova, which involved a contract claim against Moldova. After concluding that the case came within the commercial activity exception to the Foreign Sovereign Immunity Act, the district court turned to the act of state doctrine. It described the doctrine as not jurisdictional but prudential and as calling for a “‘balancing approach’” in order to decide whether to “apply the act of state doctrine and abstain from hearing the case.” The district court quoted Riggs National Corp. in support of its assumption that the act of state doctrine, when it applies, calls on the court not to decide.

185. Id. at 1367 (citation omitted).
186. Id. at 1368.
187. Id.
189. Id. at 7.
190. “In addition, the act of state doctrine aims to keep the courts ‘from deciding a case when the outcome turns upon the legality or illegality (whether as a matter of United States, foreign, or
Taking the “balancing approach” the court attributed to Sabbatino, the district court concluded that “the defendant has not met its burden of showing that the act of state doctrine should be applied.”

Virtual Defense sued on breach of contract and quantum meruit. It thus relied on the validity of the contract, so the act of state doctrine counted in the plaintiff’s favor. It had no bearing on any defense by Moldova. Under Kirkpatrick, the court should have concluded that the act of state doctrine was irrelevant and should not have engaged in any balancing. The court thus used faulty analysis to reach the correct result. Had it found that the balance tipped in favor of abstention, it would have decided the issue incorrectly and failed to reach the merits when it should have.

Another decision in the District Court of the District of Columbia fell into both of the errors previously made by the D.C. Circuit. In Doe v. State of Israel, a number of plaintiffs joined in suing a substantial number of defendants, including the State of Israel and several of its high-ranking officials, for alleged violations of customary international law and federal statutes. As to the Israeli defendants, the court found a lack of personal jurisdiction and of subject-matter jurisdiction under the Foreign Sovereign Immunities Act, and that the suit presented non-justiciable political questions. The court also held that those claims were barred by the act of state doctrine, which it said “prevents a court from deciding a case.”

International law) of official action by a foreign sovereign performed within its own territory.” Id. at 8.

191. Id. at 8. In a separate decision, the court granted Moldova summary judgment with respect to the breach of contract claim, concluding that no contract had been formed. Virtual Def. & Dev. Int’l, 133 F. Supp. 2d at 19.

192. Id. at 1.

193. The court also apparently confused validity with legality in the sense of compliance with duty. It stated that it was not asked to question the validity of a sovereign act such as price fixing, but was merely asked to adjudicate a contract claim. Id. at 8. Cases that challenge price fixing, like Spectrum Stores, and a pre-Kirkpatrick case that the district court cited, Int’l Ass’n of Machinists & Aerospace Workers v. Org. of Petroleum Exp. Countries, 649 F.2d 1354 (9th. Cir. 1981), involve claimed breaches of duties imposed by the federal anti-trust statutes, not the legal effectiveness of sovereign acts. If the court was referring to validity in the sense of effectiveness, it erred by making that a factor in a balancing test, rather than the dispositive feature of the case.


195. Id. at 104-11. The conclusion that individual defendants enjoy immunity under the FSIA is not consistent with the Supreme Court’s later decision in Samantar v. Yousuf, 560 U.S. 305 (2010) (FSIA immunity does not extend to individuals).

196. State of Israel, 400 F. Supp. 2d at 113 (quoting Riggs National Corp. v. IRS, 163 F.3d 1363, 1367 (D.C. Cir. 1999)).
Perhaps not recognizing the resulting tension, it then explained that “[w]hen it applies, the act of state doctrine is a rule of law that requires courts to presume that actions taken within a foreign sovereign’s own territory are valid.” As the citation to *World Wide Minerals* suggests, the district court apparently understood “valid” to mean “consistent with applicable duties.” It described plaintiffs’ claims as “[t]ort challenges brought against foreign military officials for such alleged harms as unlawful detention during a political revolution[,]” and said that plaintiffs asked the court to “declare that they were treated illegally by Israeli defendants on Israeli soil.” The district court almost certainly treated the act of state principle as requiring the assumption that defendants had complied with their legal duties.

4. *The Ninth Circuit’s Act of State Doctrine*

The court of appeals for the Ninth Circuit has a line of act of state precedents that began before *Kirkpatrick* and that cannot be reconciled with the Court’s doctrine, but that the court of appeals and district courts continue to apply. The Ninth Circuit’s approach treats the act of state doctrine as a bar to liability, not just a rule of validity.

Shortly before *Kirkpatrick*, the Ninth Circuit decided *Liu v. Republic of China*, a damages action growing out of the murder in California of Liu’s husband by agents of the Republic of China. The court of appeals in that case interpreted *Sabbatino* as providing a number of factors to be considered in deciding whether the act of state doctrine applies. The result in *Liu* was consistent with *Kirkpatrick* because the court, relying...
on the act of state doctrine, concluded that the findings of a tribunal of the Republic of China were valid and binding.\textsuperscript{202}

Although \textit{Liu} itself was about validity, the Ninth Circuit and district courts therein regard it as providing the factors to be considered in deciding whether the act of state doctrine bars adjudication altogether, which is not consistent with either \textit{Sabbatino} or \textit{Kirkpatrick}. The clearest expression of this understanding came in an opinion that, although vacated on other grounds when the court of appeals granted rehearing en banc, apparently reflects the court’s understanding of the doctrine. That case, \textit{Doe v. Unocal Corp.},\textsuperscript{203} involved claims against Unocal for human rights abuses it allegedly committed or assisted through its activities in Myanmar (or Burma) in cooperation with the military junta ruling that country.

Unocal, the court explained, argued that the plaintiffs’ claims were “barred” by the act of state doctrine.\textsuperscript{204} “In the present case, an act of state issue arises because the court must decide that the conduct of the Myanmar Military violated international law in order to hold Unocal liable for aiding and abetting that conduct.”\textsuperscript{205} The court then explained that in \textit{Sabbatino} the Supreme Court had developed “a three-factor balancing test to determine whether the act of state doctrine should apply[.]”\textsuperscript{206} The factors were the degree of consensus regarding the norms of international law involved, the importance of the issue for U.S. foreign policy, and whether the government whose acts are

\textsuperscript{202}. \textit{Id.} at 1433-34. That conclusion may nevertheless not have been a correct application of the act of state doctrine, which may not properly address the status of foreign judicial decisions. Whether a foreign judgment is binding in U.S. courts is a matter of comity and preclusion, which are governed by well-established principles quite distinct from the act of state doctrine. The Ninth Circuit’s decision in \textit{Liu} was consistent with \textit{Kirkpatrick} in that it assumed that the act of state doctrine is about validity, not compliance with duty; whether the doctrine properly applied at all in \textit{Liu} is another question.

\textsuperscript{203}. \textit{Doe v. Unocal Corp.}, 395 F.3d 932 (9th Cir. 2002), vacated, \textit{reh\’g en banc granted}, 395 F.3d 978 (9th Cir. 2003). The petition for rehearing en banc did not challenge the panel opinion’s approach to the act of state doctrine. It concerned the much-debated questions whether international law recognizes liability for aiding and abetting, and whether courts exercising jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350, should look to international law or U.S. law on that question. After the case was briefed and argued before the en banc court, but before it was decided, the parties entered into a settlement pursuant to which the suit was dismissed. Although the panel opinion in \textit{Unocal} does not represent binding Ninth Circuit precedent, it does show the misconception concerning the act of state doctrine that has come to guide that court’s analysis of the doctrine.

\textsuperscript{204}. \textit{Unocal}, 395 F.3d at 958.

\textsuperscript{205}. \textit{Id.}

\textsuperscript{206}. \textit{Id.} at 959.
involved still exists. The court of appeals then noted that in *Liu* it had added its own fourth factor, whether the state involved was acting in the public interest. The court concluded that three of the four factors counted against applying the act of state doctrine, and that on balance the plaintiffs’ claims “are not barred by this doctrine.”

As understood by the Ninth Circuit, the act of state doctrine is a non-jurisdictional principle that keeps a court from reaching the merits of a plaintiff’s claim. The court applied the doctrine before resolving any disputed questions of fact or law, and referred to it as barring claims. Its description of the case does not identify any legal act by Myanmar or one of its officials, the validity of which was challenged. Nor does it suggest that any such act, if held valid, would provide a rule of decision for the case. Rather, the possibility that the doctrine might apply was raised by a claim that the government of Myanmar had violated duties imposed by international law, and that Unocal aided and abetted the violation of those duties. The court thus used its four-factor balancing test in a case in which the act of state doctrine was not relevant. As in *Kirkpatrick*, “the factual predicate for application of the act of state doctrine [did] not exist” in *Unocal*, because the court was not called on to declare invalid, and refuse to apply as a rule of decision, the official act of a foreign sovereign.

Because the act of state doctrine was irrelevant in *Unocal*, the court of appeals did not err in deciding that it posed no obstacle to recovery. But the court did regard the doctrine, when applicable, as a bar to decision and hence recovery by plaintiffs based on alleged violation of duty by government actors. So conceived, the doctrine can cause claims to be decided incorrectly.

Just that happened in an unrelated district court case in the Ninth Circuit, where the Ninth Circuit’s act of state doctrine caused the trial court to dismiss claims it should have adjudicated on the merits. In *Jane Doe I v. Lui Qi*, plaintiffs were members of the Falun Gong group who sought a default judgment against Chinese officials for human rights violations. After concluding that the suit was not barred by the Foreign Sovereign Immunities Act, the court said that it “must address whether these cases are justiciable in light of their potential implications for foreign relations and separation of powers. In this context, the justicia-

207. *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)).
208. *Id.*
209. *Id.* at 960.
bility concerns are examined under the act of state doctrine.” That doctrine, the court explained, “constitutes a prudential limitation upon the exercise of the court’s power to adjudicate the legality of the acts of a foreign state or its agents.” The former statement is incorrect, unless a limit on justiciability can also provide a rule of decision for the merits. The latter is correct only insofar as a requirement that official acts be taken as valid limits the court’s power to conclude that they are not.

After describing the three-part test the Ninth Circuit attributes to Sabbatino and noting the fourth factor the court of appeals has added, the district court conducted the balancing inquiry it believed to be called for. It concluded that while the first and fourth factors weighed in favor of exercising jurisdiction, the second and third weighed against it, because of the risk to the conduct of foreign affairs by a coordinate branch of government. The court decided that the act of state doctrine barred plaintiffs’ claims for injunctive and damages relief, but not for a declaratory judgment.

The act of state doctrine, as adumbrated by the Supreme Court but not the Ninth Circuit, had no bearing on the case. The plaintiffs alleged gross violations of human rights. They pointed to no official act, such as the expropriation in Sabbatino, that they said lacked the legal effect it purported to have. They pointed to no official act purporting to have legal effect at all, but to physical acts imposing severe harm. The act of state doctrine is irrelevant to such claims, and dismissal on that basis kept the plaintiffs from an adjudication on the merits in which they might have prevailed.

B. The Act of State Doctrine in the District Courts

While the federal courts of appeals are much more important than the district courts for the creation of precedent, district courts administer doctrines and their decisions often are unreviewed. District judges’
understanding of legal issues is thus of considerable practical importance. This Part describes four district court decisions that were not subject to appellate review and that rest on the two main fallacies concerning the act of state doctrine that influence the lower courts: that the doctrine commands abstention from deciding cases on the merits, and that it instructs courts to take foreign sovereign acts as complying with applicable duties, and not just as valid.

In a quite extraordinary decision, the district court for the Northern District of Alabama in 2001 entered an injunction forbidding agreements related to oil output by the Organization of Petroleum Exporting Countries, and others (including sovereigns) acting in conjunction with it. In rejecting a defense based on the act of state doctrine, the court showed that it regarded the doctrine as a form of immunity, not a rule of decision based on presumed validity. The court explained that because OPEC is not a government but an intergovernmental organization, neither the FSIA nor the act of state doctrine was implicated in the case. The act of state doctrine, however, can govern a case between two private parties, as it did in Central Leather and Ricaud. Foreign sovereign immunity, by contrast, protects foreign sovereigns and not non-governmental actors. Like other cases involving OPEC, Prewitt Enterprises concerned government decisions that were alleged to violate the federal antitrust statutes, the validity of which was not challenged. The court’s apparent understanding of the act of state doctrine as barring substantive liability is reflected in its characterization of the doctrine as “a judge-made rule based largely on separation of powers concerns suggesting a reluctance to determine the legality of acts of foreign states taken within their own territories.” That statement is correct only if “legality” means “validity” in the technical sense, and the court was not using “legality” in that fashion.

In Resco Products, Inc. v. Bosai Minerals Group Co., the U.S. District Court for the Western District of Pennsylvania stayed proceedings, in part because it understood the act of state doctrine as one of abstention. Resco Products had sued Bosai Minerals under the Sherman Act, alleging that Bosai Minerals had conspired to fix the price of baux-

221. Id. at *21.
One of Bosai Minerals’ defenses was that its conduct regarding bauxite was “mandated by China’s export control regulations and policies,” so that “any alleged antitrust violation arguably was an act of state, and not a private conspiracy.” The court apparently believed that if the act of state doctrine controlled the case, it would require abstention from decision.

In June 2010, the district court stayed the case, pointing to a then-pending proceeding brought by the United States in the World Trade Organization dispute resolution process. The WTO proceeding involved the Chinese government’s policies governing the export of raw materials, including bauxite. In that proceeding, the United States government took the position that the Chinese government was working through chambers of commerce in China to restrict the export of bauxite “by requiring that prices meet or exceed a minimum price before the material can be exported.” Bosai Minerals sought a stay of the district court proceedings pending resolution of the WTO complaint, arguing that the outcome of the WTO proceeding could bear on the defendant’s act of state argument. According to Bosai Mineral’s reading, if the WTO panel concluded that the Chinese government had indeed sought to control the price of bauxite that would show “any alleged antitrust violation arguably was an act of state and not a private conspiracy.” That in turn would support defendant’s argument that “the act of state doctrine compels abstention.”

The district court found that the WTO proceeding would “likely shed light” on the act of state issue. It granted the stay request.

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223. Id. at *2.
224. Id. at *9.
225. One of defendants’ arguments in favor in support of dismissal was that “the act of state doctrine compels abstention.” Id. at *7. The court noted that “[t]he burden of proving dismissal on grounds of the act of state doctrine is on the moving party,” which also suggests that it regarded the act of state question as one that would be decided before the merits and that could lead to dismissal. Id. at *8. It is possible that the court thought of the doctrine as requiring judgment for defendants on the merits, but its language is more consistent with an assumption that the issue arises before that stage.
226. Id. at *17.
227. Id. at *9.
228. Id. at *7.
229. Id. at *24 n.4. The act of state question was one of the issues as to which the WTO proceeding might be relevant, the court found. For that reason, I do not mean to suggest that the decision to grant the stay was incorrect. Findings about Chinese government acts in the WTO case might have been relevant to a foreign sovereign compulsion defense, for example. The act of state doctrine, however, gave no reason to stay the case.
No information that might have been developed in the WTO proceeding had any bearing on the act of state issue. Before the WTO panel, the United States claimed that legally effective Chinese government acts violated international trade law; it did not raise any question concerning the validity of a sovereign Chinese government act. Had the court thought that the act of state principle was purely about validity, it would have thought the WTO proceeding irrelevant to the case before it, and would not have granted the stay on those grounds.

In Sturdza v. United Arab Emirates, the District Court for the District of Columbia considered several claims against the government of the United Arab Emirates based on the construction of the UAE’s new embassy building in Washington, D.C. The UAE sought to rely on the act of state doctrine along with other grounds, including sovereign immunity. After finding that the FSIA’s commercial activity exception to sovereign immunity applied, the court turned to the act of state principle, under which, it said, “a foreign government’s act will be immunized from judicial review where the nature of the act undertaken is public or sovereign and the act is completed within the sovereign’s territory.” Looking to the factors described in Sabbatino, the court denied a motion to dismiss based on an act of state. The act of state doctrine does not create immunity. No question of validity was presented in the case, as once again the only party relying on the validity of a foreign official act was the plaintiff. Had the court found that the balance went the other way, it would have dismissed claims it should have resolved on the merits. As it was, the court rejected an argument that it should indeed have rejected, but in the process showed that it understood the doctrine as one of immunity.

Another district court case that was resolved correctly, but on a straightforwardly incorrect premise about the act of state doctrine, is Sirico v. British Airways PLC. Sirico sought damages for her forcible removal from a British Airways airplane, in which police officers in Britain were involved. British Airways argued that the involvement of government officials meant that the case should be dismissed on act of state grounds. The court explained that “[t]he act of state doctrine is an abstention doctrine and, therefore, its application is committed to
Looking to the purposes underlying the doctrine and finding nothing in the case that would affect foreign relations or embarrass or hinder the executive, the court denied the motion to dismiss. The act of state doctrine, however, is not a principle of abstention. It provides a rule of decision for the merits. Sirico raised no issue of validity, so the doctrine was not applicable and the court’s resolution of the issue was sound. Had it found that the purposes underlying the doctrine called for dismissal on act of state grounds, as other courts have done on similar reasoning, the district court would have denied the plaintiff a resolution of the merits to which she was entitled.

IV. THE COMMON-LAW ACT OF STATE DOCTRINE OUTSIDE THE UNITED STATES

According to an old joke, the United States and Great Britain are divided by a common language. British English and American English are very similar but not identical, which can make for embarrassing and amusing mistakes. British and American law are also sometimes similar, but not identical. The British courts have an act of state doctrine, which they apparently believe is the same common-law principle administered by the Supreme Court of the United States. But the two sets of rules are in fact importantly different. That is why this Article refers to, and concerns, the American act of state doctrine.

This point is important for two reasons. First, one of the propositions embraced by lower federal courts that is erroneous in American law may well be correct in British law: that the act of state doctrine is one of abstention or non-adjudication. Second is that the Court of Appeal for England and Wales, an intermediate appellate tribunal of the United Kingdom, recently held that the act of state doctrine is not confined to cases in which validity narrowly speaking is at stake. Insofar as that statement concerns the British act of state doctrine, or the doctrine of other common law countries, it is correct as far as I know. This Article argues that the Court of Appeal erred in its reading of Kirkpatrick.

The British act of state doctrine was discussed in a very prominent immunity case involving then-Senator Augusto Pinochet, formerly head of the military government that had ruled Chile. In 1998, while Pinochet was in Great Britain for medical treatment, Spain sought to extradite him, so that he might stand trial in Spain for human rights

234. Id. at *5 (citing Bigio v. Coca-Cola Co., 239 F.3d 440, 451 (2d Cir. 2001)).
235. Id. at *6.
abuses by the Chilean government that Pinochet had led. Pinochet argued that as a former head of state he was immune from arrest while in the United Kingdom.

The act of state doctrine was discussed several times in both decisions on the merits. In his judgment in Pinochet (No. 3), Lord Millett discussed the difference between immunity ratione personae and ratione materiae, and then turned to the act of state principle. He began, “[g]iven [immunity ratione materiae’s] scope and rationale, it is closely similar to and may be indistinguishable from aspects of the Anglo-American act of state doctrine.” The difference, he said, was that “immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state.”

Lord Millett then returned to immunity ratione materiae. Although he did not elaborate on what follows from a national court’s incompetence to adjudicate on the lawfulness of a foreign sovereign act, the implication is that he regarded the act of state doctrine as at least sometimes leading to non-decision on the merits, though not because of a lack of jurisdiction. That understanding would make the two rules indistinguishable in at least some cases.

236. R. v. Bow St. Magistrate, Ex parte Pinochet Ugarte (No. 3) [2000] 1 AC 147 (HL) 190-91 (describing allegations against Chilean military government, extradition request by Spain, and habeas corpus petition by Pinochet). The House of Lords’ decision in the Pinochet case had a complicated procedural history. The case first came before the court in R. v. Bow St. Magistrate, Ex parte Pinochet Ugarte (No. 1) [2000] 1 AC 61 (HL). In that proceeding, a five-member panel concluded that Pinochet was subject to extradition to Spain despite his claim of immunity. Pinochet moved to set that decision aside on the grounds that one of the Law Lords on the first panel should have been recused, and the motion was granted. R. v. Bow St. Magistrate, Ex parte Pinochet (No. 2) [2000] 1 AC 119 (HL). A differently constituted panel then reheard the merits and once again decided against Pinochet. Ex parte Pinochet Ugarte (No. 3) 1 AC at 147.

237. See id. at 190.

238. “Immunity ratione personae is a status immunity. An individual who enjoys its protection does so because of his official status . . . . Immunity ratione materiae is very different. This is a subject matter immunity.” Id. at 268-69 (emphasis added) (The seriatim opinions of British judges are called judgments, a term that in American law refers to the court’s decision rather than the opinion explaining that decision.).

239. Id. at 269.

240. Id.

241. See id. at 270.

242. In American law, the immunity of foreign states as such is indeed jurisdictional, as is that of foreign diplomats, but the immunity of foreign officials ratione materiae is not. It operates before the merits, but does not deprive the court of authority to decide.
Lord Phillips of Worth Matravers also regarded the Anglo-American act of state doctrine as one that would keep a court from addressing the merits. Immunity, he said, covered cases in which a state itself or an official was sued.\footnote{243} Where a state is not directly or indirectly implicated in the litigation, so that no issue of state immunity as such arises, the English and American courts have none the less, as a matter of judicial restraint, held themselves not competent to entertain litigation that turns on the validity of the public acts of foreign states, applying what has become known as the act of state doctrine.\footnote{244}

As far as the law of Britain is concerned, the act of state principle is, or includes, a rule that keeps courts from deciding cases. From \textit{Oejten} through \textit{Kirkpatrick}, the Supreme Court has made the American doctrine a source of rules of decision, and has denied that it prevents resolution of the merits of lawsuits. The British and American doctrines are not the same. They are not the same even though British courts cite American cases and believe that they and the Americans are applying a single common-law principle that underlies decisions on both sides of the Atlantic.

That is the situation in which the Court of Appeal for England and Wales decided \textit{Yukos Capital v. OJSC Rosneft Oil Co.}\footnote{245} Yukos Capital, a Luxembourg corporation, sued Rosneft Oil Company to enforce a Russian arbitration award that had been overturned by the courts of Russia.\footnote{246} Yukos Capital argued that the Russian judicial decisions setting aside the award should be disregarded by the English courts because the Russian courts were not impartial and independent.\footnote{247} Rosneft raised as a preliminary issue the act of state doctrine.\footnote{248}

The Court of Appeal discussed American and British act of state cases at considerable length, quoting the passages from \textit{Pinochet (No. 3)} by Lords Millett and Phillips of Worth Matravers just set out. After reviewing the earlier decisions, the Court of Appeal concluded that the principle of non-justiciability had not emerged “as a doctrine separate from the act of state principle itself, but rather has to a large extent...
subsumed it as the paradigm restatement of that principle.\textsuperscript{249} Non-justiciability might mean several things, but the Court of Appeal then indicated that it meant refusal to decide a case. “It is a form of immunity \textit{ratione materiae}, closely connected with analogous doctrines of sovereign immunity.”\textsuperscript{250} Although the opinion is not altogether clear on the point, it very much seems to say that the act of state doctrine can keep a court from addressing the merits of a suit. Again, that is not the American doctrine.\textsuperscript{251}

The court then turned to limitations on the act of state principle, and concluded that one of them is that it does not apply to judicial acts.\textsuperscript{252} Having found the doctrine inapplicable, the court then rejected another argument that also supported that conclusion. What the court called “the Kirkpatrick exception” was “one of the cornerstones of Yukos Capital’s opposition to this appeal.”\textsuperscript{253} Yukos Capital’s argument, the court said, was that the act of state doctrines “are engaged only where there is a challenge to the \textit{validity} of an act of state or where the English court is requested to grant a \textit{remedy} in respect of such acts.”\textsuperscript{254} That argument was, or was very close to, the one I have presented: “validity” was contrasted with any wider formula that might speak, instead, of lawfulness or, on the other side, unlawfulness, wrongfulness, or any such concept.\textsuperscript{255}

\textsuperscript{249} Id. at [66].
\textsuperscript{250} Id.

\textsuperscript{251} One reason to wonder exactly what the court meant is that, after the passage just quoted, it went on to explain that the doctrine “has been applied in a wide variety of situations, but often arises by way of defence or riposte: as where a dispossessed owner sues in respect of his property, the defendant relies on a foreign act of state as altering title to that property, and the claimant is prevented from calling into question the effectiveness of that act of state.” Id. The court understood that cases like \textit{Oejten}, \textit{Ricaud}, and \textit{Sabbatino} were decided on the merits, and that plaintiffs like Banco Nacional could prevail in cases governed by the act of state doctrine. It also described the doctrine in such cases as arising by way of defense or riposte. Perhaps the court realized that its description of the doctrine as a form of immunity could not be reconciled with the American decisions, but thought that a principle of non-justiciability or abstention must somehow be intrinsically defensive. (Although \textit{Oejten} and \textit{Ricaud} were suits by dispossessed owners in which the defendant based title on an act of state, in \textit{Sabbatino} the plaintiff relied on an act of state, the Cuban expropriation decree, as the source of its title.)

\textsuperscript{252} “In our judgment, therefore, the act of state doctrine does not apply to allegations of impropriety against foreign court decisions, whether in the case of particular decisions or in the case of a systemic dependency on the dictates or interference of the domestic government.” Id. at [90].

\textsuperscript{253} Id. at [95]. The Supreme Court in \textit{Kirkpatrick} was defining the act of state doctrine, not enunciating an exception to it.

\textsuperscript{254} Id. at [105].

\textsuperscript{255} Id.
The Court of Appeal rejected that reasoning. “[T]he teaching of the Kirkpatrick case (and the cases which follow it) is not to do with any difference, were there to be any, between concepts of validity, legality, effectiveness, unlawfulness, wrongfulness and so on. Validity (or invalidity) is just a useful label with which to refer to a congeries of legal concepts, which can be found spread around the cases.” The court thought Justice Scalia’s meaning to that effect “perfectly clear” in Kirkpatrick. In support of that reading, it discussed Kirkpatrick’s treatment of the earlier cases, Underhill, Oetjen, Ricaud, and Sabbatino. As I have explained, the latter three were about validity in the narrow sense, the sense the Court of Appeal rejected, and cannot be explained as instances of abstention. The court was quite correct that Hernandez does not fit easily with the other cases. “It is odd to think of the acts of Commander Hernandez as ‘valid’ or ‘invalid’ . . . . Clearly, by ‘to declare invalid’ Scalia J meant the same as to find wrongful or unlawful and on that ground ineffective.” Justice Scalia nevertheless thought the opposite and characterized Hernandez in a way that is indeed odd. He made it a case about validity and not immunity. Odd though it may be, the reading of Hernandez found in Kirkpatrick is consistent with the earlier case’s conclusion and perhaps its language. And in any event, that is the reading the Supreme Court of the United States now adopts.

In the American system of precedent with respect to federal law, written and unwritten, that is enough: as precedents, earlier Supreme Court cases mean what the Supreme Court now says they mean, whatever they meant to the Court that decided them. That is a result of the American judicial structure, and the norms of precedent that have evolved within that structure. Because federal law, including unwritten federal law, is expounded by a single supreme tribunal, that tribunal’s explanations have a special status: they are conclusive. Cases that are hard to reconcile with those explanations must nevertheless be reconciled and may therefore change their meaning over time.

Matters might be different if the Justices believed that they were administering unwritten norms shared among common-law systems. If that were true they might regard their own precedents as only evidence of the content of those norms, evidence that could be outweighed by the practice of courts of other countries. Moreover, if that were the case, lower courts in this country could properly depart from the

256. Id. at [110].
257. Id. at [111].
258. Id. at [112].
Supreme Court’s most recent exposition of a common-law doctrine, in light of later developments elsewhere in the common-law world. That is not how American courts proceed, and it is certainly not how the Supreme Court approaches the act of state doctrine. Although British courts like the Court of Appeal in *Yukos Capital*, and the House of Lords in *Pinochet*, rely heavily on American act of state cases, the Supreme Court of the United States does not return the favor. There is no reason to think that in the Court’s view it is seeking the best understanding of a transnational legal phenomenon, about which its own prior precedents are just part of the picture.

The Court of Appeal in *Yukos Capital* may have believed that it was doing what the Supreme Court of the United States does not do. It may have been right in the main. The British courts may well apply an act of state doctrine that differs in substance from the American principle that goes by that name; I have argued that they probably do. And in a more methodological vein British judges may think that the doctrine is exemplified by cases from many courts and more than one country, but not conclusively stated in any one of them. It seems they are correct on every point except their attribution of both method and substance to the American system. It might be odd to think that a doctrine now said to rest on American separation of powers would apply in countries with different structures of government, but the British act of state doctrine is what British law makes it. And vice versa for the American doctrine.

The reading of *Kirkpatrick* and *Hernandez* relied on by the Court of Appeal might be appropriate in courts in which “the purpose of the doctrine is to prevent such challenge at the outset, as a matter of immunity ratione materiae.” For the Supreme Court of the United States, however, the purpose of the doctrine is to provide a rule of decision by which to resolve the merits. Immunity *ratione materiae* is governed by principles of foreign official immunity. The Court of Appeal thus erred in thinking that the teaching of *Kirkpatrick* is not about the difference between validity and legality, unlawfulness, wrongfulness, and so on. Its teaching is exactly about that. Cases that disregard that distinction are not following *Kirkpatrick*. For decisions of other countries, that is no problem, unless they are concerned with the details of American law.

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V. The Act of State Doctrine’s Place in Federal Law

According to the Supreme Court, the act of state doctrine operates on the merits of lawsuits, and its operation is to give certain foreign sovereign acts the legal effect they purport to have. In particular, the doctrine requires that transfers of title effected by foreign governments in their own territory be respected, even if the transfer violated international law. So conceived, the doctrine is in harmony with the rest of American law.

According to some lower courts, the act of state doctrine is either a barrier to reaching the merits or a doctrine under which foreign governments or related parties will be regarded as having complied with their substantive duties, including any substantive duties under U.S. federal statutes. So understood, the doctrine clashes with other well-established features of the law of this country, and leads to unreasonable results.

With good reason the Supreme Court has repeatedly said that the act of state doctrine is not a bar to adjudicating cases, but a principle by which to adjudicate them. In *Altmann* and *Yousuf*, the Supreme Court explained that the act of state doctrine is not a principle of immunity. It operates with respect to the merits of lawsuits.261 The justification for the Court’s conclusion is not hard to find. Immunity doctrines, whether found in statute or unwritten law, are also non-immunity doctrines. When they do not bar litigation, they permit plaintiffs to reach the merits. To add another norm of non-decision would change the content of the law by barring more suits.

With respect to sovereign immunity itself, to add another norm of non-decision would be to change the pattern of immunity set by Congress. Because the act of state doctrine is an unwritten principle elaborated by judges, it is subordinate to statutes. The background and content of the Foreign Sovereign Immunities Act demonstrate that the statute’s permissions are just as much part of its policy as its prohibitions. In light of considerable ferment in the international law of state immunity, the U.S. Department of State announced in 1952 that it would henceforth follow the so-called “restrictive view,” according to which states enjoy immunity for their sovereign (*jus imperii*) acts but not their commercial and similar (*jus gestionis*) acts.262 In 1976, when Congress codified the law of sovereign immunity, it adopted the

261. See supra notes 69-91 and accompanying text.
262. Republic of Austria v. Altmann, 541 U.S. 677, 689-90 (describing letter to that effect by State Department Acting Legal Adviiser Jack B. Tate, the “Tate letter”).

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restrictive principle and so included the exception at issue in *Altmann*. As the Court said in that case, “[t]hese exceptions are central to the Act’s functioning.”

The law of official immunity, specifically immunity *ratione material*, has not been codified. As with any system of restrictions on adjudication, its exceptions and limitations are central to its content. As with the statutory law of state immunity, to add a restriction would be to change that content. While the unwritten norms of official immunity derive from international law, the Court has explicitly denied such a source for the act of state doctrine, deriving it instead from domestic separation of powers concerns.

The act of state doctrine is not a principle of immunity, and to treat it as one would distort the actual principles of immunity. Perhaps, however, the doctrine is in part one not of immunity but abstention in the sense in which the Supreme Court usually uses that term, a judge-made norm that keeps courts from deciding cases and operates in addition to any applicable immunity. The Court explicitly rejected this possibility in *Kirkpatrick*. The act of state doctrine is not a doctrine of abstention but a principle of decision. American courts “have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid.” The Court in *Kirkpatrick* preached what it had practiced in *Sabbatino*. In the earlier case the act of state doctrine figured in the plaintiff’s claim, and the case was decided on the merits.

263. *Id.* at 691. In Samantar v. Yousuf, 560 U.S. 305 (2010), the Court referred to “Congress’ intent to enact a comprehensive solution for suits against states” in enacting the FSIA. *Id.* at 323.

264. A much-debated question today is whether the immunity *ratione materiae* of former officials extends to violations of fundamental and overriding norms of international law (called *jus cogens*). See, e.g., *R. v. Bow Street Magistrate, Ex parte Pinochet Ugarte (No. 3) [2000] 1 AC 147 (HL)* 203 (Lord Brown-Wilkinson).

265. Professor Keitner describes the international law of official immunity, on which the corresponding American common law is based, in Chimène Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2d 61, 63-65 (2010). The Court in *Sabbatino* denied that the act of state doctrine is compelled by “some principle of international law,” Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964), and derived it instead from “the basic relationship between the branches of government in a system of separation of powers,” *id.* at 423.


267. *Id.* at 409.
on the assumption that the Cuban nationalization decree had been
effective to transfer title.

Despite what the Court said in Kirkpatrick, perhaps the doctrine
should be seen as one of abstention in cases, unlike Sabbatino, in which
it operates in favor of the defendant.\textsuperscript{268} One might say that when the
defendant’s position rests on the validity of a foreign sovereign act in
foreign territory, the court should exercise discretion to abstain from
deciding the case, and thereby deny the plaintiff relief. Such an
asymmetrical doctrine cannot be justified. It would be asymmetrical
not only in form but in substance. Under this view, plaintiffs like Banco
Nacional de Cuba would be able to use the doctrine to obtain judg-
ment, while defendants would be able to use it only to keep the court
from deciding on the merits. That would leave the successful defendant
without the collateral benefit of a merits decision, and so vulnerable to
re-litigation in a jurisdiction other than the United States that did not
respect the act of state principle. Nothing in the doctrine’s purpose
suggests a preference for plaintiffs of that kind.

The real question is not whether the act of state doctrine keeps
courts from deciding cases on the merits. It does not, and the Supreme
Court has said that it does not. The question is whether the doctrine’s
effect on the merits goes only to validity, or also to compliance with
duties.

Considered as a rule about validity, the act of state principle answers
a choice of law question: whether the courts of one jurisdiction should
apply the law of another in deciding a case before them.\textsuperscript{269} For
example, in Sabbatino the Cuban expropriation decree purported to
answer the question of title. According to Banco Nacional de Cuba,
Cuban law governing title should have been relied on. The other

\textsuperscript{268} In Sabbatino, the doctrine aided the plaintiff, Banco Nacional de Cuba, which relied on
the validity of the Cuban expropriation. See generally 376 U.S. at 398.

\textsuperscript{269} Although the doctrine performs the function of choosing applicable law, whether it is
part of the law of conflicts properly speaking is doubtful. The Supreme Court derives it from
American separation of powers, not the general principles that the courts of different countries
look to in deciding which law to apply to disputes before them. The Fifth Circuit, in a case decided
after Sabbatino but before Kirkpatrick, said that the doctrine “operates as a super-choice-of-law rule,
requiring that foreign law be applied in certain circumstances.” Callejo v. Bancomer, S.A., 764
F.2d 1101, 1114 (5th Cir. 1985) (citations omitted). It is a “super” choice of law rule because it
overrides the ordinary principle that courts apply foreign law only if it is compatible with the
public policy of the forum. Id. The Fifth Circuit in Callejo, id., relied on Occidental of UUM al
Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis,
577 F.2d 1196, 1290, n.4 (5th Cir. 1978), which said that the doctrine “is not an abstention
doctrine, but rather resembles a conflicts of laws principle.”
claimants argued that because the Cuban decree violated international law, it should not be treated as authoritative, and title should be determined without regard to it. Choice of law principles, and more generally legal rules that perform the same function, occupy a distinctive place in the sequence of judicial reasoning. Although such rules figure in the resolution of cases on the merits, they are not themselves substantive principles of law. A guest statute is part of the law of tort. The decision whether a particular automobile accident is governed by a Canadian guest statute, or by New York law which has no special rule for guests, is not made by the law of tort. When New York courts decide cases under New York law and not Canadian law, they do not thereby apply Canadian law incorrectly.

Choice of law doctrines and substantive legal rules complement one another and do not conflict, because choice of law principles answer questions that substantive rules do not purport to resolve. Of course, the Constitution itself contains a choice of law principle that binds all courts of this country, state and federal: Article VI makes federal law supreme and so requires that it be followed where it purports to apply. A leading feature of the American legal system is that Congress has provided the courts, state and federal, with hardly any direction concerning the choice among different sources of non-federal law. Despite periodic calls for one, there is no act of Congress supplying general conflicts principles either to American courts in general or to the federal courts in particular. Federal choice of law rules exist, but they are episodic. For example, the courts sometimes find that a federal statute implicitly calls for cases under it to be decided using conflicts rules that are not those of any one State.

270. The seminal conflicts case of Babcock v. Jackson, 12 N.Y.2d 473 (1963), involved an automobile accident in Ontario involving residents of New York. Ontario law barred suit by guests of the owner of the car involved in an accident while New York law did not. The Court of Appeals in Babcock moved away from the classic conflicts rule that looked to the law of the place of the tort, and found that New York law governed the liability of the defendant, not Ontario law.

271. More than two decades ago, Professor Michael H. Gottesman urged Congress to adopt statutes that would provide choice of law rules for a number of important topics, rules that would be applicable in both state and federal court. Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes, 80 Geo. L. J. 1 (1991). Congress has not acted on that recommendation. In the absence of direction from Congress, the Court has adopted the principle that federal courts should apply the choice of law principles of the State in which they sit. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941).

272. The First Circuit reached that conclusion about 12 U.S.C. 632, which gives the district courts original jurisdiction over certain banking-related cases involving federally chartered corporations. Edelman v. Chase Manhattan Bank, 861 F.2d 1291, 1294 (1st Cir. 1988). Edelman was
Sabbatino thus was typical in that no federal statute bore on the choice of law question the case posed. As a result, the Court was free to formulate a principle of unwritten federal law, the act of state doctrine, without having to ask whether it was consistent with written federal law.\textsuperscript{273} Of course, the latter overrides the common law when they conflict, as witnessed by Congress’ later rejection of Sabbatino.\textsuperscript{274} In Judge Easterbrook’s phrase, the choice of law question in that case was not within the domain of any federal statute.\textsuperscript{275}

When the act of state doctrine is regarded as governing validity, and hence as performing a choice of law function, it will hardly ever be possible that it would conflict with an act of Congress. Exactly the opposite is the case when the act of state doctrine is treated as governing, not validity, but compliance with the duties imposed by federal statutes like the Sherman Act. So regarded, the doctrine puts the court that applies it in the untenable position of answering a question under a statute without considering the content of the statute. Whether the Sherman Act applies extraterritorially is a question about the Sherman Act, one that Congress has explicitly answered in the affirmative as to some conduct.\textsuperscript{276} Whether the Sherman Act applies to foreign sovereign acts in foreign sovereign territories is also a question about that statute. So is the question whether private conduct that otherwise violates the act is innocent because finding it to be unlawful would imply that sovereign acts were unlawful, or would impede other states’ control over their natural resources.

It is impossible to answer questions like that without examining the statute involved, but that is what a court does when it takes the act of state doctrine to mean that foreign sovereign acts comply with federal statutory duties and does not look to the applicable statute to see whether that is

\textsuperscript{273} In Kirkpatrick, the Court did not have to ask whether the act of state doctrine was consistent with the statute applicable in that case, RICO, because it found that the doctrine was not applicable. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400 (1990).

\textsuperscript{274} Section 2570 of title 22, enacted in response to Sabbatino, prescribes a different result in future cases like it.

\textsuperscript{275} Judge Easterbrook has coined that phrase to describe the questions that statutes themselves either answer or authorize the courts to answer. Frank H. Easterbrook, Statutes’ Domain, 50 U. Chi. L. Rev. 533 (1983).

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correct. It is what a court does when it concludes that, pursuant to the act of state doctrine, a non-governmental defendant’s conduct does not give rise to liability under a statute. That is what the Fifth Circuit did in *Spectrum Stores*, for example. To say that a foreign sovereign act is lawful or legal under a statute is to say either that the statute does not forbid such conduct, or that a defense is available when the complained-of conduct is a sovereign act in foreign sovereign territory. The same is true of non-sovereign acts that are said to be exempted from liability because of the act of state doctrine. Such conclusions must rest on interpretation of the statute, and cannot come from anywhere else. Yet courts that invoke the doctrine as a bar to liability reach conclusions about statutes without interpreting them.\(^\text{277}\)

When a party claims that a federal statute supplies a rule of decision, the court must construe that statute, and cannot assume conclusively that it does not forbid foreign sovereign conduct or related activity. Moreover, the Supreme Court has concluded that federal statutes must be interpreted in light of two defeasible presumptions about their content. According to the presumption against extraterritoriality, Congress’ statutes are assumed not to apply to conduct outside the United States.\(^\text{278}\) According to the so-called *Charming Betsy* canon, Congress is assumed to legislate in a manner consistent with the United States’ obligations under international law.\(^\text{279}\) Discussing the latter principle, the Court has recently explained that it “ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.”\(^\text{280}\)

Because the act of state doctrine operates with respect to foreign sovereign conduct in foreign territory, it will come into play in interpreting an act of Congress only if the presumption against extraterritorial-

\(^{277}\) Interpretation of the Sherman Act might yield the conclusion that it does not condemn foreign regulatory and natural-resource policies that apply in foreign territory. That conclusion would concern the duties the act imposes and not the validity of foreign sovereign acts, and hence would not turn on the act of state doctrine.


\(^{279}\) *Murray v. Schooner Charming Betsy*, 6 U. S. (2 Cranch) 64 (1804).

ity has been overcome. When a statute does apply extraterritorially, the purpose underlying the act of state doctrine will be accomplished by the *Charming Betsy* canon. That purpose is to ensure “exclusivity in the political branches.” 281 When a party relies on a federal statute, the most important step toward respecting Congress’ exclusivity is to interpret the statute correctly. That goal is furthered by the *Charming Betsy* assumption, which is based, not simply on the general goal of following the political branches’ decisions, but on a specific assumption about Congress’ policies. That assumption, combined with other tools of statutory construction, will achieve the goal of the act of state doctrine, and lead the courts where the legislature wants them to go.

Whether and how federal statutes affect foreign sovereign conduct, or related activities of non-sovereigns, is a question of statutory construction on which the act of state doctrine has no bearing. For similar reasons, there is no justification for a conclusive presumption, or even a weaker presumption, that foreign sovereign acts in foreign territory comply with the duties under international law of the state involved. 282 *Sabbatino* endorses no such presumption, as it explicitly left open the question whether Cuba’s expropriation had violated international law. 283 More fundamental is that there is no place for a presumption like that, which would undermine international law itself.

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281. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). The Court at one point in *Sabbatino* characterized the doctrine as involving “a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community.” *Id.* at 425. From that, one might think that the doctrine is designed specifically to protect the executive’s power to conduct foreign relations. Shortly after that passage, however, the Court said that the doctrine’s “continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.” *Id.* at 427-28. As the Court recognized in the second passage, both political branches have powers that affect the country’s relations with foreign powers.

282. As the Court formulates it, the doctrine operates like a conclusive presumption. When the doctrine applies, it cannot be defeated by contrary evidence; it prescribes a rule of decision that assumes validity by treating the foreign sovereign act in question as legally effective. If it applied to compliance with duties, it would prescribe a rule of decision on the assumption of compliance.

283. *Sabbatino*, 376 U.S. at 428. The Court at one point in *Sabbatino* characterized the doctrine as involving “a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community.” *Id.* at 425.
Public international law consists mainly of rules for sovereigns, just as domestic law consists mainly of rules for private persons. Criminal laws, such as the law against arson, are not applied on the assumption that those subject to them have complied. To do so would make the law a machine that turns itself off. Among sovereigns, international law is not applied on that assumption either. On the contrary, like domestic law, international law operates on the assumption that those subject to it may violate it, and that those violations may have consequences. Because there is no sovereign above sovereigns, those consequences are frequently acts of other states. One consequence that international law recognizes is countermeasures, negative acts by one state against another that ordinarily would violate international law but that are permitted when they are a proportionate response to an earlier violation by the target state. If states were conclusively presumed to comply with their international law duties, the concept of countermeasures would have no place in the international legal system. Nor would the authority of the U.N. Security Council to respond to violations of international norms like the U.N. Charter have a function if violations were assumed never to happen.

No U.S. court is the Security Council, which has primary responsibility for the maintenance of international peace and security. U.S. courts, however, are sometimes called on to decide whether another sovereign has complied with international law. The Foreign Sovereign Immunities Act directs them to do so, for example. Section 1605(a)(3) of title 28 limits sovereign immunity by allowing jurisdiction in certain cases "in which rights of property taken in violation of international law are in issue." Any rule of U.S. domestic law like that reflects a judgment that a U.S. court should decide whether a foreign sovereign

284. Sovereign states are “preeminently” the subjects of international law. JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 115 (8th ed. 2012).

285. Id. at 585-86 (describing countermeasures).

286. The Charter obliges all states to refrain from the threat or use of force against one another’s territorial integrity or political independence, U.N. Charter art. 2, ¶ 4, and authorizes the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression,” id. at art. 39, and if necessary to take coercive measures, including the use of force, to maintain or restore international peace and security, id. at arts. 41-42. For example, in 1990 the Security Council determined that Iraq had breached the peace by invading Kuwait, S.C. Res. 660 (Aug. 2, 1990), and four days later imposed economic sanctions on Iraq, S.C. Res. 661 (Aug. 6, 1990). The Charter’s system of collective security rests on the premise that states have legal duties that they can breach.


has met its duties under the law of nations. Considered as a conclusive presumption of compliance, the act of state doctrine would clash with all such rules. Yet each rule like Section 1605(a)(3) is more particularized than the act of state doctrine, which operates across the board. By the doctrine’s own logic, which recognizes exceptions where appropriate, it should always yield to those particularized judgments.  

Just like federal statutory law and international law, the domestic law of foreign countries generally has no place for a conclusive presumption that sovereigns have complied with their duties under it. In World Wide Minerals, for example, the court’s understanding of the act of state doctrine kept it from deciding whether Kazakhstan had breached its contract by refusing export licenses. That question should have been addressed under the contract law selected by conflicts rules, which probably was the law selected by the contract. If the agreement was governed by Kazakh law, and Kazakh law provides that acts jure imperii are not breaches, then Kazakhstan was not in breach. But Kazakh law may have no such feature, or may not have applied by the parties’ own agreement. The D.C. Circuit’s view of the act of state doctrine kept it from enforcing that agreement, no matter what it was. It thereby undercut Kazakhstan’s sovereignty: a government that is limited in its contractual capacity has less power. And the court of appeals’ decision limited Kazakhstan’s contractual capacity in that respect even though, as the court understood, the FSIA explicitly recognizes contractual waivers of sovereign immunity, and Kazakhstan had exercised that

289. This point is separate from the operation of the U.S. legal hierarchy, under which a federal statute like the FSIA automatically overrides unwritten law like the act of state doctrine when they conflict. Because it recognizes exceptions, and because the more specific controls the more general for good reason, the act of state doctrine would give way even to state law, provided the state law were otherwise consistent with federal primacy regarding foreign affairs. The act of state doctrine would give way because the principle underlying the state rule, by hypothesis permissible, would have more direct bearing on the question than the general concern of the act of state doctrine.

290. See supra note 162, at 1157.

291. The United States can breach its contracts, and be liable for damages. Sometimes the breach results from an act of Congress, as in United States v. Winstar Corp., 518 U.S. 839 (1996). The Court in Winstar found that the federal government had promised Winstar favorable tax treatment in order to induce private firms to acquire failing savings and loan companies during the savings and loan crisis. When Congress subsequently withdrew that favorable treatment, the Court found a breach of that agreement and concluded that Winstar was entitled to damages. The case rests on the difference between validity and breach of duty: had the statutory changes not been legally effective, Winstar would have suffered no injury. Only because Congress could change the law could it breach the contract; the Court found that it had done both.
Contracts to which sovereigns are a party may seem to present distinctive questions, so that perhaps the act of state doctrine could provide a conclusive presumption of lawfulness in other areas of law. It could not do so, however, without undercutting the substance of the law in those areas, replacing specific judgments with an across the board ban on legislating for sovereigns. A rule that is automatically complied with is no rule. Suppose, for example, that in the 1890s the law of Venezuela authorized military exactions but gave private people a right to compensation through a tort action and waived sovereign immunity in domestic and foreign courts. If General Hernandez had been a proper defendant in such an action, it might well have been one more transitory tort, just as Underhill said his claim was. U.S. courts entertain foreign tort claims routine, when they have jurisdiction and the conflicts rules point them to foreign law. The substance of the law that applies to sovereigns, and jurisdiction over them and their officials, are questions of substantive law and jurisdiction. Those bodies of legal norms have no place for a general presumption that sovereign acts are lawful. By hypothesis in the example just given, the law of Venezuela had no such presumption. Again, the act of state doctrine would clash with more specific legal principles actually adapted to the questions to be resolved.

None of these difficulties arises as long as the doctrine is confined to the role assigned it in Sabbatino and Kirkpatrick of providing an answer to a very specific choice of law question. That question is about the legal effectiveness of foreign sovereign acts in foreign territory. The act of state doctrine answers no other.

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293. See supra text accompanying note 117.