AN ERRONEOUS DECISION AND DANGEROUS PRECEDENT: THE EFFECTS OF THE *REPUBLIC OF ECUADOR V. DASSUM* COURT'S IMPROPER USE OF THE ACT OF STATE DOCTRINE

Ashley Galvao*

> "It would be baffling if a foreign act of state intended to affect property in the United States were ignored on one side of the Hudson but respected on the other . . . ."[1]

I. INTRODUCTION

The preservation of amicable diplomatic relations between the United States and foreign sovereign states requires that particular caution be taken with lawsuits filed within the jurisdiction of the United States against or by these sovereign states. The act of state doctrine ("the Doctrine") is a tool for judges presiding over lawsuits in both federal and state courts in the United States to preclude inquiry into the "validity of the public acts which a recognized foreign sovereign power commits within its own territory."[2] The purported purposes of this doctrine include avoiding friction between the executive branch of the United States and foreign nations, encouraging settlement of disputes outside of the judiciary, promoting predictability in transnational transactions,

 Notes and Comments Editor, Stetson Law Review 2018–2019. J.D., Stetson University College of Law, 2019. B.S., cum laude, University of Rhode Island, 2015. I would like to thank Professor Palmer, Tara Pachter, and Emily Plakon for their guidance and support throughout the writing and editing of this Article.

1. Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 50 (2d Cir. 1965).

2. Donald T. Kramer, Annotation, *Modern Status of the Act of State Doctrine*, 12 A.L.R. FED. 707, § 1(a) (1972).

and avoiding potential interference with the executive branch's interests in foreign relations.[3]

While the Doctrine is not rooted in the United States Constitution, it does have "'constitutional' underpinnings . . . aris[ing] out of the basic relationships between branches of government in a system of separation of powers."[4] The Doctrine's foundation arose from the notion that "adjudication of certain matters by the judiciary may hinder foreign affairs, the conduct of which is left to the Executive branch by the Constitution."[5] Thus, the Doctrine's principle consideration is that of international comity, directing the judiciary of the United States to defer to foreign governmental acts—whether characterized as legislative, judicial, or executive—taken within that foreign sovereign's territory.[6] In practice, the Doctrine serves as a choice of law rule, directing United States courts to apply foreign law where applying the Doctrine is appropriate.[7]

In the recent case *Republic of Ecuador v. Dassum* (*Isaias II*),[8] the Third District Court of Appeal in Miami, Florida, held that the Doctrine precluded inquiry into the merits of the case because it would require the court to determine the validity of the Republic's act of state, which determinatively found the defendants, Roberto Isaias Dassum and William Isaias Dassum ("the Isaias brothers"), personally liable for the failure of what was previously one of Ecuador's largest banks.[9] By erroneously applying the Doctrine here, the Third District effectively denied the Isaias brothers due process in Florida courts as required by the Florida Constitution and the Fourteenth Amendment to the United States Constitution.[10] Furthermore, the court has set a dangerous precedent that will allow foreign sovereigns to use the Doctrine in

3. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 447 (1964) (White, J., dissenting).

4. *Id.* at 423.

5. Carolyn B. Levine, *The Territorial Exception to the Act of State Doctrine: Application to French Nationalization*, 6 FORDHAM INT'L L.J. 121, 127 (1982).

6. Republic of Ecuador v. Dassum, 146 So. 3d 58, 61 (Fla. 3d Dist. Ct. App. 2014) (*Isaias I*).

7. Margaret E. Tahyar, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 COLUM. L. REV. 594, 595 (1986). For more on the application and threshold limitations to the Doctrine, see *infra* pt. II.

8. 255 So. 3d 390 (Fla. 3d Dist. Ct. App. 2017).

9. *Id.* at 396–97.

10. U.S. CONST. amend. XIV; FLA. CONST. art. I, § 9.

Florida courts to enforce extraterritorial takings that may disagree with the laws and policies of the United States.

A. Summary of Facts

The Isaias brothers were senior administrators and indirect shareholders of Filanbanco, S.A. ("Filanbanco"), formerly operating as one of Ecuador's largest banks.[11] On December 2, 1998, Filanbanco was placed into restructuring by the Agencia de Garantia de Depósitos[12] ("AGD") resulting from a liquidity crisis.[13] On May 8, 2001, Deloitte & Touche, a major international accounting firm, determined Filanbanco's losses as of December 2, 1998—the last time the Isaias brothers held control of the bank—to be $661.5 million.[14] Deloitte & Touche subsequently submitted a report ("the Deloitte Report") of such findings to the Ecuadorian Superintendent of Banks.[15]

In 2002, during the investigation into the Isaias brothers' activities in their official capacities at Filanbanco, Ecuador's legislature enacted Article 29 of Ecuador's Act for Economic Reorganization in the Area of Taxes and Finance ("Article 29").[16] Article 29 stated that "administrators who have declared false technical equity and altered balance sheets shall guarantee deposits in the financial institution with their personal equity."[17] Thus, following the passage of Article 29, any bank administrator of a financial institution operating in the Republic of Ecuador found guilty of fraud or embezzlement with respect to bank operations would have a personal guarantee imposed upon them for any consequent financial losses the bank suffered.[18]

On February 26, 2008, almost seven years after the submission of the Deloitte Report, the Banking Board of Ecuador

11. *Isaias II*, 255 So. 3d at 390, 393.

12. *Id.* at 392. To put it into perspective, the Agencia de Garantia de Depósitos ("AGD") is the equivalent of the Federal Deposit Insurance Corporation in the United States. *Id.* The Ecuadorian Congress established the AGD in 1998 in response to widespread national financial crisis. Appellees' Motion for Rehearing *En Banc* or, Alternatively, for Certification of an Issue of Great Public Importance at 4, *Isaias II*, 255 So. 3d 390 (Fla. 3d Dist. Ct. App. 2017) (No. 3D15-2622) [hereinafter Appellees' Motion for Rehearing]. Functions of the AGD include guaranteeing bank deposits and regulating the banking industry in Ecuador. *Id.*

13. *Isaias II*, 255 So. 3d at 392.

14. *Id.*

15. *Id.*

16. *Id.* at 392–93.

17. *Id.* at 392.

18. *Id.*

passed Resolution No. JB-2008-1084, authorizing Ecuador's Superintendent of Banks and Insurance to approve the Deloitte Report.[19] Subsequently, in March 2009, the Superintendent of Banks and Insurance passed another resolution approving the Deloitte Report for consideration by the AGD.[20] On July 8, 2008, the AGD issued Resolution No. AGD-UIO-GG-2008-12 ("AGD-12") holding the Isaias brothers liable for Filanbanco's losses as administrators of the former bank on or before December 2, 1998.[21] Under the authority granted by AGD-12, the AGD then invoked Article 29, imposing a personal guarantee on the Isaias brothers for the debts of Filanbanco as calculated by Deloitte & Touche and reported in the Deloitte Report. Pursuant to the personal guarantee established by Article 29, the AGD ordered the seizure of all of the Isaias brothers' assets and property in Ecuador; portions of their property were in fact seized by the AGD.[22]

The following day, after the issuance of AGD-12, the Republic of Ecuador enacted an amendment to its constitution referred to as "Mandate 13," which "[forbade] all judges—on pain of criminal prosecution—from . . . challeng[ing] . . . AGD-12. . . . Mandate 13 also prohibited challenges to the mandate itself."[23] Thus, Mandate 13 prohibited the Isaias brothers from challenging the validity of AGD-12 within the Ecuadorian court system.[24] The Isaias brothers then fled to Miami, Florida, where they have resided ever since.[25]

On April 29, 2009, the AGD filed a complaint in the Eleventh Judicial Circuit Court for Miami-Dade County, Florida, against the Isaias brothers, alleging that the Isaiases still owed $200 million to the AGD for the debts of Filanbanco pursuant to the personal guarantee imposed by Article 29 and the findings of the Deloitte Report.[26] The complaint indicated that the Isaiases currently owned $20 million in publicly known property located in Miami-Dade County that the AGD sought to apply to the Isaiases' outstanding debt.[27]

---

19. *Id.*
20. *Id.* at 392–93.
21. *Id.* at 393.
22. *Id.*
23. Appellees' Motion for Rehearing, *supra* note 12, at 6 (internal citations omitted).
24. *Id.*
25. Complaint ¶ 25, *Isaias I*, 146 So. 3d 58 (Fla. 3d Dist. Ct. App. 2014) (No. 2009-34950-CA-01-40).
26. *Id.* ¶ 39.
27. *Id.* ¶¶ 39–40.

The Isaias brothers moved for final summary judgment in March 2013, primarily asserting that the extraterritoriality exception[28] to the Doctrine was applicable to their case, precluding application of the Doctrine to bar review by United States courts.[29] The circuit court granted the motion, and the Republic of Ecuador appealed.[30]

On the case's first appeal, the Third District Court of Appeal reversed the circuit court's holding and remanded the case, contending that the complaint filed by the Republic of Ecuador did not invoke any of the relevant acts of state, but rather, "the Republic claim[ed] to be a creditor with a claim for money damages against the Isaiases based on their allegedly wrongful acts and omissions in Ecuador."[31] On the foundation of this assertion, the court held that the Doctrine did not apply, and it further found that the Isaias brothers did not present sufficient evidence at the trial court level to sustain a motion for summary judgment.[32] The court stated there were remaining material issues of fact as to the actual amount of alleged indebtedness of the Isaias brothers to the Republic of Ecuador and whether the Republic could recover money damages from the Isaiases.[33]

On remand, the Miami-Dade circuit court once again reviewed the Isaias brothers' case, but this time the court declined to address the Doctrine.[34] Instead, the court held that it was precluded from reviewing the case on the merits on two separate

28. The extraterritoriality exception to the Doctrine will be discussed further *infra* pt. II.

29. Isaias I, 146 So. 3d 58, 60–61 (Fla. 3d Dist. Ct. App. 2014).

30. *Id.* at 61.

31. *Id.* at 62.

32. *Id.* at 62–63. The court stated:

> The Isaiases did not make a conclusive showing in the circuit court that the actions by the banking authorities and Deloitte in Ecuador were confiscatory acts strictly based on politics, revolution, or regime change. The Isaiases have not provided, on this record, summary judgment evidence under Florida Rule of Civil Procedure 1.510(c) that the Republic's claims of misapplication and misrepresentation, and the Deloitte report, for example, are pretextual or even factually incorrect. On the record presented, the Isaiases had the opportunity to present information to the banking authorities (and on at least some occasions, took advantage of that opportunity) in Ecuador both before and after the issuance of the Deloitte report and before and after they moved to Miami.

Id. at 62 (internal footnote omitted).

33. *Id.* at 63.

34. Judgment at 4, Republic of Equador v. Dassum, No. 2009-34850-CA-01(40) (Fla. Cir. Ct. Oct. 16, 2015) [hereinafter *Isaias I* Judgment]

grounds: "(1) [because] the Republic of Ecuador lacked standing to bring suit; and (2) that the lawsuit was barred by the statute of limitations."[35]

According to the circuit court, the Republic of Ecuador relied on its various executive resolutions and Article 29 as its basis for standing to sue the Isaias brothers.[36] However, "[n]one of the resolutions contain[ed] any language granting any authority [to recover damages from the Isaiases] to any agency other than the AGD," and the Republic of Ecuador did not introduce any other evidence to assert its standing.[37]

Additionally, the circuit court found that the statute of limitations commenced on December 2, 1998—the last date with any evidence that can be construed as a wrongful act committed by the Isaias brothers.[38] This is the same date that the Isaias brothers ceased to be administrators of Filanbanco and the bank was placed into restructuring.[39] The lawsuit was filed on April 29, 2009, which is more than ten years since the last possible date a wrongful act could have occurred (December 2, 1998), far beyond the statute of limitations pursuant to § 95.11(3)(f) and/or (p) of the Florida Statutes.[40]

---

35. Isaias II, 255 So. 3d 390, 394 (Fla. 3d Dist. Ct. App. 2017).

36. *Isaias I* Judgment, *supra* note 34, at 4. Standing to sue under Florida law requires that "the claim be brought by or on behalf of one who is recognized in the law as a 'real party in interest,' that is, 'the person in whom rests, by substantive law, the claim sought to be enforced.'" Kumar Corp. v. Nopal Lines, Ltd., 462 So. 2d 1178, 1183 (Fla. 3d Dist. Ct. App. 1985) (quoting FLA. R. CIV. P. § 1.210 authors' cmt. 1967).

37. *Isaias I* Judgment, *supra* note 34, at 4. While the AGD was the original plaintiff when the case was initially filed, before the court heard this case on remand the AGD filed an unopposed motion for substitution of party naming the Republic of Ecuador as the proper plaintiff. *Id.* at 5.

38. *Id.* at 3.

39. *Id.*

40. *Id.*; FLA. STAT. § 95.11(3)(f), (p) (2019), stating in relevant part:

> Actions other than for recovery of real property shall be commenced as follows:
>
> . . .
>
> (3) Within four years.—
>
> . . .
>
> (f) An action founded on a statutory liability.
>
> . . .
>
> (p) Any action not specifically provided for in these statutes.

According to the statute, "the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues." *Id.* § 95.031. For the purposes of this statute, "[a] cause of action accrues when the last element constituting the cause of action occurs." *Id.* § 95.031(1). Thus, because the circuit court declined to apply the Doctrine, the Republic of Ecuador was outside of the statute of limitations at the time it filed suit in

Once again, the Republic of Ecuador appealed the circuit court's adverse ruling, and the case made its way back to the Third District Court of Appeal.[41] The Third District court held that the Doctrine precluded inquiry into the validity of AGD-12 and all other executive resolutions at issue.[42] Thus, the court found AGD-12 established that the Isaias brothers' liability commenced on July 8, 2008—within the applicable statute of limitations—and, pursuant to the Doctrine, AGD-12 must be recognized as valid and enforceable.[43] Regarding standing, the court held that because the Isaiases waived their right to challenge standing by failing to raise it as an affirmative defense, the Republic of Ecuador could not be dismissed on those grounds.[44] Considering the court's findings on these issues, the circuit court's holding was reversed and the case was remanded solely for a determination of outstanding debt still owed by the Isaias brothers to the Republic of Ecuador.[45]

B. Statement of Case Significance

By precluding inquiry into the case's merits or validity of the Republic's resolution finding the Isaias brothers guilty of fraud and embezzlement, the Isaias brothers have effectively been denied due process in Florida—as required by the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Through the court's holding in the present case, it has essentially created a new cause of action that eliminates the accused party's ability to present any defenses on the merits of the case. This decision will have severe implications in the future as it allows foreign parties to file suit in Florida courts without having to argue their case on the merits or provide any assurances that due process was afforded in the country of origin and, more

Florida, regardless of what the cause of action might have been. Additionally, the court pointed out that the Republic of Ecuador did not assert that "any longer limitations period applies" or that it should be held to an applicable Ecuadorian statute of limitations. *Isaias I* Judgment, *supra* note 34, at 6 (In re Avantel, S.A., 343 F.3d 311, 321–22 (5th Cir. 2003) (holding that the party seeking to apply foreign law has the burden of proving its substance to a reasonable certainty); Aetna Cas. & Sur. Co. v. Ciarrocchi, 573 So. 2d 990, 990 (Fla. 3d Dist. Ct. App. 1991) ("[W]here a party seeking to rely upon foreign law fails to demonstrate that the foreign law is different from the law in Florida, the law is the same as Florida.")).

41. Isaias I, 146 So. 3d 58, 59 (Fla. 3d Dist. Ct. App. 2014).
42. Isaias II, 255 So. 2d 390, 396 (Fla. 3d Dist. Ct. App. 2017).
43. *Id.* at 396–97.
44. *Id.* at 394–95.
45. *Id.* at 397.

disturbingly, precludes due process from occurring in Florida's courts.

C. Statement of Scope

Due to the Doctrine's expansiveness, courts have attempted to limit its scope through threshold limitations.[46] These threshold limitations for the Doctrine strictly require evidence of a public act and a finding that the situs of any property attempting to be confiscated by the foreign sovereign be outside the foreign sovereign's territory.[47] Thus, if there is no identifiable public act enacted by a foreign government (or "act of state")[48] pertinent to the merits of the case, or if the situs of the assets attempting to be confiscated is within the territory of the United States, the Doctrine is inapplicable to bar adjudication, and the case must proceed in accordance with the applicable United States federal laws, state laws, and procedural rules of the governing court.

While the *Isaias II* court was correct in its finding that there is an "act of state" pertinent to the merits of the present case,[49] the court made a detrimental error in failing to analyze the situs limitation to the Doctrine as a threshold issue of applicability. This limitation is commonly referred to as the extraterritoriality exception to the Doctrine, and it applies when a foreign state attempts to use an act of state to confiscate property that is not within its own borders.[50] When a foreign government tries to confiscate property within the United States, domestic "courts will

46. Stephen Jacobs, Robert H. King, Jr. & Sabino Rodriguez, III, Comment, *The Act of State: A History of Judicial Limitations and Exceptions*, 18 HARV. INT'L L.J. 677, 680 (1977).

47. *Id.*

48. The courts have defined an "act of state" as a "public act of those with authority to exercise sovereign powers." Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 694 (1976). The act may be judicial, executive, or legislative in nature. Isaias I, 146 So. 3d 58, 61 (Fla. 3d Dist. Ct. App. 2014). Examples of official acts that courts have determined to be "acts of state" include foreign legislation, executive decrees, and military actions including personal detentions and seizures of property. *E.g.*, First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (executive proclamations); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (foreign legislation); Underhill v. Hernandez, 168 U.S. 250 (1897) (military actions).

49. Here, AGD-12 is the pertinent "act" as it purports to establish both the liability of the Isaias brothers and damages owed, and the Republic is asserting the AGD-12 as the basis for its claim. *Isaias II*, 255 So. 3d at 393. This act can be considered an executive decree as it was issued by an administrative agency which derives its power from the Executive of Ecuador. *Id.* at 392–93. Thus, AGD-12 is rightly considered an "act of state" by the *Isaias II* court. *Id.* at 397.

50. Kramer, *supra* note 2, § 9[a].

give effect to [the foreign] acts of state 'only [when] they are consistent with the policy and law of the United States.'"[51]

II. HISTORY OF THE ACT OF STATE DOCTRINE

A. Origins and the Classic American Statement

The origins of the theory of the nonjusticiability of foreign acts of state can be traced back to seventeenth-century England, alongside the doctrine of sovereign immunity.[52] However, the first official recognition of the Doctrine in the United States occurred in the Supreme Court case *The Schooner Exchange v. McFaddon*.[53] Although the *Schooner* Court focused its ruling on the doctrine of sovereign immunity, it did acknowledge the Doctrine and the relationship between the two principles.[54]

The classic American statement of the Doctrine has developed through the judiciary, with its beginnings rooted in *Underhill v. Hernandez*, decided in 1897.[55] Here, the conflict arose from an 1892 revolution against the previously established Venezuelan government.[56] General Hernandez, belonging to the revolutionary party, took control of the city of Bolivar after defeating government forces and subsequently became Bolivar's civil and military chief.[57] The plaintiff here was an American citizen who traveled to Bolivar to construct a waterworks system for the city.[58] After completing construction, the American citizen applied to General Hernandez for a passport to leave Venezuela and return to the United States.[59] For months, General Hernandez refused to grant the passport—

51. Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965). For more on this, see *infra* pt. II.

52. Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 330–31 (1986). The doctrine of sovereign immunity, while closely related to the Doctrine, operates differently to bar United States courts from adjudicating cases where a foreign sovereign is a defendant to a suit. Antonia Dolar, Comment, *Act of State and Sovereign Immunities Doctrines: The Need to Establish Congruity*, 17 U.S.F. L. REV. 91, 91 (1982). For more information on the development of the doctrine of sovereign immunity and its relationship with the Doctrine, see *id.*

53. 11 U.S. (7 Cranch) 116 (1812).

54. *Id.* at 136 ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. . . . Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction.").

55. 168 U.S. 250 (1897).

56. *Id.* at 250–51.

57. *Id.* at 251.

58. *Id.*

59. *Id.*

however, he eventually surrendered, and the American citizen was granted permission to leave the country.[60] The United States formally recognized the revolutionary party as Venezuela's legitimate government five days after the plaintiff's passport was issued.[61]

The plaintiff thereafter filed suit in the United States against General Hernandez seeking damages resulting from Hernandez's refusal to grant the passport and alleged confinement and assaults that Hernandez's soldiers inflicted upon him.[62] The Court held for Hernandez, stating that as general of the revolutionary party then recognized by the United States, his actions were the acts of the Venezuelan government (or, in other terms, "acts of state") and thus were "not properly the subject of adjudication in the courts of another government."[63] This holding did not stray from the original interpretation "of the act of state doctrine as a corollary to sovereign immunity."[64]

However, in dicta, the *Underhill* Court stated:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[65]

This was the first time a United States court substantively distinguished the Doctrine from the sovereign immunity doctrine by extending it past its traditional, narrow application solely to personal immunity.[66] Following the *Underhill* decision, and more specifically this particular dictum, American courts began to use the doctrine as a territorial choice-of-law principle rather than strictly extending immunity to foreign officials acting in their governmental capacities.[67]

60. *Id.*
61. *Id.* at 251–52
62. *Id.*
63. *Id.* at 254.
64. Bazyler, *supra* note 52, at 332.
65. *Underhill*, 168 U.S. at 252.
66. Bazyler, *supra* note 52, at 332.
67. *Id.* at 332–33.

B. The Development of Additional Rationales

The next major development in the act of state jurisprudence manifested in 1918 with two factually similar cases: *Oetjen v. Central Leather Co.*[68] and *Ricaud v. American Metal Co.*[69] These cases involved disputes arising from the sale of goods in the United States that were originally expropriated by Mexican officials while performing their official governmental duties within Mexican territory.[70] To decide these cases on the merits, the Court would have had to determine whether the expropriation that occurred in Mexico was lawful.[71] Like the *Underhill* Court, the *Oetjen* and *Ricaud* Courts declined to assess the expropriation's validity pursuant to the Doctrine because the expropriations were official acts of a government formally recognized by the United States, executed within that foreign government's own territory.[72] These decisions were in accord with the *Underhill* choice-of-law application of the Doctrine.

However, in its holding, the *Oetjen* Court offered an additional rationale for applying the Doctrine. The Court stated:

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."[73]

With this statement, the Court introduced the additional rationale that the Doctrine could promote "international comity and expediency" and "amicable relations between governments."[74] At this point in the Doctrine's development, the Supreme Court used the phrase "act of state doctrine" to describe judicial abstention based on three different rationales—"providing personal immunity to officials of foreign governments, preserving

68. 246 U.S. 297 (1918).
69. 246 U.S. 304 (1918).
70. *Oetjen*, 246 U.S. at 300–01; *Ricaud*, 246 U.S. at 306.
71. *Oetjen*, 246 U.S. at 303; *Ricaud*, 246 U.S. at 307–08.
72. *Oetjen*, 246 U.S. at 303–04; *Ricaud*, 246 U.S. at 309–10.
73. *Oetjen*, 246 U.S. at 303–04 (quoting Underhill v. Hernandez, 65 F. 577, 579 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897)).
74. *Id.*

territorial choice of law, and avoiding international strife."[75] Not only did this greatly expand the scope of the Doctrine from its traditional application, but it also became the source of confusion in its application within the lower courts of the United States.

C. The Modern Status of the Act of State Doctrine

The modern status of the Doctrine was explained in *Banco Nacional de Cuba v. Sabbatino*.[76] Specifically, the Court described that "[i]n February and July of 1960 . . . an American commodity broker, contracted to purchase Cuban sugar . . . from a wholly owned subsidiary of Compania Azucarera Vertientes-Camaguey de Cuba (C. A. V.), a [Cuban] corporation . . . whose capital stock was owned principally by United States residents."[77] The parties' agreement stipulated that the American commodity broker was to pay for the sugar in New York after being presented with the shipping documents and a sight draft.[78] Around the same time, the United States Congress amended the Sugar Act of 1948, granting the president power to reduce Cuba's sugar quota.[79] President Eisenhower immediately exercised this power.[80] In retaliation, Cuba enacted Law No. 851, giving "the Cuban President and Prime Minister discretionary power to nationalize by forced expropriation property or enterprises in which American nationals had an interest."[81]

In August, the Cuban government expropriated C.A.V.'s sugar on the same day that the Cuban corporation loaded the shipment covered by the aforementioned contract.[82] The sugar shipment was halted until the American commodity broker entered into a contract—identical to the one it had with the now-nationalized Cuban sugar corporation—with a bank that was an instrumentality of the Cuban government.[83] Shipment proceeded. However, when payment was due, the American commodity broker paid the balance to the nationalized Cuban sugar corporation,

75. Bazyler, *supra* note 52, at 334.
76. 376 U.S. 398 (1964).
77. *Id.* at 401.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 403.
83. *Id.* at 403–05.

rather than the Cuban bank, in return for an indemnity agreement.[84]

The Cuban bank then filed suit in New York to recover damages, alleging conversion.[85] The respondents, *inter alia*,[86] asserted that the Doctrine was inapplicable here because the acts of the Cuban government violated international law.[87]

The Court ultimately ruled in the Cuban bank's favor, holding that the judicial branch is not entitled to "examine the validity of a taking of property within its own territory by a foreign sovereign government" recognized by the United States when suit was filed absent a "treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."[88] Delivering the opinion of the Court, Justice Harlan further intimated that similar circumstances may allow the judiciary to judge the act, stating that "the less important the implications of an issue are for our foreign relations, the weaker the justification" for applying the Doctrine.[89]

D. Territorial Limitations to Application of the Act of State Doctrine

Aside from the strict "act of state" requirement, case law has also developed to impose territorial limitations to the application of the Doctrine.[90] Otherwise known as the extraterritoriality exception, this limitation precludes applying the Doctrine where a foreign sovereign attempts to use an act of state to confiscate property that is not within its own borders absent a treaty or expression of public policy to justify the taking.[91] This exception complies with the Supreme Court's application of the Doctrine.

The Second Circuit stated that "[u]nder the traditional application of the act of state doctrine, the principle of judicial

84. *Id.* at 405–06.

85. *Id.* at 406.

86. The respondents also argued that "the [D]octrine is inapplicable unless the Executive specifically interposes it in a particular case," (referring to the *Bernstein* exception) and that "the [D]octrine may not be invoked by a foreign government plaintiff in our courts." *Id.* at 420. However, as these arguments and the *Bernstein* exception to the Doctrine are outside the scope of this Article, they will not be discussed herein.

87. *Id.*

88. *Id.* at 428.

89. *Id.*

90. Jacobs, King & Rodriguez, *supra* note 46, at 680.

91. Kramer, *supra* note 2, § 9[a].

refusal of examination applies only to a taking by a foreign sovereign property *within its own territory*."[92] In determining whether the extraterritoriality exception applies, many courts have considered such concepts as the "situs" of the debt and whether the act of state was able to reach "complete fruition" within the foreign state.[93] Additionally, in such cases involving a foreign sovereign attempting to confiscate property within United States borders, American courts give effect to the foreign acts of state only when they are "consistent with the policy and law of the United States."[94]

1. Situs of the Debt

Under *Sabbatino*, the Doctrine precludes judicial inquiry of the validity of foreign seizures only when there is "a taking of property *within its own territory* by a foreign sovereign government."[95] Courts are free to inquire into the validity of foreign acts of state unless the expropriation occurs within that foreign state.[96] An instructive holding on the situs of the debt analysis comes from *Republic of Iraq v. First National City Bank*.[97] In this case, the Republic of Iraq brought suit in a United States court against First National City Bank of New York claiming ownership of the bank account and stocks held in a custodian account by the deceased King Faisal II.[98] The Republic asserted its authority to recover the assets of the King based on a confiscatory decree issued by the Iraqi government, which stated that "all property [of the dynasty] . . . whether movable or immoveable . . . should be confiscated."[99]

In declining to apply the Doctrine to the Republic's case, the court reasoned that because only a United States court could

92. Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965) (emphasis added).

93. *See, e.g.*, Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 714–16 (5th Cir. 1968) (complete fruition); Zwack v. Kraus Bros. & Co., 237 F.2d 255, 259 (2d Cir. 1956) (situs of the debt).

94. *Republic of Iraq*, 353 F.2d at 51 (quoting RESTATEMENT (SECOND) of FOREIGN RELATIONS LAW OF THE UNITED STATES § 43(2) (AM. LAW INST. 1965)).

95. Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 877 (S.D.N.Y. 1983) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (emphasis added)).

96. *Id.*

97. 353 F.2d at 51.

98. *Id.* at 49–50.

99. *Id.* at 49 (quoting Ordinance No. 23, the Iraqi ordinance at issue here).

compel the bank to disburse the funds and stock to the Republic, the situs of the property was within the United States.[100] The court went on to explain:

> Although the nationality of King Faisal provided a jurisdictional basis for the Republic of Iraq to prescribe a rule relating to his property outside Iraq . . . this simply gives the confiscation decree a claim to consideration by the forum . . . not a basis for insisting on the absolute respect which . . . the decree would enjoy as to property within Iraq at the time.[101]

Thus, while the confiscatory decree gave the Republic standing to bring its claim in a United States court, the court was precluded from applying the Doctrine to enforce the Republic's confiscatory decree because the situs of the debt was not within the foreign sovereign's territory but rather within the United States.

After establishing that the Doctrine did not apply, the court turned its attention to whether the Republic of Iraq's confiscatory decree was in accord with United States law and policy—if it was, the court would enforce the decree.[102] Unfortunately for the Republic, the court found that the confiscatory decree was not in accord with United States law and policy, as "[o]ur Constitution sets itself against confiscations . . . not only by the general guarantees of due process in the Fifth and Fourteenth Amendments but by the specific prohibitions of bills of attainder in Article I."[103] Thus, the court ultimately declined to enforce the Republic of Iraq's act of state within the United States due to this territorial limitation to the Doctrine.

2. Complete Fruition

Another method courts frequently utilize to determine debt situs under the Doctrine is the complete fruition theory. The complete fruition theory considers whether the act of state was completed within the foreign sovereign's territory.[104] If the act was completed within the foreign territory, the situs of the debt is

100. *Id.* at 51.
101. *Id.*
102. *Id.*
103. *Id.* at 51–52.
104. Colleen R. Courtade, Annotation, *Situs of Debt or Property for Purposes of the Act of State Doctrine*, 77 A.L.R. FED. 293 § 5[b] (1986).

within that foreign territory and the Doctrine is applicable—barring adjudication by United States courts.[105] Conversely, if the act was not completed in the foreign territory, the situs of the debt is not within that territory—giving United States courts the opportunity to decide the case on the merits.[106]

A case illustrative of the complete fruition theory is *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*[107] Following the Cuban Revolution, the Cuban government issued an act that nationalized the Cuban tobacco industry.[108] An "interventor" was appointed to take over operations of each Cuban tobacco company operating in Cuba. Tabacalera Severiano Jorge, S.A. was one of those corporations.[109] A few months before enacting the nationalization decree, Tabacalera Severiano Jorge, S.A. sold and delivered approximately $100,000 in tobacco to the Standard Cigar Company of Tampa, Florida.[110] The Cuban government filed suit in Florida against the Standard Cigar Company seeking payment of $100,000 in outstanding debt owed to Tabacalera Severiano Jorge, S.A., which arose before the Cuban tobacco industry's nationalization and the interventor took control of the company.[111]

In rejecting the Republic of Cuba's assertions that the Doctrine should apply, the court stated that it finds "no compelling requirement" to "accept the fiction that the situs is irrevocably at the domicile of the creditor, a fiction sometimes used for other commercial purposes."[112] Furthermore, the court explained that the Doctrine does not require American courts, having personal jurisdiction over the parties and the *res*, to enforce a claim by a foreign sovereign "merely because the government of the foreign state would, if it had the parties before it, and the *res*, decide it differently."[113] The court held that foreign "acts are to be recognized under the [D]octrine only insofar as they were able to

105. *Id.* This complies with what is now considered the classic American description of the Doctrine: "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

106. *See* Courtade, *supra* note 104, § 5[a].

107. 392 F.2d 706 (5th Cir. 1968).

108. *Id.* at 709.

109. *Id.* at 709–10.

110. *Id.* at 707.

111. *Id.* at 710–11.

112. *Id.* at 116.

113. *Id.* at 713.

come to complete fruition within the dominion of" the foreign nation.[114] The court explained that because the Cuban government was not in a position to perform a *fait accompli* over the Standard Cigar Company's debt, the act did not come to complete fruition within Cuba's territory.[115] Failure of the Cuban act to come to complete fruition within its own territory precluded applying the Doctrine to the case.[116]

In deciding *Isaias II*, the Third District Court of Appeal never reached the territorial limitation issues regarding situs of the debt and the complete fruition theory. After determining that the relevant acts of the Republic of Ecuador sufficiently met the act of state requirement, the Third District Court of Appeal failed to complete this necessary prong in its analysis to accurately determine the applicability of the Doctrine.

III. COURT'S ANALYSIS

The Third District Court of Appeal found that the circuit court erred in its findings that: (1) the Republic of Ecuador lacked standing to bring suit, and (2) the statute of limitations for the Republic's claim expired because the Doctrine precluded applying Florida law and the circuit court's ability to hear the case on the merits. Accordingly, the court reversed the circuit court's final judgment and remanded the case for further proceedings to solely determine the Isaiases' outstanding debt.[117]

A. Lack of Standing

The Third District Court of Appeal held that the circuit court erred in finding that the Republic of Ecuador lacked standing to sue the Isaias brothers because "standing is an affirmative defense

114. *Id.* at 715.

115. *Id.*

116. *Id.* at 715–16. Because the court was ruling on an appeal from a dismissal following a motion for summary judgment, it never reached the issue of whether the Act was consistent with the laws and policies of the United States, and thus whether to enforce the act and order payment of the debt from Standard Cigar Company. *See id.* at 716 (directing judgment in favor of Cuban corporation's sole stockholder as assignee, "a status which [Standard Cigar Co.], by its pleadings, concedes he holds if the Act of State Doctrine does not control the case").

117. Isaias II, 255 So. 3d 390, 397 (Fla. 3d Dist. Ct. App. 2017).

that must be raised by the defendant to avoid waiver,"[118] and the Isaias brothers failed to raise this defense at trial.[119] The court stated that "[i]n order for a trial court to enter judgment upon an issue that was not pled, the parties must provide express or implied consent."[120] The Republic of Ecuador did not expressly consent nor did the Isaias brothers present evidence of the Republic's implied consent to try the issue of standing.[121] "Because the issue of standing was not pled as an affirmative defense and was not tried by consent, [the Court found] that the trial court erred in entering judgment in favor of the Isaiases on this ground."[122]

B. Statute of Limitations

The court also reversed the circuit court's ruling that the statute of limitations had expired, barring the Republic of Ecuador's claim. The Republic argued on appeal "that AGD-12 established that the Isaiases' liability commenced on July 8, 2008, and that the trial court violated the [D]octrine when it found that the statute of limitations commenced, at the latest, on December 2, 1998, rather than on July 8, 2008."[123] The Third District Court of Appeal agreed with the Republic's assertion.[124] The court reasoned "that the act of state doctrine requires American courts to presume the validity of 'an official act of a foreign sovereign performed within its own territory.'"[125] Therefore, the circuit court should have presumed the validity of AGD-12, which found the Isaias brothers liable on July 8, 2008.[126] Thus, according to the appellate court, the Isaias brothers' liability for Filanbanco's failure began to accrue on July 8, 2008, within the four-year

118. *Id.* at 394 (citing Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 842 (Fla. 1993); Congress Park Office Condos II, LLC v. First-Citizens Bank & Tr. Co., 105 So. 3d 602, 607 (Fla. 4th Dist. Ct. App. 2013); Schuster v. Blue Cross & Blue Shield of Fla., Inc., 843 So. 2d 909, 912 (Fla. 4th Dist. Ct. App. 2003)).
119. *Id.* at 395.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 395.
124. *Id.*
125. *Id.* at 396 (quoting Republic of Austria v. Altmann, 541 U.S. 677, 713 (2004) (Breyer, J., concurring)).
126. *Id.*

statute of limitations as prescribed by Section § 95.11(3)(p), Florida Statutes.[127]

C. Proceedings on Remand

The Third District Court of Appeal remanded the case and instructed that the circuit court proceedings on remand are limited solely to calculating the amount in damages still owed by the Isaias brothers to the Republic of Ecuador.[128] The court based this holding on the finding that the Doctrine precluded review of AGD-12, which determinatively found the Isaias brothers liable for the failure of Filanbanco. However, the court never analyzed whether the Doctrine was, in fact, applicable—meaning the court did not consider the territorial limitations to the Doctrine nor did it analyze any possible applicable exceptions to the Doctrine's application.[129] Thus, not only was the Republic of Ecuador not required to prove the Isaias brothers' liability for Filanbanco's losses, it was also granted the right to seize the Isaias brothers' assets located within the United States without any assurances that due process was afforded to the defendants abroad.[130]

IV. CRITICAL ANALYSIS

The Third District Court of Appeal erred in failing to adequately analyze the applicability of the Doctrine to the Isaias brothers' case. The threshold issues for applying the Doctrine require finding a relevant "act of state" and that the territorial requirements were completed within the foreign sovereign's territory.[131] While AGD-12 and other resolutions likely constitute "acts of state" as defined by the courts,[132] this court failed to conduct an analysis of the Doctrine's territorial limitations, which preclude its application to the Isaias brothers' case.

---

127. *Id.* at 396–97. For more on applying Florida's statute of limitations here, see *supra* note 40.

128. *Isaias II*, 255 So. 3d at 397. The circuit court's third review of *Isaias II* on remand has not yet occurred as of the time of writing this Casenote.

129. *Id.*

130. *But see id.* ("As this Court noted in *Isaias I*, however, this does not mean that the Republic is entitled to *automatically* seize the Isaiases' property in Miami–Dade County.") (emphasis added).

131. Jacobs, King & Rodriguez, *supra* note 46, at 680.

132. *See id.* (describing the limit of the Doctrine and three broad exceptions).

In failing to analyze the extraterritoriality exception's effect, the court blindly applied the Doctrine, which led to its incorrect application of the law to the issues raised on appeal. This error will ultimately allow the Republic of Ecuador to seize the Isaias brothers' assets in the United States without having to prosecute the case on the merits, contradicting United States law and policy. Thus, Part A will analyze the extraterritoriality exception to the Doctrine in relation to the facts of the case. Part B will discuss the relevant acts of state in relation to United States law and policy. Part C will examine the court's ruling on the issue of standing, and finally Part D will consider the court's holding on the statute of limitations issue and how it was negatively affected by the court's failure to consider the extraterritoriality exception as a threshold issue for the Doctrine's applicability.

A. The Extraterritoriality Exception to the Act of State Doctrine Applies in the Present Case

1. AGD-12 Did Not Come to Complete Fruition Within Ecuador's Territory

While the Republic of Ecuador was able to seize vast portions, if not all, of the Isaias brothers' assets in Ecuador, it was not able to perform a *fait accompli* over all of the Isaiases' assets—namely those located in the United States. Thus, AGD-12 did not come to complete fruition within the foreign sovereign's territory, barring application of the Doctrine to the present case. The *Tabacalera* court said American courts with personal jurisdiction over the parties and the *res* need not enforce a claim by a foreign sovereign "merely because the government of a foreign state would, if it had the parties before it, as well as the *res*, decide it differently."[133] The court failed to consider the complete fruition theory at all in holding that the Doctrine barred the circuit court's review of the case on the merits.

2. The Situs of the Debt Is in the United States

Another method of determining the extraterritoriality exception's applicability is defining the "situs of the debt." The

133. Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 713 (5th Cir. 1968).

present case is like *Republic of Iraq v. First National City Bank*.[134] While AGD-12 and the other resolutions gave the Republic of Ecuador[135] standing to sue in a United States court, as the *Republic of Iraq* court stated, it is "not a basis for insisting on . . . absolute respect."[136] The Republic of Ecuador does not have the power to enforce AGD-12 upon the Isaias brothers, which is precisely the action that the Republic is seeking from Florida courts. Thus, following the reasoning in *Republic of Iraq*, the situs of the debt is properly within the United States. Accordingly, the Doctrine only applies to *Isaias II* if the relevant acts are "consistent with the policy and law of the United States."[137]

B. The Acts Are Inconsistent with the Laws and Policies of the United States

Based on evidence presented at trial and the nature of the relevant acts of state enacted by the Republic of Ecuador, such acts cannot be in accord with United States law and policy. There was substantial evidence presented at the circuit court level raising material issues of fact as to whether the Isaias brothers were afforded due process in Ecuador and were actually guilty of fraud and embezzlement.[138] Furthermore, on the case's first appeal, the court stated that there were remaining material issues of fact as to whether the Republic was entitled to the recovery of money damages from the Isaiases.[139] The Isaias brothers' apparent lack of due process is in direct conflict with both the Fourteenth Amendment to the United States Constitution[140] and Article I of Florida's Constitution.[141]

The Republic of Ecuador's acts of state violate both the United States and Florida Constitutions' prohibitions on ex post facto laws

134. 353 F.2d 47 (2d Cir. 1965).

135. More accurately, as the circuit court pointed out, the AGD. *Isaias I* Judgment, *supra* note 34, at 4.

136. 353 F.2d at 51.

137. *Id.* (quoting RESTATEMENT (SECOND) of FOREIGN RELATIONS LAW OF THE UNITED STATES § 43(2) (AM. LAW INST. 1965)).

138. *See* Appellees' Motion for Rehearing, *supra* note 12, at 2 ("[T]he Florida trial court found that substantial evidence at trial showed that the defendants had committed no wrongdoing and were not provided due process in Ecuador.").

139. Isaias I, 146 So. 3d 58, 63 (Fla. 3d Dist. Ct. App. 2014).

140. U.S. CONST. amend. XIV, § 1 (providing that no state shall "deprive any person of life, liberty, or property, without due process of law").

141. FLA. CONST. art. I, § 9 ("No person shall be deprived of life, liberty or property without due process of law.").

and bills of attainder.[142] AGD-12, which found the Isaias brothers liable for fraud and embezzlement and granted the AGD resulting damages, was enacted ten years after the Isaiases could have potentially committed the accused crimes.[143] Therefore, AGD-12 operates as an ex post facto law—designed to punish the Isaiases for alleged crimes that occurred years earlier.

A bill of attainder is defined as "a legislative act that applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."[144] Mandate 13 falls squarely within this definition, and its only application is to AGD-12, implicating the Isaias brothers.[145] However, we need not speculate on the drafters' intent for Mandate 13 to apply specifically to the Isaias brothers, as "[t]he preface to Mandate 13 expressly stated that it was enacted to prevent the Isaiases from challenging AGD-12."[146] Further, the Isaias brothers were punished by the act through its prohibition of their ability to challenge AGD-12 in Ecuadorian courts. Thus, Mandate 13 is a bill of attainder, directly violating the United States and Florida Constitutions. Because the relevant acts of state are subject to the extraterritoriality exception to the Doctrine, and the acts are not in accord with United States law and policy, the court should not have held that the Doctrine barred the court from determining the case on the merits. Regarding the present case, the ultimate effect of the court's failure to analyze these territorial limitations to the Doctrine was that the court's analysis of the issues on appeal was partly incorrect.

C. The Court Correctly Ruled on the Issue of Standing

The court's error in applying the Doctrine to the Isaiases' case did not affect its holding on the issue of standing. The Third District Court of Appeals correctly identified that standing is an affirmative defense, which is waived if a defendant fails to raise

142. U.S. CONST. art. I, § 9 ("No Bill of Attainder or *ex post facto* Law shall be passed."); FLA. CONST. art. I, § 10 ("No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.").

143. Isaias II, 255 So. 3d 390, 393 (Fla. 3d Dist. Ct. App. 2017).

144. 16B AM. JUR. 2D *Constitutional Law* § 716 (2009).

145. Appellees' Motion for Rehearing, *supra* note 12, at 6 (revealing that the mandate "forb[ade] all judges—on pain of criminal prosecution—from challenging AGD-12") (internal citations omitted).

146. *Id.*

the issue at trial.[147] While the AGD may, in reality, be the proper party with standing to sue the Isaias brothers here, this issue should have been raised when the AGD filed its motion for party substitution; which, according to the circuit court, was granted unopposed.[148] Accordingly, the Isaias brothers failed to raise this affirmative defense at the proper time—waiving the issue and precluding themselves from challenging the Republic's standing.

D. The Court Incorrectly Decided the Issue of Statute of Limitations

The court's error under the Doctrine negatively impacted its statute of limitations holding. The court's presumption that the Doctrine applied, without sufficiently analyzing the threshold issues, led to its holding that the statute of limitations had not expired. The court explained that AGD-12 established liability of the Isaias brothers on July 8, 2008; under the Doctrine, the court could not review AGD-12. Accordingly, the statute of limitations began to run on that date, which falls within Florida's statute of limitations for the cause of action.[149] Regardless of the court's failure to adequately determine the applicability of the Doctrine, the court's logic is flawed. If the Doctrine was applicable here then the Florida statute of limitations would not apply.[150]

However, the court should not have applied the Doctrine here because the territorial limitations and because the Republic of Ecuador's acts of state relevant to this case violate United States

147. *See* Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 842 (Fla. 1993) (defendant waived standing by failing to challenge it as an affirmative defense at the trial court level); Congress Park Office Condos II, LLC v. First-Citizens Bank & Tr. Co., 105 So. 3d 602, 607 (Fla. 4th Dist. Ct. App. 2013) ("By failing to properly plead lack [of] standing . . . the [defendants] waived their right to assert [this] affirmative defense[ ] in response to [plaintiff's] summary judgment motion."); Schuster v. Blue Cross & Blue Shield of Fla., Inc., 843 So. 2d 909, 912 (Fla. 4th Dist. Ct. App. 2003) (stating that while lack of standing is an affirmative defense that must be raised to avoid waiver, the issue can nonetheless be tried by consent of the plaintiffs).

148. *Isaias I* Judgment, *supra* note 34, at 5.

149. *Isaias II*, 255 So. 3d at 395 (explaining that "the trial court also found that the Republic's action was barred by the four-year limitations period set forth in" FLA. STAT. § 95.11(3)(f), (p) (2019)).

150. *See* Tahyar, *supra* note 7, at 595 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 reporter's note 1 (AM. LAW INST. 1987)) ("In practice, the [D]octrine operates as an extraordinary choice-of-law rule, mandating the application of foreign law.").

law and policy. Thus, the Republic of Ecuador's claim was outside of the statute of limitations under Section § 95, Florida Statutes.[151]

According to the statute, "the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues."[152] Under this statute "[a] cause of action accrues when the last element constituting the cause of action occurs."[153] The longest time the statute allows a plaintiff to bring a claim is twenty years for "[a]n action on a judgment or decree of a court of record in this state."[154] The next longest amount of time allowed by the statute is five years, for several causes of action.[155]

As the circuit court established, the "last element constituting the cause of action" could only have been, at the latest, December 2, 1998—the latest date the Isaias brothers maintained authority within Filanbanco.[156] The present case was filed on April 29, 2009, more than ten years after accrual.[157] As this case does not involve an action on a judgment or decree issued by a Florida court, regardless of precisely what the cause of action is, the Republic falls outside of the statute of limitations by at least five years. Thus, had the court correctly found the Doctrine inapplicable, it still would not have reached the merits, as the Republic of Ecuador is precluded from asserting its claim against the Isaias brothers in Florida courts under Florida's statute of limitations.

V. CONCLUSION

The *Isaias II* court erred in applying the Doctrine here. By doing so, the court failed to review the acts of state, ultimately leading the court to find the Isaias brothers guilty of embezzlement and fraud, imposing liability upon the brothers for Filanabanco's failure. The court should have conducted a more thorough analysis of the Doctrine's limitations and exceptions. Had it done so, the court likely would have held that the Doctrine, in fact, permits review of the relevant Ecuadorian acts. Even with a finding that the Doctrine was inapplicable, the court still would not have had

151. FLA. STAT. § 95.11(3)(f), (p) (2019).
152. *Id.* § 95.031.
153. *Id.* § 95.031(1).
154. *Id.* § 95.11(1).
155. *Id.* § 95.11(2).
156. *Isaias I* Judgment, *supra* note 34, at 3.
157. *Id.*

the opportunity to rule on the merits of the case or pass judgment on the Republic's relevant acts of state because the applicable statute of limitations expired.

Aside from the limitations and exceptions to the Doctrine, the *Isaias II* court missed another major consideration. As acknowledged in the Introduction, the Doctrine's principal purpose is preserving international comity and reserving issues of foreign relations for the executive branch—the arm of our government that is empowered by the Constitution and best equipped to handle such matters.

Even the court in *Banco Nacional de Cuba v. Sabbatino*, regarded as the modern statement of the Doctrine, recognized that "the less important the implications of an issue are for our foreign relations, the weaker the justification" for the Doctrine.[158] In its decision, the *Isaias II* court ignored the current state of foreign relations between the United States and Ecuador and whether a decision from the judiciary might have any negative effect on that relationship. This may have provided yet another ground for dismissing the Republic of Ecuador's claims against the Isaiases.

Aside from the adverse effects this ruling will impose personally upon the Isaias brothers, in a broader sense this decision will only add to the confusion that has developed through case law regarding the proper application of the Doctrine. This confusion in application results in part from the expansion of the justifications for use of the Doctrine after the *Oetjen* and *Ricuad* decisions. However, those decisions were still in accord with the Doctrine's underlying principles and original statement in *Underhill*.

The *Isaias II* court's use of the Doctrine in this manner dilutes the true purpose of the Doctrine and creates precedent for later courts to use the Doctrine to refrain from ruling on cases in which there is merely a foreign sovereign named as a party and a relevant act of state. What is most troubling is that the *Isaias II* court not only used the Doctrine as justification for not ruling on the Isaiases' case on the merits, but it went a step further by ordering enforcement of the foreign acts. Thus, by creating this dangerous precedent, future defendants facing litigation against a foreign sovereign might find themselves deprived of their right to due process just as the Isaias brothers have.

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