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Abstract

This article will review the traditional approach to nationalization and assess the new theories in light of the FSIA [the Foreign Sovereign Immunities Act of 1976], Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) [Dunhill], and recent case law.

CHARACTERIZING NATIONALIZATIONS FOR PURPOSES OF THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE ACT OF STATE DOCTRINE

*George Kahale, III**

INTRODUCTION

Prior to the Supreme Court's decision in *Alfred Dunhill, Inc. v. Republic of Cuba*[1] and the passage of the Foreign Sovereign Immunities Act of 1976[2] (FSIA), the sovereign character of acts of nationalization was rarely disputed.[3] Since the FSIA and *Dunhill*, however, new theories have been developed which characterize nationalization as a commercial act or an act in connection with a commercial activity.[4] The issue goes to the heart of both the FSIA's commercial activity exception to immunity[5] and the act of state doctrine[6] in nationalization cases. This Article will review the traditional approach to nationalizations and assess the new theories in light of the FSIA, *Dunhill* and recent case law.

I. *OVERVIEW OF SOVEREIGN IMMUNITY AND ACT OF STATE DOCTRINE*

A. *Sovereign Immunity*

Sovereign immunity is an internationally recognized doctrine under which the courts of one state will decline to exercise jurisdiction over another state without its consent.[7] Although most nations give effect to some form of sovereign immunity, the precise circum-

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1. 425 U.S. 682 (1976).

2. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976)).

3. *See infra* text accompanying notes 28-43.

4. *See infra* text accompanying notes 44-84. For purposes of this Article, no distinction is made between the terms "nationalization" and "expropriation."

5. *See* 28 U.S.C. § 1605(a)(2) (1976).

6. *See infra* text accompanying notes 15-24.

7. H.R. REP. No. 1487, 94th Cong., 2d Sess. 8-9, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6606-07 [hereinafter cited as HOUSE REPORT]. *See* Jet Line Servs., Inc. v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1168-69 (D. Md. 1978).

stances under which immunity is granted vary from country to country.[8] At first, the absolute theory of immunity prevailed, affording foreign states immunity from all suits.[9] With the increasing participation of states in commercial activities, a trend developed toward restricting the scope of state immunity to suits based on sovereign acts.[10]

The United States formally adopted the "restrictive theory" of sovereign immunity in 1952.[11] Yet, despite consensus as to the principle, there remained substantial uncertainty as to the outcome of any given case, largely due to the absence of a consistent method

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8. *See* HOUSE REPORT, *supra* note 7, at 9. *See also* State Immunity Act, 1978, ch. 33; European Convention on State Immunity, May 16, 1972, Europ. T.S. No. 74, *reprinted in* 11 I.L.M. 470 (1972).

9. *See* The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). Although most Western nations long ago adopted the restrictive theory, the absolute theory of sovereign immunity retained its vitality in the United Kingdom until the passage of the State Immunity Act. HOUSE REPORT, *supra* note 7, at 8.

10. Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transps., 336 F.2d 354, 360 (2d Cir. 1964) (restrictive theory is designed "to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarassment or hindrance of defending the propriety of such acts before foreign courts"), *cert. denied*, 381 U.S. 934 (1965). *See also* HOUSE REPORT, *supra* note 7, at 6-7.

11. This position was adopted by the Department of State in the "Tate Letter." Letter from Jack B. Tate, Acting Legal Advisor, Dep't of State, to Philip B. Perlman, Acting Attorney General of the United States (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952). Prior to the FSIA, the State Department played a central role in the sovereign immunity decision-making process. *See* HOUSE REPORT, *supra* note 7, at 6-7; *Sovereign Immunity Decisions of the Department of State* (M. Sandler, D. Vagts & B. Ristau eds.) in 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1017 app. (J. Boyd ed. 1979). Foreign governments had the option of petitioning the State Department for suggestions of immunity. The Department's decisions on such petitions were held binding upon the courts. *See* Republic of Mex. v. Hoffman, 324 U.S. 30, 34-36; *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943). Although the State Department adopted the restrictive theory of immunity from suit in the Tate Letter, it continued to adhere to the absolute theory of immunity from execution. HOUSE REPORT, *supra* note 7, at 8. The latter remained in effect until the passage of the FSIA, which liberalized the rules with respect to execution on the property of a foreign state. 28 U.S.C. §§ 1609-1611 (1976). There are still certain circumstances under which suit may be brought against a foreign state but a judgment may not be executed. *See* Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 221-22 (1979). *Compare* 28 U.S.C. § 1605(a)(2) (1976) (jurisdictional immunity denied if suit based on commercial activity having specified contacts with the United States) *with* 28 U.S.C. § 1610(a)(2) (1976) (where jurisdiction is based on commercial activity provision, immunity of foreign government's property from execution denied only where property is used for commercial activity upon which the claim is based).

for distinguishing between acts *jure gestionis* (private or commercial acts) and acts *jure imperii* (sovereign acts).[12] In 1976, Congress codified the restrictive theory in the FSIA and selected the "nature of the act" test for determining whether a particular act constitutes "commercial activity."[13] Section 1605(a)(2) of the FSIA, the commercial activity exception to the FSIA's general rule of jurisdictional immunity for foreign states, denies such immunity in cases

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[14]

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12. *Victory Transp.*, 336 F.2d at 358-62. *See infra* text accompanying notes 28-33. Another source of uncertainty was uneven application of the restrictive theory by the State Department. *See* Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974) (suggestion of immunity from suit in commercial case); Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.) (suggestion of immunity from suit in commercial case involving a waiver of immunity), *cert. denied*, 404 U.S. 985 (1971).

13. 28 U.S.C. §§ 1602, 1603(d), 1605(a)(2) (1976). Under this test, the nature of the act, rather than the purpose for which it is performed, is considered controlling. *See infra* text accompanying notes 29-31. The legislative history indicates that the codification of the restrictive theory of sovereign immunity was the primary purpose of the FSIA. HOUSE REPORT, *supra* note 7, at 6-7. *See* Velidor v. L/P/G Benghazi, 653 F.2d 812, 817 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); Texas Trading & Milling Corp. v. Federal Rep. of Nig., 647 F.2d 300, 310 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); Jet Line Servs., Inc. v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1170 (D. Md. 1978). Another purpose was to promote uniformity of decision and depoliticize the decision-making process by placing the responsibility for sovereign immunity determinations in the hands of the courts. *See* National Airmotive Corp. v. Government of Iran, 499 F. Supp. 401, 406 (D.D.C. 1980); 28 U.S.C. § 1602 (1976); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the Comm. on the Judiciary of the House of Representatives*, 94th Cong., 2d Sess. 26-27, 34-35, 58-60, 88-89 (1976); HOUSE REPORT, *supra* note 7, at 7. *See also supra* notes 11-12.

14. 28 U.S.C. § 1605(a)(2) (1976). In actions brought against foreign states in federal courts, the FSIA integrates the issues of sovereign immunity and jurisdiction, hinging the latter upon the former. A general rule of immunity from the jurisdiction of both state and federal courts in the United States is set forth in section 1604, followed by various exceptions to that rule in section 1605. Apart from the commercial activity provision, those exceptions relate to cases involving: waivers of immunity; certain expropriation claims; certain claims involving rights in property in the United States acquired by succession or gift or immovable property located in the United States; certain noncommercial tort claims; and certain admiralty claims. 28 U.S.C. § 1605(a)(1), (a)(3)-(5), (b) (1976). Immunity exceptions also exist for cases in which the foreign state appears as plaintiff and a counterclaim is asserted. 28 U.S.C.

B. *Act of State Doctrine*

The act of state doctrine is related to the doctrine of sovereign immunity, with some important differences. The classic formulation of the act of state doctrine appears in the Supreme Court's decision in *Underhill v. Hernandez:*[15]

> 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.[16]

Unlike sovereign immunity, the act of state doctrine is a substantive rule of federal law which must be considered in all cases in which the validity of a foreign government's action is called into question,[17] even when the government itself is not named as a defendant in the case.[18] It is not a principle addressed to the court's jurisdiction but one which is applied by the court in reaching a determination on the merits of a case.[19]

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§ 1607 (1976). Section 1330(a) provides that if a foreign state is not entitled to jurisdictional immunity with respect to any claim, the federal district courts shall have original jurisdiction over that claim. *See* Verlinden B.V. v. Central Bank of Nig., 103 S. Ct. 1962 (1983). Under section 1330(b), personal jurisdiction exists over a foreign state with respect to any claim over which the federal court has subject matter jurisdiction provided that service of process is made in accordance with the exclusive service provisions of the FSIA. 28 U.S.C. §§ 1330(a)-(b), 1604, 1605, 1608 (1976). *See* Kahale & Vega, *supra* note 11, at 224-26. Thus, the commercial activity and jurisdictional issues are linked. If a plaintiff's claim is based on a commercial activity of a foreign state having the requisite nexus with the United States under section 1605(a)(2), immunity will be denied and the federal courts will have personal and subject matter jurisdiction under section 1330, assuming that service of process is made under section 1608. It should be noted, however, that section 1605(a)(2) is not the only avenue to jurisdiction. Immunity may also be denied, and jurisdiction therefore found to exist, if any other immunity exception is applicable. 28 U.S.C. § 1330(a)-(b) (1976).

15. 168 U.S. 250 (1897).

16. *Id.* at 252.

17. That the act of state doctrine is a federal principle applicable in actions brought in state courts was made clear in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27 (1964).

18. *See, e.g.*, Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). The Court observed in *Sabbatino:* "Perhaps the most typical act of state case involves the original owner or his assignee suing one not in association with the expropriating state who has had 'title' transferred to him." 376 U.S. at 435.

19. *See Ricaud*, 246 U.S. at 309-10.

Act of state cases often involve legislative or administrative actions of foreign governments, which are generally considered sovereign in nature.[20] In *Dunhill*, however, the Court was faced with the issue whether the doctrine applied to a repudiation of a commercial obligation to pay money by commercial agents of the Cuban government.[21] In a five-to-four decision, the Court held that the repudiation was not an act of state because there was no evidence that the agents were exercising the sovereign authority of the Cuban government.[22] Four justices went further and indicated that the act of state doctrine would not have applied even if Cuba had purported to exercise its sovereign powers to repudiate the debt.[23] While this view did not command the support of a majority of the Court, *Dunhill* has been cited as supporting a "commercial activity" exception to the act of state doctrine.[24]

The characterization of nationalizations as either "sovereign" or "commercial" acts is thus a central issue with respect to both the

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20. *See, e.g.*, *Sabbatino*, 376 U.S. 398 (nationalization); Underhill v. Hernandez, 168 U.S. 250 (1897) (refusal to grant passport); Allied Bank Int'l v. Banco Credito Agricola de Cartago, 566 F. Supp. 1440 (S.D.N.Y. 1983) (decree requiring approval for foreign debt repayment and denial of approval); Frankel v. Banco Nacional de Mex., No. 82 Civ. 6457 (S.D.N.Y. May 31, 1983) (exchange control regulations); Frolova v. USSR, 558 F. Supp. 358 (N.D. Ill. 1983) (denial of emigration); Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977) (denial of import licenses); French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968) (decision that currency conversion certificates would not be honored).

21. Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

22. *Id.* at 690-95.

23. *Id.* at 695. *See infra* text accompanying notes 62-67.

24. Empresa Cubana Exportadora de Azucar y sus Derivados v. Lamborn & Co., 652 F.2d 231, 238 (2d Cir. 1981); Hunt v. Mobil Oil Corp., 550 F.2d 68, 73 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). *See also* Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48, 52 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980), *vacated and remanded*, 103 S. Ct. 1244 (1983); Mirabella v. Banco Indus. de la Rep. Argen., 101 Misc. 2d 767, 769, 421 N.Y.S.2d 960, 961-62 (Sup. Ct. 1979). A footnote in the section-by-section analysis contained in the *House Report* states:

> Under the act of state doctrine, United States Courts may refuse to adjudicate the validity of purely public acts of foreign sovereigns, as distinguished from commercial acts, committed and effective within their own territory . . . .
>
> The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by [the FSIA], whose touchstone is a concept of "commercial activity" involving significant jurisdictional contacts with this country.

HOUSE REPORT, *supra* note 7, at 20 n.1. *See* National Am. Corp. v. Federal Rep. of Nig., 448 F. Supp. 622, 640 (S.D.N.Y. 1978) ("By emphasizing that commercial activity serves as the

sovereign immunity and act of state doctrines in nationalization cases. In suits against the foreign state itself, resolution of the issue may be dispositive of the jurisdictional question under the FSIA.[25] In other cases, or in cases in which jurisdiction over a foreign state is acquired other than through the FSIA's commercial activity exception to immunity,[26] the characterization of a nationalization may determine the outcome of the act of state issue and consequently the merits of the case.[27]

II. *THE TREATMENT OF NATIONALIZATIONS PRIOR TO THE FSIA AND* DUNHILL

Prior to the FSIA and *Dunhill*, nationalization was considered the classic example of an act of state.[28] This characterization seemed to flow from each of the tests prevailing prior to the FSIA for distinguishing between acts *jure gestionis* and acts *jure imperii* in immunity cases.

The initial tests to be formulated were known as the "purpose of the act" and "nature of the act" tests.[29] Under the former, an act was considered sovereign if performed for a public purpose.[30] Since all acts of a government are arguably performed for some public purpose, it is not clear that any activity of a government could be considered commercial under the purpose test. On the other hand,

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touchstone of both the *Dunhill* decision and sovereign immunity under the Act, Congress seems to be suggesting that both theories be interpreted in tandem."). *Cf.* International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1360 (9th Cir. 1981) ("The act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity."), *cert. denied*, 454 U.S. 1163 (1982).

25. *See supra* note 14.

26. *See id. See infra* text accompanying notes 85-155.

27. *See supra* text accompanying notes 15-19.

28. *See Sabbatino*, 376 U.S. 398; American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *Victory Transp.*, 336 F.2d 354; Occidental of Umm Al Qaywayn, Inc. v. Cities Serv. Oil Co., 396 F. Supp. 461 (W.D. La. 1975), *aff'd on other grounds sub nom.* Occidental of Umm Al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979); American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary, 257 F. Supp. 622 (D.N.J. 1966); Eastern States Petroleum Co. v. Asiatic Petroleum Corp., 28 F. Supp. 279 (S.D.N.Y. 1939). *See also* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 comment d (1965).

29. *See* International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1357 n.6 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Victory Transp.*, 336 F.2d at 359.

30. *Victory Transp.*, 336 F.2d at 359.

the nature of the act test turns upon whether the act is ordinarily performed by private parties or by governments.[31] Even under this test, however, nationalizations generally were understood to be acts uniquely governmental in nature since they involved formal legislative or executive action effecting the transfer by law of private property to public hands.

A third approach to the distinction between sovereign and commercial (or private) acts prior to the FSIA was established by the Second Circuit in *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes.*[32] In *Victory Transport*, the court criticized both of the foregoing tests and decided to formulate its own by listing five categories of sovereign acts.[33] The second category was "legislative acts, such as nationalization."[34]

Most of the cases which applied the traditional view of nationalization involved the act of state doctrine, rather than sovereign immunity, because prior to the FSIA the courts were not usually confronted with a suit directly against a foreign state based on a nationalization.[35] The most important of those cases was *Banco Nacional de Cuba v. Sabbatino,*[36] in which an agency of the Cuban government sought to recover the proceeds of the sale of a cargo of sugar nationalized by the Cuban government.[37] After confirming

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31. *Id.* For example, the purchase of supplies for an army would be considered commercial even though the purchase clearly had a public purpose. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 330-32 (3d ed. 1979); Weiss, *Compétence ou Incompétence des Tribunaux à l'Égard des États Étrangers*, 1 RECUEIL DES COURS 525 (1923). Of course, before applying this test, it is necessary to identify the act at issue. *See infra* text accompanying notes 46-61. It is true that private parties ordinarily purchase supplies, but not for an army. A finding of commercial activity results only after the act at issue is identified as purchasing, without reference to the purpose of the purchase.

32. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

33. *Id.* at 360.

34. *Id.* The other four categories listed by the court were: internal administrative acts; acts concerning the armed forces; acts concerning diplomatic activity; and public loans. *Id.* The first two categories, internal administrative acts and legislative acts, would normally constitute sovereign activity under the nature of the act test. That test, however, could lead to the opposite conclusion in the case of many acts concerning the armed forces or diplomatic activity, such as purchasing supplies for the army or renting a building for an embassy. Public loans would also constitute acts *jure gestionis* under the nature of the act test. Since the court in *Victory Transport* assumed that any acts related to the armed forces or diplomatic activity, as well as public loans, were sufficiently within the sovereign domain to be protected from judicial scrutiny, it was necessary for the court to devise its own method for distinguishing between acts *jure imperii* and acts *jure gestionis*.

35. *See* cases cited *supra* note 28.

36. 376 U.S. 398 (1964).

37. *Id.* at 400-08.

that the act of state doctrine applied to the "public" acts of a foreign sovereign,[38] the Court held the doctrine controlling even though the nationalization had been found by the Second Circuit to be in violation of customary international law.[39] In reaching that decision, the focus of the Court's discussion was on the lack of consensus in international law concerning the power of a state to expropriate the property of aliens[40] and the impropriety of judicial review of such actions "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles."[41] The status of the expropriation as a purely public act was never in issue.[42]

Prior to the FSIA and *Dunhill*, the results in cases involving nationalizations were thus fairly predictable. If a foreign state were sued based on a nationalization, it would be accorded immunity; if the state were not a defendant but the suit nevertheless challenged the validity of the nationalization, the act of state doctrine would be applied. Exceptions to these rules existed, but they were not

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38. *Id.* at 401.

39. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964).

40. *Sabbatino*, 376 U.S. at 428-37. Justice Harlan observed that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." *Id.* at 428 (footnote omitted).

41. *Id.*

42. As a reaction to the *Sabbatino* decision, Congress enacted the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2) (1976), which directs:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection; *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Id. Subsequently, in the FSIA, Congress enacted a similar exception to the jurisdictional immunity of foreign states. 28 U.S.C. § 1605(a)(3) (1976). *See infra* note 61.

based on any connection between nationalization and the concept of commercial activity.[43]

III. *THE CHARACTER OF NATIONALIZATIONS UNDER THE FSIA AND* DUNHILL

The definition of "commercial activity" in the FSIA,[44] the commercial activity exception to immunity in the FSIA,[45] and *Dunhill* have given rise to various theories of nationalization as a commercial act, or an act in connection with a commercial activity, for purposes of the FSIA and the act of state doctrine.

As noted above, Congress not only codified the restrictive theory of sovereign immunity in the FSIA but also adopted the "nature of the act" test for determining commercial activity.[46] Section 1603(d) of the FSIA provides: "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[47] This relatively simple definition goes a long way toward clarifying the scope of the commercial activity exception to immunity contained in section 1605(a)(2).[48] It falls short, however, of providing a mechanical, definitive answer to all fact patterns;

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43. Even under the absolute theory of sovereign immunity, it was possible for a state to waive its immunity. *See, e.g.*, Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1931). With respect to the act of state doctrine, several exceptions (in addition to the statutory exception set out in note 42) which were not dependent upon a finding of commercial activity had been developed by the courts. *See, e.g., Sabbatino*, 376 U.S. at 428 (doctrine might not apply where there is a "treaty or other unambiguous agreement regarding controlling legal principles"); United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868 (2d Cir. 1976) (doctrine does not apply to taking of property situated outside the territory of the acting state). In some cases, particularly those involving a contractual or similar relationship between the plaintiff and the state entity, the extraterritoriality exception has been raised in tandem with the *Dunhill* "commercial activity" exception. *See, e.g.*, Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., No. 81 Civ. 7624, slip op. at 26 (S.D.N.Y. Mar. 21, 1983) (since extraterritoriality exception was held applicable, it was unnecessary to "reach the issue of whether this case falls within the commercial activity exception to the doctrine, if such an exception exists").

44. *See* 28 U.S.C. § 1603(d) (1976).

45. *See* 28 U.S.C. § 1605(a)(2) (1976).

46. *See supra* text accompanying notes 11-14, 31.

47. 28 U.S.C. § 1603(d) (1976).

48. 28 U.S.C. § 1605(a)(2) (1976).

indeed, it was never intended to do so. As stated in the section-by-section analysis of the FSIA incorporated in the House Report (the section-by-section analysis): "It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable."[49]

During the Congressional hearings on the draft legislation, the following explanation of section 1603(d) was given:

> [T]he courts would inquire whether the activity in question is one which private parties ordinarily perform or whether it is peculiarly within the realm of governments.
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> . . . [A]side from mentioning that it should be not based on the purpose for which the activity occurred, but rather on its nature, we have decided to put our faith in the U.S. courts to work out progressively, on a case-by-case basis, and using such guidance as has already developed in the very large body of case law which exists, on the distinction between commercial and governmental.[50]

This legislative history supports the traditional characterization of an executive or legislative act of nationalization as a sovereign act. By definition, private parties are incapable of taking that kind of measure. Moreover, the large body of pre-FSIA case law unanimously affirms the sovereign character of nationalizations.[51]

Nevertheless, a serious question is raised under the "nature of the act" test in section 1603(d), particularly in light of *Dunhill*, regarding the extent to which the character of a nationalization may be tainted by an underlying direct relationship between the state and the person whose assets are nationalized.[52] A hypothetical case illustrates the problem. Assume that the government of country *X* passes a law nationalizing its mining industry. Under the constitution of *X*, all minerals in the ground are the property of the

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49. HOUSE REPORT, *supra* note 7, at 16.

50. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcom. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 53 (1976) (statement of Monroe Leigh, Legal Adviser, Dep't of State).

51. *See supra* note 28.

52. *See* Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 57-58 (1978).

state and can only be exploited through concessions granted by the state. *X* had granted concessions to various foreign companies, including *Y*, a United States company. Among the assets nationalized are the mining concessions and physical assets of those companies. *Y* brings an action in the United States for compensation for the nationalization, asserting jurisdiction by reason of section 1605(a)(2) of the FSIA. *Y*'s theory proceeds as follows: its concession constituted a contract with *X*; the nationalization of the concession constituted a breach of that contract; a breach of contract is the type of act that private parties ordinarily perform and is therefore commercial in nature. If sufficient contacts with the United States are shown, is *X*'s immunity removed by section 1605(a)(2)?[53]

The key to answering such questions and applying the "nature of the act" test in section 1603(d) is identification and definition of the particular act at issue in the suit, which can often be a difficult task. A case not involving nationalizations that illustrates the difficulty in these situations is *International Association of Machinists & Aerospace Workers v. OPEC*.[54] In that case, plaintiff asserted antitrust claims against the member states of OPEC, basing jurisdiction on section 1605(a)(2) of the FSIA. The court was thus faced with the issue whether the OPEC states' actions were sovereign or commercial in nature. According to the plaintiff's analysis, the challenged conduct was simply price-fixing by sellers of oil.[55] Standing alone, that description of the states' activity could lead readily to a finding of commercial activity since private companies can and often do engage in commercial price-fixing activities. The court, however, characterized the same actions as the establishment by sovereign nations of the terms and conditions for the removal of

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53. The issue of jurisdictional contacts required by section 1605(a)(2) is beyond the scope of this Article. *See* Ministry of Supply, Cairo v. Universe Tankships, Inc., 708 F.2d 80 (2d Cir. 1983); Maritime Int'l Nominees Establishments v. Republic of Guinea, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 52 U.S.L.W. 3262 (U.S. Oct. 4, 1983) (No. 82-1754); Texas Trading & Milling Corp. v. Federal Rep. of Nig., 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980).

54. 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

55. *Id.* at 558-59.

vital natural resources from their respective territories.[56] From this perspective, the activity appeared governmental in nature.[57]

The same type of analysis may be undertaken with respect to the hypothetical facts set forth above.[58] Is the act at issue no more than a repudiation of a purely commercial obligation, or is it more like a traditional exercise of a state's legislative powers to transfer private assets within its territory to governmental hands? The balance would seem to be tipped in favor of the latter approach. As a matter of form, state *X* has acted in a governmental capacity by exercising its legislative powers. As a matter of substance, the case does not involve a mere attempt to cloak a purely commercial act in a mantle of sovereignty by attaching the label of nationalization to it. Rather, it is the assumption by *X* of control over the conduct of a business within its borders and the taking of all assets, tangible and intangible, necessary to accomplish that result.[59] Depending on the circumstances surrounding the nationalization, issues may be raised regarding its legality under international law.[60] Those issues, how-

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56. *Id.* at 567.

57. *Id.* at 568. On appeal, the court of appeals affirmed the dismissal on the basis of the act of state doctrine, which it viewed as more flexible than sovereign immunity. International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). The act of state doctrine is designed to assist the courts in avoiding adjudication of politically sensitive areas. In this respect, it may be applicable even in cases involving a "commercial component." *Id.* at 1360. According to the Ninth Circuit: "While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations." *Id.* (footnote omitted). Since the OPEC states had exercised their sovereignty in a highly sensitive area of international law and foreign relations, their actions were not considered "purely commercial" within the meaning of *Dunhill* and therefore qualified as acts of state.

58. *See supra* text accompanying note 53.

59. *See* Eskridge, *The Iranian Nationalization Cases: Toward a General Theory of Jurisdiction over Foreign States*, 22 HARV. INT'L L.J. 525, 580-81 (1981).

60. *See* Anglo-Iranian Oil Co. v. Jaffrate, [1953] 1 W.L.R. 246, 20 I.L.R. 316 (Sup. Ct. Aden 1953); Judgment of Sept. 13, 1954, Corte cass., Italy, 1955 Foro It. I 256, 22 I.L.R. 23; Judgment of May 27, 1953, District Ct., Tokyo, 20 I.L.R. 305, *appeal dismissed*, Judgment of Sept. 11, 1953, High Ct., Tokyo, 6 Kōsai Minshū 702, 20 I.L.R. 312; American Indep. Oil Co. v. Government of Kuwait, 21 I.L.M. 976 (1982); I. BROWNLIE, *supra* note 31, at 518-51; 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1020-85 (1967); Carlston, *Concession Agreements and Nationalization*, 52 AM. J. INT'L L. 260 (1958); Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 AM. J. INT'L L. 305 (1960); Seidl-Hohenveldern, *Chilean Copper Nationalization Cases Before German Courts*, 69 AM. J. INT'L L. 110 (1975).

ever, do not relate to the character of the nationalization as a sovereign act.[61]

Dunhill is consistent with the foregoing analysis. In holding that the repudiation by commercial agents (interventors) of the Cuban government to repay monies unjustly received in the course of business was not an act of state, the majority stressed that "[n]o 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."[62] The *Dunhill* majority rested its decision on an evidentiary point.[63] An act cannot be a "sovereign" and "public" act (*i.e.*, an act of state) unless it is performed in the exercise of the state's sovereign authority. Since it had not been proved that the interventors were exercising such authority, no act of state existed.

In part III of his opinion, Justice White, expressing the views of only four justices, went further than the limited evidentiary holding described above and argued that the act of state doctrine would not apply even if Cuba had purported to exercise its sovereign authority to repudiate the commercial debts.[64] He considered such a result consistent with the restrictive theory of sovereign immunity, under which a foreign state could be subjected to suit based on its purely commercial activities. Any other conclusion

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61. The legality of a taking under international law is relevant to the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1976), the statutory exception to the act of state doctrine enacted following the decision in *Sabbatino*, 376 U.S. 398. *See supra* note 42. It also is relevant to the expropriation exception to immunity contained in section 1605(a)(3) of the FSIA. 28 U.S.C. § 1605(a)(3) (1976). Section 1605(a)(3), which is the jurisdictional counterpart to the Hickenlooper Amendment, provides that a foreign state will not enjoy immunity from jurisdiction in 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 in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

Id. See HOUSE REPORT, *supra* note 7, at 19-20.

62. Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976).

63. *See* Brest, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 265-75 (1976).

64. *Dunhill*, 425 U.S. at 695. Justice Stevens did not concur in this part of the opinion. *Id.* at 684.

might eviscerate the restrictive theory, since a foreign sovereign could always exercise its sovereign authority to repudiate its commercial debts, whether before or after suit.[65]

The intended scope of Justice White's opinion is not entirely clear. However, in relying heavily on the development of the restrictive theory in the United States since 1952, it does not seem likely that he had in mind the concept of nationalization as a commercial act. On the contrary, after referring to the principle that "[t]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it,"[66] he stated: "There may be little codification or consensus as to the rules of international law concerning exercises of *governmental* powers, including military powers and *expropriations*, within a sovereign state's borders affecting the property or persons of aliens."[67]

Thus, neither the holding in *Dunhill* nor part III of Justice White's opinion alters the pre-FSIA view of nationalization. *Dunhill* indicates that acts of commercial agents of a state will not ordinarily be elevated to the status of acts of state. It also indicates that the courts are less likely to presume sovereign activity where the act is performed in the course of a purely commercial business and affects the commercial obligations of the state. But where a government formally does exercise its sovereign authority and acts *qua* government, its actions remain sovereign in nature under both the FSIA and *Dunhill*.

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65. *Id.* at 698-99. *See* Leigh & Sandler, Dunhill: *Toward a Reconsideration of Sabbatino*, 16 VA. J. INT'L L. 685 (1976).

66. *Dunhill*, 425 U.S. at 704 (quoting *Sabbatino*, 376 U.S. at 428).

67. *Dunhill*, 425 U.S. at 704 (latter emphasis added). *See supra* note 40. In considering Justice White's reference to international law, it is worth noting that substantial international authority exists in support of the sovereign character of nationalizations, particularly those relating to natural resources. *See, e.g.*, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974); G.A. Res. 3016, 27 U.N. GAOR Supp. (No. 30) at 48, U.N. Doc. A/8730 (1972); G.A. Res. 2158, 21 U.N. GAOR Supp. (No. 16) at 29, U.N. Doc. A/6316 (1966); G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962) (resolutions of U.N. General Assembly regarding permanent sovereignty over natural resources). *See also Joint Report of Officials Appointed to Determine Payment for Expropriated Mexican Petroleum Property* (Apr. 17, 1942), *reprinted in* 9 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 1153 (C. Bevans ed. 1972) ("Expropriation, and the exercise of the right of eminent domain, under the respective Constitutions and Laws of Mexico and the United States, are a recognized feature of the sovereignty of all modern States."). Such international authority has been cited by United States courts in determining sovereign immunity issues under the FSIA. *See* Texas Trading &

Although the commercial activity issue seems analytically most difficult when some form of direct relationship exists between the nationalized party and the state, it has frequently been raised in another context relating to nationalization. It has been argued that nationalization is an act "in connection with" a commercial activity when the state utilizes the nationalized assets to engage in a business subsequent to the taking.[68] The "in connection with" theory is based primarily on the third clause of the FSIA's commercial activity exception to immunity.[69] That provision denies immunity to a foreign state when the action is based on "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[70] Because of the wording of the clause, particularly the phrase "in connection with a commercial activity," the question arises whether the "act" which is "in connection with" the "commercial activity" must itself be purely commercial, or whether the character of an act otherwise sovereign in nature is sufficiently affected by its relationship to a broader commercial activity as to be transformed into a commercial act.

Once again, the hypothetical fact pattern utilized earlier[71] illustrates the problem. Assume that country *X*, upon nationalizing the mining industry, transfers the nationalized assets to a state corporation for purposes of commercial operation. Company *Y* brings suit against *X* in the United States. It claims that the nationalization was the essential first step, and therefore an inextricable part, of *X*'s entry into the commercial business of producing and

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Milling Corp. v. Federal Rep. of Nig., 647 F.2d 300, 310 (2d Cir. 1981) ("current standards of international law concerning sovereign immunity add content to the 'commercial activity' phrase of the FSIA"), *cert. denied*, 454 U.S. 1148 (1982); International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979) (citing United Nations resolutions relating to sovereignty over natural resources), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

68. *See infra* text accompanying notes 85-156. The definition of "commercial activity" in 28 U.S.C. § 1603(d) (1976) covers both individual transactions or acts and "a regular course of commercial conduct." According to the section-by-section analysis: "A 'regular course of commercial conduct' includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation." HOUSE REPORT, *supra* note 7, at 16.

69. 28 U.S.C. § 1605(a)(2) (1976).

70. *Id.*

71. *See supra* text accompanying note 53.

marketing its natural resources, and that the nationalization had a direct effect on an American company in the United States. Does section 1605(a)(2) bar *X*'s claim for immunity?

The legislative history relating specifically to section 1605(a)(2) does not support this theory.[72] Nowhere in that legislative history is there any indication that the "act" which must be "in connection with" a commercial activity need not be a commercial or private act; nor is there support for the proposition that subsequent commercial operation of a nationalized business satisfies the "in connection with" requirement.[73]

The section-by-section analysis does not provide direct assistance for the interpretation of the third clause of section 1605(a)(2).[74] It merely states that the provision contemplates the exercise of jurisdiction consistent with the standards set forth in section 18 of the *Restatement (Second) of the Foreign Relations Law of the United States*.[75] That section, however, is more concerned with the jurisdictional reach of United States legislation than the nature of the conduct covered.[76]

Indirect assistance is provided by the legislative history of the second clause of section 1605(a)(2),[77] which denies immunity in suits based on "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere."[78] The "in connection with" construction of the second and third clauses is identical; the only difference between the clauses is the requirement in the second clause that the act upon which the suit is based be performed in the United States rather than abroad.[79] The section-by-section analysis states that the second clause is designed to cover the case in which "a claim arises out of a specific act in the United States which is *commercial* or *private* in nature and which relates to a commercial activity abroad."[80] Thus, the second clause does not contemplate the exercise of jurisdiction in suits based on sovereign

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72. *See* HOUSE REPORT, *supra* note 7, at 18-19.
73. *Id.*
74. *Id.*
75. *Id.* at 19.
76. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).
77. HOUSE REPORT, *supra* note 7, at 19.
78. 28 U.S.C. § 1605(a)(2) (1976).
79. HOUSE REPORT, *supra* note 7, at 19.
80. *Id.* (emphasis added).

acts by virtue of some perceived connection with commercial activity. The same interpretation would logically apply to the third clause.

More generally, in analyzing the "in connection with" theory of commercial activity, it is important again to recall that the primary purpose of the FSIA was the codification of the restrictive theory of sovereign immunity.[81] In this respect, the statute was not seen as a radical departure from prior law.[82] In enacting section 1605(a)(2), Congress intended to make clear that a foreign state could be subjected to suit if it engaged in commercial activity having the requisite jurisdictional nexus with the United States; it did not intend to abrogate the traditional immunity accorded a foreign state when it acted as a sovereign. To place nationalization under the umbrella of section 1605(a)(2) on the theory that it is an act in connection with a commercial activity would not seem consistent with this legislative intent. Many nationalizations have been undertaken as a prelude to commercial operation of the nationalized businesses by the foreign states concerned or their state corporations.[83] There have been cases in which property has been taken by a foreign state for use in non-commercial activities, such as military activity.[84] However, the pattern typified by the hypothetical case described above is the rule, rather than the exception. If Congress had wished to reverse the large body of case law existing on the subject, a more clearly expressed intent to do so would have been warranted.

IV. *CASE DEVELOPMENT*

With some exceptions, the case law to date supports the above analysis. The first important post-*Dunhill* case involving a nationalization was *D'Angelo v. Petroleos Mexicanos*.[85] In that case, a holder of royalty and participation interests in nationalized concessions sought compensation for the nationalization. Having obtained

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81. *Id.* at 7. *See supra* note 13.

82. *See supra* text accompanying notes 46-51.

83. *See infra* text accompanying notes 85-156.

84. *See, e.g.*, Oetjen v. Central Leather Co., 246 U.S. 297 (1918) (military use); Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680 (S.D.N.Y. 1979) (creation of national park).

85. 422 F. Supp. 1280 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

jurisdiction by attachment prior to the enactment of the FSIA,[86] plaintiff argued that *Dunhill* rendered the act of state doctrine inapplicable because the Mexican government had transferred the nationalized assets to its decentralized agency, Petroleos Mexicanos, for commercial operations.

In analyzing plaintiff's *Dunhill* argument, the court first pointed out that the majority opinion in *Dunhill* was based only on the absence of any evidence that the repudiation of Dunhill's claim was an official act of the Cuban government.[87] The existence of a formal expropriation decree in *D'Angelo*, supported by an official declaration of the Mexican government, distinguished *D'Angelo* from *Dunhill*. Nevertheless, the court also considered part III of Justice White's opinion in *Dunhill* as well as plaintiff's argument that since Petroleos Mexicanos was engaged in a commercial business, the act of state doctrine had no relevance. In this connection, the court clearly distinguished between the expropriation and the subsequent commercial activity:

> The fact that the Mexican government ultimately entered the oil business through Pemex does not make the expropriation itself commercial activity. It is a classic example of the exercise of a governmental power as an act of the sovereign. For this reason the opinion of Mr. Justice White and the three justices joining him in *Dunhill*, relating as the opinion does to governmental action in a commercial area, can have no relevance to the present case.[88]

A series of cases involving Libyan nationalizations is consistent with *D'Angelo* on the commercial activity issue. In *Hunt v. Mobil Oil Corp.*,[89] plaintiff asserted antitrust claims against several oil

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86. Prior to the FSIA, the issues of sovereign immunity and jurisdiction were not linked. Kahale & Vega, *supra* note 11, at 213-14. Jurisdiction over the foreign state was often obtained by attachment. HOUSE REPORT, *supra* note 7, at 8; Griffin, *Adjective Law and Practice in Suits Against Foreign Governments*, 36 TEMP. L.Q. 1 (1982). Subject matter jurisdiction in the federal courts was usually based on the diversity statute, 28 U.S.C. § 1332 (1976). After acquiring jurisdiction, the court would decide, if requested, whether to decline to exercise its jurisdiction by reason of the doctrine of sovereign immunity. The foreign state defendant also had the option of petitioning the State Department for a suggestion of immunity. *See supra* notes 11-12, 14.

87. D'Angelo v. Petroleos Mexicanos, 422 F. Supp. 1280, 1286 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

88. *Id.*

89. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

companies, alleging that they had induced the nationalization of plaintiff's oil concession interests and related assets. Sovereign immunity was not in issue since the foreign state was not named as a defendant in the case. However, the act of state doctrine was applied to that part of plaintiff's claim which involved an inquiry into the motives of the state in enacting the nationalization.[90]

In its act of state discussion, the Second Circuit in *Hunt*, like the court in *D'Angelo*, focused on *Dunhill* and its ramifications.[91] *Dunhill* was construed as simply a reaffirmation of the act of state doctrine "in traditional terms," meaning that the doctrine applied to "public" acts of a sovereign acting in the exercise of "governmental" authority.[92] Similarly, *Dunhill* was seen as confirming the prior law relating to nationalization. Describing the character of the nationalization before it in light of *Dunhill*, the court stated: "Expropriations of the property of an alien within the boundaries of the sovereign state are traditionally considered to be public acts of the sovereign . . . . Indeed such action as that taken here by Libya is cited in *Dunhill* as an example of non-commercial sovereign activity . . . ."[93]

Significantly, the Second Circuit overlooked the distinction in *Dunhill* between the majority opinion and part III of Justice White's opinion.[94] It referred to part III, from which it was quoting, as the "majority opinion."[95] Thus, the act of state holding in

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90. Plaintiff attempted to avoid application of the act of state doctrine by stressing that no challenge to the validity of the nationalization was being made. The court ruled that an inquiry into the motives of a state in performing an act necessarily entails an inquiry into the validity of the act. Since plaintiff's claim required analysis of the state's motives in order to determine whether the nationalization was the product of defendants' alleged conspiracy, the claim was held barred by the act of state doctrine. *Mobil Oil*, 550 F.2d at 75-77. *Accord* General Aircraft Corp. v. Air Am., Inc., 482 F. Supp. 3 (D.D.C. 1979). *But see* Williams v. Curtiss-Wright Corp., 694 F.2d 300, 304 (3d Cir. 1982) (doctrine does not necessarily preclude inquiry into state motivation; *Hunt* is distinguishable because "claims based on expropriation are traditionally barred by the act of state doctrine"); Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48, 54-55 (5th Cir. 1979) ("we disagree that motivation and validity are equally protected by the act of state rubric").

91. *Mobil Oil*, 550 F.2d at 72-73.

92. *Id.* at 73.

93. *Id. Cf.* United Mex. States v. Ashley, 556 S.W.2d 784, 786 (Tex. 1977) (*Dunhill* cited for proposition that land expropriation is "governmental action and not a commercial activity within the scope of the doctrine of restrictive sovereign immunity.").

94. *See* Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680 (S.D.N.Y. 1979); Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977).

95. *Mobil Oil*, 550 F.2d at 73.

Hunt v. Mobil Oil Corp. apparently was not based merely on the fact that the nationalization was embodied in a formal decree. Rather, the Second Circuit seemed to reach beyond the authority supporting the nationalization and rely on the character of the action taken. Not only had the state exercised its sovereign authority, it had done so to perform a sovereign and public act. The latter point was established by case precedent and was reinforced by political circumstances surrounding the nationalization as interpreted by the Second Circuit.[96]

Hunt v. Coastal States Gas Producing Co.[97] involved the same nationalization decree as *Hunt v. Mobil Oil Corp.* In *Coastal States*, plaintiff attempted to recover for conversion from the purchaser of oil. The oil had been produced by a Libyan state entity from the area covered by the nationalized concession. Since the success of the conversion action depended on proof that the title of Coastal States' transferor was not good, the validity of the nationalization was called into question.

Relying heavily on part III of Justice White's opinion in *Dunhill*, the plaintiff in *Coastal States* contended that "when a foreign government engages in a 'commercial' activity, such as Libya's conduct with regard to the Sarir field, the Act of State Doctrine does not apply and a court can inquire into the validity of the nationalization decree."[98] As in *D'Angelo v. Petroleos Mexicanos*,[99] the court rejected this contention on two levels. It first observed that the language of *Dunhill* invoked by plaintiff was not part of the majority opinion in that case.[100] However, despite the fact that the formal nationalization decree involved in *Coastal States* presumably satisfied the evidentiary requirements of the *Dunhill* majority,[101] the court also stated: "But, in any event, when

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96. *Id.* The court viewed the nationalization as a "political" act and part of "a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants." *Id.* at 73, 78. These circumstances removed "[a]ny possible doubt" as to the sovereign nature of the act at issue. *Id.* at 73.

97. 570 S.W.2d 503 (Tex. Civ. App. 1978), *aff'd*, 583 S.W.2d 322 (Tex.), *cert. denied*, 444 U.S. 992, *reh'g denied*, 444 U.S. 1103 (1979).

98. *Id.* at 508.

99. 422 F. Supp. 1280 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978). *See supra* text accompanying notes 85-88.

100. *Coastal States*, 570 S.W.2d at 508.

101. *See supra* text accompanying notes 62-63.

a foreign state has exercised a sovereign power, as Libya did here, it is a governmental, and not a commercial, act."[102]

The first major case concerning nationalization in the context of the FSIA was *Carey v. National Oil Corp.*,[103] which involved another Libyan oil nationalization and a transfer of the nationalized interests to a state corporation. Neither of the plaintiffs was itself nationalized. They claimed, however, that the nationalization interrupted a supply contract between one of the plaintiffs and an affiliate of a company whose interests were nationalized, thereby causing damage to plaintiffs. Jurisdiction was alleged to exist under the third clause of the commercial activity exception to immunity.[104]

Plaintiffs in *Carey* argued that the nationalization was "simply the first step" in establishing an "integrated oil business."[105] As such, the nationalization was arguably an act "in connection with" a commercial activity. In this regard, plaintiffs distinguished between a nationalization carried out for military or other non-commercial purposes, such as conservation, and one followed immediately by commercial operation of the nationalized interests either by the state itself or by a state-owned company.[106]

The district court in *Carey* rejected these arguments without much elaboration, stating that "nationalization is the quintessentially sovereign act, never viewed as having a commercial character."[107] Earlier in its opinion, the court had stated with respect to other claims made by plaintiffs:[108] "The structure of the Foreign

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102. *Coastal States*, 570 S.W.2d at 508.

103. 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd on other grounds*, 592 F.2d 673 (2d Cir. 1979).

104. *Id.* at 1101. *See* 28 U.S.C. § 1605(a)(2) (1976).

105. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 34, *Carey*.

106. *See supra* note 84. While the district court did not discuss the point, a basic problem with plaintiffs' analysis was its focus on the "purpose" of the nationalization. The definition of "commercial activity" in section 1603(d) specifically provides that the "purpose" of an act is not the determining factor in the commercial activity analysis. 28 U.S.C. § 1603(d) (1976). *See supra* text accompanying notes 46-51.

107. *Carey*, 453 F. Supp. at 1102. On appeal, the Second Circuit did not reach the commercial activity issue. It affirmed the district court's holding on the ground that no "direct effect" in the United States had been shown. Carey v. National Oil Corp., 592 F.2d 673, 676-77 (2d Cir. 1979).

108. The claim for damages resulting from the nationalization was one of eight claims asserted by plaintiffs. Two other claims, which were based on the 1973 oil embargo, were also held by the district court to be based on sovereign activity. *Carey*, 453 F. Supp. at 1102.

Sovereign Immunities Act leaves no question that non-commercial activities of a foreign state will be treated with the same deference to which they were entitled before 1976."[109] In a footnote, the court observed that section 1605(a)(3), the expropriation exception to immunity,[110] was the one exception to that principle.[111] That provision was inapplicable for various reasons and was not argued by plaintiffs.[112]

Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya[113] also involved a Libyan nationalization of physical assets and concession interests and a transfer of the nationalized assets to a state corporation. The fact pattern, however, was different in other respects from both the *Hunt* cases and *Carey*. Unlike the *Hunt* cases, the foreign state was the defendant; unlike *Carey*, the plaintiff was the party whose interests were nationalized. In addition, Libyan American Oil Company had obtained an arbitral award in default proceedings conducted in Switzerland under the arbitration clause in the nationalized concessions. The action in the United States was brought as a petition for confirmation of the award.[114]

The petitioner in *Libyan American Oil Co.* asserted that jurisdiction existed by reason of each of the first three immunity exceptions in the FSIA: the waiver, commercial activity and expropriation exceptions.[115] With respect to the commercial activity provision, it claimed that the nationalization was no more than a

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109. *Id. Accord* Frolova v. USSR, 558 F. Supp. 358, 362-63 (N.D. Ill. 1983) ("The Act specifically retained sovereign immunity for the foreign state's public acts.").

110. 28 U.S.C. § 1605(a)(3) (1976).

111. *Carey*, 453 F. Supp. at 1102 n.4.

112. Since plaintiffs' interest had not been nationalized, they could not allege that rights in property taken in violation of international law were in issue; nor did they allege the jurisdictional nexus with the United States required by section 1605(a)(3). Similarly, plaintiffs were not able to allege facts which would fit their claims within the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1976). *See supra* note 42. Thus, plaintiffs attempted to fit their case within the commercial activity exception to immunity and *Dunhill*.

113. 482 F. Supp. 1175 (D.D.C. 1980). The dispute in *Libyan American Oil Co.* was settled during the pendency of cross-appeals from the district court's decision. On May 6, 1981, the court of appeals granted an unopposed motion, made by several parties that had appeared on appeal as amici curiae, for an order vacating the district court's opinion for mootness.

114. 482 F. Supp. at 1176-77. The petition was based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. The United States legislation implementing the Convention is codified at 9 U.S.C. §§ 201-208 (1976).

115. 28 U.S.C. § 1605 (a)(1)-(3) (1976).

breach of contract which was commercial in nature for purposes of both section 1603(d) of the FSIA and the "commercial activity" exception to the act of state doctrine.[116] The court held that jurisdiction existed by reason of the waiver exception to immunity and thus did not reach the applicability of either the commercial activity or the expropriation exception.[117] Having found jurisdiction, the court proceeded to examine the applicability of the act of state doctrine and, in that connection, did reach the commercial activity issue.[118] Since it held that the nationalization was a sovereign act, the court applied the act of state doctrine and dismissed the petition.[119] As support for its characterization of the nature of the nationalization, the court found it necessary to cite specifically only *Hunt v. Mobil Oil Corp.*[120] However, it also stated that "[s]ince the ruling in *Underhill*, courts have consistently found a foreign state's act of nationalization to be the classic example of an act of state."[121]

The cases discussed above involving nationalizations were marked by a consistency of result which matched the pre-FSIA and *Dunhill* period. In contrast with the earlier period, however, the courts were following a more difficult path to the ultimate decision. Commercial activity arguments based on the FSIA and *Dunhill* were briefed and argued, requiring the courts to address sophisticated issues of statutory construction and case interpretation that previously had not been relevant. With these new issues frequently presented, the distinct possibility existed that a court might be persuaded to apply the "commercial activity" exception to both

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116. Memorandum of Libyan American Oil Co. in Opposition to Motion to Dismiss and in Support of Petition to Confirm Arbitral Award at 31-42, *Libyan Am. Oil Co.*

117. *Libyan Am. Oil Co.*, 482 F. Supp. at 1178.

118. *Id.* at 1178-79.

119. *Id.* at 1179. Before reaching its conclusion, the court also considered the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2) (1976). *See supra* note 42. It held the Hickenlooper Amendment inapplicable because the provision does not apply to the taking of intangible property, such as concession rights. *Libyan Am. Oil Co.*, 482 F. Supp. at 1179. *See* Occidental of Umm Al Qaywayn, Inc. v. Cities Serv. Oil Co., 396 F. Supp. 461 (W.D. La. 1975), *aff'd on other grounds sub nom.*, Occidental of Umm Al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979); *Coastal States*, 583 S.W.2d 322.

120. *Libyan Am. Oil Co.*, 482 F. Supp. at 1179. *See supra* text accompanying notes 89-96.

121. *Libyan Am. Oil Co.*, 482 F. Supp. at 1179.

sovereign immunity and the act of state doctrine in a nationalization case. The occasion arose in litigation stemming from nationalizations by the government of Iran.

In two decisions arising out of the Iranian crisis, *American International Group, Inc. v. Islamic Republic of Iran*[122] and *Pfizer Inc. v. Islamic Republic of Iran*,[123] the theory of nationalization as an act "in connection with" a commercial activity appears to have been accepted. Both cases involved claims for compensation following a nationalization; both involved subsequent commercial operation of the nationalized assets by Iran or a state-owned entity; and in both jurisdiction was found, at least in part, based on the third clause of the commercial activity exception to immunity.[124]

In *American International Group, Inc. v. Islamic Republic of Iran*,[125] plaintiffs sought compensation for the nationalization of their interests in various Iranian insurance companies. The nationalized interests were subsequently operated by Central Insurance of Iran, a governmental agency which had been created in 1971 to carry on and oversee the insurance business in Iran. The court held that defendants had waived their jurisdictional immunity under section 1605(a)(1) by virtue of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran.[126] It went on to hold, however, that the third clause of section 1605(a)(2) also served to deny defendants immunity.[127]

Explaining the commercial activity component of its holding, the court in *American International Group* merely stated: "Further, the failure of defendants to provide compensation to plaintiffs, resulting in an increase of the State insurance monopoly from 25 or 50% to 100%, is an act 'in connection with a commercial

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122. 493 F. Supp. 522 (D.D.C. 1980), *vacated on other grounds*, 657 F.2d 430 (D.C. Cir. 1981).

123. No. 80 Civ. 2791 (D.D.C. Nov. 26, 1980), *vacated on other grounds sub nom.*, American Int'l Group, Inc. v. Islamic Rep. of Iran, 657 F.2d 430 (D.C. Cir. 1981).

124. *See infra* text accompanying notes 125-32.

125. 493 F. Supp. 522 (D.D.C. 1980), *vacated on other grounds*, 657 F.2d 430 (D.C. Cir. 1981).

126. Aug. 15, 1975, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853. *Cf.* Chicago Bridge & Iron Co. v. Islamic Rep. of Iran, 506 F. Supp. 981 (N.D. Ill. 1980) (waiver provision in Treaty of Amity, *supra*, did not constitute a waiver for purposes of section 1605(a)(1)). *See* Delaume, *Foreign Sovereign Immunity: Impact on Arbitration*, 38 ARB. J. 34 (1983); Kahale, *Arbitration and Choice-of-Law Clauses as Waiver of Jurisdictional Immunity*, 14 N.Y.U. J. INT'L L. & POL. 29 (1981).

127. *American Int'l Group, Inc.*, 493 F. Supp. at 526.

activity' within the meaning of Section 1605(a)(2)."[128] Presumably, the "commercial activity" referred to was the operation of the insurance monopoly.

Pfizer Inc. v. Islamic Republic of Iran[129] reaches a similar conclusion as *American International Group*. In *Pfizer*, plaintiffs were two Panamanian companies and their United States parent. One of the Panamanian plaintiffs held eighty percent of the capital stock of an Iranian corporation which manufactured and distributed finished products from imported pharmaceutical materials. In 1980, Iran took over the Iranian pharmaceutical company by appointing its sole directors. Plaintiffs sought compensation for their financial loss, alleging jurisdiction again under the waiver, commercial activity and expropriation exceptions to immunity.[130]

The waiver and expropriation exceptions were not used in *Pfizer*.[131] The holding was instead based on the commercial activity provision. As in *American International Group*, the court did not engage in an elaborate analysis of the commercial activity requirement of section 1605(a)(2). It also did not explain how the "in connection with" requirement of the third clause of section 1605(a)(2) was satisfied, stating only: "Defendants do not dispute that this action is based on the nationalization and expropriation of Pfizer Laboratories in Iran, an 'act outside the territory of the United States,' and that Pfizer Laboratories continues to be operated by the Iranian ministries, 'a commercial activity of the foreign state elsewhere'."[132]

In both *American International Group* and *Pfizer*, the courts applied a literal interpretation of the third clause of section 1605(a)(2), coupled with a liberal assumption. They did not analyze the character of the nationalizations, relying instead on the "in connection with" construction of the statute. Yet, both courts apparently assumed that the continued operation of the nationalized businesses supplied the necessary link between the nationalizations and a commercial activity of Iran. No attempt was made by either

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128. *Id.* This reasoning was also relied upon in part by the court in rejecting the act of state defense under *Dunhill*. *Id.* at 525.

129. No. 80 Civ. 2791 (D.D.C. Nov. 26, 1980), *vacated on other grounds sub nom.* American Int'l Group, Inc. v. Islamic Rep. of Iran, 657 F.2d 430 (D.C. Cir. 1981).

130. *Id.* at 6-7.

131. *Id.* at 7.

132. *Id.*

court to support that assumption with case authority or legislative history.

Although the courts in the two Iranian cases may have correctly presumed that the operation of the nationalized businesses was a commercial activity under section 1603(d) of the FSIA,[133] there seems to be little justification for presuming that such operation was sufficient to bring the nationalizations within the purview of section 1605(a)(2).[134] The actions were not *based* in any way on the commercial activity identified (insurance and pharmaceutical operations), but on the nationalizations themselves. The facts of the cases indicated that the nationalizations were public and governmental acts of the same type involved in the earlier nationalization cases. Significantly, neither court stated anything which would contradict that characterization. Given the fact that the actions were based on sovereign activity, the use of section 1605(a)(2) as a vehicle for acquiring jurisdiction seems to have been inappropriate.[135]

The cases decided after *American International Group* and *Pfizer* involving nationalization and the commercial activity issue have reverted to the prior analysis. In *Empresa Cubana Exportadora de Azucar y sus Derivados v. Lamborn & Co.*,[136] an agency of the Cuban government was awarded judgment as seller under a sugar contract. Lamborn had attempted to assert the Cuban seizure of the assets of its assignor as a set-off. Since the original action had been brought by the Cuban agency, sovereign immunity was not available as a defense.[137] However, the court held that the counterclaim was barred by the act of state doctrine.[138] Distinguishing *Dunhill*, it stated:

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133. *See supra* note 68.

134. *See supra* text accompanying notes 68-84.

135. It has been suggested that the political circumstances surrounding the Iranian cases distorted the issues in the courtrooms, leading to "bad law." Eskridge, *supra* note 59, at 589. The natural tendency of courts and commentators would be to assume that tense political circumstances surrounding a case increase the likelihood of dismissal of an action against a foreign state. *See* International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). In the Iranian cases, precisely the opposite may have occurred.

136. 652 F.2d 231 (2d Cir. 1981).

137. *Id.* at 238 n.11. *See* 28 U.S.C. § 1607 (1976).

138. *Lamborn*, 652 F.2d at 237-39.

> While we read the two principal opinions in *Dunhill* to agree that courts should at least be inclined against applying the doctrine when they determine the challenged governmental conduct to be commercial, there is no indication here that the seizure of [the assignor's] Havana assets was anything but the governmental action of a sovereign which it purported to be. In contrast to the clearly commercial dealings of Cubazucar as Cuba's sugar merchant to the world, the Republic of Cuba's seizure of [the assignor's] assets was not a mercantile transaction but rather one designed to respond to labor difficulties of general concern.[139]

The Second Circuit's overall approach to the commercial activity issue in *Lamborn* is quite similar to its approach in *Hunt v. Mobil Oil Corp.*[140] Once again, it viewed the majority opinion and part III of Justice White's opinion in *Dunhill* as granting a lesser degree of deference to commercial activities of foreign states.[141] The court's consideration of the circumstances surrounding the nationalization (the "labor difficulties of general concern"), as well as its observation that the evidence indicated that the nationalization was the governmental action "it purported to be,"[142] is also reminiscent of the approach in *Hunt v. Mobil Oil Corp.*[143] The Second Circuit has made clear that nationalization is normally to be treated as an exercise of governmental powers within the meaning of *Dunhill.* Although a litigant may attempt to rebut that presumption, the litigant's burden in doing so would be particularly heavy. As indicated by both *Hunt* and *Lamborn,* that burden becomes even heavier when the circumstances surrounding the nationalization further support its character as a sovereign act rather than an act performed in the course of a purely commercial operation.

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139. *Id.* at 238. More recently, the Supreme Court permitted Citibank to set off the value of its assets nationalized by Cuba against a claim under a letter of credit issued by Citibank in support of a contract for delivery of sugar. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 103 S. Ct. 2591 (1983). The opinion did not turn upon the character of the nationalization, but on the circumstances under which a claim against a foreign government may be asserted against a legal entity created by it. *Id. See also* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

140. 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977). *See supra* text accompanying notes 89-96.

141. *Lamborn,* 652 F.2d at 238. *See supra* text accompanying notes 62-67.

142. *Lamborn,* 652 F.2d at 238.

143. 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977). *See supra* text accompanying note 96.

In *Ethiopian Spice Extraction Share Co. v. Kalamazoo Spice Extraction Co.*,[144] the court relied on *Lamborn* in applying the act of state doctrine to an Ethiopian nationalization. The Ethiopian government had nationalized the shares of an Ethiopian corporation (ESESCO) which had been established by a Michigan corporation (Kal-Spice). Subsequently, ESESCO delivered spices to Kal-Spice under a purchase order which had been placed prior to the nationalization. ESESCO brought suit to recover the purchase price and, as in *Lamborn*, defendant filed a counterclaim based on the expropriation. Kal-Spice also asserted a claim for damages based on the expropriation in a complaint against the Ethiopian government. The government filed a motion to dismiss under both the FSIA and the act of state doctrine.[145]

The court in *Ethiopian Spice* did not address the jurisdictional issue under the FSIA, preferring instead to base its dismissal of the expropriation claims on the act of state doctrine.[146] Its discussion of *Dunhill* consisted of only one sentence, in which it summarized the *Lamborn* ruling that the Cuban action involved in that case "was clearly public and governmental in nature, as opposed to private and commercial."[147] That ruling was held equally applicable to the Ethiopian expropriation because there had been "no suggestion that the [Ethiopian government] was engaged in purely commercial activity equivalent to that of private merchants."[148]

The Seventh Circuit was recently faced with a similar fact pattern in *Alberti v. Empresa Nicaraguense de la Carne*.[149] Nicara-

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144. 543 F. Supp. 1224 (W.D. Mich. 1982).

145. *Id.* at 1225-27.

146. *Ethiopian Spice*, 543 F. Supp. at 1227-33. By so proceeding, the court's decision addressed both the counterclaim against ESESCO and the complaint against the Ethiopian government. Jurisdiction was not in issue on the expropriation claim against ESESCO since the latter had initiated the action. *See* 28 U.S.C. § 1607 (1976).

147. *Ethiopian Spice*, 543 F. Supp. at 1229.

148. *Id.* This observation is similar to the observation of the Second Circuit in *Lamborn* that there was no indication that the Cuban nationalization was anything other than the "governmental action of a sovereign which it purported to be." *Lamborn*, 652 F.2d at 238. The court in *Ethiopian Spice* noted that "ESESCO was one of one hundred entities subjected to nationalization." *Ethiopian Spice Extraction Share Co.*, 543 F. Supp. at 1229. Whether this fact assisted the court in reaching its conclusion that the nationalization was a "public governmental act" is unclear. *Id.* The breadth of a governmental measure is a factor militating against a finding of commercial activity. *See* Mirabella v. Banco Indus. de la Rep. Argen., 101 Misc. 2d 767, 421 N.Y.S.2d 960 (Sup. Ct. 1979).

149. 705 F.2d 250 (7th Cir. 1983).

gua had nationalized plaintiffs' thirty-five percent interest in a Nicaraguan corporation engaged in the business of slaughtering livestock and packaging beef, and subsequently operated the business through a state company. Plaintiffs then purchased beef from the state enterprise but refused to pay the purchase price. The action sought recovery for wrongful conversion of plaintiffs' stock in the Nicaraguan corporation and a declaratory judgment that plaintiffs were entitled to offset the purchase price for the beef against the value of the nationalized stock. Jurisdiction was alleged to exist under both sections 1605(a)(2) and 1605(a)(3).[150]

Arguing that section 1605(a)(2) applied, plaintiffs sought to link their suit to a commercial activity carried on by defendants in the United States since the state agency's sale of beef to plaintiffs was a commercial activity having contact with this country.[151] The court ruled, however, that the sales transaction, although commercial,

> has nothing to do with this lawsuit beyond the fact that it gave rise to the debt plaintiffs seek to offset. The basis of this lawsuit is the nationalization of Empacadora, which is a quintessential Government act. . . . Plaintiffs cannot transform this governmental dispute into a commercial dispute through the simple expedient of attempting to offset an unrelated commercial debt.[152]

Thus, the Seventh Circuit was not influenced by the subsequent commercial operation of the nationalized business by the state agency, even though that commercial operation led to a sale of beef to plaintiffs. Much like the court in *D'Angelo v. Petroleos Mexicanos*,[153] the *Alberti* court drew a clear distinction between the nationalization itself and the commercial operation which followed. No mention was made of the Iranian cases discussed above, as the court implicitly rejected the "in connection with" rationale upon which those cases were based. By contrast, the district court's

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150. *Id.* at 252-55.

151. *Id.* at 254.

152. *Id.* (citations omitted).

153. 422 F. Supp. 1280 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978). *See supra* text accompanying notes 85-88.

opinion in *Carey v. National Oil Corp.*[154] was cited with approval.[155] The Seventh Circuit had joined the Second Circuit in reaffirming the traditional view of nationalization as a sovereign act.[156]

CONCLUSION

Neither the FSIA nor *Dunhill* effected a radical break with prior law on the characterization of nationalizations. With certain exceptions, the case law since the passage of the FSIA and *Dunhill* confirms that nationalization is still considered the quintessentially sovereign act. Therefore, while other exceptions to sovereign immunity and the act of state doctrine may be applicable in certain cases, an action based upon a nationalization is not likely to fit within either the FSIA's commercial activity exception to immunity or the "commercial activity" exception to the act of state doctrine.

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154. 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd on other grounds*, 592 F.2d 673 (2d Cir. 1979).

155. *Alberti*, 705 F.2d at 254.

156. *See Lamborn*, 652 F.2d at 231; Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). *See also supra* text accompanying notes 89-96, 135-42 (Second Circuit decisions on nationalization as a sovereign act).