UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 13 | Number 1 Article 2

Winter 1988

The Commercial Activity Exception to the Act of State Doctrine Revisited: Evolution of a Concept

Stephen J. Leacock

The Commercial Activity Exception to the Act of State Doctrine Revisited: Evolution of a Concept

*Stephen J. Leacock**

Professor Leacock discusses an exception to the broad immunities granted to foreign governments by the act of state doctrine. Professor Leacock examines the "commercial activity" exception to the doctrine, which was declared by a plurality of the U.S. Supreme Court in Alfred Dunhill v. Republic of Cuba, *a 1976 decision. Professor Leacock criticizes liberal application of the act of state doctrine. He argues that recognizing the commercial activity exception would promote order in international business transactions with foreign governments. Nonetheless, from his examination of lower federal court decisions of the past decade involving the act of state doctrine, Professor Leacock finds that few federal courts have applied the commercial activity exception, and that the exception has had little of the impact many commentators predicted it would have.*

I. Introduction

In May of 1976, the U.S. Supreme Court decided *Alfred Dunhill v. Republic of Cuba*,[1] an action brought by former owners of expropriated Cuban cigar companies against U.S. importers to recover payments made by the importers to Cuban government agents for cigar shipments to the United States. Government intervenors from Cuba denied liability based on the defense of act of state. The Supreme Court ruled that the record was insufficient to satisfy the requirements of an act of state with regard to the monies paid to the intervenors by the U.S. importers, and held both the Cuban government and the intervenors liable. A plurality of four justices declared a commercial activity exception to the act of state doctrine.[2]

The Supreme Court has not reexamined this commercial activity exception to the act of state doctrine since *Dunhill*. Without a major-

* Professor of Law, DePaul University College of Law. Barrister (Hons.) 1972, Middle Temple, London; LL.M. 1971, London University, King's College; M.B.L. 1971, City of London Polytechnic, London; Grad. Cert. Ed. (Distinction) 1971, Garnett College, London; B.B.L. (Hons.) 1970, City of London Polytechnic, London. The author gratefully acknowledges the invaluable research assistance provided by Michelle M. Dwyer, Darien M. Creamer, Michael K. Sweig and Barbara M. Yarnold in the preparation of this paper.

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

[2] These were Justices White, Powell, Rehnquist, and Chief Justice Burger. Justice Stevens concurred with Parts I and II of the majority opinion. In this paper, the terms "commercial activity exception" and "commercial exception" will be used interchangeably.

ity Supreme Court ruling, the lower federal courts have not embraced the commercial exception overwhelmingly. Although declared applicable in some cases, it has not been the primary factor in any individual court's decision. Generally, the lower federal courts have not relied directly on the commercial exception. Rather, the courts have found that the activity at issue was not a purely commercial act, thereby obviating the need to explicitly rule on the concept of a commercial exception. The courts have addressed the commercial activity exception in dicta, however.

A number of commentators predicted that the commercial activity exception was the beginning of a trend towards a significant narrowing of the act of state doctrine.[3] More than ten years have elapsed since the *Dunhill* plurality proposed the exception. This paper analyzes the impact of that decision, and the exception acknowledged therein, on the act of state doctrine.

II. Definition and History of the Act of State Doctrine

It can be argued that the act of state doctrine is monomorphic in nature for the following reasons. Arguments in favor of narrowing the doctrine by adopting a commercial activity exception are less persuasive than those supporting adoption of the restrictive theory of sovereign immunity. An act of state may be defined as a formal or informal act or refusal to act, (a) done by or for a recognized sovereign state by one vested with sovereignty or governmental authority; (b) made within the state's sovereign territory; (c) to give public effect to a public interest.[4] The act of state doctrine is therefore applicable only if it is a public act, done by a recognized foreign power, exclusively within its own territory.[5] There is no universally accepted definition of an act of state and its existence has been determined largely on a case-by-case basis.[6] It is not inaccurate that an act

---

[3] Friedman & Blau, *Formulating a Commercial Exception to the Act of State Doctrine*: Alfred Dunhill of London, Inc. v. Republic of Cuba, 50 ST. JOHN'S L. REV. 666 (1976) [hereinafter Friedman & Blau]; Leigh & Sandler, Dunhill: *Toward a Reconsideration of* Sabbatino, 16 VA. J. INT'L L. 685 (1976); Williams, *The Act of State Doctrine*: Alfred Dunhill of London, Inc. v. Republic of Cuba, 9 VAND. J. TRANSNAT'L L. 735 (1976); Swan, *Act of State at Bay: A Plea on Behalf of the Elusive Doctrine*, 1976 DUKE L.J. 807; Golbert and Bradford, *The Act of State Doctrine:* Dunhill *and Other* Sabbatino *Progeny*, 9 SW. U.L. REV. 1 (1977); Hahn, Dunhill v. Republic of Cuba: *A Reformulation of the Act of State Doctrine*, 11 U. WEST L.A. L. REV. 15 (1979).

[4] *See, e.g.*, Oetjen v. Central Leather Co., 246 U.S. 297 (1918). The essential issue is proof "that the facts [are] . . . sufficient to demonstrate that the conduct in question [is] . . . the public act of those with authority to exercise sovereign powers and [is] . . . entitled to respect in our courts." *Dunhill*, 425 U.S. at 694 (1976). *See* Williams, *supra* note 3, at 747.

[5] *E.g.*, "[A] statute, decree, order, or resolution of the [foreign] [g]overnment itself . . . ." *Dunhill*, 425 U.S. at 695.

[6] *See* Mathias, *Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform*, 12 L. & POL'Y INT'L BUS. 369, 373 (1980) (the act of state doctrine has been defined as a doctrine of judicial restraint, judicial deference, issue preclusion, conflict of laws, judicial abstention, and full faith and credit).

of state may be easier to recognize than define. For example, the expropriation by a state of property within its sovereign territory is clearly an act of state.[7]

Early case law involving the act of state doctrine established the approach taken by U.S. courts to acts which occurred outside U.S. borders. The seminal act of state case is *Underhill v. Hernandez*,[8] in which the Supreme Court held that "[e]very 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 *in it's own territory*."[9] In theory and application, the act of state doctrine preserves the separation of powers.[10] It prevents the courts from interfering in foreign affairs conducted by a state's executive branch.[11]

The facts of *Underhill* are as follows. General Hernandez, commander of revolutionary forces in Venezuela, denied Underhill, a U.S. citizen, exit papers to leave Venezuela. Underhill was detained and subjected to forced labor. Subsequently, the United States recognized the revolutionary party as the legitimate government of Venezuela.[12] Underhill later brought action against Hernandez for unlawful detention, confinement and assault, but the Court declined adjudication of the claim on its merits.[13] It held the acts of Hernandez constituted an act of state and were thus protected by the doctrine of sovereignty.[14]

The act of state doctrine is a judicial invention.[15] Its origin can

---

[7] *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE U.S. § 41 comment d, illustrations 7 and 8 (1985).

[8] Underhill v. Hernandez, 168 U.S. 250 (1897).

[9] *Id.* at 250 (emphasis added).

[10] The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964); *see* R. FALK, THE AFTERMATH OF SABBATINO 15-17 (1965) [hereinafter R. FALK].

[11] R. FALK, *supra* note 10, at 15-17.

[12] *Underhill*, 168 U.S. at 253.

[13] *Id.* at 252.

[14] *Id.* The Supreme Court declared:

> 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 in its own territory. Redress of grievances by reason of such acts may be obtained through the means open to be availed of by sovereign powers as between themselves.

[15] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-23 (1964). *See also* R. FALK, *supra* note 10, at 13-26 (discussing the majority opinion in *Sabbatino*, which traces the origin of the act of state doctrine to the early English case *Blad v. Bamfield*).

be traced to a seventeenth century English case,[16] and emanates from the doctrine of comity among nations.[17] Indeed, either a foreign sovereign or a private party may assert the doctrine as an affirmative defense.[18] If successful, the act of state defense precludes the courts from inquiring into the validity of any act of a foreign government on the merits or otherwise.[19]

The act of state doctrine was examined more recently in *Banco Nacional de Cuba v. Sabbatino*.[20] In *Sabbatino*, the Court adjudicated conflicting claims to the proceeds of sale of a shipload of Cuban sugar. The *Sabbatino* Court emphasized three factors, namely, the degree of consensus on a particular area of international law, the implications for U.S. foreign policy of a decision on the merits, and the balancing of relevant considerations.[21] The Court cited with approval the earlier formulation of the doctrine, and expressly adapted it to modern complexities of international world order.[22] It also emphasized that the doctrine is not inflexible, and urged that courts decide the controverted issues on their merits in the event there are controlling legal principles in a related treaty or executive agreement.[23]

The state act may also have incidental extra-territorial effect. For example, a foreign confiscation of property may affect the rights of a nonresident citizen or noncitizen who owned the property before confiscation.[24] Under the act of state doctrine, it is not required that the acts of the foreign government conform to the laws of all civilized nations.[25] The essential requirement is that the act has been done by a foreign government.[26]

The Supreme Court in *American Banana Co. v. United Fruit Co.*,[27] an antitrust case, addressed the *extra-territorial* question. Writing for the majority, Justice Holmes stated that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is

---

[16] *See* Blad v. Bamfield, 36 Eng. Rep. 992 (Ch. 1674); *see also* Duke of Brunswick v. King of Hanover, 9 Eng. Rep. 993 (H.L. 1848).

[17] *See* Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 135-36 (1812); Ricaud v. American Metal Co., 246 U.S. 304 (1918).

[18] *See, e.g.*, Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

[19] *See Ricaud*, 246 U.S. at 309.

[20] 376 U.S. 398 (1964).

[21] *Id.* at 427-28; R. FALK, *supra* note 10, at 18-24.

[22] 376 U.S. at 421.

[23] *Id.* at 428. *See also* Metzger, *Act of State Doctrine Refined: The* Sabbatino *Case*, 1964 SUP. CT. REV. 223, 233-34.

[24] *See* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

[25] "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE U.S. § 41 (1965).

[26] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964).

[27] *American Banana Co.*, 213 U.S. at 347.

done."[28] In *American Banana*, Justice Holmes firmly reiterated the proposition that U.S. laws have no application within the territory of a foreign sovereign absent some effect upon U.S. foreign commerce.[29]

The plaintiff in *American Banana* charged that the defendant, in order to prevent export competition from Costa Rica and Panama, had secured long-term contracts with most of the fruit producers in that region by out-bidding competitors and compelling producers to sell only on defendant's terms.[30] The Court concluded that the challenged acts were those of a foreign government and therefore nonjusticiable.[31]

Justice Holmes reasoned that the acts of the Panamanian government, the Costa Rican officials, and those of the defendant were essentially the same although they were instigated by the defendant. The Court therefore decided that liability against defendants under the Sherman Act was not established solely because the defendants influenced officials or instigated legislation in a foreign country. The decision in *American Banana* thus carved an exception to the prohibition against "monopolies in trade or commerce . . . with foreign nations"[32] where the Sherman Act expressed no such exception.[33] The Supreme Court concluded, on grounds of international comity, that acts of a foreign sovereign done within its own territory are not subject to the Sherman Act. As a corollary, the Court held that influencing a foreign executive or successfully lobbying for legislative action is also beyond the Sherman Act.[34]

---

[28] *Id.* at 356 (citing Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1903)).

[29] In the present day context see Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6a, 45(a)(3)(1982), which enacts the use of the direct, substantial and reasonably foreseeable effects test to establish subject matter jurisdiction in this context. *See* Victor & Chou, *United States Antitrust Jurisdiction Over Overseas Disputes After Title II of the 1982 Export Trading Company Act and Timberlane*, 10 FORDHAM INT'L L.J. 1 (1986); *see also* Simon & Waller, *A Theory of Economic Sovereignty: An Alternative to Extraterritorial Jurisdictional Disputes*, 22 STAN. J. INT'L L. 337 (1986).

[30] 213 U.S. at 353-55.

[31] *See id.*

[32] Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .

15 U.S.C. §§ 1, 2 (1982).

[33] *See id.*

[34] In the present day context, the Noerr-Pennington doctrine would probably protect such activity. *See* Eastern Railroad President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1960)(Sherman Act not applicable to essentially political or economic conduct). It is questionable whether Noerr-Pennington applies in foreign commerce, and whether American industry would violate the Sherman Act for lobbying a foreign government to enact restraints of trade. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), held that respondent's role as the Canadian government's purchas-

The place where the pertinent acts occur is crucial. For example, the Supreme Court considered the application of U.S. law to acts done abroad in *Continental Ore Co. v. Union Carbide & Chemical Co.*[35] In *Continental Ore*, the plaintiff alleged a private treble damage antitrust case under sections 1 and 2 of the Sherman Act and plaintiff contended that defendants had excluded it from the Canadian vanadium market during World War II. Further, the plaintiff charged that such exclusion occurred as a result of actions of Union Carbide's Canadian subsidiary, Electro Met of Canada. The Canadian government had appointed Electro Met exclusive wartime agent to purchase and allocate vanadium for Canadian industries.

At trial, plaintiff offered evidence to establish that Electro Met of Canada refused to purchase from plaintiff as part of a conspiracy with the other defendants, thereby eliminating plaintiff from the Canadian market. The market was then divided between Union Carbide and Vanadium Corp. of America. This evidence was excluded by the district court.

The Court of Appeals for the Ninth Circuit agreed with the district court that, assuming the allegations were true, plaintiff was not entitled to recover from the defendants for the alleged destruction of its Canadian business. The court noted that no vanadium could be imported into Canada by anyone other than the Canadian government agent, Electro Met, and Electro Met had refused to do business with plaintiff. The court reasoned:

> [E]ven if we assume that [Electro Met] acted for the purpose of entrenching the monopoly position of the defendants in the United States, *it was acting as an arm of the Canadian Government,* and we do not see how such efforts as appellants claimed defendants took to persuade and influence the Canadian government through its agent are within the purview of the Sherman Act.[36]

The Supreme Court unanimously reversed, holding that plaintiff's proof was relevant evidence of a violation of the Sherman Act and should have been presented to the jury. The Court noted that the plaintiff did not question the validity of any action by the Canadian Government or its Metals Controller. The Court found no indication that the Canadian Controller or any other Canadian approved government official "approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed

---

ing agent was protected commercial activity under Noerr-Pennington. However, Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 108 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), expressly questioned whether Noerr-Pennington would protect attempts to influence foreign legislation. See also Export Trading Company Act of 1982, 15 U.S.C. §§ 4011-4021 (1982) (lobbying exempt from antitrust laws) and Webb-Pomerene Act, 15 U.S.C. §§ 62-66 (1982) (provides limited exception from Sherman Act for associations formed solely to engage in export trade).

[35] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

[36] 289 F.2d at 94 (9th Cir. 1961)(emphasis added).

that purchases from Continental be stopped."[37] Justice White found that no question was properly raised as to any nonjusticiable action of the Canadian Government. He declared that "the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government."[38]

Acts *encouraged* by a foreign government must be distinguished from acts *mandated* by such governments. In *United States v. Watchmakers of Switzerland Information Center, Inc.*,[39] the court distinguished acts done within a foreign state's territory, which the foreign government encouraged, from acts which the foreign government required. The facts underlying *Watchmakers* involved cartel arrangements in the Swiss watch industry. The court found that beginning in 1931, four U.S. watchmakers conspired with the five Swiss defendants to eliminate competition in the U.S. import and export business, and in the production and sale in the United States of watches, watch parts, and watchmaking machinery.

To effectuate the conspiracy, the defendants entered into an arrangement in Switzerland termed the Collective Convention[40] and designed to prevent the development and growth of competitive watch industries outside Switzerland. The Collective Convention required its participants to refrain from: (a) exporting watch parts from Switzerland except under certain restrictions and conditions; (b) furnishing watchmaking machinery or technical assistance outside Switzerland except with restrictions; (c) dealing in or allowing affiliates to trade watches manufactured by nonmembers; and (d) exporting from Switzerland various types of uncased movements.

In addition, defendants had agreed to limit the export of watches and watch parts to the United States. Furthermore, they agreed not to sell watch parts for manufacturing purposes and to blacklist U.S. sellers of Swiss watches not conforming with their sales to FH and Ebauches. The U.S. defendants actively participated in the conspiracy through individual contracts which restricted the volume of watches produced in the United States, and limited the U.S. export of domestically produced watches and re-export of Swiss watches. The district court found that since "the United States watch industry was the Swiss watch industry's biggest competitor, . . . the restrictions of the Convention have obviously had a crippling effect in this country, and were so intended."[41]

The defendants argued that the agreements were executed and

---

[37] 370 U.S. at 702 n.11.

[38] *Id.* at 706.

[39] United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962).

[40] *Id.* ¶ 77,425.

[41] *Id.* ¶ 77,457.

took effect in Switzerland in accord with Swiss law. Defendants further contended that their actions were actually those of the Swiss government. The district court rejected both arguments on the basis that foreign law must be *mandatory* in order to constitute justification. Aside from legitimate invocation of the act of state doctrine, "a United States court may exercise its jurisdiction as to acts and contracts abroad, if as in the case at bar, such acts and contracts have a substantial effect upon our foreign and domestic commerce."[42]

The court observed:

> It is clear that these private agreements were then recognized as facts of economic and industrial life by that Nation's government. Nonetheless, the fact that the Swiss Government *may*, as a practical matter, approve of the effects of the private activity cannot convert a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate.[43]

The district court in *Watchmakers* concluded that only "direct government action *compelling* the defendants' activities could prevent a U.S. court from exercising its jurisdiction."[44] Therefore, mere approval of some of defendants' activities by a foreign government would not shield them from liability.[45]

The historical development of sovereign immunity is also pertinent because it shares an origin similar to that of the act of state doctrine. The two doctrines are only partially homeotic, however, as this paper indicates.[46]

III. Definition and Historical Development of Sovereign Immunity

The doctrine of sovereign immunity, unlike the act of state doctrine, is ubiquitous in nature. It may be claimed as a defense with respect to acts which occur either in the territory of the sovereign that claims it, in the territory of another sovereign, or in territory that is not under the control of any sovereign at all. Professor Hart has observed: "[w]henever the word 'sovereign' appears in jurisprudence, there is a tendency to associate it with the idea of a person above the law whose word is law for his inferiors or subjects."[47]

---

[42] *Id.*

[43] *Id.* ¶ 77,456-57 (emphasis added).

[44] *Id.* ¶ 77,457. *See also* 1 B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST 118-35 (1979); R. FALK, *supra* note 10; Dunfee & Friedman, *The Extra-Territorial Application of the United States Antitrust Laws: A Proposal for an Interim Solution*, 45 OHIO ST. L.J. 883 (1984); Waller, *Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond*, 14 LAW & POL'Y INT'L BUS. 747 (1982); Fugate, *Antitrust Jurisdiction and Foreign Sovereignty*, 49 VA. L. REV. 925 (1963); Graziano, *Foreign Government Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100 (Apr. 1967).

[45] United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 77,456-57.

[46] *See infra* note 98 and accompanying text.

[47] *See* H.L.A. HART, THE CONCEPT OF LAW 215 (1961). *See also* Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 230-31 (1951) [hereinafter Lauterpacht].

The source of such concepts is the phenomenon of feudalism in ancient England. Professor Street indicated that: "just as no lord could be sued in the court which he held to try cases of his tenants, so the King, at the apex of the feudal pyramid and subject to the jurisdiction of no other court, was not suable."[48] "[T]his English theory of sovereign immunity, an immunity originally personal to the King, came to be applied to the United States."[49]

It was logical and rational to extend this concept of sovereign immunity to foreign states as a juristic courtesy.[50] "In its classical form, the doctrine signified complete and total exemption of states from the jurisdiction of the courts of other nations and from all forms of judicial process, attachment and seizures authorized or issued by them, irrespective of the nature of the activity or property at issue in a controversy."[51]

This recognition of sovereign immunity by the community of states was not a consequence of legal obligations incumbent upon states. Rather, the practice of extending immunity to other states was motivated initially by necessity and the desire to promote good will and reciprocity among nations, a pattern of state behavior commonly referred to as "comity."[52] A noted international scholar has referred to sovereign immunity as a manifestation or consequence of the fundamental equality of all states.[53] The early development of sovereign immunity in the United States can be traced to the Supreme Court decision in *The Schooner Exchange v. M'Faddon*.[54] In

---

[48] *See* H. STREET, GOVERNMENTAL LIABILITY 1 (1975) [hereinafter H. STREET]; T. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 7 (1970) [hereinafter T. GIUTTARI]; *see also* Lauterpacht, *supra* note 47, at 232.

[49] *See* H. STREET, *supra* note 48, at 8. *See also* H.R. REP. No. 94-1487, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6606 [hereinafter HOUSE REPORT] ("sovereign immunity as a doctrine of international law was first recognized in our courts in the landmark case of *The Schooner Exchange v. M'Faddon*, 7 Cranch 116 (1812)").

[50] *See* Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812); *see also* T. GIUTTARI, *supra* note 48, at 27; *see also* H.J.S. MAINE, INTERNATIONAL LAW 55 (1888)("[A]ll states, in International Law, are regarded as equal.").

[51] *See* T. GIUTTARI, *supra* note 48, at 9.

[52] "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895); *see also* Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966) [hereinafter Yntema]; *see also* T. GIUTTARI, *supra* note 48, at 6; *see also* H. HART, *supra* note 47, at 223; *see also* E. LAUTERPACHT, 1 INTERNATIONAL LAW 483 (1970) [hereinafter LAUTERPACHT]. *See generally* McDougal & Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE STUDIES IN WORLD PUB. ORD. 249 (1980).

[53] *See* L. OPPENHEIM, INTERNATIONAL LAW 239-41 (6th ed. 1947), *cited in* T. GUITTARI, *supra* note 48, at 5.

[54] 11 U.S. (7 Cranch) 116 (1812); *see* T. GUITTARI, *supra* note 48, at 27; *see also*

The Exchange, Chief Justice Marshall wrote that absolute sovereign immunity stemmed from each sovereign state's absolute and complete jurisdiction over all persons and things within its ambit. Since sovereigns on principle had equal rights and independence, the only jurisdictional limitations which could be imposed on states were those to which they freely consented.[55]

In *Beers v. Arkansas*,[56] the Supreme Court reiterated the principles it had first enunciated in *The Exchange*. "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission . . . and as this permission is altogether voluntary . . . it may prescribe the terms and conditions on which it consents to be sued."[57] Thus, in the period prior to World War I, U.S. courts adhered to the doctrine of absolute sovereign immunity.[58] This absolute immunity was extended to foreign sovereigns personally as well as to their property, pursuant to the judiciary's conviction that this approach was rooted in international law and based on comity.[59]

In the aftermath of World War I, new economic and political realities emerged. Governments began to "assume a more active and extensive role in directing or participating in the nation's business and economic affairs."[60] Dissatisfaction with the doctrine of absolute sovereign immunity developed as governments took part in activities of a commercial nature and yet sought to retain traditional exemption from judicial process for all state activities.[61] U.S. nationals were particularly affected.[62]

During this post-war period, only one decision presented a challenge to the doctrine of absolute sovereign immunity.[63] In *The Pesaro*, Judge Mack held that a vessel owned and operated by the Ital-

---

Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1, 5-13 (1976) [hereinafter Timberg].

[55] *See* H. STREET, *supra* note 48, at 9 (citing Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)):

> a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

See also Lauterpacht, *supra* note 47, at 232; *see also* T. GIUTTARI, *supra* note 48, at 28. "[There exists] the *a priori* argument which attempts to deduce the general character of international law from *an absolute sovereignty, which is assumed, without reference to international law, to belong to states.*" H. HART, *supra* note 47, at 218 (emphasis added).

[56] 61 U.S. (20 How.) 527 (1857).

[57] *Id.* at 529.

[58] *See* T. GIUTTARI, *supra* note 48, at 42.

[59] *See supra* note 52.

[60] *See* Lauterpacht, *supra* note 47, at 220-21. *See also* T. GIUTTARI, *supra* note 48, at 63.

[61] *See* T. GIUTTARI, *supra* note 48, at 63.

[62] *See id.* at 64.

[63] The Pesaro, 277 F. 473 (S.D.N.Y. 1921), *vacated and dismissed for lack of jurisdiction*, 13 F.2d 468 (S.D.N.Y. 1926), *aff'd sub nom.* Berrizi Bros. v. Steamship Pesaro, 271 U.S. 562 (1926).

ian government was not entitled to immunity from suit and attachment, and proposed the adoption of a restrictive theory of sovereign immunity whenever the property at issue in a suit was used by a state for commercial purposes.[64] Judge Mack further held:

> To deprive private parties injured in the ordinary course of trade of their common and well-established legal remedies would not only work great hardship on them, but in the long run, it would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships, and salvors would run few risks to save the property of friendly sovereigns if they were denied recourse to our own courts and left to prosecute their claims in foreign tribunals in distant lands.[65]

The Supreme Court affirmed a subsequent ruling in *Pesaro*,[66] thereby reversing Judge Mack's district court opinion and reaffirming the classical doctrine of absolute immunity for governments.[67] Twelve years later in *The Navemar*,[68] the Supreme Court again reaffirmed the doctrine without significant discussion.[69] The consensus was that a restriction on absolute sovereign immunity must come from the executive or legislative branch and not from the judiciary.[70] As a result, the majority of judicial opinions in the early period after World War I continued to follow the weight of authority which upheld the application of absolute and unqualified sovereign immunity for states.[71]

Ablation of the classical doctrine of sovereign immunity did not occur until some time after World War I, with the progressive increase in commercial activity of states generally.[72] As a reaction to the Russian Revolution of 1917, a number of states nationalized industries while even more states engaged in activities of a commercial nature which had previously been pursued primarily by individuals.[73]

---

[64] 277 F. 473, 474-75 (S.D.N.Y. 1921); *see* T. GIUTTARI, *supra* note 48, at 67. In the domestic context Chief Justice Marshall had reached a similar conclusion. *See* Bank of the United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904, 907 (1824), *cited in* Timberg, *supra* note 54, at 6.

[65] 277 F. at 481, *cited in* T. GIUTTARI, *supra* note 48, at 67.

[66] 13 F.2d 468 (S.D.N.Y. 1926), *aff'd sub nom.* Berrizi Bros. v. Steamship Pesaro, 271 U.S. 562 (1926), in which Judge Hand dismissed the suit for lack of jurisdiction, ruling that Judge Mack's opinion was contrary to the overwhelming weight of authority (both American and English) on the subject.

[67] 271 U.S. at 576.

[68] Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938).

[69] *See id.*

[70] *See* T. GIUTTARI, *supra* note 48, at 74-83; *see also* Timberg, *supra* note 54, at 9.

[71] *See* T. GIUTTARI, *supra* note 48, at 74-83.

[72] *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 40-41 (1945). *See also* Compania Naviera Vascongado v. S.S. "Cristina", 1938 A.C. 485, 498 (opinion of Lord MacMillan); T. GIUTTARI, *supra* note 48, at 63; Lauterpacht, *supra* note 47, at 220-21.

[73] "[T]he real change has been the enormous growth, particularly in recent years, of 'ordinary merchandising' activity by governments." Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 700-01 n.14 (1976). *See also* Schmitthoff & Woolridge, *The Nine-*

In fact, these commercial neophytes began to compete with private parties in a number of activities including shipping, foreign trade, banking, and mining, to name a few.[74]

Increased state commercial activity intensified after World War II, multiplying the number of claims brought by private parties against foreign governments for damages resulting from dealing in the marketplace with these governmental entities.[75] As states increasingly combined the resolution of internal administration problems and the pursuit of diplomatic and military objectives with the pursuit of commercial activities, significant departures from traditional concepts of absolute immunity began to emerge.[76] The perception developed that the classical doctrine of sovereign immunity had become outmoded and required serious reconsideration.[77]

A. The Foreign Sovereign Immunities Act of 1976

In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA)[78] with the following objectives: (1) to codify the "restrictive" principle of sovereign immunity; (2) to insure that the restrictive principle of immunity is applied in litigation before U.S. courts;

---

teenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading, 2 DEN. J. INT'L L. & POL'Y 199, 203-11 (1972). *See also* Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 NW. U.L. REV. 109, 111 (1961).

74 *See* T. GIUTTARI, *supra* note 48, at 3.

75 "In the mid-1950s, when the United States first became involved in foreign suits on a large scale . . . the executive branch learned that *almost every country in Western Europe followed the restrictive principle of sovereign immunity* . . . ." HOUSE REPORT, *supra* note 49, at 6607 (emphasis added). White, *The State Immunity Act 1978*, 1979 J. BUS. L. 105. *See also* Lauterpacht, *supra* note 47, at 250-72. The United Kingdom did not follow this restrictive principle, *see* Higgins, *Recent Developments in the Law of Sovereign Immunity in the United Kingdom*, 71 AM. J. INT'L L. 423 (1977), yet its position did not escape criticism, *see* Lauterpacht, *supra* note 47, at 236-41. *See also* Wedderburn, *Sovereign Immunity of Foreign Public Corporations*, 6 INT'L & COMP. L.Q. 290 (1957); Schmitthoff, *The Claim of Sovereign Immunity in the Law of International Trade*, 7 INT'L & COMP. L.Q. 452 (1958); The Philippine Admiral [1976] 2 W.L.R. 214; Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 2 W.L.R. 356, *reprinted in* 16 INT'L LEGAL MATERIALS 471 (1977). The United Kingdom has arguably given effect to the doctrine of restrictive sovereign immunity since passage of the State Immunity Act 1978, ch. 33, Part 1, s.3(1): "A state is not immune as respects proceedings relating to (a) a commercial transaction entered into by the state; or (b) an obligation of the state which by virtue of a contract . . . fails to be performed wholly or partly in the United Kingdom." *See* SCHMITTHOFF, SCHMITTHOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE 189 (8th ed. 1986); *see also infra* note 89 and accompanying text.

76 *See* White, *supra* note 75, at 105.

77 "[P]artly in response to developments in international law, the Department of State adopted the restrictive principle of sovereign immunity in its 'Tate Letter' of 1952 . . . ." HOUSE REPORT, *supra* note 49, at 8 (citation omitted). *See also* Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 303 (1986). "Outside [the] hard core of an irreducible minimum of government activities, none should be protected." Wedderburn, *supra* note 75, at 298.

78 Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982)). *See* Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE J. WORLD PUB. ORD. 1 (1976).

(3) to provide a statutory procedure for making service upon and obtaining *in personam* jurisdiction over a foreign state; and (4) to help plaintiffs enforce and collect judgments against foreign sovereigns.[79] The FSIA provides that foreign states are not immune from suits based on commercial acts. Furthermore, the "nature" of the underlying act is determinative while its "purpose" is irrelevant.[80] The Act states in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . 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 the commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with the commercial activity of the foreign state elsewhere and that causes a direct effect in the United States.[81]

Section 1603(d) of the FSIA defines commercial activity as "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."[82]

The pertinent part of section 1606 provides:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages.[83]

B. The Commercial Activity Exception Under the Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act of 1976 is important to the present discussion since under the doctrine of foreign sovereign immunity, a principle of international law, domestic courts refrain from exercising jurisdiction over foreign sovereigns in certain cases.[84] The principle of immunity is based on respect for the dignity of the foreign nation, its agencies and representatives, by allowing them to function without interference from the courts of

---

[79] *See* HOUSE REPORT, *supra* note 49, at 7-8.

[80] 28 U.S.C. § 1605(a)(2)(1982); De Sanchez v. Banco Central de Nicaragua, 515 F. Supp. 900, 904 (E.D. La. 1981), *aff'd*, 770 F.2d 1385 (5th Cir. 1985); von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 48-54 (1978) [hereinafter von Mehren]. *See* Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985). *See also* West v. Multibanco Comermex, S.A., 807 F.2d 820 (9th Cir. 1987).

[81] 28 U.S.C. § 1605(a)(1982).

[82] 28 U.S.C. § 1603(d)(1982).

[83] 28 U.S.C. § 1606 (1982).

[84] HOUSE REPORT, *supra* note 49, at 8; *see also* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 322 (3d ed. 1979); *see also* E. LAUTERPACHT, *supra* note 52, at 482.

other nations.[85]

The purpose of the Foreign Sovereign Immunities Act is to create standards to be used to resolve issues of sovereign immunity raised by foreign states before U.S. federal and state courts.[86] It is an attempt to codify and detail the restrictive theory of sovereign immunity[87] previously promulgated by some U.S. courts.[88] The restrictive theory precludes the use of sovereign immunity as an affirmative defense in actions arising out of disputes involving commercial activities of states or their agencies.[89]

The third clause of the commercial activity provision of the FSIA grants U.S. courts subject matter jurisdiction in cases which arise from an act done by a foreign state[90] outside the United States in connection with a commercial activity.[91] A tripartite analysis is required: (1) identifying the act giving rise to the claim;[92] (2) identify-

---

[85] *See id.*; *see also supra* note 52 and accompanying text.

[86] *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); *see also* HOUSE REPORT, *supra* note 49, at 6; *see also* Feldman, *supra* note 77, at 304:

> The FSIA had three principal objectives: (1) to depoliticise sovereign immunity cases by transferring determinations of sovereign immunity from the State Department to the courts; (2) to codify the restrictive theory of immunity; and (3) to establish uniform procedures for litigation against foreign States, their agencies and instrumentalities in the United States. To this end, the statute establishes a comprehensive and exclusive federal regime for litigation against all foreign sovereign parties extending from service of process to execution of judgment.

[87] "[The FSIA] codifies, as a matter of federal law, the restrictive theory of sovereign immunity." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983). von Mehren, *supra* note 80, at 33.

[88] Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir. 1966), *cert. denied*, 385 U.S. 931 (1966). *See also* Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Weber, *supra* note 78, at 15.

[89] *See Victory Transport, Inc.*, 336 F.2d at 360. *See also* Collins, *The Effectiveness of the Restrictive Theory of Sovereign Immunity*, 4 COLUM. J. TRANSNAT'L L. 119 (1965); von Mehren, *supra* note 80, at 33-34.

[90] 28 U.S.C. § 1603(a)(1982). This includes the foreign state's agencies, instrumentalities and political subdivisions based on fundamental common law and equity agency principles. *See, e.g.*, Callejo v. Bancomer, S.A., 764 F.2d 1101, 1106 (5th Cir. 1986): "Bancomer was nationalized by the Mexican Government . . . . Consequently, Bancomer is now an 'agency or instrumentality of a foreign state' within the meaning of 28 U.S.C. § 1603(b)(2) . . . . "

[91] 28 U.S.C. § 1605(a)(2)(1982). Section 1605 of the FSIA enacts six exceptions to immunity, but only commercial activities will be discussed in this paper.

[92] *See, e.g.*, Callejo v. Bancomer, S.A., 764 F.2d 1101, 1108-09 (5th Cir. 1985):

> The question . . . is defining with precision which . . . [activity] is the *relevant* activity—that is, the activity on which the Callejos' suit is "based"?

The court continued:

> We agree with the conclusion of the *Braka* court [Braka v. Bancomer, S.A., 589 F. Supp. 1465 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985)] rather than the conclusion reached in *Frankel* [Frankel v. Banco Nacional de Mexico, No. 82-6457 (S.D.N.Y. May 31, 1983)]. Under the FSIA, sovereign immunity depends on the nature of those acts that form the basis of the suit. Here, *the act complained of was Bancomer's breach of its contractual obligations to the Callejos, not the promulgation by Mexico of exchange control regulations.*

Id. (emphasis added). *See infra* note 195 and accompanying text for the facts of *Bancomer*.

ing the commercial activity;[93] and (3) identifying a nexus between the act and the commercial activity.[94]

The issue of sovereign immunity can arise in one of three instances. First, where a foreign state carries on commercial activity in the United States.[95] Second, where a suit is based on an act performed in the United States in connection with a commercial activity carried on elsewhere by the foreign state.[96] Third, when the act occurs outside the territory of the United States in connection with a commercial activity carried on elsewhere by the foreign state but which causes a direct effect in the United States.[97]

Although the act of state doctrine is related to the doctrine of sovereign immunity, significant differences exist.[98] Unlike sovereign

---

[93] These contractual obligations were commercial in nature; *they were of a kind that a private individual would customarily enter into for profit.* Indeed, at the time that Bancomer sold the certificates of deposit, it was a private entity and did so as part of its general commercial activities. The fact that Bancomer was later nationalized is, in the current context, irrelevant.

Id. at 1109 (emphasis added). *See also* West v. Comermex, S.A., 807 F.2d 820, 825 (9th Cir. 1987)("sovereign immunity is determined not only by the character of the actor, but also by the nature of the act"). *See also* Lauterpacht, *supra* note 47, at 225.

[94] Section 1605(a)(2) grants an exception from sovereign immunity for suits based upon a commercial activity by an instrumentality of a foreign state, but only if the commercial activity had a sufficient connection with the United States. Section 1605(a)(2) identifies three such connections:

(1) commercial activity carried on in the United States;

(2) commercial activity carried on outside the United States, with acts performed in the United States in connection with that activity; and

(3) commercial activity carried on outside the United States that has direct effects in the United States.

The Callejos claim that Bancomer's commercial activities were carried on and had direct effects in the United States, and that therefore the first and third of these jurisdictional bases exist. We agree with the latter claim—namely, that the breach of the certificates of deposit had direct effects in the United States—and therefore do not address whether Bancomer's activities in connection with the certificates were "carried on in the United States" within the meaning of the FSIA.

Bancomer, 764 F.2d at 1110 (footnote omitted).

[95] In Wolf v. Banco Nacional de Mexico, S.A. (Banamex), . . . we held that "the sale of the certificate of deposit by Banamex to Wolf was clearly a commercial activity carried on in the United States by Banamex, within the meaning of section 1605(a)(2)." . . . *Wolf* involved substantially identical issues to the present appeal and many of the same parties. Here, as in *Wolf, the banks solicited, marketed, and generally encouraged U.S. investors to deposit monies in their banks and promised investors extraordinary rates of return.*

West v. Multibanco Comermex, S.A., 807 F.2d 820, 825 (9th Cir. 1987)(citing Wolf v. Banco Nacional de Mexico, S.A. (Banamex), 739 F.2d 1458, 1460 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985))(emphasis added). *See also* Gibbons v. Udaras na Gaeltactha, 549 F. Supp 1094, 1112 (S.D.N.Y. 1982), *cited in* Feldman, *supra* note 77, at 312 ("a foreign state's commercial activity may be 'carried on' in several jurisdictions simultaneously if that activity has a substantial contact with each").

[96] *See* Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982), *cited in* Feldman, *supra* note 77, at 312.

[97] *See* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1110-12 (5th Cir. 1986). *See also* Feldman, *supra* note 77, at 314.

[98] *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 725-28 (1976) (Marshall,

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, whether or not the government itself is named as a defendant in the case.[99] It is not a principle addressed to the court's jurisdiction; rather, it precludes jurisdiction substantively but is applied by the court in reaching a determination on the merits of the case.[100] Since the sovereign immunity issue relates to the court's jurisdiction,[101] it should be decided prior to consideration of the act of state defense which is a doctrine of judicial abstention.[102]

IV. The Proposed Commercial Activity Exception to the Act of State Doctrine

In 1976 the United States Supreme Court decided *Alfred Dunhill of London, Inc. v. Republic of Cuba*.[103] Although a Supreme Court plurality in *Dunhill* concluded that a state's conduct related to its commercial endeavors is not immunized by the act of state doctrine,[104] the issue remains unsettled.

In *Dunhill*, cigar manufacturers brought an action against Cuban cigar importers. The manufacturers sought to recover the purchase price of cigars that had been shipped to the importers from the manufacturer's plants which had been nationalized by the Cuban government.

The case was formally decided on the ground that the acts of the Cuban intervenors were not acts of state because the intervenors acted outside "the scope of their authority as agents of the Cuban government" in repudiating the debts in question.[105] Justice White ultimately reached the commercial activity exception to the act of state doctrine after an incisive exploration of sovereign immunity concepts.[106] Three justices joined in Justice White's "commercial

---

J., dissenting) ("[T]he doctrines of sovereign immunity and act of state, while related, *differ fundamentally in their focus and in their operation*")(emphasis added).

[99] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

[100] *See id.* at 421-37.

[101] *See* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1107, 1112 n.10 (5th Cir. 1985) ("[T]he FSIA was intended to introduce uniformity into the process of granting sovereign immunity . . . . In the sovereign immunity arena, we start from a premise of jurisdiction. Where jurisdiction would otherwise exist, sovereign immunity must be pleaded as an affirmative defense . . . .").

[102] The exact relation between the sovereign immunity and act of state doctrines has been a source of considerable controversy. Prior to *Sabbatino*, it was thought that the act of state doctrine was based on the doctrine of sovereign immunity . . . . *Sabbatino*, however, rejected this notion, grounding the act of state doctrine in *prudential rather than jurisdictional terms*.

See Callejo, 764 F.2d 1101, 1113 n.12 (emphasis added).

[103] 425 U.S. 682 (1976).

[104] *Id.* at 695.

[105] *Id.* at 694.

[106] *Id.* at 703-04.

act" exception to the act of state doctrine,[107] while four dissenting Justices rejected the commercial activity exception.[108] Justice Stevens, the ninth judge, completed the majority in favor of petitioners but declined to express an opinion on the exception.[109]

In an amicus brief, the Solicitor General expressly endorsed a commercial activity exception to the act of state doctrine.[110] In 1952 the State Department had abandoned the absolute theory of sovereign immunity in favor of the restrictive theory which denies immunity where commercial acts of a foreign state are involved.[111] Justice White had reasoned that perpetuating the expansive interpretation of the act of state doctrine would undermine the policy of the executive branch and the effect of the restrictive theory of sovereign immunity.[112]

In his dissenting opinion, Justice Marshall pointed out that the two doctrines, while related, "differ fundamentally in their focus and in their operation."[113] Whereas sovereign immunity accords a defendant an exemption from suit by virtue of its status, the act of state doctrine merely instructs a court what law to apply to a case.[114] The dissent doubted the wisdom of attempting to articulate any broad exception to the act of state doctrine within the confines of a single case, preferring instead, a case-by-case approach to the thorny problem.[115]

The efficacy of Justice White's conclusion that a commercial act exception to the act of state doctrine was appropriate is doubtful, because it is not absolutely clear that *Dunhill* involved a commercial act on the part of the Cuban government. Nationalization of the Cuban cigar factories was intended to include the accounts receivable of those enterprises. The Court decided that the situs of the accounts receivable for cigars shipped prior to the nationalization was with Dunhill the debtor.[116] When the accounts receivable were sent to Cuba and received by the agents of the Cuban government, how-

---

[107] *See* text at *supra* note 2.

[108] 425 U.S. at 715-37 (Marshall, J. with whom Justices Brennan, Stewart and Blackmun join, dissenting).

[109] *Id.* at 715.

[110] *Id.* at 696. *See also* letter from Monroe Leigh, Legal Advisor, Dept. of State, to the Solicitor General (Nov. 26, 1975), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706 app. 1 (1976).

[111] This theory was first advanced by the State Department in the "Tate Letter" in 1952. In the Tate Letter the State Department declared that the United States had adopted the restrictive theory of sovereign immunity; thereafter, courts would deny immunity for private or commercial acts of a foreign state, but continue to grant immunity for public acts. *See Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments (the Tate Letter)*, 26 DEPT. ST. BULL. 984 (1952).

[112] 425 U.S. at 698-99.

[113] *Id.* at 725 (Marshall, J., dissenting).

[114] *Id.* at 726.

[115] *Id.* at 728.

[116] *Id.* at 682.

ever, the nationalization was arguably completed.[117] The subsequent refusal to repay the accounts receivable was a refusal on the part of Cuba to give up nationalized property.[118]

Although this commercial activity exception received only plurality support,[119] some lower courts have cited it with approval. The split in the lower courts as to whether a commercial activity exception exists is addressed below.

V. Act of State Doctrine Developments in Lower Federal Courts Since Dunhill

A number of lower courts, influenced by congressional codification of a "commercial exception" in the context of sovereign immunity,[120] have viewed Justice White's rationale in *Dunhill* as controlling.

It appears, however, that the federal appellate courts[121] and the vast majority of the federal district courts[122] have avoided any conclusive position regarding the commercial exception to the act of state doctrine. The lack of any definitive acceptance or rejection of the exception is because the commercial exception was proposed by a plurality,[123] and thus the lower federal courts are not required to address the issue.

Unavoidably, courts will find it difficult to apply the commercial exception in situations when a foreign nation is acting both as a sovereign and as a commercial entity. This potential problem was recognized and discussed in an article by counsel of record to Alfred Dunhill of London, Inc.[124] The authors of the article advocated that in the event a case arises in which a foreign nation has acted in the above dual capacity, careful analysis should be used to determine whether the act in question falls within the commercial activity exception.[125] First, the court determines whether the sovereign's ac-

---

[117] *Id.* at 723.

[118] *See id.*

[119] *Dunhill* has therefore left the Court split on whether the act of state doctrine should apply to purely commercial acts. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

[120] 28 U.S.C. § 1605(a)(2)(1982).

[121] Callejo v. Bancomer, S.A., 764 F.2d 1101, 1115 n.16 (5th Cir. 1985) ("Although we have cited *Dunhill* on a number of occasions . . . *thus far we have not actually adopted the commercial activity exception.*"). "The *Dunhill* plurality argued that a commercial activities exception exists to the act of state doctrine. *We do not reach that issue here.*" West v. Multibanco Comermex, S.A., 807 F.2d 820, 828 n.5 (9th Cir. 1987)(emphasis added).

[122] *See infra* notes 128-207 and accompanying text.

[123] *See* text at *supra* note 2.

[124] Friedman & Blau, *supra* note 3, at 683.

[125] *Id.* A *jure imperii/jure gestionis* analysis is analogous to and derived from the commercial activities criteria of the restrictive theory of sovereign immunity. *See* Lauterpacht, *supra* note 47, at 225. *See also* von Mehren, *supra* note 80, at 48-49; Weber, *supra* note 78, at 18; Singer, *Abandoning Restrictive Sovereign Immunity: Analysis in Terms of Jurisdiction to Prescribe*, 26 HARV. INT'L L.J. 1, 17 (1985).

tions were lawful under the "recognized principles of international law."[126] Second, even if the act was "facially in accordance with international law," it should be subjected to a stricter scrutiny by the court to determine if the sovereign is "merely engaged in a subterfuge to avoid commercial obligations."[127]

In *D'Angelo v. Petroleos Mexicanos*,[128] decided shortly after *Dunhill*, the District Court concluded that the facts and circumstances of the controversy did not fall within the scope of the *Dunhill* plurality's commercial activity exception to the act of state doctrine.[129] As a result, the court declined to express an opinion on the issue.

Two years after *D'Angelo*, however, the Third Circuit cited Justice White's opinion as if it constituted settled precedent.[130] The court declared that "the [act of state] doctrine does not apply 'to acts

---

[126] Friedman & Blau, *supra* note 3, at 683. An example of the violation of recognized principles of international law would be a transgression of the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1982), which states in part:

> [N]o 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 rights to property is asserted by any party . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law, including the principles of compensation . . . .

See West v. Multibanco Comermex, S.A., 807 F.2d 820, 829 (9th Cir. 1987) ("When Hickenlooper governs, courts are barred from invoking the judicially created act of state doctrine under which we refrain from consideration of cases involving acts of foreign governments or foreign officials"); *see also* Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307 (1962).

[127] *See* Friedman & Blau, *supra* note 3, at 684. The Supreme Court plurality that proposed a commercial activity exception to the act of state doctrine arguably agreed in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 694-95 (1976)(citation omitted):

> As the District Court found, the only evidence of an act of state other than the act of nonpayment by interventors was "a statement by counsel for the interventors, during trial, that the Cuban Government and the interventors denied liability and had refused to make repayment." But this merely restated respondents' original legal position and adds little, if anything, to the proof of an act of state. No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due three foreign importers.

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

[129] The court stated that:

> It is true that Pemex is engaged in a commercial business, the operation in Mexico of an oil company for profit. The expropriation, however, *was not accomplished as an incident to this business.* Pemex was not even in existence when the expropriation occurred. 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.

Id. at 1286 (emphasis added).

[130] *See* Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 458 (D. Del. 1978)(quoting *Dunhill*, 425 U.S. at 706).

committed by foreign sovereigns in the course of their purely commercial operations.' "[131] In *Hunt v. Mobil Oil Corp.*,[132] the Court of Appeals for the Second Circuit apparently interpreted *Dunhill* as establishing a commercial activity exception to the act of state doctrine. In *Hunt*, the court referred to the "*majority* opinion"[133] of Justice White in concluding: "*Dunhill* declined to extend the act of state doctrine to situations where the sovereign has descended to the level of entrepreneur."[134] Since appellants had conceded in oral arguments that the nationalization of plaintiff's oil interests by the Libyan government was not a purely commercial activity, the court ruled that it was an expropriation of the property of an alien within the boundaries of the sovereign state.[135] Consequently, the court characterized the nationalization as an act of state and held the plaintiff's private antitrust claim to be non-justiciable.[136]

The Second Circuit's acceptance of the commercial activity exception to the act of state doctrine in *Hunt* was based upon that court's mistaken belief that the commercial exception was part of the majority opinion.[137] The Second Circuit had not differentiated between the majority and plurality opinions. That the commercial exception was mistakenly adopted by the Second Circuit is supported in *First National Bank of Boston v. Banco Nacional de Cuba.*[138] In *First National*, the court declared that "if there were a commercial activity doctrine,"[139] it would be inapplicable in light of the facts.[140] Furthermore, in a footnote the court specifically indicated that since the commercial activity exception was a plurality decision the Second Circuit was not bound by the commercial activity exception.[141]

At the time *National American Corp. v. Federal Republic of Nigeria*[142]

---

[131] *See id.* The Court did not analyze *Dunhill* at all and therefore its citation is clearly *obiter*, since the only issue in the case was whether or not to grant defendant summary judgment. The court stated: "With this question in substantial and presently unresolvable dispute, the motion for summary judgment on the basis of act of state will be denied." *Id.* at 459 (footnote omitted).

[132] 550 F.2d 68 (2d Cir. 1977).

[133] *See id.* at 73. Mr. Justice Stevens, however, did not concur in the commercial activity exception to the act of state doctrine (part III of the court's opinion). *Dunhill*, 425 U.S. at 715 (Stevens, J., concurring) ("For reasons stated in *Parts I and II* of the Court's opinion, I agree that the act of state doctrine does not bar the entry of the judgment in favor of Dunhill.")(emphasis added).

[134] 550 F.2d at 73.

[135] *See id.* The appellant's concession that Libya's action was *governmental* rather than *commercial* obviated analysis of the facts based on the *jure imperii/jure gestionis* criteria. *See supra* note 125 and accompanying text.

[136] 550 F.2d at 73.

[137] *See* text at *supra* note 133.

[138] First National Bank of Boston v. Banco Nacional de Cuba, 658 F.2d 895 (2d Cir. 1981), *cert. denied*, 459 U.S. 1091 (1982).

[139] *Id.* at 902.

[140] *Id.*

[141] *Id.*

[142] National American Corp. v. Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978).

came to trial, Congress had just indicated by enacting the FSIA its intention to allow commercial claims against foreign sovereigns in U.S. courts.[143] *National American* raised the issue whether a sovereign defendant, denied immunity from suit in U.S. courts by virtue of the FSIA, could avoid liability for repudiation of a commercial obligation through the "back door" of the act of state.[144]

In *National American*, the district court cited both the plurality and majority opinions in *Dunhill*. Applying the *Dunhill* plurality opinion, the court held that even if the repudiation was vested with sovereign authority, the act of state doctrine "should not be extended to include the repudiation of a purely commercial obligation."[145] The court therefore found the commercial exception to be a bar to the act of state doctrine.[146]

Applying the *Dunhill* majority opinion, the court held that Nigeria's refusal to pay demurrage due under the Agreements of Discharge was not "invested with sovereign authority" by the embargo of the port nor by the execution of the settlement negotiations.[147]

This conclusion of the *National American* court that the refusal of Nigeria to pay the demurrage charges was not an act of state because it was not vested with sovereign authority may be flawed. Appropriate weight may not have been given to a memorandum from the Nigerian Ministry of Transport to the Central Bank of Nigeria[148] authorizing the suspension of all demurrage payments to suppliers who had received payment for undelivered cement.[149] In *Dunhill,* the court held that no evidence of an act of state existed because the only evidence of repudiation of the debt was offered by counsel for the intervenors during trial.[150] In contrast, in *National American*, the memorandum from the Ministry of Transport arguably qualified as a "statute, decree, order or resolution" as required by *Dunhill* to prove the existence of an act of state.[151]

Assuming a commercial activity exception to the act of state doctrine, the decision in *National American* leaves much to be desired. The court held that even if dishonoring the settlement agreement was an act of state, the act was purely commercial and thus the doc-

---

143 12 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982).

144 448 F. Supp. at 640.

145 *Id.* (citing Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 695 (1976)).

146 *Id.* at 641. This must now be considered overruled by the Second Circuit Court of Appeals comments in National Bank of Boston v. Banco Nacional De Cuba, 658 F.2d 895 (2d Cir. 1981), *cert denied*, 459 U.S. 1091 (1982). *See supra* note 138 and accompanying text.

147 *Id.* Thus, no act of state was proven. For satisfactory elements of proof, see text at *supra* note 5.

148 448 F. Supp. at 632.

149 *Id.*

150 425 U.S. at 694-95.

151 *See id.* at 695.

trine was unavailable to the defendant. In contrast, the court found the port embargo and the formation of the settlement committee to be acts of state outside the commercial exception. Since the occurrence of all these acts was directly attributable to the initial commercial act of purchasing such enormous quantities of cement for delivery to a port with limited unloading capability, declaring only the repudiation of the agreements of discharge to be within the commercial exception seems unconvincing. A commercial exception conclusion seems inappropriate since the acts were arguably not purely commercial, but part of a total mix of strategies to solve the public interest problem of disastrous port congestion.

In *National American*, the court referred to the House Report[152] by the drafters of the FSIA:

> [T]he [House] Report pointed to the decision in *Dunhill* as an example of judicial rejection of an improper assertion of the act of state doctrine . . . . By emphasizing that commercial activity serves as the touchstone of both the *Dunhill* decision and sovereign immunity under the [FSIA], Congress seems to be suggesting that both theories be interpreted in tandem.[153]

The *National American* court felt compelled to harmonize the act of state doctrine with the newly enacted FSIA[154] and apply a commercial activity exception to the act of state doctrine on terms similar to those enacted in the FSIA.[155]

The commercial exception to the act of state doctrine was also applied in *Behring International v. Imperial Iranian Air Force*.[156] The court, citing *Dunhill* as if it were settled precedent, ruled that the act of state doctrine did not preclude consideration of the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.[157] The fact that only a plurality opinion was relied upon was not mentioned at all by the court.

A New York district court also referred to a commercial activity exception to the act of state doctrine in *Federal Republic of Germany v.*

---

[152] *See supra* note 49.

[153] 448 F. Supp. at 640.

[154] *Id.*

[155] *See supra* note 81 and accompanying text.

[156] Behring Int'l v. Imperial Iranian Air Force, 475 F. Supp. 396 (D.N.J. 1979). In this case, the court found the act of state doctrine inapplicable for three reasons. First, the court held without explanation that the commercial activity exception precluded an application of the act of state doctrine. Second, the court held that the parties to the suit previously agreed that all of the defendants' activities in the United States were commercial in nature. Third, the court perceived that it could be shown that the breaches of contract occurred in the United States. The court based this conclusion on the fact that refusal to honor the invoices occurred in the United States and the defendant did not offer any evidence that proved the refusal to pay was ordered from Iran. For the act of state doctrine to be relevant, the acts in controversy must have occurred within the territory of the foreign sovereign. Since all pertinent acts occurred in the United States, the act of state doctrine could not be raised as an affirmative defense. *Id.* at 401.

[157] "The doctrine, however, distinguishes between the public and governmental acts of sovereign states and their private and commercial acts." *Id.*

Elicofon.[158] The court found that the acts in issue were not purely commercial and, therefore, did not fit within the *Dunhill* commercial activity exception.[159] Thus, the court held that the act of state doctrine applied and precluded an inquiry into the validity of the sovereign's act.[160]

The commercial activity exception was again applied by a district court in *American International Group v. Islamic Republic of Iran*.[161] All of the U.S. insurance companies with operations in Iran sought damages resulting from Iran's nationalization of the insurance industry without compensation in 1979. The court held that the act of state doctrine would not preclude the award of summary judgment to the plaintiff for the following reasons. First, the court was not asked to judge the validity of the nationalization, but rather whether the defendant violated the Treaty of Amity between the United States and Iran,[162] as well as international law, by failing to compensate the insurance companies.[163] Second, the act of state doctrine does not prohibit judicial review when a clear and unambiguous treaty exists which applies to the situation.[164] Third, the act of state doctrine did not apply because the defendant's failure to compensate the plaintiffs fell within the commercial activity exception set forth in *Dunhill*.[165] Because of the existing treaty between the United States and Iran, the act of state doctrine was inapplicable.[166] The Treaty of Amity clearly barred the use of the act of state doctrine in this situation.[167]

If, however, the existence of a commercial exception to the act of state doctrine is assumed, the court's conclusion that on these

---

158 Federal Republic of Germany v. Elicaton, 536 F. Supp. 813 (E.D.N.Y. 1978).

159 *Id.* at 825. The court did not mention that the exception was only a plurality opinion.

160 *Id.* at 826.

161 493 F. Supp. 522 (D.D.C. 1980).

162 Treaty of Amity, Economic Relations, and Consular Rights, June 16, 1957, United States-Iran, 8 U.S.T. 899, T. I.A.S. 3853 [hereinafter Treaty of Amity]. Article IV, paragraph 2 of the Treaty of Amity states:

> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

163 *Id.* at 525. *See, e.g., supra* note 126.

164 493 F. Supp. at 525. *See* Metzger, *supra* note 23.

165 493 F. Supp. at 525. The court incorrectly interpreted the *Dunhill* plurality's commercial activity exception to the act of state doctrine as if it were binding precedent.

166 "[We] decide . . . that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . *in the absence of a treaty* . . . ." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

167 493 F. Supp. at 523.

facts such an exception applied is questionable. Indeed, if no treaty existed, it is irrational that the nationalization of the insurance industry should be declared purely commercial conduct.[168] In fact, the plurality opinion in *Dunhill* accepted the proposition that the original nationalization of the cigar businesses by the Republic of Cuba was an act of state which foreclosed adjudication.[169] The plurality's commercial exception was based on the continued operation of the cigar businesses by the Republic of Cuba, not on the original nationalization.[170] In principle, "conventional expropriations of foreign assets located *ab initio* inside a country's territorial borders"[171] can hardly be construed as purely commercial acts, as they are clearly acts that only a sovereign can perform.[172]

In *Northrup Corp. v. McDonnell Douglas Corp.*,[173] the Ninth Circuit incorrectly treated the commercial exception to the act of state doctrine as if it were settled precedent, declaring that it prevented "violators of private agreements that involve some foreign governmental act" from using the act of state doctrine as a shield.[174] The court held that the plaintiff's claims for fraud and breach of contract pertained to the defendant's private commercial conduct and were not inextricably bound up in any foreign state action. The court further noted that purely commercial activity ordinarily does not require judicial forbearance under the act of state doctrine as expressed in *Dunhill*.[175]

---

[168] *See* Alfred Dunhill of London, Inc. v. Republic of China, 425 U.S. 682, 695 (1976)(plurality opinion)(citing Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 907 (1824)); *see also* Lauterpacht, *supra* note 47, at 225; *see also supra* note 93 (for purposes of construing "commercial activity" in the FSIA context); *see also supra* note 64 and accompanying text (for purposes of the restrictive theory of sovereign immunity). Of course, on other grounds, the failure to provide for appropriate compensation might very well preclude the application of the act of state doctrine specifically because of the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2)(1982); *see supra* note 126 and accompanying text.

[169] 425 U.S. 682, 697 n.11 (1976)(citing the landmark authority Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-28, 431-33 (1964)).

[170] *Id.*

[171] *Id.*

[172] These are acts defined in Callejo v. Bancomer, S.A., 764 F.2d 1101, 1115 (5th Cir. 1986) as being "[p]aradigmatically sovereign in nature; . . . not . . . a type that a private person can exercise" (the issuance of exchange control provisions). *See infra* note 198 and accompanying text; Empressa Cubana Exportadora, Inc. v. Lamborn & Co., 652 F.2d 231, 238 (2d Cir. 1981) (expropriation); *see also* Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc., 686 F.2d 322, 326 (5th Cir. 1982) (expropriation); Ethiopian Spice Extraction v. Kalamazoo Spice, Etc., 543 F. Supp. 1224, 1229 (W.D. Mich. 1982) (expropriation); Int'l Ass'n of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (price fixing by certain governments); Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977) (denial of import licenses).

[173] Northrup Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983).

[174] *Id.* at 1048.

[175] *Id.* at 1048 n.25 (not specifying that only a plurality in *Dunhill* supported this conclusion).

In *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*,[176] the Ninth Circuit stated it had not definitively ruled on the commercial exception.[177] The court held that since the commercial exception would not apply to the facts of the case, the court need not reach the question of whether to adopt the commercial exception to the act of state doctrine.[178]

Of course, not all courts have treated the *Dunhill* plurality opinion as binding precedent. For example, in *Bokkelen v. Grumman Aerospace Corp,*[179] the district court expressed doubt as to whether a commercial activity exception existed.[180] The court noted that *Dunhill* did not command the support of a majority of the Supreme Court and thus could not be considered authoritative.[181] The court held that the Brazilian government's denial of import licenses was an act of state, thereby precluding inquiry into the reasons for denial.[182]

In *Hunt v. Coastal States Gas Producing Co.*,[183] the Texas Court of Civil Appeals, unlike the federal court in *Hunt v. Mobil Oil*,[184] questioned the efficacy of a commercial activity exception to the act of state doctrine.[185] The state court held that the act of state doctrine barred judicial inquiry into the validity of Libya's actions because they represented the exercise of governmental power.[186]

Moreover, in *Mol Inc. v. People's Republic of Bangladesh*,[187] the district court rejected the notion that the act of state doctrine had been diluted as a result of the commercial activity exception limiting the doctrine of sovereign immunity.[188] The court preferred the classic case-by-case approach with the caveat that while a purely commercial activity may not rise to the level of an act of state, certain quasi-com-

---

[176] Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

[177] *Id.* at 408. This conclusion is startling because in both *Northrup* and *Int'l Ass'n of Machinists*, 649 F.2d at 1360 n.8, the Ninth Circuit Court of Appeals referred to the commercial activity exception to the act of state as if it were part of the majority opinion in *Dunhill*. In neither case was the fact that it was only part of the plurality opinion mentioned. Indeed, only in *Clayco* did the Ninth Circuit Court of Appeals state: "A *plurality of the Supreme Court* recognized an exception for purely commercial activity in . . . [*Dunhill*], but only four Justices concurred in that section of the opinion." 712 F.2d at 408 (emphasis added).

[178] 712 F.2d at 408.

[179] Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977).

[180] The court discussed the commercial activity exception proposed by the *Dunhill* plurality simply because, as the court stated: "[W]e cannot completely dismiss the third section of the *Dunhill* opinion as the Second Circuit in *Mobil Oil* seems to adopt the reasoning contained therein apparently without realizing that that section of *Dunhill* did not command a majority of the court." *Id.* at 333.

[181] *Id.*

[182] *Id.*

[183] Hunt v. Coastal States Gas Producing Co., 570 S.W.2d 503 (Tex. Civ. App. 1978).

[184] Hunt v. Mobil Oil, 550 F.2d 68, 73 (2d Cir. 1977).

[185] 570 S.W.2d at 508.

[186] *Id. See supra* note 125.

[187] Mol, Inc. v. Bangladesh, 572 F. Supp. 79 (D.Ore. 1983).

[188] *Id.* at 83.

mercial activity will activate the act of state doctrine when the foreign state *qua* state acts in the public interest.[189] The court therefore decided that wildlife regulation in this context did fall under the act of state doctrine defense.[190]

Finally, in *Allied Bank International v. Banco Credito Agricola*,[191] the court held that actions of the Central Bank of Costa Rica in response to a serious economic crisis were more than just the repudiation of commercial debts, but were intended to serve a governmental function.[192] Since the acts in question were clearly part of a governmental function, the act of state doctrine barred adjudication arising from nonpayment of the notes.[193]

The tenuousness of the commercial activity exception in *Dunhill*, as a result of only plurality support, has not been judicially enhanced by the number of subsequent supporting decisions which have embraced and attempted to apply it without critical analysis, justification, or explanation. Even Congress apparently misled itself in viewing *Dunhill* as establishing a binding precedent on the question of a commercial activity exception to the act of state doctrine.[194] Yet, given this extensive acceptance of the doctrine, careful analysis of the commercial activity exception in conjunction with the FSIA is necessary.

The Court of Appeals for the Fifth Circuit engaged in such an analysis in *Callejo v. Bancomer, S.A.*[195] William Callejo and his wife Adelfa, U.S. citizens residing in Texas, brought suit in federal court for breach of contract[196] against Bancomer, a Mexican bank. Plaintiffs sought either rescission or money damages from their purchases

---

189 *Id.*

190 *Id.* at 86.

191 Allied Bank Int'l v. Banco Credito Agricola, 566 F. Supp. 1440 (S.D.N.Y. 1983), *rev'd on other grounds*, 757 F.2d 516 (2d Cir. 1985). *See* Ebenroth & Teitz, *Winning (Or Losing) by Default: The Act of State Doctrine, Sovereign Immunity and Comity in International Business Transactions*, 19 INT'L LAW. 225 (1985); *see also* Frumkin, *The Act of State Doctrine and Foreign Sovereign Defaults on United States Bank Loans: A New Focus for a Muddled Doctrine*, 133 U. PA. L. REV. 469 (1985); Zaitzeff & Kunz, *The Act of State Doctrine and the Allied Bank Case*, 40 BUS. LAW. 449 (1985); Comment, *Allied Bank III and United States Treatment of Foreign Exchange Controls: The Effects of the Act of State Doctrine, The Principle of Comity, and Article VIII section 2(b) of the International Monetary Fund Agreement*, 9 B.C. INT'L & COMP. L. REV. 409 (1986); Note, *The Act of State Doctrine and Allied Bank*, 31 VILL. L. REV. 291 (1986); Note, *The Resolution of Act of State Disputes Involving Indefinitely Situated Property*, 25 VA. J. INT'L L. 901 (1985).

192 *Allied Bank*, 566 F. Supp. at 1443.

193 *Id.* The cause of action is barred, however, only if the *situs* of the debts was the territory of the foreign government (i.e. Costa Rica).

194 *See* HOUSE REPORT, *supra* note 49, at 20 n.1.

195 764 F.2d 1101 (5th Cir. 1985). *See* Note, *Callejo v. Bancomer, S.A.: The Need for a Commercial Activity Exception to the Act of State Doctrine*, 7 NW. J. INT'L L. & BUS. 413 (1985).

196 *Callejo*, 764 F.2d at 1105-06, 1106 n.1. The Callejos also claimed securities act violations from Bancomer's failure to register the certificates in violation of § 12(1) of the Securities Act of 1933, 15 U.S.C. § 771(1) (1982), as well as § 33A.1 of the Texas Securities Act, TEX. REV. CIV. STAT. ANN. art. 581-33 A.(1) (Vernon Supp. 1987).

of four certificates of deposit (CDs)[197] issued by Bancomer, for terms of three months. The CDs were denominated in U.S. dollars and required payment of principal and interest in dollars. Each CD specified Mexico City as the place of payment.

The suit arose because the government of Mexico promulgated exchange control regulations[198] which required Mexican banks to pay both principal and interest on U.S. dollar denominated CDs *in pesos*[199] at a designated exchange rate.[200] Acting pursuant to these exchange control regulations, Bancomer notified plaintiffs that it would pay principal and interest on their four CDs in pesos.[201] Plaintiffs renewed their two CDs which matured on August 31, 1982, and filed suit against Bancomer.

The district court granted Bancomer's motion to dismiss. It held that plaintiff's suit was not based on Bancomer's commercial activities and thus failed because Bancomer, acting as an instrumentality of the Mexican government, was entitled to sovereign immunity. The Fifth Circuit affirmed the dismissal but on grounds different from the lower court. The court decided the acts were commercial activity[202] falling within the commercial activity exception to the Foreign Sovereign Immunities Act (FSIA).[203] Therefore, Bancomer was not entitled to sovereign immunity under the FSIA; however, the act of state doctrine applied, precluding success by the Callejos in the suit.[204]

---

[197] *Callejo*, 764 F.2d at 1101. They had a total value of approximately U.S. $300,000. *Id.*

[198] *Id.* These regulations were adopted because of a severe monetary crisis precipitated by declining world oil prices.

[199] *Id.* The regulations stipulated that payment be made in Mexico and limited the total number of pesos that foreigners were allowed to take out of the country. Finally, on September 1, 1982, the Government of Mexico nationalized Bancomer along with all privately-owned Mexican banks. *Id.*

[200] *Id.* Plaintiffs alleged that the designated rate was below the market exchange rate of August 13, 1982.

[201] *Id.* The interest was to be paid at a rate that was substantially below the current market rate.

[202] 28 U.S.C. § 1605(a)(2) (1982) states:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state, or upon an act 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 the act causes a direct effect in the United States.

[203] 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982).

[204] 764 F.2d at 1116. The court also ruled that the treaty exception (*see supra* note 23; *see also supra* note 162 and accompanying text) based on the Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, Art. VIII 2(a), 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39, *as amended* April 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 (amendments effective April 1, 1978), to which Mexico is a party, did not apply on these facts, and that the situs of the deposits was not Texas but Mexico. *Id.* at 1121, 1125. *Compare* Allied Bank International v. Banco Credito Agricola, 757 F.2d 516, 522 (2d Cir. 1983), *cert. de-*

Unquestionably, commercial activity is not monolithic. Its meaning varies with context and applicable juristic value judgments. Its meaning is therefore not necessarily constant in the FSIA and the act of state contexts. In the context of FSIA, focus is on the inherent nature of the activity in a business sense, whereas in the act of state context, governmental policy considerations are inseparably fused with the inherent nature of the business activity. Commercial activity, for the purposes of the FSIA, can therefore be metamorphosed into noncommercial activity, vis-a-vis the act of state doctrine, by the impact of the Mexican government decrees. Mexican government public purpose emergency measures, invoked to avert national economic disaster, were indeed at issue in *Bancomer*. The situational nature of the commercial activity, under act of state criteria, precluded an affirmative conclusion of commercial exception proportions and permitted judicial deference to Mexican sovereignty to predominate.

The court of appeals declared Bancomer's activity of accepting deposits of money, as an investment by the Callejos, to be commercial activity under the FSIA.[205] Without violating the bounds of rationality, the court then concluded that the promulgation by the Mexican government of the pertinent decrees did *not* satisfy commercial activity exceptions requirements under the act of state criteria,[206] despite the inevitable and disastrously reductive impact on the value of the amounts returned to the Callejos.

VI. Is There a Need for a Commercial Activity Exception to the Act of State Doctrine?

It can be argued that a commercial activity exception is not inconsistent with the policies[207] underlying the act of state doctrine. These policies include comity among nations[208] and the separation

---

nied, 472 U.S. 974 (1985) (holding that situs of the bank debts on those facts and law was New York and not Costa Rica); *see supra* note 191.

[205] *See supra* note 93.

[206] "We need not decide whether to adopt the commercial activity exception, since *Mexico's actions were clearly sovereign and not commercial in nature.*" 764 F.2d at 1115 (footnote omitted)(emphasis added). The court nevertheless unequivocally stated that it had not adopted the commercial activity exception to the act of state doctrine proposed by the *Dunhill* plurality. *Id.* at 1115 n.17.

[207] Arguably, the international community of states has progressively accepted disparate treatment of commercial activity compared to noncommercial public acts. This increasingly widespread adoption of the restrictive theory of sovereign immunity attests to the dynamism of comity and its evolution towards international tolerance of exceptions to sovereignty with respect to commercial international interaction. *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 698-99 (1976)(plurality opinion); *see also supra* note 75 and accompanying text. Of course, this international tolerance of restrictions, vis-a-vis commercial activity, developed in the context of the potentially ubiquitous claim to sovereign immunity. In contrast, the act of state doctrine is monomorphic in nature, being limited as it is to the *public* acts of a sovereign *within her/his own territory*.

[208] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 417-18 (1964). *See* Ricaud v. American Metal Co., 246 U.S. 304, 309-10 (1918).

of powers.[209] Similarly, the principle of sovereign immunity is based on respect for the dignity of the foreign nation, its agencies, and representatives, and allows them to function without interference from the courts of other nations.[210] The concept of comity between nations is perpetuated by judicial reluctance to pass upon acts of a foreign state which may infringe upon the sovereignty of that nation.[211]

Judicial scrutiny of purely commercial dealings of foreign governments should not undermine respect for sovereign states, since political value judgments are not generally the issue. Acceptance of the commercial exception would merely be the application of well-recognized international mercantile law principles to the actions of foreign sovereigns. When entering the realm of private business, a sovereign state should be held to have waived olympian immunities and implicitly consented to abide by the same rules and regulations which bind private entities, entrepreneurs, and traders.[212] To permit otherwise would allow governmental parties an unfair advantage.[213]

The second premise underlying the act of state doctrine is the concept of separation of powers.[214] Implicit in the separation of powers concept is the President's power to recognize and negotiate with foreign nations.[215] The judiciary has frequently shown reluc-

---

209 The separation of powers can be used to explain the self-restraint of the judiciary in deferring to the executive with respect to matters pertaining to the sphere of foreign affairs. See the plurality opinion citing the Tate Letter, *reprinted in* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 696-97 (1976)(appendix 2); *see also* U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). It can, however, also be used to articulate the constitutional power of the judiciary to delineate areas of power constitutionally allocated to each of the three branches of government. In this sense, the act of state doctrine may be perceived by the judiciary as its exclusive domain by virtue of its "constitutional" underpinnings. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). *See also supra* note 10. Thus, only the judiciary would have constitutional power to modify the doctrine by declaring a commercial activity exception to it, but the legislature or executive would not. "The Act of State Doctrine was not repealed or limited by the passage of the [FSIA] . . . and since the Act of State Doctrine has 'constitutional underpinnings' . . . *it appears that Congress would have lacked the authority to limit the doctrine.*" Mol, Inc. v. Peoples Republic of Bangladesh, 572 F. Supp. 79, 83 (1983)(footnotes omitted)(emphasis added).

210 *See supra* note 52 and accompanying text; *accord* I. BROWNLIE, *supra* note 84, at 322.

211 *See* Purcell, *The Act of State Doctrine: The Need for a Commercial Exception in Antitrust Litigation*, 18 SAN DIEGO L. REV. 813, 823-24 (1981) (subjecting foreign governments to the rule of law in commercial dealings which do not necessarily represent their political preferences presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers that can also be exercised by private citizens); *see also* Cooper, *Act of State and Sovereign Immunity: A Further Inquiry*, 11 LOY. U. CHI. L.J. 193, 207 (1980).

212 *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 695-96 (1976)(plurality opinion).

213 *See supra* note 65.

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

215 Foreign policy falls within the purview of the executive branch. U.S. CONST. art. II, §§ 2, 3.

tance to interject itself into the foreign affairs of the United States.[216] In addition to the lack of diplomatic subtlety on the part of the judicial branch in this area is the concern that the decision of the judiciary may in fact collide with a foreign policy advanced by another branch of the government.[217]

The prospects of governmental conflict and embarrassment to the foreign relations of the United States may be exaggerated, however, because the State Department has officially promulgated this policy through its letter endorsement of the plurality's commercial exception in *Dunhill*.[218] Adjudication in conformity with that position should therefore not conflict with the foreign policy goals of the executive.

In addition to executive encouragement of judicial activism, it is arguable that commercial matters do not generally activate ideological and political concerns involved in recognition of a foreign government or negotiation of a treaty.[219] Commercial matters are essentially transactional in nature and subject to rules and practices more attenuated from political concerns.[220]

Congress, in enacting the FSIA, decided that the sovereign immunity defense should not prevent a private litigant from bringing an action against a foreign state when that foreign state is engaged in commercial activity.[221] Thus, when acts of a foreign state fall within the definition of commercial activity under the FSIA, but the foreign state is granted immunity under the act of state doctrine, congressional intent might appear to be stultified.

Undoubtedly, Congress intended to include acts that happen within a foreign state's territory but have a direct effect on U.S. commerce.[222] Generally, a state has jurisdiction to prescribe a rule of law

---

[216] *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[217] *See* 376 U.S. at 427-28, 431-33.

[218] *See* letter from Monroe Leigh, Legal Advisor, Dept. of State, to the Solicitor General (Nov. 26, 1975), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706 app. 1 (1976). In an amicus brief filed by the Solicitor General, a commercial exception to the act of state doctrine was expressly endorsed. *Id.* at 696. Additionally, in the Tate Letter, the State Department declared that the United States had adopted the restrictive theory of sovereign immunity; thereafter, courts should deny immunity for private or commercial acts of a foreign state, but continue to grant immunity for public acts. *See Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments (The Tate Letter)*, 26 DEP'T. ST. BULL. 984 (1952).

[219] There is a yearning in practically all national legal systems for establishment of a stable legal framework to generate solutions to problems arising in international commerce. *See* Rajski, *The Law of International Trade of Some European Socialist Countries and East-West Trade Relations*, 1967 WASH. U.L.Q. 125, 137.

[220] The sale of goods within the United States by a foreign trade organization of the People's Republic of Poland was not perceived as impinging on the political system of Poland. *See* Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 396 (D. Del. 1978).

[221] 28 U.S.C. § 1605(a)(2) (1982). *See supra* note 80 and accompanying text.

[222] *See supra* note 97.

to conduct occurring outside the territory which causes an effect within its territory if either:

> (a) the conduct and its effects are elements of commonly recognized crimes or torts; or
> (b) the conduct and its effects are elements of rules not inconsistent with principles of justice and the effect within the territory is substantial, direct, and foreseeable.[223]

The House Report on the FSIA acknowledged that once the defense of sovereign immunity was removed, the act of state doctrine might be improperly asserted in the effort to block litigation.[224] After *Dunhill*, Congress erroneously concluded that it was unnecessary to statutorily modify the act of state doctrine in the FSIA legislation, because the courts "already have considerable guidance enabling them to reject improper assertions of the act of state doctrine."[225] Thus, Congress presumably did not intend the act of state doctrine to apply to a case in which a commercial activity involved significant jurisdictional contacts with the United States.[226]

Since both Congress and the executive[227] have not objected to an application of similar standards to both the sovereign immunity and the act of state claims, the scope of foreign immunities defined by the commercial activity exception to the FSIA should be scrutinized in determining the scope of the act of state doctrine. Historical congruity between these doctrines would be reestablished if the courts restricted the act of state doctrine whenever the FSIA applied. Yet, "when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and sacrifice custom in pursuit of other and larger ends."[228] Thus, reestablishing congruity between the act of state and sovereign immunity doctrines should not be blindly pursued as a panacea, by accepting a commercial exception to the act of state doctrine in tandem with commercial activity under the FSIA.[229] Pursuit of congruity would, of course, not be irrational where it would be inconsistent to presume that a foreign state's commercial activity has no impact on foreign relations for jurisdictional purposes, and then based on the

---

223 H.R. REP. No. 94-1487, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6618-19.

224 *Id.*

225 *Id.*

226 *See supra* note 194.

227 *See supra* note 218.

228 B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65 (1921). "We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897).

229 *See* text at *supra* notes 209 and 98. Under the FSIA the foreign sovereign's purpose for engaging in the pertinent activity is irrelevant. *See supra* note 80 and accompanying text. However, the foreign sovereign's *purpose* in doing the act is *fundamental* in the context of the act of state doctrine, which precludes only the justiciability of *public purpose* acts. *See supra* notes 4 and 172.

same act foreclose adjudication on the merits. Thus, a true commercial activity exception to the act of state doctrine could, if necessary, be drawn much more narrowly than commercial activity exceptions under the FSIA.

The approach advocated by the plurality of the Supreme Court in *Dunhill* could be subtle enough to require the court to determine on a mutually exclusive basis, first, whether the acts of the foreign government were essentially commercial[230] or public[231] in nature. Then, if it is determined that the acts are essentially commercial, the court could reject application of the act of state doctrine.

The approach followed by the majority in *Dunhill* in deciding whether to apply or reject the act of state doctrine would be unaffected if the act were found to be public in nature under the plurality approach. There seems to be a degree of ambivalence in the present policy of the courts. Inherent in the present policy of the courts, including a majority of the Supreme Court in *Dunhill*, is a concession of a "quasi-commercial exception" to the act of state doctrine. Thus, if the court wishes to review the actions of a foreign government in a commercial matter, it need only apply a strict definition of the "act of state"[232] and thus deny the action its sovereign status. Under this patina of respectability, unless the foreign sovereign enters into the

---

[230] *E.g.*, Callejo v. Bancomer, S.A., 746 F.2d 1101 (5th Cir. 1985). Hypothetically, if the Government of Mexico had simply nationalized all privately-owned Mexican banks including Bancomer and continued ordinary banking functions *but had not promulgated any exchange control regulations*, then arguably all the contractual obligations binding the bank to its depositors would have survived the nationalization intact, with only a change in the ownership of the banks having occurred.

Thus, if the Callejos had owned stock in Bancomer prior to the nationalization, a suit by the Callejos against the Government of Mexico with respect to ownership of the nationalized stock would require dismissal by the courts under the act of state doctrine.

If, however, the Callejos were simply depositors of Bancomer, *in the absence of promulgation of exchange control regulations by the Government of Mexico*, a suit by the Callejos with respect to enforcement of the contract terms of the CDs should prevail if the Government of Mexico acting as a banker through Bancomer refused to pay the Callejos as required by the terms of the CD contract. Clearly, no public purpose implications of the nationalization would be relevant to the banking activities in such circumstances.

[231] An act of state may be found "fundamentally public" in nature if commercial components are present. For example, in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), the combined effect of nationalization by the Government of Mexico of all privately-owned Mexican banks, including Bancomer, in addition to the promulgation by the Government of Mexico of the exchange control regulations in response to the severe national monetary crisis brought on by a decline in the world price of oil, reached public purpose proportions. These specifics activated the act of state doctrine when claimed as a defense by Bancomer precluding recovery by the Callejos on these facts.

The transaction may be categorized as an expropriation of the Callejos' (as well as those of others similarly situated) U.S. dollar denominated CDs, by virtue of the exchange control regulations promulgated by the Government of Mexico, followed by payment of adequate, effective, and prompt compensation in the form of pesos at the rate specified in the exchange control regulations. *Compare* West v. Multibanco Comermex, S.A., 807 F.2d 820, 833 (9th Cir. 1987) ("Here, however, as we have concluded . . . *there was simply no taking*")(emphasis added).

[232] *See supra* note 5.

marketplace to advance a legitimate "public interest,"[233] its acts can be classified *sub silento* as "private" and denied the protection of the act of state defense.[234]

The distinction between this narrow quasi-commercial exception and a true commercial exception to the act of state doctrine on the one hand, and the commercial activity exception of the FSIA[235] on the other, is the emphasis on the purpose of the act itself. Under the commercial exception of the FSIA,[236] whether the purpose of the act was to advance public or nonpublic interests, if its nature were commercial,[237] it would be denied the shield of sovereign immunity.[238] Consequently, in focusing on the nature of the sovereign's acts, the coverage of the sovereign immunity defense, in light of the FSIA, is more restricted than that of the act of state doctrine with or without a true commercial activity exception or a quasi-commercial exception.

It must be conceded, however, that placing any commercial activity exception to the act of state doctrine on the same footing as the commercial activity exception under the FSIA is more conducive to consistent application, obviating the necessity of inquiring into the motivation of the foreign government's actions. If a court adjudicated a commercial claim[239] against a foreign state on the merits, it would not affront the sovereignty of a foreign nation, because sovereignty would not be implicated in such an adjudication. The foreign state would have entered the marketplace as a merchant, not as a sovereign, and it is as a merchant that the foreign state would be adjudicated liable for its commercial obligations.[240]

Finally, uncertainty in international trade would be reduced by a judicial "commercial activity" exception to the act of state doctrine.[241] The prospects of broken contracts would probably diminish, proportionate to the certainty that liability would be imposed by courts of law.

---

[233] *See* Callejo v. Bancomer, S.A. 764 F.2d 1101 (5th Cir. 1985); *see also* West v. Multibanco Comermex, S.A., 807 F.2d 820 (9th Cir. 1987).

[234] *E.g.*, Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976)(majority opinion). "Legal traditions have persisted largely because it is less wasteful to keep to old settled paths than to lay out new ones." Pound, *Juristic Science and Law*, 31 HARV. L. REV. 1047, 1058 (1918).

[235] *See supra* note 80 and accompanying text.

[236] *Id.*

[237] *See supra* note 93 and accompanying text.

[238] *Id.*

[239] *Id.*

[240] *See supra* note 64.

[241] Uncertainty is reduced whether or not the courts adopt an exception (a) based on the same footing as FSIA, or (b) based on (i) a true commercial activity exception or (ii) a quasi-commercial exception as outlined in this paper. The differences are those of degree.

VII. Conclusion

Trade is of profound importance to the U.S. economy.[242] If international trade is to continue to prosper, it is essential to assure merchants that contractual obligations voluntarily undertaken by anyone, including foreign governments, will not be unsatisfactorily abrogated. If enterprises were permitted to escape commercial liability by invoking the act of state doctrine without limit, such enterprises would operate under blanket immunity from legal consequences. The national interest would clearly not be served by this result.

Conversely, a Supreme Court holding that commercial acts[243] are not immunized by the act of state doctrine would promote international economic order. Governments would be restrained from arbitrarily exercising their authority against private commercial interests, as well as against the commercial interests of other governments. This is clearly a situation in which the common interests of all nations would be served by Supreme Court action.

Moreover, irrespective of whether the act of state doctrine was limited by the courts in *Dunhill*, both legislative and executive intent indicate that the sovereign immunity and the act of state doctrines should be restricted with respect to the commercial acts of foreign states. Instead, invocation of the act of state doctrine has led to the circumvention of the FSIA, despite legislative intent to the contrary. Consequently, a Supreme Court holding that commercial acts are not protected by the act of state doctrine would restore congruity between the doctrines.

Unmistakably, in the more than ten years since the *Dunhill* plurality decision, the proposed commercial activity exception to the act of state doctrine has had little of the impact initially anticipated. Thus, without a Supreme Court majority decision to mandate application by lower courts of a commercial exception, its interpretive force will remain inchoate.

---

[242] Since 1979, total United States exports have climbed from $291.2 billion to $376.2 billion in 1986, an increase of $85 billion. As a percentage of gross national product, however, exports have declined from 11.6% in 1979 to 8.8% in 1986. Council of Economic Advisors, ECONOMIC INDICATORS 1 (Oct. 1987).

United States imports grew by $209.2 billion, from $272.5 billion in 1979 to $481.7 billion in 1986. Thus, imports have increased from 10.9% of the gross national product in 1979 to 11.4% in 1986. As of the third quarter of 1987, the net export deficit was $121.7 billion, or 2.7% of the gross national product. *Id.*

[243] *See supra* note 241.