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The Act of State Doctrine: The Need for a Commercial Exception in Antitrust Litigation

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THE ACT OF STATE DOCTRINE: THE NEED FOR A COMMERCIAL EXCEPTION IN ANTITRUST LITIGATION*

When successfully asserted, the act of state defense bars inquiry into the actions of a foreign government. This Comment traces the evolution of the act of state doctrine in a commercial context, focusing on antitrust litigation. The author concludes that the commercial and extraterritorial nature of most or the majority of antitrust actions and the detrimental effect of the broad application of the act of state doctrine on current federal legislation mandate a commercial exception to the doctrine.

INTRODUCTION

The classic enunciation of the act of state doctrine can be found in *Underhill v. Hernandez*[1] in which Justice Fuller stated: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the goverment of another done within its own territory."[2]

This Comment will examine various arguments in support of a commercial exception to the act of state doctrine. In particular, the argument that the commercial exception is appropriate in antitrust litigation. The nature of antitrust violations will be analyzed to show why the act of state doctrine should not apply in those situations. An alternative approach to the commercial exception put forth by the Ninth Circuit Court of Appeals in *Timberlane Lumber Co. v. Bank of America*[3] will also be ana-

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1. 168 U.S. 250 (1897).

2. *Id.* at 252. In this case the Court refused to inquire into the acts of Hernandez, a Venezuelan military commander whose government had been later recognized by the United States. Underhill, an American citizen, claimed that he had been unlawfully assaulted, coerced, and detained in Venezuela by Hernandez.

3. 549 F.2d 597 (9th Cir. 1976).

lyzed. The *Timberlane* analysis will be developed as a viable alternative to the commercial acts exception.

DEVELOPMENT OF THE ACT OF STATE DOCTRINE

The act of state doctrine is a judicial creation, required neither by the Constitution nor international law.[4] The roots of the doctrine may be discerned in the 1674 English case of *Blad v. Blamfield*.[5] Its emergence in the United States occurred in the late eighteenth and early nineteenth centuries.[6] The early doctrinal basis was the concept of comity among nations.[7] In effect, the actions of the foreign state were being judged solely by the laws of that state.[8] The doctrine may be asserted as an affirmative defense by either a foreign sovereign or a private party.[9] If successfully asserted, the act of state defense will preclude inquiry into the details of an action of the foreign government, or the merits of the result it has reached, in action by it upon the subject matter of the litigation.[10]

The first major United States Supreme Court case to utilize the act of state doctrine in an antitrust[11] suit was *American Banana Co. v. United Fruit Co.*[12] Both parties to the action were American corporations. The plaintiff claimed that the defendant had induced the Costa Rican Government to seize the plaintiff's plantation and banana supplies with the intent of establishing a monopoly in the banana trade. Justice Holmes concluded that the acts of the defendant could not be declared illegal in an American court. This was because, to find the defendant's acts illegal, the court would initially be required to adjudicate the legality of the Costa Rican seizure, an action which could not be scrutinized under the act of state doctrine.[13]

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4. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-23 (1964).

5. 36 Eng. Rep. 992 (1674).

6. *See* Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 135-36 (1812), and Santissima Trinidad, 20 U.S. (7 Wheat) 283, 336 (1822).

7. Ricaud v. American Metal Co., 246 U.S. 304 (1918).

8. For further explanation of this "conflict of laws" rationale see American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

9. Oetjen v. Central Leather Co., 246 U.S. 297 (1918). *See* notes 14-17 and accompanying text *infra*.

10. Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918).

11. Here "antitrust" refers to the Sherman Act, 15 U.S.C. §§ 1-7 (1976), the Clayton Act, 15 U.S.C. §§ 12-27 (1976), and the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976).

12. 213 U.S. 347 (1909).

13. "For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all. . . ." *Id.* at 357. The case was also dismissed on a jurisdictional argument which was based on the theory that the acts at issue were performed outside the United States and therefore were not subject to con-

> The fundamental reason [for the Court's refusal to question the acts of the Costa Rican Government] is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. . . . The very meaning of sovereignty is that the decree of the sovereign makes law.[14]

The next case, *Oetjen v. Central Leather Co.*,[15] involved a seizure of hides from a Mexican citizen as a military levy for the forces of General Carranza, whose government was subsequently recognized by the United States.[16] The plaintiff claimed ownership of the seized hides as assignee of the Mexican citizen. The defendant claimed title to the hides through a third party who had purchased the hides from the General enforcing the levy. In affirming a judgement for the defendant, the Court extended the act of state doctrine to disputes arising between two private parties.

The Court articulated another doctrinal basis for the act of state defense in *Oetjen*. "To permit the validity of the acts of one sovereign State to be reëxamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.' "[17] Because the sovereignty of General Carranza's forces had been recognized by the United States Government, the Court concluded the adjudication of the acts of the General's forces would certainly interfere with the foreign relations powers invested in the executive and legislative branches. In designating the issue a political question, the concept of separation of powers emerged as a second basis for the act of state doctrine.

Ricaud v. American Metal Co.[18] arose out of the same circumstances as *Oetjen*, except it was an American citizen whose property was confiscated by General Carranza's forces. The

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gressional scrutiny. Justice Holmes stated that the determination of whether an act is lawful or unlawful must be determined "wholly by the law of the country where the act is done." *Id.* at 356. This analysis has been subsequently discredited by *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), where the court found that an agreement among foreign companies in violation of the Sherman Act was illegal even though the acts complained of occurred abroad, if the agreement was intended and did in fact affect United States imports.

14. American Banana Co. v. United Fruit Co., 213 U.S. at 358.

15. 246 U.S. 297 (1918).

16. Interestingly enough, the Government was recognized by this country subsequent to the trial but prior to the decision by the Court.

17. 246 U.S. at 304.

18. 246 U.S. 304 (1918).

importance of *Ricaud* is the distinction made between the act of state doctrine and the doctrine of sovereign immunity.[19] The doctrine of sovereign immunity prevents the assertion of subject matter jurisdiction by the courts of the United States under certain circumstances where a foreign state is involved. The act of state doctrine in contrast,

> does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision.[20]

The act of state doctrine is judicially created; its definitions and limitations have remained ambiguous. As *American Banana*, *Oetjen* and *Ricaud* illustrate, the courts have utilized the ambiguity to excuse themselves from adjudicating cases they consider politically volatile or undesirable. This judicial practice became even more apparent with the decision of the United States Supreme Court in *United States v. Sisal Sales Corp.*[21] In *Sisal* a number of American corporations faced charges of antitrust violations arising from the formation of a cartel of Mexican sisal producers whose products were purchased by an exclusive American importer. The establishment of the cartel was greatly aided by favorable Mexican legislation that was solicited and secured by the defendants.[22] As a defense, Sisal Sales contended that the alleged monopoly was created by the laws of a foreign state and thus could not be the basis of a cause of action within the United States.[23] The Supreme Court held that the defendants could be enjoined from violating American antitrust laws because the defendants had entered into a conspiracy to monopolize the sisal business from *within* the United States and had themselves pro-

19. The American Law Institute's RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 41 (1965), distinguished the two concepts. Sovereign immunity is a defense available to a state when a claim is brought against it in the court of another state. The defense bars consideration of the merits of the claim, including examination of the act which gave rise to the claim. When a proceeding against a state or against a thing in its possession is dismissed on the ground of foreign sovereign immunity, it is unnecessary for the court to consider whether the suit could also be dismissed on the separate ground that the act giving rise to the claim against the state is an act of state. On the other hand, the act of state doctrine provides that a court in the United States with appropriate jurisdiction to determine a claim asserted against a person in the United States or with respect to a thing located there, or other interest localized there, will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests. *Id.*

20. 246 U.S. at 309.

21. 274 U.S. 268 (1927).

22. *Id.* at 273-74.

23. *Id.* at 270, 275-76.

cured the Mexican legislation.[24]

The result in *Sisal* is difficult to reconcile with *American Banana* and its progeny. In both *Sisal* and *American Banana* the gist of the action involved the influencing of a foreign government to create legislation beneficial to the defendants.[25] As with *American Banana*, *Sisal* involved action of the foreign government, the form of which was ostensibly an "act of state."[26] Yet in *Sisal* the Court created its own jurisdiction by distinguishing the actions of the defendants on the basis of their conspiring from within the territorial boundaries of the United States. The distinction is arguably fictional and is reflective of the broad discretion vested in courts in deciding whether to invoke or deny the protections afforded by the act of state doctrine.

The modern cases dealing with the act of state doctrine limit the scope of the doctrine by creating exceptions to it.[27] In *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaant-Maatschappij*,[28] the Second Circuit reversed its earlier opinion and held that the Nazi confiscations would not be protected by the act of state defense. The reason for the court's reversal was a State Department press release directing the courts to deny the defense.[29] The result of the *Bernstein* decision has become known as the "Bernstein exception." This exception allows courts to deny the defense of act of state with the approval of the executive branch. This decision also illustrates the court's use of the separation of powers concept as a basis for the act of state doctrine.

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24. *Id.* at 276.

25. *See* notes 12-14 and accompanying text *supra*.

26. Furthermore, the arguments of "comity" and separation of powers in *Oetjen* and *Ricaud* would apply in *Sisal*.

27. The first exception arose in Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947), where a German Jew brought suit to recover his property which had been confiscated by the Nazi regime and subsequently sold to the puchaser-defendant. On appeal Judge Learned Hand felt compelled to allow the act of state defense to validate the Nazi's actions. The importance of the opinion was the court's intimation that the existence of a United States policy denying the validity of the decree dispossessing the plaintiff of title might dictate an opposite result. In addressing executive policy on the matter, Hand said:

> Thus the case is cleared for the second question: whether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine [i.e. the act of state doctrine] which we have just mentioned, does not apply.

Id. at 249.

28. 173 F.2d 71 (2d Cir. 1949).

29. *Id.*

Banco Nacional de Cuba v. Sabbatino[30] is generally accepted as establishing the modern basis for the act of state doctrine. In this case, the Cuban Government had expropriated the property of a Cuban sugar corporation (owned primarily by American interests) in retaliation for the United States' import quota reduction of Cuban sugar. The ship carrying the sugar was allowed to leave Cuba only after the American commodity broker entered into a new contract to purchase the nationalized sugar from an instrumentality of the Cuban Government. As assignee of the contract, the Banco Nacional de Cuba brought suit to recover the proceeds of the sale.[31] The Supreme Court speaking through Justice Harlan reversed the lower courts in holding that the act of state doctrine applied to Cuba's seizure of the sugar.[32] In tracing the historical development of the doctrine the Court rejected the rationale of *American Banana* which established "[n]otions of sovereign authority . . .," and the deference due foreign sovereigns, as its basis.[33] The Court also rejected the findings of the lower courts that international law was a source of the rights here asserted.[34] The Court noted that the act of state doctrine was based on neither international nor constitutional law,[35] although it had "constitutional underpinnings" arising out of the "basic relationships between branches of government in a system of separation of powers."[36] Because foreign policy falls within the purview of the executive branch,[37] the Court declined to adjudi-

30. 376 U.S. 398 (1964).

31. *Id.* at 406.

32. In granting summary judgment in favor of the defendant Sabbatino, the district court stated that although ordinarily the act of state doctrine would prevent it from questioning the validity of the Cuban action, the act complained of violated international law and therefore fell within the court's jurisdiction. 193 F. Supp. 375, 381 (S.D.N.Y. 1961). Owing, in addition to Cuba's retaliatory and discriminatory intent and its improper public purpose, the court reasoned that it was bound to respect and enforce international law rather than the act of state doctrine. *Id.* at 384-85. The Fifth Circuit Court of Appeals affirmed, modifying the decision slightly by declining to hold that any one of the grounds advanced below would be sufficient by itself to constitute a violation as a whole; however, the court reasoned that there was a sufficient showing of a violation of international law. 307 F.2d 845, 868 (2d Cir. 1962).

33. 376 U.S. at 421.

34. The Court in *Sabbatino* reasoned that the vast ideological rift concerning expropriation of alien property necessitated this holding: "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." *Id.* at 428.

35. *Id.* at 427.

36. *Id.* at 423. Note the parallel to *Oetjen* where the Court held that problems arising within the context of the act of state doctrine were best determined by the legislative and executive departments. *See* notes 15-17 and accompanying text *supra*.

37. U.S. CONST. art. II, §§ 2, 3.

cate such matters.[38] The Court reasoned that the executive branch was best equipped to provide adequate relief for all claimants[39] and interference by the judiciary might damage the negotiations being carried on by the executive branch.[40]

In redefining the doctrine, the Court sought to avoid an "inflexible and all-encompassing rule."[41] Instead it opted for an ad hoc approach in which the decision to exercise judgment would result from the "balance of relevant considerations."[42] These "considerations" included: the degree of codification or consensus concerning a particular area of international law;[43] the possibility of affronting the foreign nation;[44] the implications of the issues before the Court on United States foreign policy;[45] and whether the State which perpetrated the challenged act is still in existence.[46]

In abandoning the inflexible rule-oriented approach of the act of state doctrine in favor of an ad hoc balancing of relevant considerations, the Court opened the door to judicial determination of acts of foreign sovereigns within their own territories. The Court was able to rationalize this change of approach by altering the doctrinal basis of the act of state defense. A separation of powers rationale is more conducive to scrutinizing acts of a foreign sovereign than is a rationale based on comity and a resultant policy of deference to the foreign sovereign's own laws.

The act of state doctrine was again reexamined in *First National City Bank v. Banco Nacional de Cuba*[47] but instead of clar-

38. 376 U.S. 398 (1964).

39. Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly. Representing all claimants of this country, it will often be able . . . to achieve some degree of general redress. Judicial determinations of invalidity of title can, on the other hand, have only an occasional impact. . . .

376 U.S. at 431.

40. "Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached." *Id.* at 432.

41. *Id.* at 428.

42. *Id.*

43. *Id.*

44. *Id.* For further explanation see *id.* at 432.

45. *Id.* at 428.

46. *Id.*

47. 406 U.S. 759 (1972).

ifying the *Sabbatino* decision, the Supreme Court proceeded to further confuse the problems associated with the doctrine. As with *Sabbatino*, *First National City Bank* arose from an expropriation of American property by Castro in 1960. The majority opinion cited as controlling a State Department letter advising the Court that the executive branch did not wish the act of state doctrine to be applied to bar the counterclaim of First National City Bank.[48] The majority, in effect, found the "Bernstein exception"[49] to be the determinative factor, ignoring the *Sabbatino* balancing process in favor of treating the act of state doctrine as a "general rule."[50] The rationale was separation of powers and the necessity of judicial deference in the area of foreign affairs.[51] Justice Brennan's dissent noted that the Bernstein exception, in effect, abrogated the separation of powers between the executive and judiciary by "requiring blind adherence" of the judiciary to the directions of the executive.[52] The dissenters emphasized the existence of other relevant factors which should be balanced in making the decision.[53]

In 1976 the Supreme Court decided *Alfred Dunhill of London, Inc. v. Republic of Cuba*.[54] The controversy also arose from an expropriation of assets by the Cuban Government. On September 15, 1960, five Cuban companies which manufactured cigars were nationalized by the Republic of Cuba.[55] At issue was whether the act of state doctrine encompassed Cuba's refusal to return payments mistakenly made by Dunhill for cigars purchased from the expropriated Cuban cigar business.

The majority opinion in *Dunhill* reflects two separate approaches to the act of state doctrine. In an opinion written by Justice White and joined in parts I and II by four other Justices, the majority found that by definition "act of state" does not encompass Cuba's repudiation of its obligation to repay the funds. "No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had . . . as a sovereign matter determined to confiscate the amounts due

48. *Id.* at 767-68.

49. *See* notes 27-28 and accompanying text *supra*.

50. 406 U.S. at 763.

51. *Id.* at 767.

52. *Id.* at 790 (Brennan, J., dissenting). The dissent was joined by Justices Stewart, Marshall and Blackmun.

53. *Id.* at 788, 790.

54. 425 U.S. 682 (1976). In *Dunhill* the Court explicity requested counsel to brief and argue whether the Court's holding in *Sabbatino* should be reconsidered. *Id.* at 690 n.5.

55. 425 U.S. 682.

three foreign importers."[56] Instead of an "act of state," the refusal to return the funds was merely a natural extension of Cuba's litigation stance.[57]

Part III of the majority opinion was endorsed by only four Justices. In an alternative approach Justice White formulated a "commercial exception" to the act of state doctrine. "[T]he concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities."[58] This exception was supported by the separation of powers rationale in that Justice White was seeking to implement the policies of the State Department.

In an amicus brief filed by the Solicitor General, a commercial exception to the act of state doctrine was expressly endorsed.[59] In addition, in 1952 the State Department 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.[60] Justice White reasoned that to perpetuate 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.

> Repudiation of a commercial debt cannot, consistent with this restrictive approach to sovereign immunity, be treated as an act of state; for if it were, foreign governments, by merely repudiating the debt before or after its adjudication, would enjoy an immunity which our Government would not extend them under prevailing sovereign immunity principles in this country.[61]

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56. *Id.* at 695.
57. *Id.* at 694-95.
58. *Id.* at 695.
59. *Id.* at 696. *Also see* letter from Monroe Leigh, Legal Advisor, Dep't 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., 706 (1976).
60. This theory was first advanced by the State Department in the "Tate letter" in 1952. In this letter, the United States Government abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial activity or proprietary actions. *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T STATE BULL. 984 (1952) (letter from Jack B. Tate, Acting Legal Adviser of Dep't of State to Phillip B. Pearlman, Acting Attorney General (May 19, 1952)) [hereinafter cited as Tate letter], *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706 app., 711 (1976). *Also see* notes 18-20 and accompanying text *supra*, for distinction between act of state and sovereign immunity doctrines.
61. 425 U.S. at 698-99.

In view of this articulated Executive policy, White maintained that the role of the court should be limited so as not to embarrass the executive in its conduct of foreign affairs: "[I]t is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."[62]

Although *Dunhill* may be viewed as a return to the inflexible rule-oriented approach of pre-*Sabbatino*, when considered as part of the overall trend, it is consistent with the attempt beginning with *Sisal* and *Bernstein* to limit the scope of the act of state doctrine.[63] Part II of the majority opinion in *Dunhill* limits the doctrine by narrowly defining what constitutes an "act of state." Part III creates the commercial exception—an exception whose contours, although undefined, are potentially vast as nations become increasingly involved in commercial ventures. Perhaps the most limiting opinion is that of the dissenters in *Dunhill* who employed a balancing approach. Even so, the use of an approach that balances all of the relevant considerations is flexible and arguably the commercial nature of the venture is a relevant consideration in some cases.[64]

Subsequent to the broad assertions of *Underhill*, the Supreme Court has continually whittled away the protections of the act of state doctrine. The transition from a comity basis to a separation of powers rationale has facilitated the process of limiting the scope of the defense. The concept of comity as a basis required absolute deference to the acts of foreign sovereigns. In comparison, separation of powers focuses on relationships between branches of government within the United States as opposed to international relations. Thus the expression of the executive or legislative branches is given much weight in the courts' determination. The separation of powers basis does not require the courts to comply with the expressions of the other branches. The current application of the act of state doctrine therefore gives the courts a measure of flexibility not available under the former approach. The act of state doctrine must now be given definitive contours to aid lower courts in their application of the doctrine. A commercial exception to the doctrine would be a natural step in

62. *Id.* at 699-700. Justice Marshall wrote the dissent in which the remaining three Justices joined. As with the dissent in *Citibank* and the majority opinion in *Sabbatino*, Marshall rejected the "inflexible rule" approach to the act of state doctrine: "[T]he carving out of broad exceptions to the doctrine is fundamentally at odds with the careful case-by-case approach adopted in Sabbatino." *Id.* at 728 (Marshall, J., dissenting).

63. *See* notes 21-29 and accompanying text *supra*.

64. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 724 (1976). Even Justice Marshall in his dissent did not discount such a possibility.

that direction and this exception would merely legitimize what is already a trend in the application of the act of state doctrine.

THE ACT OF STATE DOCTRINE IS INAPPLICABLE TO ANTITRUST VIOLATIONS OF FOREIGN SOVEREIGNS

A review of the *Dunhill* case reveals that the commercial exception is founded upon a distinction between the "public and governmental," and the "private and commercial" acts of foreign governments.[65] According to Justice White, acts which are "purely commercial" in nature should be denied the protections of the act of state doctrine.[66]

Two arguments support the exemption of antitrust cases from the act of state doctrine. First, the doctrine's rationales are not served when purely commercial activity is protected from judicial scrutiny. Second, "act of state" by definition excludes any new act which can be considered "commercial" from its purview.

A commercial exception is not inconsistent with the policies underlying the act of state doctrine.[67] 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. Commercial dealings of nations are arguably not reflective of their political preferences, so that to scrutinize those dealings would not affront the sovereignty of that nation.[68] *Sab-*

65. *Id.* at 695.

66. *Id.* at 706. The support for Justice White's opinion lies in the case of Bank of the United States v. Planter's Bank of Georgia, 22 U.S. (9 Wheat) 904 (1824). That case involved a suit on promissory notes which were assigned and delivered to the plaintiffs. (The defense was jurisdictional). Planter's Bank claimed that it was a corporation of which the State of Georgia and other individuals were members. Thus, the defendants argued that the State itself was a party defendant in the case, removing the suit from the jurisdiction of the lower courts and placing it within the original jurisdiction of the Supreme Court. In delivering the opinion of the Court, Justice Marshall distinguished the State's role as a governmental entity from its involvement in private transactions. "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Id.* at 907.

67. These policies are comity among nations and separation of powers. *See* text accompanying notes 7-17 *supra*.

68. Of equal importance is the fact that subjecting foreign governments to the rule of law in commercial dealings 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 peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens.

batino's concern of stepping on "national nerves" by judicial interference[69] is therefore not present in the purely commercial dealings of foreign governments. The concept of comity is not preserved by shielding those dealings from judicial scrutiny. In addition, *Sabbatino* specifically stated that the higher the degree of "codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . ."[70] According to *Dunhill*, "discernable rules of international law have emerged with regard to the commercial dealings of private parties in the international market."[71] Acceptance of the commercial exception would merely be the application of these well recognized principles to the commercial actions of foreign sovereigns. In any event, when entering the realm of private business, a sovereign state should be held to have impliedly consented to abide by the same rules and regulations which bind private entities. To permit otherwise would allow governmental parties an unconscionable advantage.

The second premise underlying the act of state doctrine is the concept of "separation of powers."[72] Implicit in the separation of powers argument is the President's power to recognize and negotiate with foreign nations. The judiciary has frequently expressed its reluctance to interfere in the foreign affairs of the United States. In addition to the incompetence of the judicial branch in this area is the concern that a decision of the judiciary may conflict with a foreign policy advanced by another branch of the Government.[73] This fear of inconsistency is not a viable reason for the courts to refrain from scrutinizing the commercial acts of foreign governments. The executive department, since 1952, has expressly indicated its approval of the judiciary assuming a larger role in reviewing the actions of foreign governments.[74] In the

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Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 703-04 (1976). The commercial exception would appear to be within the underlying expectations of the parties in any commercial agreement. In such transactions, each party has the justifiable expectation that the other will perform his part of the bargain unless his non-action is somehow "legally excused" (i.e. by impossibility, frustration of purpose, etc.). Yet to allow a government to enforce an obligation owed to it while excusing its performance due to its own action, (i.e. governmental acts are a recognized excuse for nonperformance) would be to run afoul of the principle underlying contract law. Such a practice would allow a government to enter contracts at its choosing and then perform or fail to perform its duties in accordance with its predilections.

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

70. *Id.* at 428.

71. 425 U.S. at 704.

72. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).

73. *Id. See* notes 38-40 and accompanying text *supra*.

74. In 1952 the State Department issued the Tate letter. *See* note 60 and accompanying text *supra*.

Dunhill case, the Department of State specifically advocated a commercial exception, finding that such an exception would not interfere with the conduct of foreign relations.[75]

In addition to the executive encouragement of judicial activism, it is arguable that commercial matters do not deal with the ideological and political concerns involved in the recognition of a foreign government or the negotiation of a treaty. By definition, commercial matters are transactional in nature and subject to rules and practices more attenuated from political concerns. This idea is best illustrated by the case of *Outboard Marine Corp. v. Pezetel*.[76]

In *Pezetel*, an American manufacturer of electric golf carts brought an antitrust suit against a Polish manufacturer operating under the laws of Poland. The Polish manufacturer was in business for the purpose of advancing the interest of the State in the State controlled economy.[77] In denying the defendant's argument the court stated:

> The Court cannot agree that this action is the kind contemplated by Justice Harlan when he wrote 'some aspects of international law touch more sharply on national nerves than do others.' . . . [citation omitted] The sale of goods within the United States is not perceived as impinging on the political system of Poland.[78]

But, even if the State of Poland were involved, the court found that "any political embarrassment appears highly remote since there can be no genuine insult to sovereignty when a foreign enterprise undertaking to do business in a given market place is subject to the nondiscriminatory laws of that market place."[79]

In two recent district court cases,[80] the Second Circuit's opinion in *Hunt v. Mobil Oil Corp.*,[81] has been interpreted as accepting

75. Tate letter, *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706 app., at 707. "[A]djudications of commercial liability against foreign states do not impede the conduct of foreign relations . . . such adjudications are consistent with international law on sovereign immunity." *Id.*

76. 461 F. Supp. 384 (D. Del. 1978).

77. *Id.* at 396.

78. *Id.* at 398.

79. *Id.*

80. Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F. Supp. 680 (S.D.N.Y. 1979), stated there must be a public act such as a legislative enactment, regulatory decree, or executive use of public powers in order to invoke the act of state doctrine. In Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977), the court, while not finding the commercial exception to be "authoritative," deemed it appropriate to examine it since the Second Circuit seemed to adopt it in *Hunt*. *Id.* at 332.

81. 550 F.2d 68 (2d Cir. 1977).

the commercial acts exception to the doctrine. In *Hunt* Libya had nationalized the assets of the plaintiff located in that country. The plaintiff alleged that the defendant oil companies induced Libya to do so after the plaintiff had entered a contract with the defendants pursuant to which the plaintiff was to deny Libyan demands to market expropriated oil. The Second Circuit affirmed the district judge's decision allowing the act of state defense because nationalization within Libya's own territory was the actual cause of the damage.[82] The court agreed with the district judge's opinion that inquiry into "acts and conduct of Libyan officials, Libyan affairs and Libyan policies . . ." was foreclosed under the act of state doctrine.[83] The Second Circuit in *Hunt* went on to find, however,

> [e]xpropriations of the property of an alien within the boundaries of the sovereign state are traditionally considered to be public acts of the sovereign removed from judicial scrutiny by application of the act of state rubric. . . . We conclude that the political act complained of here was clearly within the act of state doctrine. . . .[84]

It is this language that has lead some district courts to embrace the commercial acts exception to the act of state doctrine.[85]

The present policy of the courts reveals a "quasi commercial exception" to the act of state doctrine whereby the courts simply determine that the acts complained of are not "acts of state."[86] In *Dunhill*, the Court followed this approach, although it also advocated the acceptance of a commercial exception. In Part II of the

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82. *Id.* at 72.

83. *Id.* at 72 (quoting Hunt v. Mobil Oil Corp., 410 F. Supp. 4, 24 (1975), *aff'd*, 550 F.2d 68 (2d Cir. 1977)).

84. 550 F.2d at 73.

85. Some district courts have recently accepted the commercial acts exception advanced in *Dunhill*. In Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 396 (D.N.J. 1979), the district judge stated: "The doctrine . . . distinguishes between the public and governmental acts of sovereign states and their private and commercial acts. The doctrine does not preclude me from considering the 'repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.'" *Id.* at 401 (quoting in part Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976)).

86. In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), the Canadian Government made a private corporation its exclusive agent for the purchase of avaladium. The Canadian corporation proceeded to use its position to exclude an American affiliate from the Canadian market. The Court entertained the suit claiming there was no indication that any Canadian Government official "approved or would have approved for joint efforts to monopolize." *Id.* at 706. Thus, by finding that the Canadian Government was not "officially" involved, the Court was able to circumvent the act of state problem.

In Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 398 (D. Del. 1978), the court circumvented the issue of a commercial exception to the act of state doctrine by determining that the action in question was not an "act of state." *Id.* at 398. The rationale for this conclusion was the probability that the sovereignty of Poland would not be insulted by adjudication of issues surrounding Pezetel's sale of goods within the United States. *Id.*

opinion, Justice White writing for a majority of the Court found that a mere refusal to pay a commercial debt was not equivalent to an act of state. Instead of confronting Cuba's actions in the confiscation, the court avoided that issue by finding that "[n]o statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general. . . ."[87] The commercial exception alternative was introduced only on the assumption that the Cuban Government had purported to exercise sovereign power to confiscate payments belonging to the foreign creditors.[88]

In *Timberlane Lumber Co. v. Bank of America*,[89] the plaintiffs alleged that the Bank of America sought to remove the competition of the plaintiff's mill by seeking to disrupt its operations through the use of a claim against the operations property located in the Honduras. Pursuant to the filing of suit the property in question was "embargoed." According to Honduran law, "embargoed" property cannot be sold without a court order and an "interventor" must be appointed to ensure against any diminution in the value of the property. Timberlane alleged that the official appointed to watch over the mill was on the payroll of the Bank and was acting in the interest of the Bank in attempting to disrupt and close the mill.[90] The Ninth Circuit Court of Appeals applied a narrow definition of the act of state doctrine. The court found that acts of state require a public interest qualification, and there was "no indication that the actions of the Honduran court and authorities reflected a sovereign decision that Timberlane's efforts should be crippled or that trade with the United States should be restrained."[91]

An analysis of each of the foregoing cases suggests two facets. First, if the court wishes to review the actions of a foreign government in a commercial matter it need only apply a strict definition of "act of state" and thus deny the action its sovereign status. In so doing, the court is left to decide the case on the merits and need not concern itself with the prohibitions of the act of state defense. Second, implicit in the court's decision to apply this strict definition is a recognition of a form of commercial exception. Un-

87. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976).
88. *Id.*
89. 549 F.2d 597 (1976).
90. *Id.* at 604-05.
91. *Id.* at 608.

less the foreign sovereign enters into the marketplace to advance a legitimate "public interest," its acts can be classified as "private" and denied protection of the act of state defense.

The distinction between this quasi-commercial exception and a true commercial exception is the emphasis on the purpose, as opposed to the nature of the act itself. Where a strict definition of act of state is applied to delete "private" acts from coverage of the defense, the focus is on the purpose of the act. Acts for the purpose of promoting the public interest of the state will remain protected by the doctrine.[92]

In comparison, a true commercial exception would focus on the nature of the act in question. Whether the purpose of the act was to advance public or private interests, if its nature were commercial, it would be denied the shield of the act of state doctrine. Consequentially, in focusing on the nature of the sovereign's acts, the coverage of the defense is more restricted. In addition, the latter approach seems more conducive to consistent application, foregoing the necessity of inquiring into the motivation of the foreign governments' actions.

One commentator cites the situation of a sovereign acting in a dual capacity as necessitating a commercial exception to the act of state doctrine.[93] For example, consider a nation which imposes an embargo due to its own shortage of goods which necessarily "has the effect of abrogating that nation's commitments to deliver contracted-for commodities."[94] The purpose of such an act is public and, therefore, the act is definitionally an "act of state." Under the broader commercial exception, those parties injured by the acts of the sovereign would have redress in court.

The traditional application of the act of state doctrine also nullifies the intent and effect of the Foreign Sovereign Immunities Act (F.S.I.A.).[95] The passage of the F.S.I.A. in 1976 codified the restrictive approach to sovereign immunity first advanced by the State Department in 1952.[96] The doctrine of sovereign immunity

92. Thus, one can distinguish "mere foreign governmental involvement from true acts of state. An act of state is the means by which the foreign government gives effect to its national interests, and such an act remains a complete defense to alleged violations of U.S. law." 18 VA. J. INT'L LAW. 321, 324 (1978). *See also* International Ass'n of Machinists and Aerospace Workers v. OPEC, 81 Daily J. D.A.R. 2249, 2250 n.6 (U.S.C.A. 9th, July 6, 1981).

93. 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).

94. *Id.* at 682.

95. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 (1976).

96. *See* note 60 and accompanying text *supra*.

precludes the assertion of subject matter jurisdiction in situations where a foreign state is involved, whereas the act of state doctrine operates as a defense to inquiry into the acts of a foreign sovereign. Nevertheless, the historical foundations of sovereign immunity and the act of state doctrine are common and reveal parallel purposes.

Both doctrines arose early in our judicial history when court decisions reflected the prevailing notions of the inherent supremacy of respective sovereigns. The development of these concepts can be traced to *Schooner Exchange v. McFaddon*,[97] where Chief Justice Marshall distinguished between the private and public acts of a sovereign.[98] From this common historical nucleus the respective doctrines developed similar rationales and effects. Thus, as in *Ricaud*,[99] though the doctrines were clearly distinguished, their aims are similar.

As with the act of state doctrine, sovereign immunity has a strong foundation in the concept of separation of powers. In *Mexico v. Hoffman*,[100] the Supreme Court unanimously denied immunity to a commercial ship owned but not possessed by the Mexican Government. Although the decision turned upon the lack of possession by the Mexican Government, the Court stated one of the basic premises underlying the sovereign immunity doctrine:

> [I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction . . . that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. "In such cases the judicial department . . . follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."[101]

Thus, as with the Bernstein exception to the act of state doctrine, the courts have, in applying the sovereign immunity doctrine, looked to the State Department policies so as not to assume an "antagonistic jurisdiction." In *Compania Espanola de Navegacion Maritima, S.A. v. Navemar*[102] and *Ex parte Republic of Peru*,[103] Justice Stone, the author of both opinions, stated that the touchstone for the sovereign immunity doctrine was not whether sub-

97. 11 U.S. (7 Cranch) 116 (1812).
98. *Id.* at 143.
99. *See* notes 19-20 and accompanying text *supra*.
100. 324 U.S. 30 (1945).
101. *Id.* at 35 (citations omitted).
102. 303 U.S. 68 (1938).
103. 318 U.S. 578 (1943).

stantive international law concepts were applied, but what effect judicial action would have on the foreign relations of the United States.[104] Stone acknowledged the superior expertise of the State Department in determining whether the denial of sovereign immunity would harm the United States' relations with foreign sovereigns.[105] In a tone reminiscent of *Sabbatino*, Justice Stone discussed the greater diplomatic capabilities of the executive branch which make that branch more productive in settling foreign disputes.[106] With these considerations in mind, the judiciary advocated a duty to abstain from adjudication when the State Department felt that such action would adversely affect United States foreign relations.[107]

The modern notions of a restrictive sovereign immunity doctrine stem from *Victory Transport, Inc. v. Comisaria General*.[108] In this case, there was a charter between the plaintiff and the defendant to arbitrate in accordance with a clause in the charter. The defendant asserted a sovereign immunity defense. In reaching its decision, the Second Circuit considered the State Department's position as contained in the Tate letter.[109] An analysis of the Tate letter reveals three reasons behind the State Department policy in support of the restrictive theory of sovereign immunity. First, the Department felt that the trend in international law revealed a growing acceptance of the restrictive theory of sovereign immunity by other nations.[110] Second, the granting of a blanket immunity to other nations would be inconsistent with the action of the United States in "subjecting itself to suit in these same courts in both contract and tort" for its foreign merchant vessels.[111] Third, the Department felt that "widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts."[112]

The effect of the Tate letter was to create an instability between the judicial policy of a broad theory of sovereign immunity, and

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104. *Id.* at 586-88.

105. *Ex parte* Republic of Peru, 318 U.S. 578, 589 (1943); Compania Espanola de Navegacion Maritima, S.A. v. Navemar, 303 U.S. 68, 74 (1938).

106. *See* notes 37-40 and accompanying text *supra*.

107. *Ex parte* Republic of Peru, 318 U.S. 578, 589 (1943); Compania Espanola de Navegacion Maritima, S.A. v. Navemar, 303 U.S. 68, 74 (1938).

108. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

109. *See* note 60 and accompanying text *supra*.

110. Tate letter, *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706 app., 711 (1976).

111. *Id.* at 714.

112. *Id.*

the executive department's advocacy of a restrictive doctrine. In order to alleviate these inconsistencies, the F.S.I.A. was enacted. The F.S.I.A. has three purposes. First, to codify the restrictive theory of sovereign immunity as was then recognized in international law. This would grant immunity only to public acts ("jure imperii") as opposed to commercial or private acts ("jure getionis").[113] Second, to transfer responsibility for evaluating claims of sovereign immunity from the executive branch to the judiciary.[114] Third, to provide a statutory procedure for serving process on and acquiring jurisdiction over a foreign state.[115]

In implementing the aforementioned purposes of the Act, Section 1605(a) of the United States Code details the types of activities which expose a foreign sovereign to jurisdiction within the courts of the United States. Included in these activities are "commercial acts."[116] In determining what constitutes a "commercial act" Section 1603 suggests that the determination should hinge upon the nature of the act rather than its purpose.[117]

In essence, the Act reflects the adoption of the "restrictive" theory of sovereign immunity, thereby requiring that the courts hear matters in which another government acts in a commercial capac-

113. 28 U.S.C. § 1602 (1976).

114. The legislative history of the Immunities Act revealed this specifically recognized objective stating:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

[1976] U.S. CODE CONG. & AD. NEWS, 6604, 6606.

115. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 9-10, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604.

116. 28 U.S.C. § 1605(a) (1976). "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. . . ." *Id.*

117. "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the *nature* of the course of conduct or particular transaction or act, rather than by reference to its *purpose*." 28 U.S.C. § 1603 (1976) (emphasis added).

The legislative history of the Act reveals that the bottom line in distinguishing between public and private acts turns upon whether the action taken could have been taken by a private person. "Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. . . . Such contract should be considered to be commercial contract, even if their ultimate object is to further a public function." H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604.

ity. Furthermore, the Act establishes the judiciary as the final arbiter of these matters. Thus, under the F.S.I.A. the judiciary is thrust into assuming a leading role in the arbitration of international commercial disputes. Both the wording and the history behind the act reveal a strong commitment by Congress to divorce the political pressures involved in foreign affairs from the commercial transactions amongst the individuals and nations of the international community.

Having codified the State Department's concept of sovereign immunity, its application and effect upon the act of state doctrine remains a matter of interpretation. In adopting the restrictive theory of sovereign immunity, the F.S.I.A. created a wide discrepancy between the effect and practices of the sovereign immunity and the act of state doctrines. A foreign sovereign acting in a commercial capacity, subject to the jurisdiction of the United States courts under the F.S.I.A., may still invoke the act of state defense to preclude adjudication.

In *Dunhill*, Justice White examined the development and purposes of these two doctrines and concluded that the act of state could not be given a broad construction and remain consistent with the commercial exception embodied in the restrictive theory of sovereign immunity.[118] Thus, in seeking to reunite the doctrines Justice White concluded: "[W]e hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label 'Act of State' than if it is given the label 'sovereign immunity.' "[119]

Nevertheless, the reconciliation of the sovereign immunity concept and the act of state doctrine is ultimately a question of interpretation. The dissent in *Dunhill* spent a considerable amount of effort articulating the distinction between these doctrines; "The act of state doctrine, 'although it shares with the immunity doctrine a respect for sovereign states,' serves important policies entirely independent of that rule."[120]

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118. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 698-99 (1976).

119. *Id.* at 705.

120. *Id.* at 726 (Marshall, J., dissenting).

The Ninth Circuit in International Machinists v. OPEC, Daily J. D.A.R. 2249-50 (U.S. C.A. 9th, July 6, 1981), also emphasized the distinctions between the two doctrines. The court asserted that the "act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity." *Id.* This is because the Ninth Circuit interpretation of the act of state doctrine focuses on the purpose of the action, regardless of its commercial nature. But there was no discussion of the effects of the traditional application of the act of state doctrine on the F.S.I.A. Perhaps the court felt such a discussion unnecessary because

The crux of these "independent policies" is that the act of state doctrine reflects a political question which is not cognizable in the courts, while the sovereign immunity doctrine deals only with the status of a party to the suit.[121] The dissent thus felt that the many considerations which the court enunciated in *Sabbatino* would not have an effect on sovereign immunity and vice versa. To accept this premise, however, and yet construe the act of state defense to include commercial activities is to acknowledge a grant of jurisdiction in theory and deny its application in practice. In addition, the *Dunhill* dissent is somewhat weakened by its timing. At the time of the decision, the restrictive theory of sovereign immunity was merely a trend which had not been codified by the legislature nor recognized by the court. As such, the decision by White relied heavily on the State Department's letter of go-ahead.

The portion of White's opinion in *Dunhill* which advocates the adoption of a commercial exception to the act of state doctrine was supported by only three other Justices. That portion of the opinion also may be viewed as mere dicta in the case. Prior to announcing the commercial exception, a majority of the Court had concluded that the acts involved were not sovereign acts.[122]

Today, the restrictive theory of sovereign immunity is clearly articulated by the F.S.I.A. Consistent with its policy of deference in foreign affairs, the court should support the commercial exception to the act of state doctrine. Such a result is necessitated by the separation of powers principles underlying both doctrines. For the court to decide otherwise would result in abrogation of the intent of the legislative and executive branches in the form of the F.S.I.A.

Another rationale in support of excluding antitrust cases from the act of state doctrine is based in the nature of antitrust violations. An act of state by definition is limited to acts by foreign sovereigns committed within their territory. The language of the Supreme Court in *Underhill v. Hernandez*[123] clearly reflects the

its application was not traditional. In its consideration of factors beyond a public interest, it does not appear that the finding of a public interest will always provide the shield of act of state.

121. *Id.* at 727 (Marshall, J., dissenting). Mr. Justice Marshall and the dissenters felt that the "political nature" of the act of state doctrine should turn upon the factors enunciated in *Sabbatino* while sovereign immunity was not designed to be responsive to these considerations.

122. 425 U.S. at 694-95.

123. 168 U.S. 250 (1897).

territorial limitation embodied in the rule: "[T]he courts of one country will not sit in judgment on the acts of the government of another *done within its own territory*."[124] In contrast, violations of United States antitrust laws by a foreign sovereign are extra-territorial in nature.

The modern act of state doctrine as announced in *Sabbatino*[125] involved a situation in which the acts complained of were particularly local in character. A review of the case reveals that the territorial concern was crucial in the Court's decision and rationale. Essentially, the recognition of a foreign sovereign's acts within its territory was considered tantamount to the recognition of the foreign sovereign itself "since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders."[126]

Dunhill exposes the first rift in the concept of territoriality.[127] The Court did not directly address the question of whether the act of state doctrine was solely a question of territorial comity. The division of the Court reflects the difference of opinion concerning the labeling of the actions as an "expropriation decree" or merely a "repudiation of a commercial obligation." The majority opinion by Justice White found the act of Cuba was merely a repudiation of a commercial debt.[128] The dissent accepted the argument advanced by Cuba's counsel that the act complained of was entirely non-commercial in character since it was an expropria-

124. *Id.* at 252. (emphasis added).

125. *See* notes 30-46 and accompanying text *supra*.

126. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432 (1964). In *Sabbatino*, the acts complained of involved the confiscation of property by the government within its borders. Implicit in such actions are the division of political and ideological factors which underlie such confiscations. The Court in *Sabbatino* was well aware that Cuba and many other communist countries often resorted to similar measures as the first acts of statehood and independence. The *Sabbatino* Court noted that there were few areas more replete with differing perspectives and ideological debate. "However, Communistic countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country." *Id.* at 429. In view of these antecedents, the Court was extremely reluctant to enter an arena which included such problematic issues as American imperialism and the rights of self determination among emerging nations. Asserting jurisdiction could only lower the prestige and viability of American courts. Faced with these alternatives, the Court concluded: "It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id.* at 430.

127. *See* notes 54-75 and accompanying text *supra*.

128. "Nothing in our national policy calls on us to recognize as an act of state a repudiation by Cuba of an obligation adjudicated in our courts and arising out of the operation of a commercial business by one of its instrumentalities." Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 705 (1976). *See also* notes 58-68 and accompanying text *supra*.

tion decree.[129]

This split in perspective may be instrumental in explaining the split decision of the Court. If the matter involved had not arisen in the context of a recent social revolution, tainted with numerous political ramifications, the dissent may have been more limited or perhaps even obviated. In view of the circumstances of the case, the dissent felt compelled to follow the footsteps of *Sabbatino*,[130] and determined that the division of opinion and political rift involved in the case precluded judicial scrutiny.

Decisions in the appellate and federal district courts subsequent to *Dunhill* evidence a growing judicial awareness of the territorial limits of the act of state doctrine and the parallel expansion of jurisdiction in antitrust matters. In *Mannington Mills, Inc. v. Congoleum Corp.*,[131] the court examined the act of state doctrine and found a distinction between confiscatory decrees by a sovereign and antitrust litigation:

> In the typical confiscation situation based on a foreign state's expropriation of property rights or its repudiation of contractual obligations, only private rights are sought to be vindicated. In antitrust litigation, however, in addition to claims of private injury, there is a public interest in clearing monopolistic activities from the channels of American commerce.[132]

Mannington is important in that it notes the judicial distinction between acts of a state committed solely within the territory of that state and those where the effects of the sovereign acts are intended to be extraterritorial. Through this type of analysis the court is able to distinguish the separation of powers restrictions of *Sabbatino* in order to consider the more salient issues involved in such cases. In essence, the court refused to automatically apply those restrictions under the rubric of an act of state. Instead, all considerations relevant to the case were to be weighed to determine whether jurisdiction should be exercised.[133]

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129. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. at 721-27.

> Cuba's retention of and refusal to repay the funds at issue in this case took place against the background of the intervention, or nationalization of the businesses and assets of five cigar manufacturers. . . . The seizure of the funds . . . reflected a purpose to exert sovereign power to its territorial limits in order to effectuate the intervention of ongoing cigar manufacturing businesses.

Id. at 729.

130. *See* notes 30-46 and accompanying text *supra*.

131. 595 F.2d 1287 (3d Cir. 1979).

132. *Id.* at 1293.

133. *Id.* at 1298.

In *United Bank Ltd. v. Cosmic International Co.*,[134] the Second Circuit refused to accept the plaintiff's claim that the situs of the debt at issue was in Bangladesh. The court in this manner denied an act of state shield to an extraterritorial seizure by Bangladesh. "Where an act of state has not 'come to complete fruition within the dominion of . . . (a foreign) government,' [citation omitted] no *fait accompli* has occurred which would otherwise effectively prevent an American court from reviewing the act's validity."[135] By failing to find a *fait accompli* in Bangladesh, the court was able to use the *Sabbatino* rationale to determine that the ensuing judicial review would not likely jeopardize the foreign relations of this country.

An examination of the concepts of territoriality reveals that the act of state doctrine is vulnerable to an antitrust exception. *Dunhill* and its progeny have sought to limit the doctrine to acts arising and having their effects within the territorial confines of the foreign sovereign. Furthermore, it is clear that the modern controversies involving the act of state doctrine have arisen in fact situations in which the court has had to shape its decree in accordance with political exigencies. Thus, the development of the doctrine has been retarded by factors which should not arise in commercial transactions. Normally, antitrust violations do not have the ideological and political impact found in expropriation cases; and, as illustrated in *Cosmic Intern*, antitrust violations do not come to "complete fruition" until they have some effect on U.S. commerce. Such acts would clearly seem to fall outside the "territorial" restrictions envisioned by *Underhill* and *Sabbatino*.

THE *TIMBERLANE* ANALYSIS ADEQUATELY COMPREHENDS THE INTERESTS AND POLICY CONSIDERATIONS UNDERLYING THE ACT OF STATE DOCTRINE

As previously discussed, the cases involving act of state problems reveal that the modern basis of the doctrine is separation of powers. Essentially, the question is jurisdictional: how far should the American courts extend their jurisdiction beyond the territorial borders of the United States?

The leading case involving extraterritorial antitrust jurisdiction is *United States v. Aluminum Co. of America (Alcoa)*.[136] The opinion represented the first declaration that the Sherman Act prohibited agreements restricting international trade if "they were intended to affect imports and did affect" imports into the

134. 542 F.2d 868 (2d Cir. 1976).
135. *Id.* at 874.
136. 148 F.2d 416 (2d Cir. 1945).

United States.[137] Yet, in construing the "effects" test, Judge Learned Hand left unanswered just what type and magnitude of "effect" would sustain jurisdiction. Furthermore, in focusing solely on the effects on United States imports, the court left open various political and international policy considerations which are often crucial to the court's jurisdictional determinations.[138]

Timberlane reflects an attempt by the judiciary to assimilate the concepts of extraterritoriality and act of state into a coherent, rational approach. As mentioned earlier, *Timberlane* arose as the result of collusive acts of the Bank of America and a Honduran official in seeking to interfere in and disrupt the operations of the plaintiff. Although the Ninth Circuit analyzed the act of state doctrine and found that it was not involved, the core issue of the case was the nature and extent to which a United States court could extend its jurisdiction. In examining *Alcoa* and its progeny, the court determined that: "An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness."[139]

In determining the extent of United States' jurisdiction, the court felt that the considerations underlying the act of state doctrine should be extended to problems of extraterritorial jurisdiction. The result of this analysis is the "jurisdictional rule of reason," which suggests a triparte analysis.

Initially, there must be some effect, either actual or intended "on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction. . . ."[140] Secondly, there must be an analysis of the burden involved. A "greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and; therefore, a civil *violation* of the antitrust laws."[141] Thirdly, there is a consideration unique to the interna-

137. *Id.* at 444.
138. *See* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 611-12 (9th Cir. 1976). "The effects test by itself is incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country." *Id. See also* notes 89-91 and accompanying text *supra*.
139. 549 F.2d at 613.
140. *Id.*
141. *Id.*

tional setting. This is "whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-á-vis those of other nations, to justify an assertion of extraterritorial authority."[142] This last consideration is essentially a balancing process by which the judiciary measures the competing claims of the countries involved. It is this step which comprises the aims and goals of the act of state doctrine.

In balancing the international considerations involved in extraterritorial jurisdiction, the court included a number of factors. First, the "degree of conflict with foreign law or policy. . . ."[143] This is a restatement of *Sabbatino*'s discussion regarding decisions which affect "national nerves" in the context of an act of state determination.[144] Second, the "extent to which enforcement . . . can be expected to achieve compliance. . . ."[145] This factor is a measure of the feasibility of jurisdiction. The court is determining whether other departments of government would be more effective. This is similar to the *Sabbatino* proposition that the most effective relief for act of state problems is through diplomatic rather than judicial channels.[146] Unlike *Sabbatino*, the *Timberlane* court did not attempt to determine which branch of government should provide relief, but left the question to turn upon the particular facts of the case. Third, the "relative significance of effects on the United States as compared with those elsewhere. . . ."[147] This factor adequately comprehends issues relating to the extraterritorial nature of the act. The "effect" of an expropriation by a foreign sovereign on U.S. commerce, for example, would be comparatively minimal.

In balancing the foreign interests involved, the *Timberlane* analysis permits a court to determine whether the policies underlying the act of state doctrine should be invoked to bar jurisdiction. Inherent in the Ninth Circuit's articulation of the various factors relevant to an exercise of jurisdiction is an attempt to elucidate the concerns underlying the act of state doctrine.

This approach was applied in the context of the act of state doctrine in the recent Ninth Circuit decision of *International Machinist v. OPEC*.[148] There, the Ninth Circuit made it clear that they

142. *Id.*
143. *Id.* at 614.
144. *Id.*
145. *Id.*
146. *See* notes 37-40 and accompanying text *supra*.
147. 549 F.2d at 614.
148. 81 Daily J. D.A.R. 2249 (U.S.C.A. 9th, July 6, 1981). Members of the International Association of Machinists and Aerospace Workers alleged the price-setting

had no inclination to create a commercial exception to the act of state doctrine. Rather, the Ninth Circuit adopted a definition of act of state based on the purpose of the sovereign's actions.[149] Where those actions have a public interest factor the act of state doctrine may be applicable.[150]

The court went further than merely considering the sovereign purpose. The "potential for interference with our foreign relations" was cited as a "crucial element" in the decision to allow the act of state defense.[151] The international relations involved in the world energy crisis and the "possibility of insult to OPEC states and of interference with the efforts of the political branches" were factors important to the allowance of the defense in *International Machinists*.[152]

A third consideration cited by the Ninth Circuit was the "availability of internationally-accepted legal principles", a factor initially enunciated in *Sabbatino*.[153] The absence of any "international consensus condeming cartels, royalties, and production agreements" lent further support to the court's decision to allow the act of state defense to OPEC.[154]

The language in *International Machinists* was carefully chosen. The court never said the existence of a public interest would require the application of the act of state doctrine. Rather, such public interest merely requires the courts to "proceed cautiously to avoid an affront to that sovereignty."[155] The Ninth Circuit repeated *Sabbatino*'s preference for a balancing approach rather than a "rigid rule of application."[156] Thus the possibility of interference with foreign relations and the lack of international consensus in the area of law are factors to be considered "in addition to" the public interest factor.[157] Much of the language in *International Machinist* is reminiscent of the *Sabbatino* decision.

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activities of OPEC violated the United States antitrust laws. The decision of the district court in favor of the defendants (OPEC) was affirmed by the Ninth Circuit under the rubric of the act of state doctrine. *Id.* at 2249.

149. *See* notes 89-94 and accompanying text *supra*.
150. 81 Daily J. D.A.R. at 2250.
151. *Id.*
152. *Id.*
153. *Id. See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).
154. 81 Daily J. D.A.R. at 2250.
155. *Id.*
156. *Id. See also* notes 41-46 and accompanying text *supra*.
157. 81 Daily J. D.A.R. at 2250.

The *Timberlane*, *International Machinists* approach calls for an evaluation of the competing governmental interests involved and of the international implications of exercising jurisdiction. A similar approach which resulted in disallowance of the act of state defense was used in *Industrial Investment Development Corp. v. Mitsui & Co.*[158] The case involved an antitrust action against a foreign corporation and its American subsidiary.

In refusing to apply the act of state doctrine, the Fifth Circuit held that the participation of the Indonesian Government, by refusing to issue a license to the plaintiff, did not bar adjudication.[159] *Timberlane* was cited by the Fifth Circuit in support of its decision. The Third Circuit Court of Appeals in *Mannington*[160] was in "substantial agreement" with the analysis of *Timberlane* and remanded the case to the district court for preparation of a record which was comprehensive enough for evaluation of the relevant factors.[161] The Seventh Circuit in *Westinghouse Electric Corp. v. Rio Algom Ltd.*,[162] in citing *Timberlane*'s jurisdictional rule of reason, noted that it was not inconsistent with their own determination.[163]

The *Timberlane* analysis reflects an attempt by the judiciary to come to grips with many of the ambiguous concepts which have continually plagued the exraterritorial jurisdiction of American courts. Through concepts such as act of state the judiciary has been able to assert or decline jurisdiction on an ad hoc basis. The problems inherent in such an approach are readily apparent. With each case decided on its facts, the courts fail to conduct an appropriate evaluation of the interests involved. With such a standardless approach, the courts may choose to hide behind the

158. 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

159. *Id.*

160. *See* notes 131-33 and accompanying text *supra*.

161. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979).

162. 617 F.2d 1248 (7th Cir. 1980).

163. *Id.* at 1255.

Both *Westinghouse* and *Timberlane* involved suits by American companies against domestic and foreign corporations for alleged antitrust violations taking place abroad. The *Westinghouse* controversy, however, was distinguished from *Timberlane*. Although both involved similar fact patterns and alleged antitrust violations, the district court in *Westinghouse* had determined the act of state doctrine was not a bar, whereas in *Timberlane*, another district court had allowed the defense. Therefore, the decision of the circuit court in *Westinghouse* was confined to whether the district judge had abused his discretion in deciding to proceed. 617 F.2d at 1255. The Seventh Circuit held he had not. It was recognized that the district judge had used factors different from those advanced in *Timberlane* and *Mannington*. In affirming the decision, the court reasoned that because the defendants had defaulted in *Westinghouse* and not presented evidence against the exercise of jurisdiction, it would be fruitless to remand the case on the issue of jurisdiction. *Id.* at 1256.

screen created by the act of state doctrine and thus avoid decisions which they consider too volatile. Yet, this self-protectionism may result in the inequities which our judicial system was designed to prevent.

In retrospect, the act of state doctrine, with its bases in comity and separation of powers concepts, is concerned with the interests of the United States and those of the foreign government. The strengths and weaknesses of these respective interests ultimately determine the jurisdictional outcome of the case. In *Timberlane* these interests are clearly articulated and developed. Thus, the determination made pursuant to the *Timberlane* analysis should preclude act of state considerations from obfuscating the truly relevant issues.

CONCLUSION

While the F.S.I.A. grants jurisdiction to the United States courts in situations where the foreign government is acting in a commercial capacity, it continues to allow the defense of the act of state doctrine under the same circumstances. Due to this anomalous result, the argument in support of a commercial exception to the act of state doctrine is persuasive. Essentially, this was the argument accepted by four members of the Court in *Dunhill*.[164]

The argument in support of a commercial exception to the act of state doctrine in antitrust cases is buttressed by three distinct rationales. First, an "act of state" by definition excludes commercial dealings from its purview.[165] Second, the present application of the act of state doctrine nullifies the intent and effect of the F.S.I.A.[166] Third, the act of state doctrine is by definition limited to acts by foreign sovereigns committed within their own territory.[167] Foreign states' violations of United States antitrust laws are by their nature extraterritorial.[168]

An alternative to the adoption of a commercial exception is the approach of the Ninth Circuit Court of Appeals in *Timberlane*. *Timberlane* reflects an attempt to assimilate the purposes underlying the act of state doctrine into a jurisdictional determination.

164. 425 U.S. at 705-06.
165. *See* notes 63-135 and accompanying text *supra*.
166. *See* notes 95-122 and accompanying text *supra*.
167. *See* notes 123-35 and accompanying text *supra*.
168. *See* notes 133 and accompanying text *supra*.

The *Timberlane* approach is an attempt to provide guidelines in the exercise of jurisdiction in situations where foreign governments are involved. This approach takes into account the purposes and premises of the act of state doctrine without bestowing an absolute defense on the foreign government.

The increasing participation of foreign governments in commercial endeavors mandates abrogation of the absolute defense of act of state for the harmful consequences ensuing from those endeavors. The mechanism might be a judicially created commercial exception to the act of state doctrine, or a balancing approach akin to that in *Timberlane*. A blanket immunity such as the act of state defense, allows the foreign sovereign an unconscionable advantage over private entities in the marketplace. Permitting the United States courts to scrutinize commercial dealings of foreign states in antitrust controversies will tend to limit the inequities inherent in the present application of the act of state doctrine.

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