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FORMULATING A COMMERCIAL EXCEPTION
TO THE ACT OF STATE DOCTRINE:
ALFRED DUNHILL OF LONDON, INC.
v. REPUBLIC OF CUBA[†]

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There exists in the United States a well-established doctrine which prohibits judicial examination of certain actions of foreign sovereigns done within their own territory. A recent decision of the United States Supreme Court, *Alfred Dunhill of London, Inc. v. Republic of Cuba*,¹ may represent a step toward erosion of this deferential act of state rule at least insofar as it protects the foreign nation which acts as a commercial trader. In *Dunhill*, four of the nine Justices of the Supreme Court recognized that "purely commercial" acts of nations are not protected by the act of state doctrine, while the remaining five Justices found it unnecessary to consider a commercial exception to the act of state rule.

This Article will discuss the views expressed by the Justices of the Supreme Court in the *Dunhill* case. In order to fully understand those views and to appreciate the import and ramifications of a commercial exception to the act of state doctrine, it is helpful to examine the background of the *Dunhill* controversy.

THE *Dunhill* CONTROVERSY

On September 15, 1960, pursuant to its own Decree, the Cuban Government seized the business and assets of five leading cigar manufacturers and appointed agents of the Government, called interventors,² to operate the businesses. The Cuban owners of the businesses fled to the United States. For several months

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¹ 96 S. Ct. 1854 (1976).

² "Intervention" is distinguishable in theory from the related concept of confiscation. Under the law of the Castro regime, title to an intervened Cuban business remains in the hands of its former owners. However, the business is operated for the benefit of the Cuban Government to the exclusion of its former owners and officers. The former owners have no rights to profits. See Law No. 647 of Nov. 24, 1959, as amended, Law No. 843 of June 30, 1960 [1960] Folletos de Divulgacion Legislativa (Cuba). In *Menendez v. Faber, Coe & Gregg, Inc.*, 345 F. Supp. 527 (S.D.N.Y. 1972), *rev'd sub nom.* *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973), *rev'd sub nom.* *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 96 S. Ct. 1854 (1976), the subject litigation of this Article, the district court treated intervention as complete confiscation "in practical effect." 345 F. Supp. at 532.

thereafter, three principal importers of cigars, including Alfred Dunhill of London, Inc., continued to do business with the companies, paying for cigars shipped before the Decree and ordering new shipments. In February 1961, however, the former owners asserted that they, and not the intervenors, were entitled to payment for the shipments and to enforce their claim, each of the former owners instituted separate actions against the importers which were eventually consolidated for trial in *Menendez v. Faber, Coe & Gregg, Inc.*³ In response, Cuba and the intervenors promptly took action in *F. Palicio y Compania S.A. v. Brush*⁴ against the attorneys of the former owners, seeking to enjoin the latter's lawsuit and to establish the right of the intervenors to payment for the cigars.

The issue of who was entitled to payment for the postintervention shipments, as it was presented in *Palicio*, was resolved by the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*.⁵ In *Sabbatino*, the Court held that the legality of a Cuban expropriation decree, even if discriminatory, retaliatory, and arguably in violation of international law, cannot be reviewed in the United States.⁶

³ 345 F. Supp. 527 (S.D.N.Y. 1972), *rev'd sub nom.* *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973), *rev'd sub nom.* *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 96 S. Ct. 1854 (1976). The nine separate actions that were consolidated for trial were *Menendez v. Faber, Coe & Gregg, Inc.*, Civil No. 61-472 (S.D.N.Y.); *Por Larranaga, Fabrica de Tabacos, S.A. v. Faber, Coe & Gregg, Inc.*, Civil No. 61-582 (S.D.N.Y.); *Cifuentes v. Faber, Coe & Gregg, Inc.*, Civil No. 61-583 (S.D.N.Y.); *F. Palicio y Compania, S.A. v. Faber, Coe & Gregg, Inc.*, Civil No. 61-584 (S.D.N.Y.); *Cifuentes v. Dunhill Int'l, Inc.*, Civil No. 61-848 (S.D.N.Y.); *Menendez v. Dunhill Int'l, Inc.*, Civil No. 61-849 (S.D.N.Y.); *Por Larranaga, Fabrica de Tabacos, S.A. v. Dunhill Int'l, Inc.*, Civil No. 61-850 (S.D.N.Y.); *F. Palicio y Compania, S.A. v. Dunhill Int'l, Inc.*, Civil No. 61-869 (S.D.N.Y.); *Menendez v. Saks & Co.*, Civil No. 61-3336 (S.D.N.Y.).

⁴ 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd per curiam*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967). The *Menendez* litigation was held in abeyance by the district court pending determination of the parties' rights in *Palicio*. 345 F. Supp. at 532.

⁵ 376 U.S. 398 (1964).

⁶ A determination of the legality of a sovereign's act typically depends upon the resolution of a conflict of laws issue. An American victim of a Cuban expropriation, for example, may argue that international law, rather than Cuban law, governs the question of the legality of the expropriation. However, the *Sabbatino* Court ruled that a determination of the conflict of laws issue could create numerous problems: it could embarrass the executive branch, interfere with foreign relations, disrupt the constitutional allocation of governmental powers, involve a political question, or impede the flow of international trade. *Id.* at 431-34. Thus, the *Sabbatino* Court forbade adjudication of the legality of a Cuban expropriation decree.

The victims of the September 15, 1960 Decree at issue in *Palicio* were all Cubans and were precluded at the outset from raising an international conflict of laws issue since a citizen cannot hold his own state to standards of international law when the act of which he complains is lawful in his own country. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 442 (1964) (White, J., dissenting); *United States v. Belmont*, 301 U.S. 324, 332 (1937); *Pons v. Republic of Cuba*, 294 F.2d 925 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 960 (1962); *Luther v. James Sagor & Co.*, [1921] 3 K.B. 532; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 165, 171 (1965); Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959). It should be noted that the *Sabbatino* decision may permit adjudication of the legality of a foreign act of state if the alleged crimes committed by a sovereign infringe upon basic human rights. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 457 n.18 (1964);

Under the act of state doctrine⁷ as enunciated in *Sabbatino*, the courts of this country are obliged to give full legal effect to all foreign expropriation decrees insofar as they affect property within the foreign state.⁸ Applying this rule, the *Palicio* district court held that the interventors and not the former owners were entitled to payment for cigars shipped after the Decree.⁹

Thus, the *Palicio* court resolved in favor of Cuba the issue of entitlement to payment for *postintervention* shipments by application of the act of state rule. However, the former owners remained party to the *Menendez* litigation¹⁰ in part because Cuba had agreed in *Palicio* to allow the former owners alone to prosecute claims for the "small sum" owed by the importers for preintervention shipments.¹¹

At the *Menendez* trial, it became apparent that the "small sum"

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 165, comment *b* at 502 (1965). For general discussion of the *Sabbatino* doctrine, see Falk, *The Complexity of Sabbatino*, 58 AM. J. INT'L L. 935 (1964); Friedmann, *National Courts and the International Legal Order: Projections on the Implications of the Sabbatino Case*, 34 GEO. WASH. L. REV. 443, 447-55 (1966); Lillich, *A Pyrrhic Victory at Foley Square: The Second Circuit and Sabbatino*, 8 VILL. L. REV. 155 (1963); Mann, *The Legal Consequences of Sabbatino*, 51 VA. L. REV. 604 (1965); Stevenson, *The Sabbatino Case—Three Steps Forward and Two Steps Back*, 57 AM. J. INT'L L. 97 (1963); Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1607, 1614-18 (1962) [hereinafter cited as Harvard Note].

⁷ The act of state doctrine was initially advanced in this country in *Underhill v. Hernandez*, 168 U.S. 250 (1897) (dictum), wherein the Supreme Court stated: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Id.* at 252. Adherence to the doctrine was subsequently reiterated in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) and *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918). For a general discussion of the act of state doctrine, see Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1151-56 (1956); Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959); Harvard Note, *supra* note 6, at 1608-10, 1614-18.

⁸ 376 U.S. at 428. See *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), discussed in text accompanying notes 17-20 *infra*; *Compania Ron Bacardi S.A. v. Bank of Nova Scotia*, 193 F. Supp. 814, 815 (S.D.N.Y. 1961); *Naamloze Vennootschap Suikerfabriek "Wono-Aseh" v. Chase Nat'l Bank*, 111 F. Supp. 833, 841 (S.D.N.Y. 1953); *Zwack v. Kraus Bros. & Co.*, 93 F. Supp. 963, 966 (S.D.N.Y. 1950), *aff'd*, 237 F.2d 255, 259 (2d Cir. 1956).

⁹ 256 F. Supp. at 488-89.

¹⁰ See text accompanying note 3 *supra*.

¹¹ 256 F. Supp. at 489 n.8. Although the *Palicio* district court referred to Cuba's agreement to "turn over to the [former owners] the small sum" representing amounts due for preintervention shipments, in the agreement incorporated in the *Palicio* judgment, the interventors agreed not to press their claims for these sums. *F. Palicio y Compania, S.A. v. Brush*, Civil No. 61-2299 (S.D.N.Y., Oct. 31, 1966).

It should be noted that the former owners' primary reason for remaining a party to the *Menendez* litigation was to press claims of trademark infringement and unfair competition against the importers and the interventors. In fact, since it was thought by all parties that the preintervention debts were negligible, the owners might well have abandoned the *Menendez* litigation entirely had not the trademark claims been involved. Ultimately, the *Menendez* court rejected the owners' demands for injunctive relief since the United States embargo against Cuban goods eliminated the possibility of any future violation of the former owners' trademark rights. 345 F. Supp. at 559-60.

representing preintervention debts was not small at all. The practice of the importers had been to pay for merchandise between 30 and 90 days after shipment. Consequently, the amount owed by Dunhill for preintervention shipments actually exceeded the amount due for cigars shipped after the Decree. On the date of the Decree, Dunhill's obligations amounted to approximately \$148,600, while the value of all shipments to Dunhill after that date was only about \$93,000.¹² Since Cuba had relinquished its claim to the preintervention debts on the assumption that they were minimal, the *Menendez* court allowed the parties to litigate the issue of entitlement to payments for the preintervention shipments.¹³

The *Menendez* court refused to give effect under the act of state doctrine to the expropriation decree insofar as it purported to seize the former owners' accounts receivable. Since the act of state doctrine applies only with respect to property within the jurisdiction of a foreign sovereign, the key issue before the court was the situs of the accounts receivable.¹⁴ Applying the rule of *Harris v. Balk*,¹⁵ the court found that the importers' debts constituted property of the former owners located in the United States.¹⁶ In *Republic of Iraq v. First National City Bank*¹⁷ the Court of Appeals for the Second Circuit had held that "when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States.'" ¹⁸ Since it was clear to the *Menendez* court that confiscation without compensation is contrary to the law of this country, the Decree was held ineffective insofar as it purported to confiscate the former owners' accounts receivable.¹⁹ Accordingly, the former owners were held entitled to these sums²⁰ — sums which, however, had already been paid to Cuba.²¹ The trial court further ruled that the importers' payments to Cuba did not discharge their obligations to the former owners.²² Under

¹² 345 F. Supp. at 564.

¹³ *Id.* at 533-34.

¹⁴ *Id.* at 537.

¹⁵ 198 U.S. 215 (1905).

¹⁶ 345 F. Supp. at 538.

¹⁷ 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

¹⁸ 353 F.2d at 51 (citation omitted).

¹⁹ 345 F. Supp. at 537-38.

²⁰ *Id.* at 540, 542.

²¹ The intervenors, whose records were not in good order, claimed that they did not know whether they had received payment for the preintervention shipments. *Id.* at 536. The *Menendez* district court determined that the intervenors had, in fact, received such payments. *Id.* The intervenors contended on appeal that there was insufficient evidence to support the trial court's finding regarding their receipt of preintervention payments. 485 F.2d at 1363. The court of appeals rejected this contention. *Id.* at 1369.

²² 345 F. Supp. at 542.

the theory of unjust enrichment, however, the importers were allowed to recover these payments from Cuba by way of setoff²³ against amounts the *Palicio* court had held were due Cuba for postintervention shipments.²⁴ Since the amounts paid by Dunhill to Cuba for preintervention shipments exceeded the amounts Dunhill owed Cuba for postintervention shipments,²⁵ the *Menendez* court awarded an affirmative judgment in favor of Dunhill for the difference.²⁶

One argument raised by the intervenors in support of their claim to keep the preintervention payments they had received was based on the *Sabbatino* doctrine.²⁷ The intervenors contended that Cuba's failure or refusal to return the preintervention payments to the importers constituted an act of state, and thus *Sabbatino* barred the importers' recovery by way of a setoff or otherwise for amounts mistakenly paid to Cuba.²⁸ The *Menendez* court rejected this argument, stating:

[I]t may be noted that there was no formal repudiation of these obligations by Cuban Government decree of general application or otherwise. . . .

Here, all that occurred was a statement by counsel for the intervenors, during trial, that the Cuban Government and the intervenors denied liability and had refused to make repayment. This statement was made after the intervenors had invoked the jurisdiction of this Court in order to pursue their claims against the importers for post-intervention shipments. It is hard to conceive how, if such a statement can be elevated to the status of an act of state, *any* refusal by *any* state to honor *any* obligation at *any* time could be considered anything else.²⁹

The Court of Appeals for the Second Circuit set aside the affirmative judgment in Dunhill's favor.³⁰ Rejecting the district court's view that there was insufficient proof of an act of state, the Second Circuit stated:

We . . . find ourselves unable to accept the district court's view that because the Cuban government's repudiation of its obligation to return the funds to the importers was informal, taking the form of a failure to honor the importers' demand (which was

²³ *Id.* at 563-64.

²⁴ See text accompanying notes 4-9 *supra*.

²⁵ See text accompanying note 12 *supra*.

²⁶ 345 F. Supp. at 563-64.

²⁷ For a discussion of *Sabbatino*, see notes 6-8 and accompanying text *supra*.

²⁸ 345 F. Supp. at 544.

²⁹ *Id.* at 545.

³⁰ *Menendez v. Saks & Co.*, 485 F.2d 1355, 1374 (2d. Cir. 1973), *rev'd sub nom.* *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 96 S. Ct. 1854 (1976).

confirmed by the Cuban government's counsel at trial), it fails to qualify as an act of state. The test is not whether the act was embodied in a 'formal . . . decree of general application,' which the district court deemed essential, but whether the agent acted within the scope of his authority as a representative of the foreign government.³¹

Nevertheless, the court of appeals did not entirely set aside the judgments awarded the importers against Cuba.³² This disposition by the Second Circuit was based upon *First National City Bank v. Banco Nacional de Cuba (Citibank)*,³³ which the *Menendez* court interpreted to hold that in a lawsuit instituted by a foreign sovereign the act of state doctrine does not preclude adjudication of a counterclaim based upon an illegal act of state.³⁴ However, according to the *Menendez* panel, *Citibank* limits recovery on any such counterclaim to the amount sought by the foreign government.³⁵ Thus the court of appeals affirmed the judgments allowing setoff claims by the importers³⁶ but reversed the affirmative judgment entered in favor of Dunhill.³⁷

Dunhill then petitioned for certiorari, urging that the remarks of Cuba's counsel failed to prove an act of state. The Supreme Court granted certiorari, and set the case down for argument, directing the parties to address the question of whether the statements of Cuba's counsel that the interventors would not honor Dunhill's claim for return of the payments constituted an act of state.³⁸ Five months after this question had been briefed and argued, the Supreme Court raised for reargument an unexpected question: Should *Sabbatino* be reconsidered?³⁹

Dunhill addressed this latter question by arguing that *Sabbatino* should not preclude adjudication of a sovereign's repudiation of its commercial obligations.⁴⁰ Dunhill contended that a sovereign state which incurs liabilities in international trade does so not as a

³¹ 485 F.2d at 1371 (citation omitted).

³² *Id.* at 1373-74.

³³ 406 U.S. 759 (1972).

³⁴ 485 F.2d at 1373-74.

³⁵ *Id.* For an interesting discussion of the *Citibank* case, see Leigh, *The Supreme Court and the Sabbatino Watchers: First Nat'l City Bank v. Banco Nacional de Cuba*, 13 VA. J. INT'L L. 33 (1972).

³⁶ 485 F.2d at 1374. See text accompanying notes 23-24 *supra*.

³⁷ 485 F.2d at 1374.

³⁸ 416 U.S. 981 (1974). In addition, the parties were directed to brief a second issue: "[If the statements of Cuba's counsel constitute an act of state], is an exception to the act of state doctrine created . . . where petitioner's counterclaim does not exceed the net balance owed to Cuba on its claims by petitioner's co-defendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?" *Id.* (citation omitted).

³⁹ 422 U.S. 1005 (1975).

⁴⁰ Brief for Petitioner on Reargument at 8-18.

sovereign, but as a merchant. Characterizing its claims as arising out of its commercial dealings with Cuba, Dunhill argued that even if Cuba's repudiation of its obligations was considered an act of state, that repudiation should not preclude full adjudication of the controversy. To the extent that *Sabbatino* precludes such adjudication, Dunhill urged that it be reconsidered.⁴¹

The United States Solicitor General, appearing as amicus curiae on reargument, took a position similar to Dunhill's. The Solicitor General, like petitioner Dunhill, advanced an argument predicated upon the so-called "restrictive theory of sovereign immunity."⁴² In general, the doctrine of sovereign immunity prohibits judicial exercise of jurisdiction over foreign states or their property.⁴³ The restrictive theory recognizes sovereign immunity "only with respect to causes of action arising out of a foreign state's governmental acts (*jure imperii*) and not with respect to those arising out of its commercial or proprietary acts (*jure gestionis*)." ⁴⁴ Quoting extensively from a 1952 letter in which the State Department first espoused this theory,⁴⁵ the Solicitor General and Dunhill noted that a restrictive view of the sovereign immunity doctrine has been adopted by lower courts in this country.⁴⁶ Thus, the Solicitor General argued:

Under modern precepts of sovereign immunity a foreign state may not assert mere sovereignty as a preclusive defense against a claim or counterclaim relating to a commercial obligation.

But to defer to a foreign state's sovereignty by refusing to enter judgment against it in an action on a commercial obligation merely because of that state's repudiation of the obligation would

⁴¹ *Id.* at 8.

⁴² Brief for United States as Amicus Curiae at 18-27; Brief for Petitioner on Reargument at 10, 14.

⁴³ See generally Harvard Note, *supra* note 6, at 1607-08, 1610-14. The adoption of the doctrine of sovereign immunity in this country dates back to at least the early 19th century. See *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

⁴⁴ Brief for United States as Amicus Curiae at 20. See Brief for Petitioner on Reargument at 10, 14. Because of the increased importance of international trade, a trend toward this restrictive view of the sovereign immunity doctrine has emerged in recent decades. See, e.g., *National City Bank v. Republic of China*, 348 U.S. 356 (1955); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); 26 DEP'T STATE BULL. 984 (1952) (the "Tate Letter"), discussed in note 70 *infra*. This restrictive view is now generally favored by the lower federal and state courts. See, e.g., *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1966); *Victory Transp., Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965), discussed in note 51 *infra*; *Premier S.S. Corp. v. Embassy of Algeria*, 336 F. Supp. 507 (S.D.N.Y. 1971); *Ocean Transp. Co. v. Republic of Ivory Coast*, 269 F. Supp. 703 (E.D. La. 1967); *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. N.Y. County 1960).

⁴⁵ The "Tate Letter," 26 DEP'T STATE BULL. 984 (1952), quoted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 96 S. Ct. 1854, 1869-71 (1976), discussed in note 70 *infra*.

⁴⁶ Brief for United States as Amicus Curiae at 22; Brief for Petitioner on Reargument at 10. See note 44 *supra*.

be to permit the state to assert mere sovereignty as a preclusive defense. Therefore, a foreign state's repudiation of a commercial obligation does not preclude entry of judgment in favor of the private claimant.⁴⁷

In addition, both the Solicitor General and Dunhill contended that adoption and application of the restrictive theory would not offend the sovereignty of a foreign nation since a state's sovereignty as such is not involved in adjudication of a commercial claim against it.⁴⁸ Immunity would be denied only because the foreign state has appeared in the marketplace as a merchant and is seeking to avoid its commercial obligations.⁴⁹ Applying this theory to Dunhill's claim against the interventors, the Solicitor General stated:

Petitioner's cause of action is based upon acts committed by respondents in their commercial capacities as sellers of tobacco products: petitioner had paid respondents, in their roles as tobacco merchants, amounts in excess of petitioner's actual indebtedness for tobacco purchases; petitioner's counterclaim simply seeks recovery of its excess payments.⁵⁰

The Solicitor General viewed Cuba's contention that an act of state had occurred upon repudiation of any obligation to Dunhill as "nothing more . . . than a claim of sovereign immunity in disguise . . . an effort to resurrect the doctrine of absolute foreign sovereign immunity under cover of the act of state doctrine."⁵¹ In

⁴⁷ Brief for United States as Amicus Curiae at 17.

⁴⁸ *Id.* at 24; see Brief for Petitioner on Reargument at 11.

⁴⁹ Brief for United States as Amicus Curiae at 24; Brief for Petitioner on Reargument at 10-11.

⁵⁰ Brief for United States as Amicus Curiae at 25.

⁵¹ *Id.* at 26. Petitioner Dunhill advanced a similar argument:

Clearly, where a foreign sovereign has breached its commercial obligations . . . the rights of the parties in United States courts should not depend on whether the sovereign pleads that it has repudiated its obligations as an act of state or whether it pleads that it has not consented to be sued.

Brief for Petitioner on Reargument at 14 (citation omitted).

The Solicitor General also argued that an act of state must consist of a *public* act, which involves the interest of a sovereign as a sovereign rather than as an entrepreneur. The Solicitor General relied in part on *Victory Transp., Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), in reaching the conclusion that an act of state occurs only when a sovereign engages in a public act. In that case, the owner of a ship sued the Spanish Government for damage sustained by his ship while it was docked in a Spanish port. The ship had been chartered by the Spanish Government to carry wheat to ports designated "safe" by the Spanish Government. The shipowner claimed that the ports were not, in fact, safe. The Spanish Government contended that the act of state doctrine precluded inquiry into the propriety of its designation of safe ports. The Second Circuit responded:

[A]ppellant, [a branch of the Spanish Government] seeks to enter the sanctuary of sovereign immunity through the side door by urging that since the acts complained of occurred in Spanish ports, which were designated as safe by a branch of the

conclusion, it was urged that a foreign sovereign's liabilities in commerce could be determined under established legal standards applicable to private entrepreneurs, and that adjudication of such liabilities would not embarrass the United States in its conduct of international affairs.⁵² Thus, there was not present in the *Dunhill* case, two considerations which intensified the *Sabbatino* Court's reluctance to adjudicate the legality of a sovereign's act — uncertainty as to principles of international law acceptable to all nations and possible embarrassment in the conduct of foreign affairs.⁵³

Consequently, neither the Solicitor General nor Dunhill found it necessary to reach the broader question of whether *Sabbatino* should be reconsidered in toto. However, appended to the Solicitor General's brief was a letter from the legal advisor of the Department of State.⁵⁴ The legal advisor's letter reviewed a trend in the executive branch favoring adjudication of acts of state,⁵⁵ noted several recent decisions in other countries favoring such adjudica-

Spanish Government, the act of state doctrine prohibits holding the Spanish Government to account for the propriety of those acts. As most recently formulated by the Supreme Court, the act of state doctrine precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory. The difficulty with appellant's argument is threefold. First of all, the act of state doctrine applies only to the "public acts" of a foreign sovereign, and we cannot see that designating ports as safe for the S.S. Hudson was a public act of the Spanish Government. The designation of safe ports for the discharge of cargo is an act frequently performed by merchants voyage-chartering a cargo ship. It can hardly be termed an act of state simply because a state instrumentality happened to be the voyage-charterer. Moreover, designation of the ports as safe was not an act performed within the territory of Spain, nor was it performed by the Government of Spain. Here the designation of the actual discharge ports was done on the bill of lading by the appellant's shipper at Mobile, Alabama. Appellant's act of state argument is therefore considerably wide of the mark.

336 F.2d at 362-63 (citations omitted).

⁵² Brief for United States as Amicus Curiae at 36-37, 39; Brief for Petitioner on Reargument at 11, 14.

⁵³ A primary consideration behind the act of state doctrine has always been judicial reluctance to interfere with executive foreign policy. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 433 (1964); *United States v. Pink*, 315 U.S. 203 (1942); Falk, *The Complexity of Sabbatino*, 58 AM. J. INT'L L. 935, 940, 943 (1964).

The Solicitor General also contended that any Cuban act of state committed against Dunhill did not take place in Cuba, but in the United States. The Solicitor General wrote: "Respondents' repudiation was intended to operate not within Cuba's territorial sovereignty but within the United States, by 'confiscating' a United States national's cause of action that was subject to adjudication in American courts under American law." Brief for the United States as Amicus Curiae at 34-35 (footnote omitted).

⁵⁴ Brief for United States as Amicus Curiae at 45, quoted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 96 S. Ct. 1854, 1867-69 (1976).

⁵⁵ The legal advisor's letter discussed three cases in which the executive branch had expressed opposition to the act of state doctrine: *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), discussed in text accompanying notes 33-35 *supra*; *Bernstein v. N.V. Nederlandsche Amerikaansche*, 210 F.2d 375 (2d Cir. 1954) (involving Nazi decrees); and *Banco Nacional de Cuba v. Farr*, 272 F. Supp. 836 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968) (expropriation of a cargo of sugar by the Castro government). Brief for United States as Amicus Curiae at 46-47.

tions,⁵⁶ and all but urged complete abandonment of the act of state doctrine:

In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.⁵⁷

On May 24, 1976, the Supreme Court, with four Justices dissenting, reversed the determination of the court of appeals and reinstated the affirmative judgment in favor of Dunhill.⁵⁸ The opinion of the Court was delivered by Justice White and was joined by Chief Justice Burger and Justices Rehnquist and Powell,⁵⁹ and was partially concurred in by Justice Stevens. The affirmative judgment in Dunhill's favor was sustained on two alternative grounds: First, a majority of the Court found insufficient proof of an act of state by Cuba; and, second, Justices White, Rehnquist, and Powell, and the Chief Justice agreed that even if there had been an act of state, the act of state doctrine does not encompass the repudiation of a "purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities."⁶⁰

Justice White's opinion began by noting that both the district court and the court of appeals found the September 15, 1960 Decree to be ineffective insofar as it purported to seize the importers' accounts receivable.⁶¹ Thus, it was reasoned, the intervenors, in order to escape repayment by utilization of the act of state doctrine, had to demonstrate "a second and later act of state involving

⁵⁶ The cases cited by the State Department are described in Brief for the United States as *Amicus Curiae* at 47 n.2, 48 n.3.

⁵⁷ Brief for United States as *Amicus Curiae* at 49.

⁵⁸ 96 S. Ct. 1854 (1976).

⁵⁹ Justice Powell also wrote a brief concurring opinion. *Id.* at 1871 (Powell, J., concurring). He had expressed his views on the act of state doctrine for the first time as a member of the Supreme Court in *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1972) (Powell, J., concurring), discussed in text accompanying notes 33-35 *supra*. In that case, Justice Powell wrote that it was the role of the judiciary to review each litigation involving an act of state issue on an individual basis to determine whether deference to the executive branch required judicial absention. 406 U.S. at 774. However, Justice Powell noted in his concurring opinion in *Dunhill* that he could foresee no reason to abstain "in cases involving only commercial acts of a foreign state." 96 S. Ct. at 1871 (Powell, J., concurring.).

⁶⁰ 96 S. Ct. at 1861. Justice Stevens found it unnecessary to reach the issue of a commercial exception to the act of state doctrine. *See id.* at 1871 (Stevens, J., concurring in part).

⁶¹ *Id.* at 1859.

the funds mistakenly paid them"⁶² This, the majority held, had not been done. In the Court's view, the statement of Cuba's counsel denying the interventors' liability and refusing to make repayment

merely restated respondents' original legal position and add[ed] 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 her obligations in general or any class thereof or that she had as a sovereign matter determined to confiscate the amounts due three foreign importers.⁶³

Moreover, the majority entertained serious doubt as to whether the interventors, who were merely agents appointed to operate a business, pay its debts, and collect accounts receivable, had the sovereign power necessary to repudiate debts incurred by those businesses. The Court found no facts from which it could conclude that the interventors had the authority to exercise such sovereign power as was attributed to them by Cuba's counsel.⁶⁴

In considering what was perhaps the most far-reaching issue of the *Dunhill* case, Justices White, Rehnquist, Powell, and the Chief Justice recognized the existence of a commercial exception to the act of state doctrine. The four Justices also determined that the *Dunhill* case fit squarely within that exception.⁶⁵ Justice White's analysis of the commercial exception to the act of state doctrine substantially paralleled the reasoning advanced by both *Dunhill* and the Solicitor General.⁶⁶ The Supreme Court adopted the premise that a state engaging in commerce does so as a trader, and not as a sovereign.⁶⁷ Justice White wrote:

Repudiation of a commercial debt cannot, consistent with [the] 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

⁶² *Id.*

⁶³ *Id.* at 1861.

⁶⁴ *Id.* at 1860. Justice White wrote:

[I]n addition to authority to operate commercial businesses, to pay their bills and to collect their accounts receivable, interventors [have not been shown to be] invested with sovereign authority to repudiate all or any part of the debts incurred by those businesses. Indeed, it is difficult to believe that they had the power selectively to refuse payment of legitimate debts arising from the operation of those commercial enterprises.

Id.

⁶⁵ *Id.* at 1861-67.

⁶⁶ Compare *id.*, with Brief for Petitioner on Reargument at 8-18, and Brief for the United States as Amicus Curiae at 27-43. See text accompanying notes 40-53 *supra*.

⁶⁷ 96 S. Ct. at 1863.

immunity which our government would not extend them under prevailing sovereign immunity principles in this country. This would undermine the policy supporting the restrictive view of immunity, which is to assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts whenever possible.⁶⁸

Justice White observed that the restrictive approach to sovereign immunity followed in the United States⁶⁹ is based on several factors: First, such an approach has been accepted "by a large and increasing number of foreign states in the international community";⁷⁰ second, the United States itself has consented to be sued in matters regarding its own merchant vessels;⁷¹ and, third, foreign sovereigns have become so involved in international trade as to render it essential for "persons doing business with them to have their rights determined in the courts."⁷² Serious harm might ensue if a sovereign could effectively gain the benefits of absolute sovereign immunity while acting in the commercial sphere.⁷³ Since Cuba's act of state, if any, was a repudiation of a purely commercial obligation, it was not, under Justice White's analysis, entitled to be accorded the deference due a noncommercial act of state.⁷⁴

Justice Marshall authored a dissenting opinion which was con-

⁶⁸ *Id.*

⁶⁹ See notes 42-46 and accompanying text *supra*. Legislation to codify the restrictive theory of sovereign immunity which had been pending at the time of the *Dunhill* litigation has recently been enacted. Foreign Sovereign Immunities Act, Pub. L. No. 94-583 (Oct. 21, 1976).

⁷⁰ 96 S. Ct. at 1865. The "Tate Letter," 26 DEP'T STATE BULL. 984 (1952), quoted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 96 S. Ct. 1854, 1869-71 (1976), which first espoused the restrictive sovereign immunity theory in this country, noted that there was little support for an unrestricted theory of sovereign immunity outside of the Soviet Union. The opinion in *Dunhill* cited over a dozen decisions in as many countries which, over the last 3 decades, have adhered to the restrictive sovereign immunity approach. 96 S. Ct. at 1865 n.15.

⁷¹ 96 S. Ct. at 1865.

⁷² *Id.* Justice White emphasized that exposure of foreign sovereigns to the courts in the context of their commercial obligations does not create a grave risk of affronting foreign governments. *Id.* This was a concern deemed essential by the Court in *Sabbatino*. See 376 U.S. at 431. In addition, Justice White noted that in the area of commerce, settled rules of international law have emerged which are readily applicable to the commercial dealings of sovereigns:

There may be little codification or consensus as to the rules of international law concerning exercises of *governmental* powers, including military powers and expropriations, within a sovereign state's borders affecting the property or persons of aliens. However, more discernible rules of international law have emerged with regard to the commercial dealings of private parties in the international market. The restrictive approach to sovereign immunity suggests that these established rules should be applied to the commercial transactions of sovereign states.

96 S. Ct. at 1866 (footnote omitted) (emphasis in original).

⁷³ 96 S. Ct. at 1865.

⁷⁴ *Id.* at 1866-67.

curred in by Justices Brennan, Stewart, and Blackmun.⁷⁵ It was the opinion of the dissenters that the record revealed the existence of an act of state. Justice Marshall declared:

The act of state doctrine commits the courts of this country not to sit in judgment of the acts of a foreign government performed within its own territory. Under any realistic view of the facts of this case, the interventors' retention of and refusal to return funds paid to them by Dunhill constitute an act of state, and no affirmative recovery by Dunhill can rest on the invalidity of that conduct.⁷⁶

The remarks of counsel for Cuba were viewed by the dissent as "authoritative representations of the position of counsel's clients" and as such served "to confirm that the continued retention of those monies has been undertaken as an exercise of sovereign power."⁷⁷

The dissent declined to reach the broader question of a commercial exception to the act of state doctrine, arguing that even if such an exception should exist, it was not available under the facts of *Dunhill*.⁷⁸ This position was predicated upon the view that Cuba's retention of the preintervention payments was in accordance with the original Decree and was not a "purely commercial" act.⁷⁹ Justice Marshall stated:

Cuba's . . . refusal to repay the funds at issue in this case took place against the background of the intervention . . . pursuant to the initial intervention decree. For all practical purposes, the seizure of the funds once they arrived in Cuba [was] indistinguishable from the seizure of the remainder of the cigar manufacturer's businesses.⁸⁰

Accordingly, the dissent maintained that the affirmative judgment in favor of Dunhill was properly vacated by the court of appeals.⁸¹

FORMULATING A COMMERCIAL EXCEPTION

It is the thesis of this Article that there should, indeed, be a commercial exception to the act of state doctrine, and that cases of exceptional gravity will arise which will turn upon this exception and its ramifications. Moreover, a careful analysis of *Dunhill* — a

⁷⁵ *Id.* at 1871 (Marshall, J., dissenting).

⁷⁶ *Id.* (footnote omitted).

⁷⁷ *Id.* at 1875 (footnote omitted).

⁷⁸ *Id.*

⁷⁹ *Id.* at 1878.

⁸⁰ *Id.*

⁸¹ *Id.* at 1882.

case which probably did not present the best possible factual setting for the development of a commercial exception — reveals that while at least four Justices fully accepted the commercial thesis, the remainder of the Court did not necessarily reject it. Indeed, it is submitted that the sharp split in the Court may not have resulted from doctrinal differences. Rather, alternative arguments made in the presentation of Cuba's case in the course of the litigation may have caused the Justices to perceive the facts differently.

On the one hand, statements of Cuba's counsel at trial could be read as supporting the argument that an act of state occurred when the monies paid by the importers for preintervention shipments were retained upon arrival in Cuba pursuant to the intervention Decree.⁸² On the other hand, in its trial brief Cuba argued that it had not retained the funds pursuant to the Decree. Rather, it was contended that an independent act of state occurred when Cuba repudiated its obligation to return the importers' mistakenly submitted payments.⁸³ Although this latter argument was rejected by the trial court,⁸⁴ the Second Circuit held that Cuba's repudiation of its obligation to the importers was, in fact, an act of state.⁸⁵

At the time Dunhill filed its petition for certiorari, a series of events unrelated to the *Dunhill* controversy had occurred which vastly increased Cuba's interest in securing affirmance of the Second Circuit's disposition. These events had their genesis in 1961 when a Cuban branch of an American bank was nationalized by a decree which also apparently provided for the assumption of all banking obligations. On the strength of this assumption of liability, the American parent honored letters of credit issued by the Cuban branch. When the nationalized branch bank refused to reimburse the American parent, an action was instituted in *Bank of Boston v.*

⁸² Counsel for Cuba had stated at the trial of the *Menendez* action:

[U]nder the act of state doctrine the Cuban government, in accepting, appropriating, seizing, nationalizing, whatever other words you want, to take this money, has done so pursuant to a regulation, a law, a decree of the government of Cuba, and therefore the courts of this state will not look into the matter nor will the federal court.

Now, I am not talking about the extraterritorial effect of an act of state. I am talking about a territorial effect, namely, the seizure or the acceptance or the appropriation of this money when it got down to Cuba. We are not now concerned with whether they expropriated debts on September 15th. The question is what happened on October 1st, and October 15th and on November 8th and December 12th, when the money came down. And at that time the Cuban government took this money and under the act of state doctrine it belongs to the Cuban government.

Record at 854-56, *quoted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 96 S. Ct. 1854, 1874 (1976).

⁸³ Answering Brief for Plaintiff-Interventors at 20-22.

⁸⁴ 345 F. Supp. at 545; *see* text accompanying note 29 *supra*.

⁸⁵ 485 F.2d at 1371; *see* text accompanying notes 30-31 *supra*.

*Banco Nacional de Cuba*⁸⁶ for \$1.6 million, an amount which dwarfed the amount at stake in the *Dunhill* controversy. Relying on the holding of the court of appeals in *Dunhill*, Banco Nacional contended in *Bank of Boston* that its repudiation of the obligations it had incurred by the nationalization Decree constituted an act of state.⁸⁷ Against the backdrop of these events, Cuba opposed Dunhill's petition for certiorari, arguing as it did in *Bank of Boston* that the intervenors' repudiation of their obligation constituted an act of state:

[H]ere, the Republic of Cuba is a party to the suit. For seven long years it has been asserting that its repudiation of the debt was its act of state. That assertion was made in the district court, in the court of appeals and is now being made in this Court. It has been and is being made by counsel⁸⁸

Clearly, Cuba's interest in obtaining Supreme Court approval of this act of state argument was intensified by the comparatively large amount in controversy in the *Bank of Boston* litigation. However, when the Supreme Court directed the parties to the *Dunhill* litigation to discuss the advisability of reconsidering the *Sabbatino* doctrine,⁸⁹ Cuba was faced with an issue of such importance as to render insignificant the amounts disputed in both the *Dunhill* and *Bank of Boston* cases. Accordingly, on reargument Cuba seemingly abandoned its efforts to secure affirmance of the Second Circuit's characterization of Cuba's repudiation as an act of state. Instead, Cuba claimed the preintervention payments on the basis of a more "typical" act of state, retention of the monies pursuant to the intervention Decree:

⁸⁶ Civil No. 61-2116 (S.D.N.Y., filed June 15, 1961).

⁸⁷ A trial had already been held in the *Bank of Boston* litigation when the court of appeals decision in *Dunhill* was rendered. The *Bank of Boston* trial judge called for supplemental briefs discussing the applicability of the *Dunhill* decision to the case at bar. To date, no decision has been rendered in the *Bank of Boston* case.

⁸⁸ Respondent's Brief in Opposition to Certiorari at 3. In its petition for certiorari, Dunhill discussed the *Bank of Boston* case, noting that it "emphasize[d] the uncertainty which will be created if the Court of Appeals decision is left unreviewed." Petitioner's Brief for Certiorari at 10. In addition, Dunhill argued:

The implications of the holding of the Court of Appeals are far-reaching. If that holding is followed, any dispute arising out of a commercial transaction with a foreign government can be immunized from full judicial review in the courts of the United States. A simple statement by counsel for the foreign government will be sufficient to trigger the Act of State doctrine and thus divest our courts of the power to resolve the controversy against the foreign government. We are entering an era marked by a vast increase in commercial dealings between United States nationals and foreign governments — often involving transactions of massive proportions. Under the holding of the Court of Appeals, in disputes arising out of such transactions, our courts will always be available to grant relief against the American national, but, with a word from opposing counsel, never in his favor.

Id. at 9.

⁸⁹ 422 U.S. 1005 (1975). See text accompanying note 39 *supra*.

[Cuba] is seeking . . . to hold on to an asset located in Cuba — an asset it claims on the basis of a typical act of state, its original intervention decree.

We do not agree that the act of state doctrine does not apply to commercial transactions but find no need to argue the point here. It is, of course, absurd to characterize this as an ordinary commercial controversy. It arose, not out of normal international trade, but out of an intervention and it is the intervention which is the act of state, not the repudiation of a commercial debt.⁹⁰

The Court, however, refused to disturb the conclusion of the Second Circuit that the interventors had acquired the preintervention accounts *not* by retention pursuant to the Decree, but rather by repudiation of the obligation to repay. Thus their inquiry was limited to whether the repudiation alone constituted an act of state.⁹¹ Viewing Cuba's repudiation as a "purely commercial" act,⁹² the four Justices concluded that there had transpired no act of state and that had there been such an act, its "purely commercial" character excepted it from the act of state doctrine.⁹³

The dissent, on the other hand, did not limit itself to the Second Circuit's delineation of the act of state issue. The dissent substantially adopted the argument advanced by Cuba on reargument before the Supreme Court, and declared that an act of state occurred when Cuba retained the funds in Cuba pursuant to the intervention Decree.⁹⁴ Thus, in the eyes of the dissenters, the relevant act of state was entirely noncommercial in character since it was no more than an aspect of the expropriation Decree.⁹⁵ Accordingly, the dissent concluded that any possible commercial exception to the act of state doctrine would be inapplicable to the *Dunhill* case.⁹⁶

It is the belief of the authors that a commercial exception to the act of state doctrine will be sanctioned by the Supreme Court when there emerges a case unencumbered by the factual disputes in *Dunhill*. This commercial exception is based upon the theory that a governmental body which enters the commercial arena should not be permitted to enjoy without limitation the privileges of sovereignty in its commercial dealings. That is, a government may not assert its sovereign status as a blanket protection against liability incurred while acting as a trader.

⁹⁰ Brief for Respondent on Reargument at 4, 8 (footnote omitted).

⁹¹ 96 S. Ct. 1854, 1859, 1860 n.8 (1976).

⁹² *Id.* at 1861.

⁹³ *Id.*

⁹⁴ *Id.* at 1874 (Marshall, J., dissenting).

⁹⁵ *Id.* at 1878.

⁹⁶ *Id.*

Difficult questions about the scope of this commercial exception may emerge in cases where a nation repudiates a commercial obligation while acting in a dual role as both a sovereign and a commercial entity. Such questions were not reached in *Dunhill* since Justice White and the concurring Justices viewed Cuba's repudiation of its obligation as no more than a refusal to repay monies received in the course of commercial transactions,⁹⁷ while the dissent treated the repudiation as a logical extension of the intervention Decree and thus wholly unrelated to any commercial activities of the Government of Cuba.⁹⁸

Cases may arise, however, wherein a nation's repudiation of its commercial obligations takes a form suggestive of a sovereign act. Consider, for example, an embargo imposed by a nation suffering a shortage of goods which has the effect of abrogating that nation's commitments to deliver contracted-for commodities. Or, consider a nation which, faced with a ruinous balance of payments situation, places a total ban on imports payable in foreign currency and, in so doing, makes unlawful the honoring of its own purchase contracts. Such cases, it is suggested, will require slightly different analysis than cases involving a nation's mere repudiation of a commercial obligation.

For example, in *Dunhill*, which in the opinion of the authors and at least four Justices of the Supreme Court involved a simple repudiation of an obligation to repay monies mistakenly received in commerce,⁹⁹ it is submitted that such a repudiation should not be viewed as an act of state. Rather, it should be viewed as an act of a commercial entity which, wholly immaterially, happened to be a government agency. Under this analysis, it would be imprecise to describe judicial scrutiny of a nation's wholly commercial acts as permissible under an "exception" to the deferential act of state doctrine. More accurately, the acts of a foreign sovereign functioning as a purely commercial entity should be subject to examination by the courts simply because such acts are not true acts of state.

It would be a fiction of the first order, however, to characterize a nation's embargoes, import bans, or currency trading restrictions as "purely" commercial acts of a commercial entity. Regardless of a nation's status as a trader and the effect of such embargoes and the like on its trading commitments, those acts are performed by a nation which has assumed a dual role as both a sovereign and a

⁹⁷ See *id.* at 1861.

⁹⁸ See *id.* at 1878 (Marshall, J., dissenting).

⁹⁹ See *id.* at 1861.

commercial entity. If full recognition is to be denied such acts by the courts of the United States, there must be created a true exception to the act of state doctrine.

It is submitted that there should exist such a true commercial exception permitting the courts of this country to adjudicate any dispute arising out of a nation's commercial dealings. A foreign government should succeed in escaping its commercial obligations by means of an act clearly sovereign in nature, *only* when it can be demonstrated that the sovereign's act is lawful under recognized principles of international law.¹⁰⁰ Clearly, the adoption of a true commercial exception rule would require that *Sabbatino* be partially overruled since such a rule would mandate judicial examination of the propriety of sovereign acts under standards of international law. But, it is the opinion of the authors that entry into the world marketplace by a sovereign requires such a result. A sovereign which engages in an international commercial transaction should be deemed to have agreed implicitly to abide by the well-established rules of international law governing such dealings.¹⁰¹ It seems hardly unreasonable, therefore, to insist that a sovereign which seeks treatment *qua* sovereign to justify repudiation of its commercial obligations abide by the rules of international law governing the conduct of nations.

It should be noted, moreover, that the sensitive problems of international relations which intensified the *Sabbatino* Court's desire to avoid consideration of the vexing questions of international law presented in that case,¹⁰² do not preclude a true commercial exception to the act of state doctrine. The *Sabbatino* case, it should be remembered, involved Cuban expropriation of the property of a Cuban corporation which was substantially owned by United States residents. The *Sabbatino* Court observed:

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others

There are few if any issues in international law today on

¹⁰⁰ Justice White commented upon the feasibility of applying rules of international law to sovereigns acting in commercial capacities. See *id.* at 1866; note 72 *supra*.

¹⁰¹ See note 72 *supra*.

¹⁰² See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-34 (1964); note 6 *supra*.

which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.¹⁰³

In contrast, the issues likely involved when a nation acts in a dual sovereign-commercial capacity — the lawfulness of currency restrictions,¹⁰⁴ embargoes,¹⁰⁵ and the like — are not notably sensitive issues upon which conflicting ideological systems would likely reach differing conclusions. Since international consensus on the resolution of issues raised by such sovereign-commercial acts of nations is not unlikely, adjudication of such issues creates little chance of disturbing foreign affairs.

Additionally, it is the opinion of the authors that even a sovereign-commercial act which is facially in accordance with international law should be subject to judicial scrutiny to determine if it is merely a subterfuge to avoid commercial obligations. Though such an inquiry may seem inordinately delicate, courts of this country have demonstrated willingness to engage in similarly vexing inquiries. In *United States v. Sisal Sales Corp.*,¹⁰⁶ a number of organizations 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. Establishment of the cartel was greatly aided by favorable Mexican legislation which was solicited and secured by the *Sisal Sales* defendants.¹⁰⁷ It was contended by the defendants that the alleged monopoly was created by the laws of a foreign state and thus could not be complained of in American courts.¹⁰⁸ The Supreme Court held that the defendants could be enjoined from violating the antitrust laws since the defendants had entered into a conspiracy to monopolize the sisal business within the United States and had themselves procured the Mexican legislation:

The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.¹⁰⁹

¹⁰³ 376 U.S. at 428 (footnote omitted).

¹⁰⁴ See, e.g., M. SCHUSTER, *THE PUBLIC INTERNATIONAL LAW OF MONEY* 73-94 (1973).

¹⁰⁵ Cf. K. VON SCHUSCHNIGG, *INTERNATIONAL LAW: AN INTRODUCTION TO THE LAW OF PEACE* 303 (1959).

¹⁰⁶ 274 U.S. 268 (1927).

¹⁰⁷ *Id.* at 273-74.

¹⁰⁸ *Id.* at 270, 275-76.

¹⁰⁹ *Id.* at 276.

Similarly, in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*,¹¹⁰ the defendants, oil suppliers, had engaged in a boycott designed to deny the plaintiff, a refiner of Venezuelan crude oil, the oil required for its operations. The defendants raised as a defense the fact that they were compelled by regulatory authorities in Venezuela to engage in such a boycott.¹¹¹ The court held that compulsion by a foreign sovereign is a complete defense to an antitrust action brought against a private party, and stated:

Nothing in the materials before the Court indicates that defendants either procured the Venezuelan order or that they acted voluntarily pursuant to a delegation of authority to control the oil industry. The narrow question for decision is the availability of genuine compulsion by a foreign sovereign as a defense.¹¹²

Thus, in both *Sisal Sales* and *Interamerican Refining* the courts did not hesitate to sanction judicial inquiry into the question of whether the acts of a foreign government were procured by private parties. If the courts are willing to scrutinize the good faith of the acts of foreign governments which are claimed to justify the behavior of nongovernmental entities, they should similarly be willing to examine the acts of a sovereign which affect its nongovernmental commercial transactions.

Finally, it is submitted that the true commercial exception suggested here is in accord with the fundamental principle applicable in resolving disputes between parties to commercial transactions: honoring the intent of the parties. The underlying expectation of the parties to any commercial agreement is that each will perform its obligations, subject only to contingencies beyond its control. The scope of those contingencies is usually spelled out in the form of a force majeure clause or by reference to a body of law or arbitration rules which embody appropriate principles to be applied to "acts of God" or "acts of princes" which may hinder performance totally or partially.¹¹³ Where, however, one party to a commercial transaction

¹¹⁰ 307 F. Supp. 1291 (D. Del. 1970).

¹¹¹ *Id.* at 1294.

¹¹² *Id.* at 1297 (footnote omitted).

¹¹³ The concept that supervening events beyond the control of the parties will, under appropriate circumstances, excuse performance is embodied in some form in the law of all commercial nations. The term force majeure — which refers to an insurmountable force rendering performance impossible — is derived from articles 1147 and 1148 of the Napoleonic [Civil] Code of 1804. See A. VON MEHREN, *CIVIL LAW* 862 (1957); M. PLANIOL & G. RIPERT, *TREATISE ON THE CIVIL LAW* (11th ed. 1939). Under German law, performance can be excused if the set of basic assumptions surrounding the transaction, the "*Geschäftsgrundlage*," has "disappeared or [become] fundamentally altered" such that "enforcement by one party of the original contract would offend against *Treu und Glauben* [good faith]." Cartwright, *The Law of Obligations in England and Germany: Comparative Reflections in the Light of the Proposals in Law Reform Now*, 13 INT'L & COMP. L.Q. 1316, 1335 (1964); see

is a governmental entity, an inherent conflict exists between certain recognized excuses for nonperformance, *i.e.* governmental acts, and the traditional justification for allowing such an excuse, *i.e.* that the event is beyond the control of the party seeking to invoke it. Under the rule suggested here, a governmental trading agency would remain free to negotiate terms in its contracts specifying the kinds of subsequent behavior by its government, not clearly interdicted by international law, which would excuse nonperformance. At the same time, the governmental agency would be subject to the rules so specified when seeking to rely on its own unlawful acts or acts within its control which have the effect of thwarting its own performance. Moreover, the existence of a well-recognized commercial exception to the act of state doctrine might force governmental agencies and their private trading partners to focus more carefully during the contracting stage on precisely which acts by the foreign sovereign will constitute an appropriate excuse for

Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287, 297 (1958). The German approach is paralleled at least in Switzerland, Turkey, and Greece, see Hay, *Frustration and Its Solution in German Law*, 10 AM. J. COMP. L. 345, 353-55 (1961); Zepos, *Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946*, 11 MODERN L. REV. 36, 41-42 (1948), and also by countries such as Belgium, Israel, Italy, and The Netherlands, which have ratified without reservation the treaty known as the Uniform Law on the International Sale of Goods, as appearing in 30 HALSBURY'S STATUTES OF ENGLAND 131 (1971). The laws of Romania, Lebanon, Austria, the Soviet Union, and the law of Belgium and The Netherlands as it existed prior to ratification of the Uniform Law of International Sales probably developed along the lines of the French concept of force majeure. See Hay, *Frustration and Its Solution in German Law*, 10 AM. J. COMP. L. 345, 352 & n.35 (1961); Note, *Colloquium on Some Problems of Non-Performance and Force Majeure in International Contracts of Sale*, 9 INT'L & COMP. L.Q. 677, 680 (1960). Although there are few decided cases, Japanese law recognizes the principle of change of circumstances ("*jijō henkō no gensoku*") see KATSUMOTO, MIMP ō NI OKERU JIJ ō HENK ō N GENSOKU (Change of Circumstances Theory in Civil Law) (1926), cited in Igarashi & Rieke, *Impossibility and Frustration in Sales Contracts*, 42 WASH. L. REV. 445, 452 (1967), and in Latin American jurisprudence the doctrine of frustration exists to deal with unforeseeable events. See, *e.g.*, Hay, *Frustration and Its Solution in German Law*, 10 AM. J. COMP. L. 345 (1961); Drachler, *Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality*, 3 N.Y.L.F. 50, 79-80 (1957).

The common law counterparts to the civil law doctrine of force majeure and change of circumstances are the fraternal doctrines of impossibility of performance, in American terminology, and frustration of contract in British jurisprudence. The once inflexible *pacta sunt servanda* doctrine of *Paradine v. Jane*, [1647] Aleyn 26, has been modified by numerous cases which set forth the doctrine of frustration of contract, although they often evidence a judicial reluctance to resort to the doctrine. See, *e.g.*, *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696; *British Movietonews Ltd. v. London and District Cinemas Ltd.*, [1952] A.C. 166 (1951). In the United States, § 2-615 of the Uniform Commercial Code deals at length with "Excuse by Failure of Presupposed Conditions" and excuses performance in sales contracts where it "has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contract." UNIFORM COMMERCIAL CODE § 2-615, Comment 1. Accepted by at least one federal circuit as a "source for the 'federal' law of sales," *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966) (Friendly, J.), § 2-615 has been recognized by still another circuit as reflecting contemporary concepts of impossibility. *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966) (Wright, J.).

the governmental agency's nonperformance. To this extent, the commercial exception will serve to clarify further the intent of the parties and to reduce the element of uncertainty in such transactions.

Under the views expressed above, the sovereign which enters into international commercial agreements will not be permitted to avoid judicial scrutiny of its own public acts which operate to negate its commercial obligations. Wartime embargoes, economic emergency decrees, currency control regulations, and the like, if valid under international law and not invoked solely as devices to nullify commercial undertakings, should pass judicial scrutiny and excuse a sovereign from its commercial obligations. Ultimately, it is submitted that judicial scrutiny of commercial acts of sovereigns will enhance the stability of international trade at a time when the role of nations in the world marketplace is becoming ever more important.