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NOTE

Callejo v. Bancomer, S.A.: The Need for a Commercial Activity Exception to the Act of State Doctrine

I. INTRODUCTION

The ability of the United States courts to adjudicate claims against foreign sovereigns is limited by the Foreign Sovereign Immunities Act of 1976 ("FSIA")¹ and the act of state doctrine.² The FSIA gives United States courts jurisdiction over foreign states when the action is based upon an act "in connection with a commercial activity of the foreign state elsewhere."³ The act of state doctrine as traditionally defined, however, does not appear to encompass such a commercial activity exception.⁴ Since virtually any act of a foreign state may be defined as an act of state,⁵ traditional application of the act of state doctrine renders many claims nonjusticiable in United States courts.⁶

¹ 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982). *See infra* notes 42-45 and accompanying text.

² The act of state doctrine is a common law rule precluding adjudication by a United States court of the legality of public acts of a foreign government carried out within its own territory. McCormick, *The Commercial Activity Exception to Foreign Sovereign Immunity and the Act of State Doctrine*, 16 LAW & POL'Y INT'L BUS. 477, 478 (1984). *See infra* notes 46-57 and accompanying text.

³ 28 U.S.C. § 1605(a)(2). *See infra* note 44 for the text of the statutory exception.

⁴ *See infra* notes 46-57 and accompanying text.

⁵ *See* H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 360 n.56 (R. Tucker ed. 1966) (any act may become a public act if it is undertaken by a state).

⁶ *See* McCormick, *supra* note 2, at 478. The foreign sovereign immunity and act of state doctrines address the same considerations of comity and separation of powers, yet they operate in different ways and serve different functions. Sovereign immunity shields the foreign sovereign and its agents from jurisdiction, while the act of state doctrine protects the sovereign's internal laws and proclamations from intrusive scrutiny. *Braka v. Bancomer, S.A.*, 589 F. Supp. 1465, 1470 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985). *See also* Comment, *Foreign Sovereign Immunity and the*

The drafters of the FSIA considered the possibility that by permitting absolute immunity to be applied in instances where the FSIA precluded such immunity,⁷ the act of state doctrine might be used to frustrate the intent underlying the commercial activity exception of the FSIA.⁸ This possibility, however, was dismissed⁹ based on the Supreme Court's decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba*.¹⁰

In *Dunhill*, a plurality of the Court held that the "concept of an act of state should not be extended to include the repudiation of a purely commercial obligation. . . ."¹¹ Since *Dunhill* was decided before the FSIA was enacted, the drafters believed that the FSIA would preclude the application of the act of state doctrine where a foreign state's commercial acts were at issue.¹² Thus the legislative intent was that both the FSIA and the act of state doctrine be restricted by commercial acts of foreign states.¹³

Recently, the Fifth Circuit in *Callejo v. Bancomer, S.A.*¹⁴ examined

Act of State: The Need for a Commercial Act Exception to the Commercial Act Exception, 17 U.S.F.L. REV. 763, 772-73 (1983) (discussing the independent but interrelated nature of the act of state and sovereign immunity doctrines).

⁷ The House Report states:

The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the act of state doctrine may be improperly asserted in an effort to block litigation. . . .

The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine.

H.R. REP. NO. 1487, 94th Cong., 2d Sess. 6, 20 n.1, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6619 n.1 [hereinafter House Report].

⁸ See *infra* note 44.

⁹ House Report, *supra* note 7, at 20 n.1, 1976 U.S. CODE CONG. & AD. NEWS at 6619 n.1.

¹⁰ 425 U.S. 682 (1976); see Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act In Practice*, 33 SW. L.J. 1009, 1054 (1979) (Congress decided it was not necessary to address the act of state doctrine in view of *Dunhill*).

¹¹ 425 U.S. at 695. Because *Dunhill* was a plurality decision, it is disputed whether a commercial activity exception to the act of state doctrine was created or whether the Court merely failed to find that an act of state took place in *Dunhill*. See, e.g., Cooper, *Act of State and Sovereign Immunity: A Further Inquiry*, 11 LOY. U. CHI. L.J. 193, 205 (1980) (question of a commercial activity exception to the act of state doctrine remains unsettled); Mathias, *Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform*, 12 LAW & POL'Y INT'L BUS. 369, 385 (1980) (*Dunhill* did not create a commercial activity exception to the act of state doctrine); *The Supreme Court—1975 Term*, 90 HARV. L. REV. 265, 266 (1976) (no resolution of the question of limiting act of state doctrine to noncommercial acts). For a detailed discussion of *Dunhill*, see *infra* notes 113-35 and accompanying text.

¹² House Report, *supra* note 7, at 20 n.1, 1976 U.S. CODE CONG. & AD. NEWS at 6619 n.1: "[I]t appears that the [act of state] doctrine would not apply to the cases covered by H.R. 11315 [the FSIA], whose touchstone is a concept of 'commercial activity' involving significant jurisdictional contacts with this country."

¹³ See *supra* notes 7 & 12.

¹⁴ 764 F.2d 1101 (5th Cir. 1985).

the plurality's commercial activity exception in *Dunhill*,¹⁵ yet declined to decide whether to adopt the exception with respect to the act of state doctrine.¹⁶ The court held that the defendant Mexican bank, by issuing certificates of deposit ("CDs"), was engaged in a commercial activity, thus invoking the commercial activity exception of the FSIA.¹⁷ Such activity provided United States courts with jurisdiction.¹⁸ The defendant failed to repay the face amount of the CDs to the United States plaintiffs because the Mexican government issued compulsory monetary exchange rate restrictions.¹⁹ Mexico's actions were categorized by the Fifth Circuit as sovereign, not commercial, in nature.²⁰ Since adjudicating the plaintiffs' claims would necessarily call into question the Mexican regulations, the court dismissed the claims under the act of state doctrine.²¹ The court's action was therefore contrary to Congress' assumption that the act of state doctrine would not be used to undermine the commercial activity exception of the FSIA.²²

This Note analyzes the commercial activity exception to the act of state doctrine as espoused in *Dunhill*²³ and examines the Fifth Circuit's treatment of the exception in *Callejo*.²⁴ Although the *Callejo* court avoided a decision on the validity of the exception, this Note argues that the facts in *Callejo* indicate that such a decision was necessary.²⁵ The Note concludes that a rule-oriented approach to the situation should have been utilized and that, under such an approach, the *Callejo* plaintiffs' claims should have been adjudicated.²⁶

II. CURRENT STATE OF THE LAW

A. The Restrictive Theory of Sovereign Immunity and the FSIA

Foreign sovereign immunity is a jurisdictional principle of international law which precludes the courts of one sovereign from asserting jurisdiction over a foreign government or its agents.²⁷ The first applica-

¹⁵ See *infra* notes 124-35 and accompanying text.

¹⁶ 764 F.2d at 1115.

¹⁷ *Id.* at 1110. For the text of the commercial activity exception of the FSIA, see *infra* note 44.

¹⁸ 764 F.2d at 1112.

¹⁹ *Id.* at 1106.

²⁰ *Id.* at 1115.

²¹ *Id.* at 1116, 1125-26.

²² See *supra* notes 7, 9-10 & 12 and accompanying text.

²³ See *infra* notes 124-35 and accompanying text.

²⁴ See *infra* notes 102-12 and accompanying text.

²⁵ See *infra* notes 155-64 and accompanying text.

²⁶ See *infra* notes 145-54 and 159-64 and accompanying text.

²⁷ McCormick, *supra* note 2, at 478.

tion of the doctrine in the United States allowed foreign governments absolute immunity from the jurisdictions of United States courts.²⁸ Reasons underlying the early practice of absolute immunity included the need to protect the dignity of the foreign sovereign,²⁹ the desire for reciprocal immunity for the United States in foreign courts,³⁰ and the inability of domestic courts to enforce judicial decisions against a foreign nation.³¹

This theory of absolute immunity was abandoned in 1952 when the State Department, in the issuance of the "Tate Letter,"³² announced the adoption of a restrictive theory of sovereign immunity.³³ This restrictive theory accords immunity to a sovereign only when it is acting in a public capacity.³⁴ According to the Tate Letter, immunity would no longer be asserted by the State Department on behalf of foreign sovereigns in suits arising from private or commercial activity.³⁵ The three principal reasons set forth in the Tate Letter for the official shift to the restrictive theory of sovereign immunity were: (1) increased international acceptance of the restrictive theory of sovereign immunity and an official desire for reciprocity; (2) the elimination of the advantage which communist countries derived from absolute sovereign immunity because all of their commercial activity was immune; and (3) growing governmental involve-

²⁸ See *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). *The Schooner Exchange* action was brought by United States plaintiffs who alleged that the ship *Exchange* was forcibly taken from them on the high seas by persons acting under Napoleon's orders. *Id.* at 117. Chief Justice Marshall refused to exercise jurisdiction over the *Exchange* (which was then located in Philadelphia Harbor) on the ground that the vessel, as a ship of a peaceful foreign sovereign, "must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country." *Id.* at 147.

²⁹ *Id.* at 137.

³⁰ *Id.* at 146.

³¹ *Id.* For a detailed examination of the reasons why a foreign state should be immune from United States legal proceedings, see Comment, *Sovereign Immunity and the Foreign-State Enterprise in Alaska*, 4 UCLA-ALASKA L. REV. 343, 347-48 (1975).

³² Letter from Jack B. Tate, State Department Acting Legal Advisor, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984 (1952).

³³ *Id.* For a critical analysis of the Tate Letter, see Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93, 95 (1953) ("There seems no doubt that the adoption by the United States of its new policy restricting sovereign immunity is fully in accord with the obligations of international law.").

³⁴ *Id.* Latin terms are sometimes used: public acts are *jure imperii* and private acts are *jure gestionis*. The Tate Letter, however, did not establish any guidelines for distinguishing between public and private acts. For a discussion of cases attempting to delineate such guidelines following the Tate Letter, see Cooper, *supra* note 11, at 210-14.

³⁵ 26 DEP'T ST. BULL. at 984-85. The rationale for the restrictive theory of sovereign immunity first appeared in *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904, 907 (1824), where Chief Justice Marshall stated that "when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes [the character] of a private citizen."

ment in commercial matters worldwide.³⁶ The State Department also expressed a hope that the courts would follow suit.³⁷

The leading case interpreting and upholding restrictive immunity is *Victory Transport Inc. v. Comisaria General*.³⁸ In *Victory Transport*, the Second Circuit held that when a foreign government chartered a ship to transport wheat, the foreign government was subject to the jurisdiction of United States courts because the government was engaged in a private, commercial transaction.³⁹ The court stated that immune public acts included:

- (1) internal administrative acts, such as expulsion of an alien;
- (2) legislative acts, such as nationalization;
- (3) acts concerning the armed forces;
- (4) acts concerning diplomatic activities;
- (5) public loans.⁴⁰

Despite these relatively clear rules espoused by the *Victory Transport* court, continued intervention by the State Department hindered the systematic development of the restrictive sovereign immunity doctrine.⁴¹ The resulting disorder presented a need for codification of the doctrine.

Passed in 1976, the FSIA codified the restrictive theory of foreign

³⁶ 26 DEP'T ST. BULL. at 984-85.

³⁷ "[A] shift in policy by the executive cannot control the courts but . . . the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so." *Id.* at 985. *See infra* note 38.

³⁸ 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). *See also* Southeastern Leasing Corp. v. Stern Dragger Belogorsk, 493 F.2d 1223 (1st Cir. 1974); AMKOR Corp. v. Bank of Korea, 298 F. Supp. 143 (S.D.N.Y. 1969). The cited cases support the position that a State Department suggestion will preclude a judicial determination of immunity. *See also* Carl, *supra* note 10, at 1012 n.15 (State Department's definition of the scope of sovereign immunity is frequently controlling because federal courts defer to the Department's assertion of sovereign immunity).

³⁹ 336 F.2d at 360-62.

⁴⁰ *Id.* at 360. The court stated that this list of categories could be enlarged or contracted by the State Department. *Id.*

⁴¹ Subsequent to the issuance of the Tate Letter, the State Department continued to advise the courts with respect to sovereign immunity questions. This intervention by the State Department was not, however, entirely consistent with the policies espoused in the Tate Letter. The Supreme Court of Pennsylvania stated:

Irrespective of its clear meaning, it appears that the State Department has silently abandoned the "revised and restricted policy" set forth in the Tate letter and has substituted a case by case foreign Sovereign Immunity policy, i.e., the State Department will recognize and suggest, or fail to recognize or grant or suggest Sovereign Immunity *in each case* presented to it, depending (a) upon the foreign and diplomatic relations which our Country has at that particular time with the other Country, and (2) [sic] the best interests of our Country at that particular time. *Chemical Natural Resources, Inc. v. Republic of Venezuela*, 420 Pa. 134, 159, 215 A.2d 864, 876 (1966) (emphasis in original). *See also* Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1455 (1983) (sovereign immunity doctrine could not develop along the lines of the *Victory Transport* decision due to politically motivated State Department intervention); Comment, *supra* note 31, at 362 n.70 ("The strict adherence of the State Department to the doctrines of the Tate Letter is somewhat in doubt.").

sovereign immunity⁴² and provided the courts with the power to deal with claims of sovereign immunity.⁴³ The FSIA embodies the commercial activity exception which allows United States courts to exercise jurisdiction over foreign governments engaging in private, commercial acts.⁴⁴ Congress recognized that the sovereign loses its attributes of sovereignty when it engages in commercial acts; therefore, the sovereign should be treated like a private citizen with regard to those acts.⁴⁵

B. The Act of State Doctrine

The act of state doctrine, like the doctrine of sovereign immunity, comes "from the thoroughly sound principle that on occasion individual litigants may have to forego decision on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy."⁴⁶ In its modern form, the act of state doctrine is a common law rule which precludes adjudication by a United States court of the legality of public acts of a foreign government carried out within its own territory.⁴⁷ In 1897, the Supreme Court set forth the classic expression of the act of state doctrine in *Underhill v. Hernandez*:

Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.⁴⁸

⁴² The legislative history indicates that this was the primary purpose of the FSIA. House Report, *supra* note 7, at 7-8, 1976 U.S. CODE CONG. & AD. NEWS at 6605-06. See *infra* note 44.

⁴³ 28 U.S.C. § 1602 (1982) provides in part:

[T]he determination by United States courts of the claims of foreign states to immunity . . . would serve the interests of justice and would protect the rights of both foreign states and litigants. . . . Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned. . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States. . . .

⁴⁴ The relevant parts of the commercial activity exception in the FSIA are:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
(2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). The FSIA defines a commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d).

⁴⁵ 28 U.S.C. § 1602 (1976).

⁴⁶ *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 769 (1972) (plurality opinion adopting an exception to the act of state doctrine based on a State Department letter which advised that United States foreign policy would not be disrupted if the Court adjudicated claims based upon commercial activities). See *infra* notes 145-54 and accompanying text.

⁴⁷ McCormick, *supra* note 2, at 478.

⁴⁸ 168 U.S. 250, 252 (1897). An earlier example of a United States court applying the doctrine is

Although the history of the act of state doctrine is long and complex,⁴⁹ the doctrine's modern concepts spring mainly from the Supreme Court's opinion in *Banco Nacional de Cuba v. Sabbatino*.⁵⁰ In *Sabbatino*, the Court renounced its proposition in *Underhill* that the act of state doctrine is rooted in principles of sovereign immunity.⁵¹ Instead, the Court held that, although it is not constitutionally required, the doctrine has constitutional underpinnings because it is rooted in the "basic relationships [among] branches of government in a system of separation of powers."⁵² The Supreme Court stated:

[R]ather than laying down . . . [an] all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.⁵³

More recently, however, the Supreme Court in a plurality opinion in *Dunhill* held that the act of state doctrine would not apply to a commercial act.⁵⁴ Writing for the plurality, Justice White took the view that international comity is not involved where a sovereign engages in commercial acts.⁵⁵ The exception was viewed by the plurality as having similar policy justifications as the commercial activity exception to the sovereign immunity doctrine.⁵⁶ Justice Marshall's dissenting opinion rejected the theory that commercial acts are always private acts and stated that where international comity is involved, the "validity of an act of a foreign sovereign is . . . a 'political question' not cognizable in our

Hudson v. Guestier, 8 U.S. (4 Cranch) 293 (1808) where a United States ship violated French municipal law and was ultimately condemned by a French court. *Id.* at 293. The United States Supreme Court stated, with respect to the United States plaintiffs' claim, that "no foreign court is at liberty to question the correctness of what is done [by a foreign state]." *Id.* at 294.

⁴⁹ For a further discussion of the origins of the act of state doctrine, see, generally, Note, *Rehabilitation and Exoneration of the Act of State Doctrine*, 12 N.Y.U. J. INT'L L. & POL. 599, 600-10 (1980) (arguing for a more limited scope of the act of state doctrine) [hereinafter Note, *Rehabilitation and Exoneration*].

⁵⁰ 376 U.S. 398 (1964).

⁵¹ *Id.* at 421.

⁵² *Id.* at 423.

⁵³ *Id.* at 428. See *infra* notes 136-42 and accompanying text.

⁵⁴ 425 U.S. at 695. The Department of Justice "strongly urged the Supreme Court to embrace the commercial [activity] exception" to the act of state doctrine. Starr, *Department of Justice Views, in ACT OF STATE AND EXTRATERRITORIAL REACH* 13, 14 (J. Lacey ed. 1983). The Department currently views the plurality's decision in *Dunhill* to recognize such an exception as a "partial success." *Id.* For a detailed presentation of *Dunhill*, see *infra* notes 113-35 and accompanying text.

⁵⁵ 425 U.S. at 695-706 (1976) (plurality opinion).

⁵⁶ *Id.* at 705-06. These justifications were espoused in the Tate Letter. See *supra* notes 32-37 and accompanying text.

court.”⁵⁷

Notwithstanding the fact that the commercial activity exception was accepted by only a plurality of the Court,⁵⁸ there is evidence that the exception is evolving into a rule of law. Two authors, Victor S. Friedman and Leslie A. Blau, have suggested that in a more suitable factual situation than *Dunhill*,⁵⁹ the commercial activity exception will be adopted by the Supreme Court.⁶⁰ Friedman and Blau note that a government should not be permitted to assert its sovereign status as a “blanket protection against liability” incurred while engaged in commercial dealings.⁶¹ They reason that a governmental body in the commercial arena should not be granted the vast advantage of enjoying, without limitations, the privileges of sovereignty while private parties in the same arena are not allowed any such immunity.⁶² In addition to this concern regarding fair dealings by sovereigns in the commercial arena, these authors posit that the commercial dealings of sovereigns should be subject to judicial scrutiny in order to determine whether the transactions are merely subterfuges intended to avoid commercial obligations.⁶³ They point to cases⁶⁴ where courts sanctioned judicial inquiry to determine whether the acts of a foreign government were procured by private parties. Friedman and Blau analogize that “[i]f the courts are willing to scrutinize the good

⁵⁷ *Id.* at 727.

⁵⁸ *See supra* note 11.

⁵⁹ In *Dunhill*, the Cuban government appointed “interventors” to take possession of five Cuban cigar manufacturers. 425 U.S. at 685. American importers then paid the interventors for amounts due to the manufacturers. The importers later asserted a claim against the interventors to return the money because the original owners of the cigar companies were suing the importers for payment. The interventors asserted the act of state defense. *Id.* at 686-87. *See infra* notes 113-35 and accompanying text for a further discussion of *Dunhill*.

⁶⁰ 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, 681 (1976). Friedman and Blau were counsel of record to Alfred Dunhill of London, Inc. Their article discusses the *Dunhill* litigation in detail and concludes that a commercial activity exception to the act of state doctrine is needed. For a discussion of their reasoning, see *infra* text accompanying notes 61-65. *See also* Note *Rehabilitation and Exoneration*, *supra* note 49, at 637 (The commercial activity exception “appears to stand on the verge of becoming a well-entrenched boundary for the act of state doctrine. It is apparently only a matter of time until the [exception] is universally declared a rule of law in American courts.”). *But see* Note, *International Association of Machinists v. OPEC: The Ninth Circuit Breathes New Life into the Act-of-State Doctrine in Commercial Settings*, 16 GEO. WASH. J. INT'L L. & ECON. 427 (1982) (arguing that a commercial activity exception to the act of state doctrine is not evolving into law, and that such an exception would not eliminate the risk of adverse judicial interference in politically sensitive foreign relations).

⁶¹ Friedman & Blau, *supra* note 60, at 681.

⁶² *Id.*

⁶³ *Id.* at 684.

⁶⁴ *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970), *cited in* Friedman & Blau, *supra* note 60, at 684-85.

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.”⁶⁵

Courts also have evidenced a trend toward accepting the commercial activity exception to the act of state doctrine. The Second Circuit, at least in dicta, favors adoption of the exception as a rule of law. Judge Mulligan in *Hunt v. Mobil Oil Corp.*⁶⁶ observed that “*Dunhill* declined to extend the act of state doctrine to situations where the sovereign has descended to the level of an entrepreneur.”⁶⁷ The court applied the act of state doctrine, however, to bar plaintiffs’ recovery in *Hunt* where a Libyan oil producer brought an action against other oil producers to recover for alleged violation of antitrust laws.⁶⁸ The complaint alleged that defendant oil producers prevented plaintiffs from reaching a settlement with Libya upon Libya’s nationalization of plaintiffs’ operations.⁶⁹ The United States characterized the expropriation as a “political reprisal against the United States. . . .”⁷⁰ The *Hunt* court held that such acts were “an example of non-commercial sovereign activity within the ambit of the [act of state] doctrine.”⁷¹

In another case, *D’Angelo v. Petroleos Mexicanos*,⁷² the court found it necessary to note that *D’Angelo* did not fall within the scope of the commercial activity exception despite the fact that *Dunhill* was a plurality decision.⁷³ The *D’Angelo* court held that, even though the Mexican government entered into the commercial arena of oil production by expropriating a United States corporation, the expropriation itself was not a commercial activity and was therefore outside of the *Dunhill* exception.⁷⁴

⁶⁵ Friedman & Blau, *supra* note 60, at 685.

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

⁶⁷ *Id.* at 73; *accord* *Dominicus Americana Bohio v. Gulf & Western Indus.*, 473 F. Supp. 680, 689-90 (S.D.N.Y. 1979); *see also* *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 316 n.38 (2d Cir. 1981) (noting the existence of several purported “exceptions” to the act of state doctrine), *cert. denied*, 454 U.S. 1148 (1982). *But see* *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) (not yet considering the possible existence in the Second Circuit of a commercial act exception to the act of state doctrine under *Dunhill*).

⁶⁸ 550 F.2d at 73.

⁶⁹ *Id.* at 71-72.

⁷⁰ *Id.* at 73.

⁷¹ *Id.*

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

⁷³ *Id.* at 1286; *accord* *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445, 458 (D. Del. 1978).

⁷⁴ 422 F. Supp. at 1286.

Some jurisdictions, however, do not recognize a commercial activity exception to the act of state doctrine. The Ninth Circuit in *International Association of Machinist and Aerospace Workers, (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*,⁷⁵ for example, held that the act of state defense was applicable despite the commercial acts of a defendant foreign government.⁷⁶ In this case, IAM brought suit against OPEC and its member nations alleging that OPEC's price setting violated United States antitrust laws.⁷⁷ The court dismissed the case on act of state grounds, stating that the courts should not interfere with "a delicate area of foreign policy which the executive and legislative branches have chosen to approach with restraint."⁷⁸ The Ninth Circuit thus disregarded any indications that the Supreme Court, as well as the general trend of the law, has become sympathetic to a commercial activity exception to the act of state doctrine.⁷⁹

The Fifth Circuit in *Callejo v. Bancomer, S.A.* discussed *Dunhill's* commercial activity exception yet applied the act of state doctrine to bar adjudication.⁸⁰ The defendant in *Callejo* repaid a debt contract at below current exchange rates in accordance with a regulation promulgated by the Mexican government. The court found that the defendant's activity was sovereign, not commercial, in nature.⁸¹ The activity was, therefore, held to be outside of the scope of the exception.⁸² Furthermore, the court declined to rule on the validity of the commercial activity exception to the act of state doctrine in the Fifth Circuit.⁸³

III. THE CALLEJO LITIGATION

A. Background

William and Adelfa Callejo, the plaintiffs in *Callejo v. Bancomer, S.A.*, were United States citizens residing in Texas.⁸⁴ The Callejos purchased CDs issued by Bancomer, a privately-owned Mexican bank starting in 1979 or 1980.⁸⁵ Bancomer operated a branch office in Los Angeles and an agency in New York City. In Texas, Bancomer main-

⁷⁵ 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

⁷⁶ *Id.* at 1360. See *infra* notes 143-44 and accompanying text.

⁷⁷ *Id.* at 1355.

⁷⁸ *Id.* at 1361.

⁷⁹ See generally McCormick, *supra* note 2, at 514-19.

⁸⁰ 764 F.2d at 1125.

⁸¹ *Id.* at 1115.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1105.

⁸⁵ *Id.*

tained accounts with two local banks.⁸⁶

The four CDs at issue in *Callejo* were purchased on May 31 and June 3, 1982.⁸⁷ All four CDs were denominated in United States dollars and called for repayment, including interest, in United States dollars.⁸⁸ Their total value was approximately \$300,000 and they specified on their face Mexico City as the place of payment.⁸⁹

In the summer of 1982, Mexico experienced a severe economic recession by a decline in world oil prices.⁹⁰ In the late 1970s, Mexico initiated "an ambitious domestic spending program financed by substantial overseas borrowing."⁹¹ Mexico was then realizing high foreign currency revenues from the sale of oil.⁹² By August 1982, however, world oil prices had fallen significantly.⁹³ The drop in oil prices seriously restricted the primary source of foreign exchange Mexico required to repay its debt and placed severe pressure on the Mexican peso in foreign exchange markets.⁹⁴

Faced with this crisis, the Mexican government issued a decree on August 13, 1982 mandating a ban on the use of foreign currency as legal tender and requiring all domestic obligations to be paid with pesos at the prevailing market exchange rate.⁹⁵ Two more decrees were issued on September 1, 1982, one nationalizing all of Mexico's private banks, including Bancomer, the other requiring repayment of United States dollar-denominated CDs and other debt obligations in pesos at a specified rate of exchange.⁹⁶

The Callejos' complaint alleged breach of contract because Bancomer failed to repay the face amount of the CDs and also alleged securities act violations against Bancomer.⁹⁷ Bancomer's motion to dis-

⁸⁶ *Id.*

⁸⁷ *Id.* at 1106.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Braka*, 589 F. Supp. at 1467.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* The government set the exchange rate at 70 pesos to the dollar. 764 F.2d at 1106 n.2. The market exchange rate on September 1, 1982 was 121 pesos to the dollar. Wall St. J., Sept. 2, 1982, at 30, col. 6. By November, 1982, the market rate rose to more than 130 pesos to the dollar. 764 F.2d at 1106 n.2.

⁹⁷ 764 F.2d at 1106. The plaintiffs alleged that Bancomer's failure to register the CDs violated § 12(1) of the Securities Act of 1933, 15 U.S.C. § 771(1)(1982), and § 33A.1 of the Texas Securities Act, TEX. REV. CIV. STAT. ANN. art. 581-33A.1 (Vernon 1977). The Fifth Circuit held that since adjudicating the securities claims would not involve reviewing the validity of Mexico's exchange control regulations, the claims were not barred by the act of state doctrine. 764 F.2d at 1125 n.33.

miss was granted by the district court which relied on sovereign immunity in granting the motion.⁹⁸ The district court held that Bancomer was an instrumentality of the Mexican government and that the Callejo's claim was based on the issuance of exchange control regulations by Mexico, an activity found to be sovereign, not commercial.⁹⁹ The lower court dismissed the claims, holding that Bancomer was immune from suit under the FSIA.¹⁰⁰ The district court did not reach the act of state question because the suit was dismissed for lack of jurisdiction.¹⁰¹ The Callejos then appealed the lower court's decision.

B. The Fifth Circuit's Decision

The Fifth Circuit reached the same result as the district court, but with different reasoning.¹⁰² The appellate court found the plaintiffs' claim to be based on Bancomer's breach of its contractual obligations, not Mexico's promulgation of exchange control regulations as the district court found.¹⁰³ The contractual obligations were classified by the appellate court as commercial in nature because "they were of a kind that a private individual would customarily enter into for profit."¹⁰⁴ The court also held that Bancomer did not "acquire any derivative immunity [for purposes of the FSIA] by virtue of the fact that, in breaching the terms of the certificates of deposit, it was merely complying with the sovereign decrees of the Mexican government."¹⁰⁵ Since Bancomer's activities were

Nonetheless, the court dismissed the claims. It found that the CDs issued by Bancomer "were not 'securities' within the meaning of the federal and Texas securities laws." *Id.* Moreover, purchasers of the CDs did not require the protections afforded by federal securities laws because they were protected by Mexican banking law. The court applied this conclusion to the Texas securities law claim because the meaning of "securities" as construed by federal courts is considered by Texas courts to be "a 'reliable guide' to the definition of 'securities' under the Texas Act." *Id.* (citing *First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart*, 648 S.W.2d 410, 414 (Tex. Ct. App. 1983)).

⁹⁸ 764 F.2d at 1104.

⁹⁹ *Id.* at 1104, 1108. The appellate court subsequently determined that the Callejos' claim was based on Bancomer's breach of the CD contracts. *Id.* at 1108-09. See *infra* notes 103-07 and accompanying text.

¹⁰⁰ *Id.* at 1104-05.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1105.

¹⁰³ *Id.* at 1109; accord *Braka*, 589 F. Supp. at 1469 ("[A]nalysis must focus on the named defendant's acts which are the basis of the action and not on the separate acts of other sovereign instrumentalities or agencies.").

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* The court cited *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980) as precedent. In *Arango*, the plaintiffs brought breach of contract, negligence, battery, and false imprisonment charges against the Dominican national airline after they had been denied entry into the Dominican Republic for a vacation. The Fifth Circuit held that the airline was not entitled to sovereign immunity on the breach of contract and tort claims even though it was only complying

neither themselves sovereign nor entitled to derivative immunity by virtue of compliance with Mexican law, the Fifth Circuit held that the commercial activity exception to the FSIA¹⁰⁶ applied, “and that jurisdiction is consequently not barred by sovereign immunity.”¹⁰⁷

The Fifth Circuit refused, however, to adjudicate the plaintiffs’ claims, holding that the act of state doctrine operated as a bar.¹⁰⁸ In its analysis of the act of state doctrine, the court found Mexico’s exchange rate promulgations to be a sovereign, not a commercial act.¹⁰⁹ The court stated that the “power to issue exchange control regulations is paradigmatically sovereign in nature; it is not of a type that a private person can exercise.”¹¹⁰ Since adjudicating the Callejos’ claims would necessarily call into question the Mexican government’s regulations, the court applied the act of state doctrine to affirm dismissal of the suit.¹¹¹ Furthermore, since the Fifth Circuit held Mexico’s regulations to be sovereign in nature, the court did not need to decide whether to adopt the commercial activity exception to the act of state doctrine.¹¹²

IV. ANALYSIS

A. The *Dunhill* Litigation

The Callejos argued that the act of state doctrine was inapplicable to their case because Mexico’s promulgation specifying an official exchange rate for repayment of domestic debts was a commercial act and therefore should fall into the commercial activity exception to the act of state doctrine¹¹³ as announced in *Alfred Dunhill of London, Inc. v. Republic of*

with the government’s sovereign decision to deny entry to the plaintiffs. *Id.* at 1379-80. The airline was entitled to sovereign immunity on the battery and false imprisonment claims, however, because it acted as a sovereign itself by participating directly in those acts. *Id.* at 1379. In *Callejo*, the court noted that Bancomer was merely complying with the government’s order and acting as any private party would in complying with the law, thus Bancomer was not entitled to sovereign immunity for breaching its contractual obligations. 764 F.2d at 1110.

¹⁰⁶ See *supra* note 44.

¹⁰⁷ 764 F.2d at 1112.

¹⁰⁸ *Id.* at 1125-26.

¹⁰⁹ *Id.* at 1115.

¹¹⁰ *Id.* at 1116. The *Callejo* court also relied on the reasoning found in *Braka*, which dealt with a substantially similar factual situation:

Mexico’s act in this instance cannot be construed as a simple repudiation of a government entity’s commercial debt. While the ultimate result may seem similar—i.e. Mexico has enriched itself at plaintiff’s expense—the mechanisms used by Mexico are conventional devices of civilized nations faced with severe monetary crises, rather than the crude and total confiscation by force of a private person’s assets.

589 F. Supp. at 1472.

¹¹¹ *Callejo*, 764 F.2d at 1125-26.

¹¹² *Id.* at 1115 & n.17.

¹¹³ Two other arguments were raised by the Callejos to persuade the court that the act of state

Cuba.¹¹⁴ The *Dunhill* case arose out of the confiscation by the Cuban government of the business and assets of five Cuban cigar manufacturers.¹¹⁵ The Cuban government appointed "interventors" to replace the old ownership and to take possession and operate the businesses.¹¹⁶ After intervention, Dunhill, a United States importer of Cuban cigars, and two other United States importers, made payment to the interventors for cigars purchased prior to intervention under the assumption that the interventors were entitled to collect the accounts receivable of the confiscated businesses.¹¹⁷ The former owners of the confiscated businesses then sued the importers, claiming the importers made erroneous payments to the interventors and that payment was still due them from the importers.¹¹⁸ The importers asserted a claim against the interventors and the Cuban government for recovery of their mistaken payments.¹¹⁹ The interventors defended upon the ground that their refusal to repay the importers was an act of state not subject to adjudication in United States courts.¹²⁰

The Supreme Court, in a five-to-four decision,¹²¹ rejected the interventors' argument and ruled that the interventors had to return the erroneous payments they received from the importers.¹²² Justice White, writing for the majority, found no evidence that the interventors had been vested with sovereign authority to repudiate the debts incurred in their businesses.¹²³

Only three other justices¹²⁴ joined in Part III of Justice White's

doctrine was inapplicable to their case. First, the Callejos asserted that the "treaty exception" to the act of state doctrine was applicable since the exchange control regulations violated Mexico's obligations under the Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, *as amended* Apr. 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937. Second, the Callejos alleged that the situs of the CDs was Texas rather than Mexico, and therefore the CDs were not governed by the Mexican decrees. The Fifth Circuit rejected both of these arguments. 764 F.2d at 1116-25.

¹¹⁴ 425 U.S. 682, 695-706 (1976) (plurality opinion).

¹¹⁵ A history of the *Dunhill* litigation is found in *Menendez v. Faber, Coe & Gregg, Inc.*, 345 F. Supp. 527 (S.D.N.Y. 1972) and *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973).

¹¹⁶ 425 U.S. at 685.

¹¹⁷ *Id.* at 686.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 687.

¹²⁰ *Id.*

¹²¹ *Id.* at 684.

¹²² *Id.* at 690-95.

¹²³ "No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due three foreign importers." *Id.* at 695.

¹²⁴ These were Chief Justice Burger and Justices Powell and Rehnquist. *See infra* notes 133-35 and accompanying text for the dissent's views.

opinion which considered an exception to the act of state doctrine for foreign sovereigns engaged in commercial acts.¹²⁵ A letter from the State Department urged that the act of state doctrine should not be applied to foreign acts which are “commercial, and not public, in nature.”¹²⁶ Justice White endorsed this exception and sought to apply it to Cuba’s repudiation of the obligation to repay in *Dunhill*.¹²⁷

Justice White concluded that a commercial activity exception to the act of state doctrine would not enhance the ills which the doctrine seeks to alleviate, primarily embarrassment to the Executive Branch in the conduct of foreign relations.¹²⁸ On the contrary, he feared “that embarrassment and conflict would more likely ensue if we were to require that the repudiation of a foreign government’s debts arising from its operation of a purely commercial business be recognized as an act of state and immunized from question in our courts.”¹²⁹

In further support of his position, Justice White noted that the lower courts in the United States have adopted the restrictive theory of sovereign immunity,¹³⁰ premised on the notion that sovereigns entering the world marketplace should have their conduct judged as private litigants.¹³¹ Where a nation, such as Cuba in *Dunhill*, is estopped under the restrictive theory from asserting sovereign immunity as a defense, Justice White felt it inequitable for the nation to turn to the act of state doctrine for the same defense:

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. 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.¹³²

The dissent in *Dunhill* avoided this question of whether the act of state doctrine was being applied to undermine the restrictive theory of sovereign immunity.¹³³

¹²⁵ 425 U.S. at 695-706.

¹²⁶ *Id.* at 707.

¹²⁷ *Id.* at 705.

¹²⁸ *Id.* at 698.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See *supra* notes 32-45 and accompanying text. The FSIA codified the restrictive theory.

¹³² 425 U.S. at 698-99.

¹³³ *Id.* at 715-37 (Marshall, J., dissenting).

Justice Marshall's dissenting opinion in *Dunhill* did not rule on the merits of the commercial activity exception since he found the exception inapplicable to the *Dunhill* facts. The dissent viewed the taking of the importers' funds as indistinguishable "for all practical purposes" from Cuba's original intervention of the firms.¹³⁴ Therefore, since the disputed obligation arose from the intervention, it was not "purely commercial," and the plurality's commercial activity exception to the act of state doctrine would be inapposite.¹³⁵

B. The *Sabbatino* Balancing Test

It is important to note that the *Dunhill* exception is a general exception to the act of state doctrine. This is part of a movement by the Supreme Court away from a factor-balancing perspective like the Court set forth in *Banco Nacional de Cuba v. Sabbatino*¹³⁶ and towards a more rule-oriented approach. In *Sabbatino*, the Court refused to treat the act of state doctrine as an "inflexible and all-encompassing rule" to use in considering suits against foreign sovereigns.¹³⁷ The *Sabbatino* Court found that the basis of the act of state doctrine was in "the basic relationships between branches of government in a system of separation of powers."¹³⁸ The Court held that the doctrine was required to reflect "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."¹³⁹ Three factors to be weighed in determining this distribution of functions were listed by the Court. First, if there is a high degree of established international law in the area, then a judicial decision applying this law is appropriate.¹⁴⁰ Second, the issue's impact on United States foreign relations is to be considered.¹⁴¹ Finally, if the defendant state is no longer in existence, then the courts may adjudicate more freely a dispute involving the acts of the nonexistent state.¹⁴²

¹³⁴ *Id.* at 729.

¹³⁵ *Id.* at 729 & n.16.

¹³⁶ 376 U.S. 398 (1964). See *supra* notes 50-53 and accompanying text.

¹³⁷ *Id.* at 428.

¹³⁸ *Id.* at 423.

¹³⁹ *Id.* at 427-28. The Court feared that judicial decisions regarding the validity of expropriations could lead, through inconsistent actions by the Court and the President, to "embarrassment to the Executive Branch." *Id.* at 433. Nevertheless, the Supreme Court at this time declined to pass on the validity of executive suggestions which would require the judiciary to act in accordance with executive directives regarding application of the act of state doctrine. *Id.* at 436. The Court has since moved away from the *Sabbatino* ideology. *First Nat'l City Bank v. Banco-Nacional de Cuba*, 406 U.S. 759 (1972). See *infra* notes 145-54 and accompanying text.

¹⁴⁰ 376 U.S. at 428.

¹⁴¹ *Id.*

¹⁴² *Id.*

The Ninth Circuit recently used this balancing test in *IAM v. OPEC* where the OPEC nations were alleged to have violated United States antitrust laws.¹⁴³ The court concluded that issues concerning the availability of oil significantly affect international relations and that to grant injunctive relief would insult the OPEC nations as well as interfere with efforts of the political branches seeking favorable relief.¹⁴⁴ Thus, the Ninth Circuit refused to recognize a shift in the law away from the *Sabbatino* balancing test.

C. The Rule-Oriented Approach

The shift by the Supreme Court after *Sabbatino* toward a more rule-oriented approach to act of state questions was first discernible in *First National City Bank v. Banco Nacional de Cuba*.¹⁴⁵ This case involved a loan by First National City Bank ("Citibank") to the predecessor of Banco Nacional de Cuba that was secured by a pledge of United States government bonds.¹⁴⁶ After the Castro government came to power, Citibank's branches in Cuba were seized.¹⁴⁷ Citibank responded by selling the collateral securing the loan and then applying the proceeds to repay the principal and unpaid interest.¹⁴⁸ Almost two million dollars in excess of the principal and accrued interest was realized by Citibank.¹⁴⁹ Banco Nacional de Cuba sued Citibank for the excess. Citibank then set-off and filed a counterclaim asserting its right to recover out of the excess its damages incurred from the expropriation.¹⁵⁰ A plurality of the Court held that Citibank's counterclaim was not barred by the act of state doctrine.¹⁵¹

The Department of State advised the *Citibank* Court "that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."¹⁵² In the plurality opinion, Justice Rehnquist reasoned that be-

¹⁴³ 649 F.2d at 1361; see *supra* notes 75-79 and accompanying text.

¹⁴⁴ *Id.*

¹⁴⁵ 406 U.S. 759 (1972). The *Dunhill* case and its commercial activity exception to the act of state doctrine is also a part of the trend away from *Sabbatino*. See *supra* notes 113-32 and accompanying text.

¹⁴⁶ *Id.* at 760.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 761.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 768.

¹⁵² *Id.* at 764. The Department of State relied on the decision in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), which recognized the principle that where the Executive Branch publicly advises the Court not to apply the act of state doctrine, the Court should proceed to examine the pending issues on their merits. *Id.* at 376. Execu-

cause the act of state doctrine is based chiefly on the policy that the Judicial Branch should not interfere with the Executive's conduct of foreign affairs, the doctrine need not be applied in cases where the Executive Branch maintains that the Court's decision will not interfere with United States foreign policy.¹⁵³ Since the *Citibank* plurality considered executive suggestions not to apply the act of state doctrine as dispositive, and not as merely one factor to balance, the Court spoke of a general exception to the act of state doctrine in such cases.¹⁵⁴

D. *Callejo* and the Commercial Activity Exception

In *Callejo*, the Mexican government effectively repudiated almost half of its debts owed to CD holders in the United States by setting an exchange rate for pesos well below the prevailing market rate.¹⁵⁵ This repudiation of Mexico's¹⁵⁶ commercial obligations is, in form, suggestive of a sovereign act. Since Mexico assumed a dual role as both a sovereign and a commercial entity, it would be a fiction to characterize the repudiation as a purely commercial act. It follows that it is similarly incorrect to characterize Mexico's actions as purely sovereign. The latter, however, is precisely what the Fifth Circuit held in *Callejo*.¹⁵⁷ The Fifth Circuit therefore never reached the issue of whether to adopt a commercial activity exception to the act of state doctrine¹⁵⁸ as it should have done.

This Note argues that a commercial activity exception should exist which allows United States courts to adjudicate disputes arising out of a nation's commercial dealings. A sovereign engaging in an international commercial transaction should be held to abide by the rules of international law governing the conduct of nations. Justice White in *Dunhill* emphasized that "discernable 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 transac-

tive suggestions not to apply the act of state doctrine are currently referred to as the *Bernstein* exception to the act of state doctrine. The *Citibank* plurality expressly adopted the *Bernstein* exception. 406 U.S. at 768.

¹⁵³ *Id.* at 765-68. "[W]here the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that the application of the act of state doctrine would not advance the interests of American foreign policy, the doctrine should not be applied by the courts." *Id.* at 768.

¹⁵⁴ *Id.*

¹⁵⁵ See *supra* note 96.

¹⁵⁶ Bancomer was an "agency or instrumentality" or the Mexican government due to Mexico's nationalization of all private banks. *Callejo*, 764 F.2d at 1106.

¹⁵⁷ *Id.* at 1115.

¹⁵⁸ *Id.*

tions of sovereign states.”¹⁵⁹ One well-established international rule, for example, is that appropriate compensation must be paid to the former owners of expropriated property.¹⁶⁰ To enforce these rules, a judicial forum is needed.¹⁶¹

Furthermore, there is a need to purge the inequities discussed by Justice White when a sovereign attempts to bypass the restrictive theory of sovereign immunity by relying on a general act of state defense.¹⁶² In *Callejo*, the Mexican government did exactly what Justice White was trying to prevent.¹⁶³ The sale of CDs was held to be commercial, yet since the Mexican government failed to repay the obligations, the act of state doctrine was held to preclude judicial review.¹⁶⁴ A commercial activity exception to the act of state doctrine is needed to prevent this inconsistent result in the future.

V. CONCLUSION

The act of state doctrine should not be available to a sovereign or its instrumentalities engaged in commercial activities. To allow a sovereign absolute immunity in such instances places the sovereign in a vastly superior and unfair position with regard to private commercial parties. The act of state doctrine should therefore encompass the restrictive theory of

¹⁵⁹ 425 U.S. at 704-05 (footnote omitted).

¹⁶⁰ See 1 R. LILICH & B. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* 208 (1975) (“When a State deprives foreigners of their property . . . payment of ‘prompt, adequate and effective’ compensation [is required].”). See also, Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1975) (“Each State has the right . . . to nationalize [or] expropriate . . . ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures. . .”). For an effort to give juridical content to the adjectives “prompt, adequate and effective,” see *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 187-90 (1965).

¹⁶¹ Courts in England and Germany have exercised domestic jurisdiction over sovereigns engaging in private, commercial activities. Justices in England and Germany reason that the restrictive theory of sovereign immunity confers jurisdiction on their courts to adjudicate claims of this type brought by citizens of their countries. For a discussion of these cases, see T. ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* 167-79 (1983). It is unclear whether each nation’s domestic tribunals or an international forum would be better suited to hear such cases. If each country consistently applied general rules of international law, there would be little advantage to using an international forum. The use of an international court, however, would more likely guarantee a consistent application of international principles. For a presentation of the modern operation of the International Court of Justice, see generally, T. ELIAS, *supra*, at 13-99; Quadeer, *The International Court of Justice: A Proposal to Amend its Statute*, 5 *HOUS. J. INT’L L.* 35 (1982) (tracing the evolution of the International Court of Justice and critically examining certain provisions of its statute).

¹⁶² See *supra* notes 128-32 and accompanying text.

¹⁶³ 764 F.2d at 1125-26.

¹⁶⁴ *Id.*

sovereign immunity. Sovereignty is not at stake when a nation enters the trading community in a commercial capacity because the sovereign has assumed the role of a private entrepreneur. Once a sovereign assumes this role, it becomes a commercial entity, and the fact that this entity also happens to be sovereign then becomes immaterial with respect to the entity's commercial dealings. Therefore, in these circumstances, a sovereign should not expect to be treated any differently than the parties with which it is dealing. The restrictive theory therefore meets the expectations of the parties.

Difficult issues arise when a nation, like Mexico in *Callejo*, repudiates a commercial obligation while acting in a dual role as both a commercial entity and a sovereign. A commercial activity exception to the act of state doctrine is needed to prevent nations from avoiding judicial scrutiny of public acts which result in avoidance of their commercial obligations. If Mexico's emergency exchange control regulations are valid under international law and were not issued merely to reduce its commercial debt, then the regulations should pass judicial scrutiny and Mexico would be excused from the obligations.¹⁶⁵ Such scrutiny is needed to hold sovereigns to their obligations and to protect commercial stability and foreign relations in the world marketplace.

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¹⁶⁵ An example of a valid transaction would be the cancellation of debt in the event of bankruptcy. When dealing in a commercial capacity, however, a sovereign should not be the sole and final judge of such matters, just as the private parties on the opposite end of the commercial relationship are not afforded the same latitude.