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CASE COMMENT: *Alfred Dunhill of London, Inc. v. Republic of Cuba*

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CASE COMMENTS

Alfred Dunhill of London, Inc. v. Republic of Cuba—The United States Supreme Court in effect declined to place new limitations upon the act of state doctrine which would have allowed review of cases arising out of the purely commercial operations of a foreign State.

INTRODUCTION

An area of controversy that has sharply divided the United States Supreme Court in recent years is whether the act of state doctrine¹ should be applied to render certain actions of a foreign State non-reviewable on the merits in United States courts. The classic American statement of the doctrine was expressed in *Underhill v. Hernandez*.² Chief Justice Fuller, speaking for a unanimous Court, set forth the rationale for the exercise of judicial restraint:

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.³

Although this statement appears simple, each phrase requires careful interpretation. The task of deciding what constitutes “acts of the government of another” or what is meant by “within its own territory” in a particular case is not an easy one.

In addition, the application of the act of state doctrine presents more difficulties than mere rule interpretation. Any decision by a United States court affecting the liabilities of a foreign sovereign involves foreign policy considerations. While the Judiciary may feel obligated to provide a forum in which a private party may seek redress, it may at the same time feel constrained to defer to the Executive in the conduct of foreign affairs.⁴ The

1. See 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW ch. XIV, § 1 (1971); 1 J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 309-15 (1968); Henkin, *Act of State Today: Recollections in Tranquillity*, 6 COLUM. J. TRANSNAT'L L. 175 (1967).

2. 168 U.S. 250 (1897).

3. *Id.* at 252.

4. U.S. CONST. art. II, §§ 2, 3.

result has been an inconclusive shifting of power among the three branches of government. It is not surprising that cases involving the act of state doctrine have resulted in deep divisions in the Court which have prevented its movement in a predictable direction.

The Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*⁵ [hereinafter referred to as *Dunhill*] recently examined the act of state doctrine in the context of a Cuban expropriation of property. The Court endeavored to define a broad new area—commercial transactions—in which that doctrine would never be applied. However, the holding that finally secured a majority vote failed to clarify the controversy surrounding the application of the act of state doctrine since the Court decided the case in a manner which avoided direct confrontation with that issue.⁶

I. FACTS

On September 15, 1960, the revolutionary government of Fidel Castro moved to nationalize ("intervene") five Cuban business entities which were the leading manufacturers and exporters of Havana cigars.⁷ These businesses were owned almost entirely by Cuban nationals.⁸

The Cuban Government appointed "interventors"⁹ for each of the companies. These interventors, acting on behalf of the Government, expropriated all assets, properties, and production capabilities of the companies and continued to manufacture and export cigars under the same brand names and trademarks.¹⁰ One of the importers in the United States to whom the interventors continued to ship cigars was Alfred Dunhill of London, Inc.,¹¹ appellant in this case.

The former owners of the intervened companies, most of

5. 425 U.S. 682 (1976).

6. The Supreme Court had asked that counsel for each side address himself to the question: "Should this Court's holding in *Banco Nacional de Cuba v. Sabbatino* be reconsidered?" 424 U.S. 1005 (1975). For different reasons each answered in the negative, and the Court never referred to the question again.

7. 425 U.S. at 685.

8. *Id.*

9. Interventors is the name given to agents appointed to take over and manage business entities which have been intervened or nationalized. *Id.*

10. *Id.*

11. Alfred Dunhill of London, Inc. is a United States company, incorporated in Delaware.

whom had fled to the United States, commenced actions in the United States District Court for the Southern District of New York against several United States importers, including Dunhill, to recover the purchase price of cigars shipped to the importers both before and after the expropriation.¹² The intervenors and the Republic of Cuba were made additional parties plaintiff.¹³ The actions—owners against importers and intervenors against importers—were consolidated in *Menendez v. Faber, Coe & Gregg*.¹⁴

The district court in *Menendez*, under the act of state doctrine, acknowledged the right of the Cuban nationals and of the intervenors to receive all monies for shipments made subsequent to the intervention.¹⁵ However, it held that payments made by the importers to the intervenors for cigars shipped prior to the intervention were actually owed to the owners,¹⁶ and that the payment to the intervenors did not discharge the debt.¹⁷ The court considered the situs of the debts to be in the United States with the debtors. The debts therefore were not subject to the original expropriation.¹⁸ The court allowed the importers to offset the payments already made to the intervenors for pre-intervention shipments against monies owed the intervenors for post-intervention shipments.¹⁹ Dunhill, the only importer whose pre-intervention payments exceeded the amount owed for post-intervention shipments, was awarded affirmative judgment against the intervenors for the difference.²⁰

The United States Court of Appeals for the Second Circuit upheld the right of all the importers to offset,²¹ but viewed the

12. The former owners also sued for trademark infringement. Judge Ryan found that there had been an infringement of trademark rights, which is a violation of the Lanham Trade-Mark Act, 15 U.S.C. § 1051 *et seq.* (1970), but that no damages could be proven. The injunctive relief asked for became unnecessary when the United States embargo against Cuban goods became effective on February 7, 1962. *Menendez v. Faber, Coe & Gregg*, 345 F. Supp. 527, 559 (S.D.N.Y. 1972), *aff'd in part sub nom. Menendez v. Saks*, 485 F.2d 1355 (2d Cir. 1973), *rev'd sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

13. 345 F. Supp. at 533.

14. *Id.* at 527.

15. *Id.* at 534.

16. *Id.* at 542.

17. *Id.* at 540.

18. *Id.* at 538.

19. *Id.* at 543.

20. *Id.* at 564 (supplemental memorandum).

21. *Menendez v. Saks*, 485 F.2d 1355, 1374 (2d Cir. 1973), *rev'd sub nom. Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976).

affirmative judgment awarded Dunhill as violative of the act of state doctrine since any obligation of Cuba to repay Dunhill was quasi-contractual and now had its situs in Cuba.²² Dunhill's petition for review by the Supreme Court was granted.²³

II. RECENT BACKGROUND: THE ACT OF STATE DOCTRINE

A. *The Sabbatino Case*

The recent controversy over the act of state doctrine of which *Dunhill* forms yet another chapter began with the 1964 Supreme Court decision, *Banco Nacional de Cuba v. Sabbatino*²⁴ [hereinafter referred to as *Sabbatino*]. In that case, the Cuban Government had expropriated the property of a Cuban sugar corporation, owned primarily by Americans, in retaliation for a reduction by the United States in the Cuban sugar import quota. An American commodity broker who had contracted for a shipload of sugar prior to the expropriation entered into a new contract with the Cuban Government in order to obtain release of the sugar from Havana Harbor. After release, the broker made payment to the former owners of the sugar, and the Cuban Government, through Banco Nacional de Cuba, brought suit. The Supreme Court, with Justice White the lone dissenter, held for the Cubans.²⁵

Justice Harlan, writing for the majority, presented a modern refinement of the act of state doctrine:

The Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized^[26] by this country at the time of suit, 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.²⁷

Although the Court tried to avoid creating an "inflexible and all-encompassing rule,"²⁸ it made sweeping pronouncements. It de-

22. *Id.* at 1370.

23. 416 U.S. 981 (1974).

24. 376 U.S. 398 (1964).

25. *Id.*

26. The words "extant and recognized" distinguished this case from *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart Maatschappij*, 210 F.2d 375 (2d Cir. 1954). The court in *Bernstein* held that act of state need not be applied to the Nazi Government which was no longer extant. 210 F.2d at 376.

27. 376 U.S. at 428.

28. *Id.*

clined, for example, to examine the expropriation against the background of principles of international law because such principles could not be agreed upon by all or even most of the nations of the world.²⁹ The district court in *Sabbatino*³⁰ had ruled that the expropriation was invalid since the law authorizing the taking was blatantly discriminatory and was directed specifically against United States citizens³¹ to whom no adequate compensation was given.³² However, the Supreme Court declined to leap into this "battleground for conflicting ideologies."³³ It reiterated its intention not to encroach upon sovereign prerogatives by questioning the validity of a taking by a foreign government within its own territory, and implied that only the executive branch had such power.³⁴

The Court noted that the act of state doctrine has "constitutional underpinnings . . . [and] arises out of the basic relationships between branches of government in a system of separation of powers."³⁵ Since foreign policy falls within the purview of the executive branch,³⁶ the Court decided to refrain from reviewing the expropriatory acts of a sovereign State where it might embarrass the President in his conduct of foreign affairs. As a practical matter, the Court suggested that diplomacy offered a better way "to assure that United States citizens who are harmed are compensated fairly."³⁷

29. There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens. . . . The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system.

Id. at 428-30.

30. 193 F. Supp. 375 (S.D.N.Y. 1961).

31. The Cuban law stated, "[The President and Prime Minister] may proceed to nationalize, through forced expropriations, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America. . . ." 376 U.S. at 401-02 n.3.

32. Secretary of State Cordell Hull stated in 1940 that it was the policy of the United States to recognize the right of a country to expropriate for public purposes conditioned on the requirement of "adequate, effective, and prompt compensation." Note from Secretary of State Hull to Mexican Ambassador, Apr. 3, 1940, MS. Dep't of State, File No. 812.6363/6659A, noted in 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 662 (1942).

33. 376 U.S. at 430 n.34.

34. *Id.* at 428.

35. 425 U.S. at 726, quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 423.

36. See U.S. CONST. art. II, §§ 2, 3.

37. 376 U.S. at 429. The Court pointed out its own limitations in these matters, stating that "[j]udicial determinations of invalidity of title can, on the other hand, have

B. *The Second Hickenlooper Amendment*

In 1962, Congress had passed the first Hickenlooper Amendment³⁸ to the Foreign Assistance Act of 1961.³⁹ The Amendment prevented the President from sending foreign aid to a country which had nationalized property owned by any United States citizen.⁴⁰ In the wake of *Sabbatino*,⁴¹ Congress was urged by international businessmen and lawyers to take further action. The result was an amendment to the Foreign Assistance Act of 1964,⁴² often called the Sabbatino Amendment or the second Hickenlooper Amendment.⁴³

This amendment provided that no court should invoke the act of state doctrine to avoid making a determination on the merits of a case involving foreign confiscations of property belonging to United States citizens.⁴⁴ According to Senator Hicken-

only an occasional impact, since they depend on the fortuitous circumstances of the property in question being brought into this country." *Id.*

38. Foreign Assistance Act of 1962, Pub. L. No. 87-565, § 301(d)(3), 76 Stat. 260, as amended, 22 U.S.C. § 2370(e)(1)(A) (1970).

39. Pub. L. No. 87-194, 75 Stat. 424.

40. This first Hickenlooper Amendment states:

(e) (1) The President shall suspend assistance to the government of any country to which assistance is provided under this Act when the government of such country or any other governmental agency or subdivision within such country on or after January 1, 1962—

(A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation . . . not less than 50 per centum beneficially owned by United States citizens . . .

Foreign Assistance Act of 1962, Pub. L. No. 87-565, § 301(d)(3), 76 Stat. 260, as amended, 22 U.S.C. § 2370(e)(1)(A) (1970).

41. Response to the *Sabbatino* decision was varied and intense. See, e.g., Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1962). In applauding the decision, Professor Henkin said, "*Sabbatino* is evidence that the United States, now a most powerful nation with interests reaching everywhere, may be prepared to accord similar respect to new nations." *Id.* at 830.

Others found the *Sabbatino* decision dangerous. E.g., Stevenson, *The State Department & Sabbatino*—"Ev'n Victors Are By Victories Undone," 58 AM. J. INT'L L. 707 (1964). See also Delson, *The Act of State Doctrine—Judicial Deference or Abstention*, 66 AM. J. INT'L L. 82 (1972); Metzger, *The State Department's Role in the Judicial Administration of the Act of State Doctrine*, 66 AM. J. INT'L L. 94 (1972); Domke, Friedmann, & Henkin, *Act of State: Sabbatino in the Courts and in Congress*, 3 COLUM. J. TRANSNAT'L L. 99 (1965); Falk, *The Complexity of Sabbatino*, 58 AM. J. INT'L L. 935 (1964); Collinson, *Sabbatino: The Treatment of International Law in United States Courts*, 3 COLUM. J. TRANSNAT'L L. 27 (1964).

42. Pub. L. No. 88-633, 78 Stat. 1009.

43. Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1013, as amended, 22 U.S.C. § 2370(e)(2) (1970).

44. (2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a

looper, Congress intended to discourage foreign governments from nationalizing property of United States citizens in a manner contrary to international law,⁴⁵ and to prevent the law of the offending country from operating as a shield when the courts of the United States are called upon to consider the consequences of an unlawful nationalization.⁴⁶

determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interest of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

22 U.S.C. § 2370(e)(2) (1970).

45. The language of the Hickenlooper Amendment is tied to a presumption of customary international law, the validity of which is in doubt, as evidenced by the *Sabbatino* decision. The United States position that any expropriation was valid only if it were for a public purpose and was accompanied by "adequate, effective, and prompt compensation," see note 32 *supra*, was supported at one time by a majority of those nations taking a position. But by 1975, all but a few members of the United Nations declared a "new emerging standard of compensation" in the Declaration on Establishment of a New International Economic Order, G.A. Res. 3281, ch. II, art. 2, 29 U.N. GAOR Supp. 31, at 52, U.N. Doc. A/RES/3281 (1974). It stated:

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over *all its wealth, natural resources and economic activities*.

. . . .
. . . In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals. . . .

Id. (emphasis added).

In an early article on this subject, Professor Friedmann stated:

The view taken by Mexico, that in case of nationalization foreign interests should not be entitled to better treatment than national interests, undoubtedly represents the dominant philosophy of capital importing countries.

Friedmann, *The Position of Underdeveloped Countries and the Universality of International Law*, 2 INT'L L. BULL. 5, 6-7 (1963).

46. 110 CONG. REC. 19,559 (1964) (remarks of Senator Hickenlooper). The Senator stated that

[the Amendment] will serve notice that foreign states taking action against U.S. investments in violation of international law cannot market the product of their expropriation in the United States free from the risk of litigation.

Id.

After the bill became law, *Sabbatino* was reinstituted in the district court as *Banco Nacional de Cuba v. Farr*.⁴⁷ Ruling that the second Hickenlooper Amendment was applicable, the court awarded payment for the sugar to the former owners rather than to the interventors. The Court of Appeals for the Second Circuit affirmed,⁴⁸ and certiorari was denied by the Supreme Court.⁴⁹

It is interesting to note that even the strong language of the second Hickenlooper Amendment stops short of establishing a definite rule as to which branch of government should handle act of state questions. The statute stipulates that it need not be applied in any case where the President believes foreign policy considerations dictate otherwise.⁵⁰

C. *The Bernstein Exception*

Prior to the direct attack by the second Hickenlooper Amendment upon the act of state doctrine, the doctrine was subject to suspension in special circumstances under the "Bernstein exception," derived from the case *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maarschappij*.⁵¹ In 1948 and 1949, Bernstein, a former German national, brought two actions in United States courts⁵² to recover property confiscated in Germany under the so-called anti-Jewish decrees of the Nazi Government. This case clearly met the criteria of an act of state, i.e., action of a sovereign State against one of its own nationals within its own territory. Therefore no examination was made of the legality of the seizure.⁵³

In 1954, in a petition to amend this decision, counsel for plaintiff Bernstein submitted with his brief a letter from the Department of State. The letter declared the State Department's intention to "relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."⁵⁴ In other words, the Executive declared that

47. 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

48. 383 F.2d 166 (2d Cir. 1967).

49. 390 U.S. 956 (1968).

50. 22 U.S.C. § 2370(e)(2) (1970). *See note 44 supra*.

51. 76 F. Supp. 335, *aff'd*, 173 F.2d 71 (2d Cir. 1949), *as amended*, 210 F.2d 375 (2d Cir. 1954). This was the so-called second *Bernstein* case. The first case, in which plaintiff Bernstein was denied relief, was *Bernstein v. Van Heyghen Frères Société Anonyme*, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947).

52. *See id.*

53. 163 F.2d at 248-49.

54. 20 DEP'T STATE BULL. 592 (1949).

no foreign policy considerations precluded the court from making a determination on the merits in this case. The court, with this directive from the Executive, examined the case on its merits and awarded judgment for Bernstein.⁵⁵ Since that time, any letter from the executive branch stating that foreign policy considerations need not hinder the Judiciary from reviewing on the merits a case which would ordinarily fall within the scope of the act of state doctrine has been called a "Bernstein letter," and the exception to the act of state doctrine created thereby has been called a "Bernstein exception."

D. *The Citibank Case*

After *Sabbatino* the act of state doctrine was next examined by the Supreme Court in *First National City Bank v. Banco Nacional de Cuba*⁵⁶ [hereinafter referred to as *Citibank*]. Citibank had made secured loans to Cuba. A portion of the loans had been paid off, and a part of the collateral returned. When the Cuban Government expropriated property owned by United States nationals, it confiscated Citibank's branches in Cuba. In retaliation Citibank sold the collateral. All but approximately \$1.8 million of this sum was used to discharge the outstanding debt, and this balance was retained by Citibank as partial payment for its expropriated and uncompensated properties. Cuba sued for return of the \$1.8 million and Citibank counterclaimed for its expropriation loss.⁵⁷

Before this case was decided hopes were high that a clear decision would be made regarding a formula for the balancing of power between the Executive and Judiciary in act of state cases.⁵⁸ Instead, the Court secured a majority vote on only two points. The first was that a State, having invoked the jurisdiction of a court, cannot escape the judgment of that court.⁵⁹ The second was that a private party's counterclaim will be allowed against a

55. 210 F.2d at 376.

56. 406 U.S. 759 (1972).

57. *Id.* at 760-61.

58. See Leigh, *The Supreme Court and the Sabbatino Watchers: First National City Bank v. Banco Nacional de Cuba*, 13 VA. J. INT'L L. 33 (1972). The author wrote the "Bernstein letter" submitted by the Department of State in the *Dunhill* action.

59. Justice Douglas, in putting forth this line of reasoning in his concurrence, relied solely on *First National City Bank v. Republic of China*, 384 U.S. 356 (1955), in which the Court had ruled that once the Republic of China had brought suit in courts of the United States, it was liable for any counterclaim which would normally have been barred by considerations of sovereign immunity. 406 U.S. at 771.

State up to the point of setoff on any claim arising from a relationship between the parties which existed at the time of the act of state.⁶⁰

The third point stated by Justice Rehnquist was unable to command a majority of the Court. He believed that instructions from the Executive in the form of a "Bernstein letter" limiting the application of the act of state doctrine should be dispositive.

The act of state doctrine is grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government. We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called Bernstein exception to the act of state doctrine.⁶¹

Six justices, however, refused to subscribe to the "Bernstein exception."⁶² Justices Douglas and Powell, although voting with the majority, were explicit in their rejection of the unwarranted shifting of power from the judicial to the executive branch.⁶³ Justice Douglas wrote that if the Court applies the "Bernstein exception," "[it] becomes a mere errand boy for the Executive which may choose to pick some people's chestnuts from the fire, but not others."⁶⁴ According to Justice Powell,

I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.⁶⁵

Thus, *Citibank* fell short of extending the restrictions on use of the act of state doctrine to the point favored by Justice Rehnquist, and offered little guidance for future decisions.⁶⁶

60. *Id.* at 769.

61. *Id.* at 767-68.

62. Consequently, the future utility of that doctrinal basis for resolving cases remains unclear. *See* Leigh, *supra* note 58, at 42.

63. 406 U.S. at 770-77.

64. *Id.* at 773.

65. *Id.*

66. *See* 3 DENVER J. INT'L L. & POLICY 117 (1973); 14 HARV. INT'L L.J. 131 (1973).

III. ANALYSIS OF THE OPINION

Dunhill must be analyzed in light of the preceding development of the act of state doctrine. Justice White, writing for himself, the Chief Justice, and Justices Rehnquist and Powell, seemed intent upon placing yet another limitation upon the act of state doctrine. The dissenting justices—Marshall, Brennan, Blackmun, and Stewart—viewed this assault upon the act of state doctrine as an ill-advised intrusion upon the discretionary power of the Court. Only two points of the Court's decision were approved by a majority as Justice Stevens concurred in the first two arguments but not in the third.

Justice White's first proposition was that since the situs of a debt is with the debtor,⁶⁷ the situs of the pre-intervention accounts receivable of the expropriated companies is the United States.⁶⁸ To allow Cuba to have these monies would, in effect, give extraterritorial force to an act of state.⁶⁹

His second holding was that Cuba's refusal to return the funds paid them, absent some formal repudiation of foreign debts, did not constitute an act of state.⁷⁰ Usually some formal declaration or decree heralds an act of state.⁷¹ In this case the formal decree of expropriation made September 15, 1960 confiscated only those properties then in Cuba. Justice White argued that pre-intervention debts, their situs in the United States, escaped this formal decree of expropriation, and that only some subsequent formal repudiation of all legitimate debts by the Cuban Government could make confiscation of these pre-intervention accounts fall within an act of state. Mere in-court statements by counsel for the Republic of Cuba were not deemed sufficient.⁷²

67. *Harris v. Balk*, 198 U.S. 215 (1905).

68. 96 S. Ct. at 1857. After the *Dunhill* decision, the Second Circuit, relying upon *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973), *rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), arrived at a similar conclusion as to the situs of debts in *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868 (2d Cir. 1976).

69. See, e.g., *Republic of Iraq v. First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), in which the Second Circuit declined to do just that. This case involved the attempted confiscation of the bank account of the deceased King Faisal II which was located in a New York bank. Judge Friendly declined to allow extraterritorial enforcement under the act of state doctrine. *Id.*

70. 425 U.S. at 695.

71. *Id.*

72. *Id.* at 1858. See also *Banco de Espana v. Federal Reserve Bank of New York*, 114 F.2d 438 (2d Cir. 1940) (ambassador's in-court statements held insufficient to declare an act of state).

It is in the third part of his opinion that Justice White endeavored to break new ground—to define an area in which the act of state doctrine would never be applied. This was in the area of commercial obligations.⁷³ Justice White reasoned that when a State enters into commerce with corporations or individuals of other States, it takes on the “character of a trader” and becomes engaged in purely private and commercial activities which should not be given the same deference as a State’s public or governmental activities. Therefore, if any suit arises from these commercial activities, a defense of act of state should not automatically be interposed. Justice White cited for support Chief Justice Marshall’s opinion in *Bank of United States v. Planters Bank of Georgia*.⁷⁴

It is, we think, a sound principle, 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 that of a private citizen.⁷⁵

Additional support for this new “commercial exception” was stated in an amicus curiae brief filed by the Solicitor General and in a “Bernstein letter” from the Legal Advisor to the Department of State.⁷⁶ The letter stated: “We do not believe that the *Dunhill* case raises an act of state question because the case involves an act which is commercial, and not public, in nature.”⁷⁷

Justice White reiterated the idea stated in *Sabbatino* and *Citibank* that a major reason for invoking the act of state doctrine is to avoid adjudication that “might embarrass the Executive Branch of our government in the conduct of our foreign relations.”⁷⁸ But with respect to holding States to their commercial obligations, certain considerations other than foreign policy become even more important.

[W]e fear 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.⁷⁹

73. 425 U.S. at 695.

74. 22 U.S. (9 Wheat.) 904 (1824).

75. *Id.* at 907.

76. 425 U.S. at 706-11 (app. 1).

77. *Id.* at 707.

78. *Id.* at 697.

79. *Id.* at 698.

Justice White determined that the United States has adopted a "restrictive theory" of sovereign immunity.⁸⁰ Along with a growing number of foreign States,⁸¹ the United States has declined to extend sovereign immunity to the commercial transactions of foreign governments.⁸² Of course, as Justice White pointed out, sovereign immunity was not pleaded in this case; however, by analogy, he reasoned that the thinking that led to the restrictive theory of sovereign immunity leads to the commercial exception to the act of state doctrine in this case.⁸³

The expansion of the restrictive theory of sovereign immunity is necessitated, according to Justice White, by the fact that State participation in international trade is increasing by quantum leaps. If "participants in the international market" are not held obedient to some sort of commercial law, there is great danger of injury to private businesses and, indeed, to the whole growth of trade among nations. The restrictive theory of sovereign immunity should apply, and nations be held to the discernible rules of international law.⁸⁴

Justice Powell, in a concurring opinion, would greatly expand the restrictions upon application of the act of state doctrine. Rather than carving out an area of "commercial

80. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 (1965). See generally 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW ch. XV, §§ 20-26 (1971).

81. Austria, Belgium, Canada, Egypt, the Federal Republic of Germany, France, Great Britain, Greece, Italy, Pakistan, and Yugoslavia have adopted the restrictive theory of sovereign immunity. 425 U.S. at 702 n.15.

82. See Letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to Philip B. Perlman, Acting Attorney General, May 19, 1952, 26 DEP'T STATE BULL. 984 (1952).

According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).

Id.

83. 425 U.S. at 705.

84. *Id.* at 703. Interested professors of international law, in an amici curiae brief, stated:

[W]here an Act of State of a foreign government raises a question as to a violation of international law, conventional or customary, courts of the United States should determine the case on its merits, applying international law in absence of express representation by the Executive that such determination in that case would be harmful to the foreign policy interests of the United States.

Motion of John G. Laylin, *et al.*, for Leave to File a Brief Amici Curiae, and Proposed Brief at 4, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

exception," Justice Powell insisted that the Judiciary in any case should "decide for itself whether deference to the political branches of government requires abstention."⁸⁵

Justice Marshall, joined by Justices Brennan, Stewart, and Blackmun, dissented. First, Justice Marshall stated that although the situs of accounts receivable at the time of expropriation was New York as the majority had ruled, once Dunhill had made the payments to Cuba, mistakenly or not,⁸⁶ they were in Cuba's possession. Therefore the situs of the property in issue was Cuba, and the act of state doctrine was applicable, preventing their recovery.⁸⁷

Second, Justice Marshall argued that an act of state need not be formal or affirmative,⁸⁸ but may be passive as in *French v. Banco Nacional de Cuba*,⁸⁹ where the mere refusal to redeem a tax exemption certificate was ruled an act of state.⁹⁰ Refusal by Cuba to return the monies and its claim of such monies pursuant to an ongoing act of expropriation required no formal declaration.

While it is true that an act of state generally takes the form of an executive or legislative step formalized in a decree or mea-

85. 425 U.S. at 715. Justice Stevens, concurring in the decision, declined without explanation to accept the rationale of the commercial exception. *Id.*

86. Jac Wolff, attorney for respondent, took issue with the description of payments as "mistaken." He stated:

After Intervention, seemingly actuated by a motive to promote a profitable future business relation with the Castro government, these Importers elected to pay the price of such pre-intervention shipment to the interventors without the consent or knowledge or authority of the owners. The courts below ruled that such payment to the interventors did not discharge the Importer's obligation to the owners for pre-intervention cigar shipments and granted judgment in favor of the owners against the interventors with interest.

Respondent-Owners Brief in Opposition to Cross-Petition for Writ of Certiorari at 5, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

87. See also *Republic of Iraq v. First National City Bank*, 353 F.2d 47 (2d Cir. 1965); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968).

88. 425 U.S. at 719.

89. 23 N.Y.2d 46, 295 N.Y.S.2d 433, 242 N.E.2d 704 (1968). In this case, assignor of plaintiff had invested heavily in farm land in Cuba. He had been granted tax exempt certificates by the pre-Castro Government. These certificates entitled him to exchange pesos earned on his farm for United States dollars and then to export those dollars (up to a \$150,000 limit) free from the Cuban export tax. However, the Cuban authorities refused to honor the certificates. The New York Court of Appeals deemed this refusal by the Castro Government to be an act of state and denied recovery. *Id.*

90. See also *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) (both involved seizures by government agents in civil war); *Underhill v. Hernandez*, 168 U.S. 250 (1897) (refusal by revolutionary forces to issue passport).

sure, that is only because duly constituted governments generally act through formal means. When they do not, their acts are no less the acts of a State, and the doctrine, being a practical one, is no less applicable.⁹¹

The dissent saved its strongest criticism for the suggested rationale for a broad commercial act exception to the act of state doctrine. Justice Marshall reasoned first that the restrictive theory of sovereign immunity upon which Justice White relied had not been accepted by the Court.⁹² Even if it had been, the exception to sovereign immunity "ought not be transferred automatically . . . to the act of state doctrine."⁹³ According to the dissent, although the act of state doctrine and the sovereign immunity doctrine share a respect for the prerogatives of sovereign States, the former rests upon constitutional underpinnings⁹⁴ and is characterized by a flexibility which allows the Court to avoid "political questions."⁹⁵ Justice Marshall stated that this flexibility should not be abandoned by the adoption of broad exceptions; rather, it should be nurtured in the careful case-by-case approach the Court has in the past adopted.⁹⁶

IV. RAMIFICATIONS OF THE DECISION

With a majority combining three divergent opinions and a minority joining in vigorous dissent, *Dunhill* presented an anything but clear indication of the future direction of the Court. Clearly, the Court retreated somewhat from the idea suggested in *Citibank* that whether to apply the act of state doctrine should be decided completely at the discretion of the State Department.

91. 425 U.S. at 718-19 (citations omitted).

92. *Id.* at 725.

93. *Id.* at 728.

94. *Id.* at 726.

95. *Id.* at 727. Counsel for the Republic of Cuba pointed out in its brief that it was overly simplistic to view commercial activities as divorced from political actions.

We live in a complex world where food and oil may sometimes be as potent a weapon as tanks and guns. We have seen in the past few years many instances in which great political issues were raised not by marching armies but by transactions which to a casual observer might appear commercial. The withholding of oil by Middle Eastern oil producers, the sale of wheat by the United States to the Soviet Union, the attempted world-wide embargo of Chilean Copper—all of these are illustrative of commercial transactions with very profound political implications.

Brief for Respondent in Reply to Brief for United States as Amicus Curiae, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

96. 425 U.S. at 728.

Although the brief filed by the Solicitor General was referred to by Justice White,⁹⁷ and a "Bernstein letter" from the Department of State was attached to the opinion,⁹⁸ they were considered only in conjunction with a number of other factors, and nowhere was it suggested that they were dispositive.

Justice Marshall in his dissent took note of this withdrawal from total reliance on instruction from the State Department. He seemed to infer or perhaps simply hope that all the Justices were now agreed that the "task of defining the role of the Judiciary is for this Court, not for the Executive Branch."⁹⁹

In striving to secure a majority on the "commercial act exception" Justice White used as a primary argument the effect on world trade of allowing "trading" governments to use an act of state defense. He stated:

The potential injury to private businessmen—and ultimately to international trade itself—from a system in which some of the participants in the international market are not subject to the rule of law has therefore increased correspondingly.¹⁰⁰

The concern over world trade and the interest of nations who participate in world trade to develop some new sort of "law merchant" to govern commercial dealings has been impelled at least in the United States by the shock of non-compensated expropriations. Indeed, the recent act of state cases have arisen from expropriation of properties located in Cuba since Castro came to power. Congressional distress at such wholesale confiscation is evidenced by the strong language of the Hickenlooper amendments and testimony given at hearings before the House and Senate foreign relations committees prior to their passage.¹⁰¹

A similar concern was evident in the country at large, especially among international businessmen. All felt a sense of frustration that short of going to war there seemed to be no way to protect American investment in Cuba or to obtain compensation.¹⁰² Earlier, in writing about *Sabbatino*, Professor Wolfgang Friedman had said:

97. *Id.* at 696.

98. *Id.* at 706 (app. 1).

99. *Id.* at 725.

100. *Id.* at 703.

101. *Hearings on H.R. 7750 Before the House Comm. on Foreign Affairs*, 89th Cong., 1st Sess. (1965); *Hearings on H.R. 11,380 Before the Senate Foreign Relations Comm.*, 88th Cong., 2d Sess. (1964).

102. The Hickenlooper amendments evidenced this frustration. They were passed in an effort to afford new sanctions that could be used against expropriating nations. Al-

There is a natural temptation to feel a sense of impotence and disillusionment about the apparent inability of the law to do something in redress of a measure that at least the majority regard as in contravention of accepted rules of international law.¹⁰³

It is at least partly in response to these frustrations that the Court has made various efforts to limit application of the act of state doctrine over the last decade, particularly by use of the commercial exception sought to be adopted in *Dunhill*.

The dissent, in rejecting this commercial act exception, stated that the United States Supreme Court had not yet espoused the restrictive theory of sovereign immunity, but this seems too puristic an approach in light of recent developments. In 1972, the European Convention on State Immunity adopted the restrictive doctrine of sovereign immunity.¹⁰⁴ Although the United States was not a party, this trend on the part of traditional European allies cannot help but influence thinking in this country. The Department of State has never retreated from its adoption of the restrictive theory of sovereign immunity set forth in the Tate letter in 1952.¹⁰⁵ Recently, Congress passed the Foreign Sovereign Immunities Act of 1976¹⁰⁶ which delineated a restrictive theory of sovereign immunity. Had the commercial exception in *Dunhill* been able to command a majority vote, this would have added judicial impetus to the development and acceptance of a new mercantile law.

Of course, such a move toward a "law merchant" is not without its pitfalls. Although the trend would appear to be strongly in the direction of such development, there is not yet a body of international law which commands universal acceptance by the trading nations of the world. According to one commentator:

though the Hickenlooper Amendments are never specifically mentioned in *Dunhill*, they form an important part of the background against which the commercial exception was formulated.

103. Domke, Friedmann, & Henkin, *Act of State: Sabbatino in the Courts and in Congress*, 3 COLUM. J. TRANSNAT'L L. 99, 103 (1964).

104. European Convention on State Immunity, done May 16, 1972, 3 COUNCIL OF EUROPE, EUROPEAN CONVENTIONS AND AGREEMENTS 28 (Europ. T.S. No. 74), 11 INT'L LEG. MAT'S 470 (1972). See I.M. Sinclair, *The European Convention on State Immunity*, 22 INT'L & COMP. L.Q. 254-83 (1973).

105. Tate Letter, *supra* note 82. While the Bernstein Letter specifically suspended the act of state doctrine in a particular class of cases, the Tate Letter declared the State Department's adoption of the restrictive theory of sovereign immunity.

106. Pub. L. No. 94-583 (Oct. 21, 1976). See Atkeson, Perkins, & Wyatt, H.R. 11315—*The Revised State-Justice Bill on Foreign Sovereign Immunity: Time for Action*, 70 AM. J. INT'L L. 293 (1976).

We are beginning to rediscover the international character of commercial law . . . : the general trend of commercial law everywhere is to move away from the restrictions of national law to a universal international conception of the law of international trade.¹⁰⁷

John J. McCloy, however, speaks to the contrary:

One also hears a good bit now about the desirability of adopting an international code of good commercial behavior. Who is to draw it, and who is to police it? If the SEC has difficulty drawing up guidelines, I question whether the United Nations is any better equipped to do so. . . . I can imagine considerable reluctance on the part of a number of countries to subscribe to any code they felt would restrict them to a course of action to which they were not accustomed or which they believed could lose them commercial advantages.¹⁰⁸

At least partly because of these difficulties Justice White was unable to induce a majority in *Dunhill* to declare a commercial exception to the act of state doctrine. Consequently, the decision did not formulate a new limitation upon that doctrine. The expectation that the Court would signal a clear direction in this disputed area remains unfulfilled in *Dunhill*.

Louise Hertwig Hayes

107. Schmitthoff, *The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions*, 17 INT'L & COMP. L.Q. 551, 563 (1968). A similar idea is expressed in Rajska, *The Law of International Trade of Some European Socialist Countries and East-West Trade Relations*, 1967 WASH. U.L.Q. 125.

The striking similarity evidenced in all national legal systems in this respect [international trade] explains itself through the essence of the subject matter of their regulation: international commerce. . . . The goal of these provisions is to safeguard international economic intercourse, which can be achieved by establishing a stable legal protection of the interests of those involved in foreign commercial transactions. . . .

Id. at 137.

108. McCloy, *On Corporate Payoffs*, 54 HARV. BUS. REV. 14, 20 (July-Aug. 1976).