In the

Supreme Court of the United States

ALFRED DUNHILL OF LONDON, INC.,)
)
Petitioner)
)
v.) Case Number 73-1288
)
THE REPUBLIC OF CUBA, et al.)

Washington, D. C.
December 10, 1974

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v.	:	Case No. 73-1288
THE REPUBLIC OF CUBA ET AL	:	

Washington, D. C.

Tuesday, December 10, 1974

The above-entitled matter came on for argument at 11:07 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

VICTOR S. FRIEDMAN, ESQ., 120 Broadway, New York, New York 10005 For Petitioner

VICTOR RABINOWITZ, ESQ., 30 East 42nd Street, New York, New York 10017

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73 1288, Alfred Dunhill of London, Inc. against the Republic of Cuba et al.

Mr. Friedman.

ORAL ARGUMENT OF VICTOR S. FRIEDMAN, ESQ.

ON BEHALF OF PETITIONER

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court:

This case is here on a writ of certiorari to the Court of Appeals for the Second Circuit which applied the Act of State Doctrine to hold the Petitioner, Alfred Dunhill of London, could not obtain an affirmative judgment against the Republic of Cuba awarded by the District Court.

Certiorari was granted by this Court with respect to two issues.

The first issue was whether the statement of counsel made at the trial can constitute an Act of State. As to that issue, we contend that there is nothing in the record that in any way evidences a sovereign act by the Republic of Cuba.

All that the record shows in this respect are statements by counsel for the Republic of Cuba indicating a litigating position in the case.

The second issue on which certiorari was granted

sui sponte by this Court was whether, assuming the Act of State Doctrine applies in this case, whether the affirmative judgment nevertheless should be reinstated under the counterclaim exception set forth in First National City Bank against Banco Nacional de Cuba.

As to that issue, we contend that under the totality of the circumstances in this case where Cuba has put into issue in a single proceeding far more than the amount of the counterclaims awarded against it and where all of the claims and counterclaims arise out of a series of related transactions put into issue by Cuba in our courts, that that counterclaim exception should apply.

Because of the position taken by Respondents' counsel in their brief in this Court, the position being that the record does not justify the phrasing of the questions as granted in the petition for certiorari, I think it important that the background of this litigation be set forth at some length so that we can understand precisely what is in the record and the significance of the questions as framed by the Court.

Litigation arose out of the action in September, 1960 of the Republic of Cuba in nationalizing certain cigar factories in Cuba. That action was termed an intervention, a euphemism and for that reason, the Cuban Government and its representatives in this case are often referred to as

interventors.

The persons whose factories were seized are very often referred to as the owners.

For a long time prior to the intervention, Dunhill, as well as other employers, had purchased cigars from the owners. Indeed, for a short period after the intervention the importers, again including Dunhill, continued to purchase cigars from Cuba and during the immediate post-intervention period, continued to make payments for shipments of cigars that had been shipped prior to the intervention.

The owners, of course, immediately after the intervention, fled Cuba, some of them coming here to the United States.

In early 1961, the owners instituted nine actions in the southern district of New York. Four of them were against Dunhill. By these actions, the owners, in essence, sought to obtain payments for cigars shipped both before and after the intervention.

Shortly thereafter, the interventors brought their own action, not against the importers, but against the owners' counsel in an action entitled Palicio against Brush and Bloch.

By that action, the interventors, in essence, sought to claim the right to sue for the same matters on

which the owners had already instituted suit.

Since the importers were essentially in the position of stakeholder in these actions, the District Court stayed the actions against them and proceeded to resolve the threshold and significant disputes between the owners and the interventors regarding who was entitled to payment for what cigars.

Insofar as relevance here, the District Court, per Judge Bryant, in 1966, in a decision that was later affirmed per curiam by the Second Circuit, held that the interventors were entitled to sue for the post-intervention shipment.

In essence, the court held that, at least with respect to Cuban assets, under the ruling of this Court in Sabbatino and the Act of State Doctrine set forth there, the nationalization decree of 1960 was effective as to the seized Cuban assets.

At this point in time, however, the significant -- and we are talking now about 1967 -- the interventors stipulated before the District Court that the owners were entitled to recover for preintervention shipments the assumption by both the owners and the interventors, some seven years after the event being that these amounts were too insignificant to concern themselves with.

After the rulings in Palicio against Brush and

Bloch, the interventors were allowed to intervene at this time in the procedural sense in the nonactions in New York.

The actions were, in fact, consolidated for trial, were tried together and appealed together in the Second Circuit.

During the course of trial preparation, however, and the course of the trial itself, it developed that, as of the date of the intervention there had been almost $500,000 in unpaid amounts for cigars shipped prior to the intervention, hardly an "insignificant sum" as had been thought by both the owners and the interventors when they entered into the stipulation in 1967.

It further developed during the course of these proceedings that the importers, shortly after the intervention had, in fact, paid all of those sums in accordance with their longstanding practice of paying on 30, 60 or 90-day terms.

At that point, Cuba, of course, changed its position and sought to back off from its stipulation that it had entered into in Palicio against Brush and Bloch.

They contended now that they should be entitled to the preintervention shipments as well and not only that, they contended that they never received those payments if, in fact, they had been made.

The District Court, however, found that not only

had the payments been made by the importers, but that Cuba, in fact, had received them.

In the case of Dunhill, those payments amounted to some $55,000 more than the District Court found Dunhill still owed Cuba for the post-intervention shipments.

In the case of the importers as a group, however, the situation was reversed because far more was still owed to the interventors or the importers as a group for post-intervention shipment than the District Court found had been paid to Cuba for the preintervention shipments.

Judge Bryan ruled that the owners were entitled to payment for the preintervention shipments. He also ruled that the interventors had received those payments and were liable under an unjust enrichment theory to return them to the importer.

In his initial decision, he allowed the importers to set off against what they owed for the post-intervention shipments, the amount that they had paid for the pre-intervention shipments.

He specifically ruled the Act of State Doctrine inapplicable to the payments received by Cuba, stating in part -- and I am quoting this portion of an opinion now:

"Here, all that occurred was a statement by counsel for the interventors during trial that the Cuban Government and the interventors denied liability and had refused to

make repayment."

This statement was made after the interventors had invoked the jurisdiction of this Court in order to pursue their claims against the importers for post-intervention shipment.

It is hard to conceive how, if such a statement can be elevated to the status of an Act of State, any refusal by any state to honor any obligation at any time could be considered anything else.

I should note parenthetically at this point that it was apparent that the set-off procedure described by Judge Bryan in his initial opinion obviously did not take account of the Dunhill situation.

Accordingly, after the decision was rendered, we moved for an affirmative judgment against the interventors. Despite the claim at trial of an Act of State, the interventors expressed no opposition to this and, there being no opposition, that motion was granted.

The Second Circuit, of course, affirmed Judge Bryan's decision in all respects except one. It reversed the affirmative judgment in favor of Dunhill on the ground of the Act of State Doctrine.

It found the Act of State in Cuba's failure to honor the importer's demand for return of the payments and I am quoting now, "Confirmed by the Cuban Government's

counsel at trial."

In short, regardless of what the Court of Appeals' language was, there is no question that on the record the only conceivable evidence of any Act of State by the Cuban Government was simply the statements by counsel for the Cuban Government that its client would not honor a claim for return of the funds.

The effect of the Court of Appeals ruling, of course, is to force Dunhill to pay twice for the same cigars. Having already paid the interventors under the court's ruling, they must now pay the owners with interest.

We submit, therefore, that despite the statements in Respondents' brief to the contrary, the first issue is properly before this Court.

That is, whether statements of counsel can constitute an Act of State and we submit as well for the reasons set forth in our brief that they cannot.

QUESTION: Is the Court of Appeals opinion reproduced in any of the papers we have?

MR. FRIEDMAN: Yes, that is in the Joint Appendix, Mr. Justice Stewart.

QUESTION: I have an Appendix.

MR. FRIEDMAN: And there is a Joint Appendix as well.

QUESTION: Oh, I don't have that.

MR. FRIEDMAN: The page on which the quote from the Court of Appeals that I read is on 25-A of the Joint Appendix.

QUESTION: Is there really any doubt as to the fact that Cuba has repudiated the debts?

MR. FRIEDMAN: Yes, your Honor, I would say there is.

QUESTION: Have they paid any of them to anybody in this country since Castro took power?

MR. FRIEDMAN: Well, your Honor, this is a rather special circumstance. I think we must recognize that in all other instances where Cuba has been before this or any other court, they have appeared armed with a decree which states certain consequences, usually confiscation of property.

We have a situation in this case, however, where up until the last year, not only has Cuba certainly not issued any decree with respect to these funds, but has been actively contending in our courts that they never received them.

Now, it seems to me that it is a far cry from stating that we have funds and we hereby seize them, to say, in the other instance, that we are coming into your courts to try to collect those funds and then when the proof comes out that they already have them, to deny receipt of the

funds.

That is not a seizure and I would respectfully suggest that the situation is far different and that there is a real debt.

Yes, sir?

QUESTION: The Second Circuit, as I read the opinion, found an Act of State in view of all of the circumstances and said that a formal declaration was not necessary and you differ from that?

MR. FRIEDMAN: No, I do not.

Clearly, there are circumstances where some act, some public, sovereign act of the state may be proved by other than a formal decree. There are a number of cases. Most of them occur in time of civil strife or rebellion where a military officer, for example, goes in and seizes property. That is not a formal act.

But every case which has decided the Act of State Doctrine has insisted that there be some public affirmative act, something that one can look at and say, this is the affirmative act of the sovereign, something where the sovereign is acting so that if this Court or any court in this country were to take a contrary position, it could be considered an affront to the sovereignty of that nation.

QUESTION: Well, then, is it not also an act which takes place within the jurisdiction of that sovereign and

then, in turn, is asserted in our courts?

MR. FRIEDMAN: That is correct, Mr. Chief Justice and not only that, in every case which has dealt with the doctrine our courts have required proof in our courts of the fact of that act in the foreign jurisdiction, that is correct.

QUESTION: Was that true in Pons against Cuba, do you recall?

MR. FRIEDMAN: Pons?

QUESTION: P-O-N-S against Cuba -- was there an official act claim?

MR. FRIEDMAN: I'm sorry, I am not familiar with that case, sir.

QUESTION: Well, it's unimportant. I can track that down.

MR. FRIEDMAN: Respondents appear to concede in their brief -- and I am not sure it is a concession -- but they do appear to concede that statements of counsel in fact cannot constitute an Act of State and I refer the Court to page 12 of Respondents' brief in that respect.

They seek to avoid the issue by, in effect, asserting that counsel was simply the agency by which Cuba made known its legal position. We suggest that this simply does not square with the cases and as I have said, every case which has thus far considered the application of this

doctrine has insisted that there be some affirmative act of the foreign sovereign, as the Chief Justice has pointed out, within its own territory and then as a second requirement, that there be competent proof of the existence of that act within our courts.

Here, for all the counsel has said, we still do not know what the Act was. We do not know when it took place or how it took place or who was responsible for it.

In this connection, we cited the case of The Navemar which, albeit a case dealing with sovereign immunity, I think is instructive in terms of the standards of at least minimal proof required when a sovereign comes into our courts and asserts a claim that it should be treated differently from private litigates and in The Navemar there was a verified statement by the Ambassador of Spain that his government had, in fact, seized possession and ownership of a liable vessel. There being some question about those facts, the court refused to foreclose these issues but, instead, invited the Ambassador to intervene in the action and prosecute his claims as a litigant in the suit.

I suggest, moreover, that in addition to the fact that the Act of State application here was far broader than in any of the decided cases, that there are no policy reasons underlying the Act of State Doctrine which would require any less proof than we are contending for.

The Doctrine itself, as the Respondents concede, of necessity works in unfairness as to any litigant against whom the doctrine is applied. It denies him his judicial remedies.

True, if the courts are attempting to deal with a public act or pronouncement of a foreign government, certainly there may be a realistic danger that the courts either may be involved in political controvery in international affairs or may be usurping executive prerogatives in those affairs.

But surely, where there is no public act of a foreign sovereign, we submit that those dangers are unrealistic and that to apply the doctrine to create the unfairness, unless there is a realistic basis in fact on which the courts can operate simply does not make sense.

And we submit that that requires nothing less than competent evidence at the trial that an affirmative act of a foreign sovereign has, in fact, occurred and here, as we know, nothing of the sort has occurred.

I reviewed the history of the case at some length because I wanted to show that, for some ten years, Cuba apparently was either unaware or, at the very least, disputed the receipt of the very monies counsel for Cuba now says it has seized at some time that we don't know and in some manner which we also don't know.

There is a suggestion in Respondents' brief that I feel should be discussed briefly.

At page 17, Respondents appear to argue that the nationalization decree of 1960 might be the Act of State which justifies the retention of Petitioner's payments.

The argument appears to be that since that decree nationalized the accounts receivable of the owners, that payments on those accounts, at least insofar as they reach Cuba, may also have been taken under the authority of that decree.

Both courts below, of course, held -- under the Republic of Iragui case that the decree was ineffective to reach those accounts receivable because they were assets located outside of the jurisdiction of Cuba being payable in New York.

We believe that ruling was correct but we do want to point out that if this is Respondent's position now, and if that were to be adopted, we must note to the extent that the court should rule in that fashion, the rulings of the court below with respect to parties not now before it would also be effective because if the court were to rule that the decree somehow operates with respect to the accounts receivable insofar as payments on those accounts reach Cuba, then we would submit that the -- that such a ruling would, in effect, extinguish the accounts receivable themselves and

the owners' judgment against Dunhill to that effect would also be extinguished.

I turn now to the second argument -- or the second branch of the argument which assumes that the court finds that the Act of State Doctrine is effective here and the question is, assuming that effect, is this case within the counterclaim exception created by City Bank in view of the fact that Petitioner's counterclaim here does not exceed the net balance owed to Cuba by all of the other importers who were consolidated for trial in this case.

We submit that in view of the totality of circumstances of this case that the counterclaim exception should, in fact, be applied.

In fact, we believe that the circumstances here are far stronger for justifying the application of that doctrine than they were in City Bank.

In City Bank, of course, there were many differences of views among the Justices but we think that two threads run through the various opinions.

I have already alluded to them in my argument on the first point. They are that the Act of State Doctrine really serves two fundamental purposes.

One is involved with not having this Court enter into areas which are more properly reserved for the Executive. The other is that this Court should not be involved in

deciding issues which may affect our foreign relations.

I do not -- and I am thankful I do not for purposes of this case, have to get into the question as to which of those is the more important because I think under either view, it is quite clear that allowing the counter-claim here to the extent of all of the judgments in favor of Cuba would not violate either of those principles.

You must recall that this case, like any other that we have found, involves Cuba's coming into our courts and affirmatively seeking relief on the question of who was entitled to the payment of all of the cigars?

Initially they came in and asked for payments of all. They then retreated when they found that there were significant amounts due on the pre-intervention shipments. They went back and again sued for all of them.

The only thing that happened after that was that having, as the court's -- as the evidence mounted and as it became clear that they might lose on some of those issues they retreated into an Act of State defense to the assertion of a judgment.

Cuba has never in this case said that anything they have done with respect to those accounts receivable and the amounts payable on the cigars should not be treated by these courts as a judicial issue.

In fact, Cuba has submitted these very issues

to the court.

The only reason the Act of State Doctrine has been asserted here is because on some of those issues, Cuba seemed to have been coming out a loser That we -- yes?

QUESTION: What has our State Department had to say about this case?

MR. FRIEDMAN: So far as I know, nothing, Mr. Chief Justice.

QUESTION: Is it not usual that our State Department does take a position or at least advises the court that they have no position?

MR. FRIEDMAN: My understanding, sir, is that they will do that if any party or the court requests it.

We did not feel it was appropriate to request it in this instance because we did not believe there was any proof whatsoever that an Act of State had occurred.

QUESTION: Well, wherever it has been thought, at least in my observation in cases of this kind for 18, 20 years -- wherever the State Department has thought any relations between the two countries would be adversely affected, they didn't wait for anybody to ask. They affirmatively told the Attorney General what was the position of the State Department.

MR. FRIEDMAN: Well, I am perfectly prepared to accept that, Mr. Chief Justice. In addition, I might point

out that I believe that the Stevenson letter, which goes beyond the City Bank case, but also talks about like cases would, I believe, be applicable here.

If anything, this case presents certainly far less rationale for an abstention by the judiciary than First National City Bank did. After all, in First National City Bank, the effect of this Court's ruling was to have the District Court's or the Court of Appeals actually rule on the legality of the seizure by the Castro Government of First National City's Cuban Bank.

Here, we have nothing of the sort. All of the legal issues have already been decided. The factual issues have already been decided.

The only thing at issue here is the entry of the judgment. We do not have a situation where this Court is being asked, as against an act of state contention, to rule on matters which may involve some kind of sensitive foreign relations possibilities.

I might also point out that it appears that Mr. Rabinowitz has been in contact with the State Department, although -- in the Appendix to his brief with regard to the Office of Foreign Assets -- I'm sorry, that's the Treasury Department. So the Executive Branch is obviously aware of the case.

I would conclude simply by saying that we have

cited in our brief a number of instances where both the executive and legislative trend, it seems to us, are distinctly going towards looking at disfavor with any expansion of either the Act of State Doctrine or the Doctrine of Sovereign Immunity.

We think that this case, to the extent that the Court of Appeals held that there was an Act of State Doctrine applicable, clearly is such an expansion and we see no reason why the courts, in the face of a decided legislative and executive trend to the contrary, should get involved in expanding the Act of State Doctrine.

QUESTION: Might I ask you just one question? Suppose there were no Act of State Doctrine involved in the case and it came out as it did with owing money -- debts due on either side -- how about Dunhill being able to collect the excess of what Cuba -- was it from the other -- from the other judgments -- from the other assets available in the case?

Did you say they were consolidated for trial?

MR. FRIEDMAN: That is correct. That is correct.

QUESTION: Now, under your procedure would it be technically a set-off? Let's assume Dunhill had judgment against Cuba for this -- what is it, $80,000 or $100 -- whatever it is -- had that judgment and it wanted it satisfied. Would it be technically a set-off in that case?

MR. FRIEDMAN: No, I believe it would not be.

QUESTION: So you would have to utilize other procedures available?

MR. FRIEDMAN: That is correct. We would have to attach the judgment.

QUESTION: You would have to attach the judgment?

MR. FRIEDMAN: Yes.

QUESTION: But the assets are there before the Court?

MR. FRIEDMAN: That is correct. That is correct. But let me point out --

QUESTION: But would it be really -- for purposes of -- for our purposes, is it really any different than if you found that you had this judgment and you found a bank account somewhere?

MR. FRIEDMAN: I believe it is. I believe it is.

QUESTION: Now, that is what I want to know. Why is it?

MR. FRIEDMAN: All right. Not on a technical or procedural ground. My point simply is that Cuba has put into issue, in a single, litigating mode, all of these claims and counterclaims and what I am suggesting is that the rationale for allowing a complete set-off or counterclaim within this framework regardless of the precise form that it took is far stronger than was present in City BAnk.

There are no -- to my way of thinking, there are no justifications which underlie the application of the Act of State Doctrine which in any way should preclude that result, whereas, in City Bank, there very definitely were different policy considerations which could have led the Court to the other result.

So I am not relying on the technicality of whether or not these were consolidated for trial or consolidated action. I do not think that New York procedural niceties should control the ruling of this Court in that respect.

QUESTION: Would it be your position -- I am not sure that you need to go so far -- but is it your position that whenever a foreign sovereign comes into our courts he must come in on our terms and have the cases cited by traditional principles of law applicable to American litigants?

MR. FRIEDMAN: Well, I am afraid if I answer that question yes, Mr. Chief Justice, I have eliminated the Act of State Doctrine and --

QUESTION: You don't think you need to eliminate it entirely in order to prevail in this case?

MR. FRIEDMAN: No, I don't really at all, Mr. Chief Justice. In fact, I think I can live within the decided precedents on the subject.

QUESTION: Mr. Friedman, your response to Justice

White's question that you are not relying on New York procedural niceties has certain overtones of making a virtue out of necessity because I take it if you were to bottom the argument on procedural niceties, this is really nothing like a set-off in the traditional sense that lawyers use the word.

MR. FRIEDMAN: You mean, to the extent that we would be reaching a judgment by a co-defendant? I would agree with that, Mr. Justice Rehnquist.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Friedman.

Mr. Rabinowitz.

ORAL ARGUMENT OF VICTOR RABINOWITZ, ESQ.,

ON BEHALF OF RESPONDENTS

MR. RABINOWITZ: Mr. Chief Justice, and may it please the Court:

I would like to start off, if I may, with the discussion that Mr. Justice White and Mr. Justice Rehnquist have been having because I suggested in filing my brief here that this petition for certiorari was improvidently granted and should be dismissed.

And one of the reasons that I urged was that no judgment can be collected here -- collected -- it can perhaps be obtained, if the Petitioner wins, but no judgment can be collected here under any foreseeable circumstances and therefore, this case, while not moot in a constitutional

sense, that is, there is a case of controversy, under Article III, nevertheless, it is, for all practical purposes, pointless and it is pointless because all Cuban assets are frozen and the Treasury Department, which has the task of licensing the expenditure of funds out of frozen funds, has indicated already, as we knew all along it would, that it will not license the execution of any Dunhill excess judgment against assets which are otherwise frozen, whether it be a bank account, as Mr. Justice White suggests, or one of the other judgments that has been obtained as against Faber Coe, as Mr. Friedman suggests.

Therefore, we have a situation which is the kin, shall we say, to an action in which Plaintiff is suing a person who is concededly and obviously insolvent.

The total number of claims filed against Cuban assets in the United States amounts to $1 billion 799 million.

Now, I don't know what the amount of frozen funds are, but if they amount to a few million dollars, it is a lot. If this $53,000 judgment is collected from those funds, and I don't believe it can be, but if it is collected from those funds, we have pennies, depending on the outcome of this litigation.

And I don't believe it can be because the procedure that is followed in all of these cases and that has been followed in the Cuba case, is to require a debtor to

file a claim with the foreign claims settlement commission and not to bring a lawsuit.

Dunhill chose to bring a lawsuit instead of filing a claim. Now, I suppose it has the right to do that but if past precedent in handling these cases is any guide to what the future may bring, and of course, I have no crystal ball, but I can read what has happened, there is no possibility of even this $53,000 sharing in that $1 billion, 800,000 claim. So this whole discussion, although it involves very interesting questions of law, so far as the return to Dunhill is concerned, is going to end in zero and I cannot understand any justification for Dunhill spending all this time and, why, of course, the Court granted the petition for cert is not my business, but at least I suggest that perhaps that question might be reviewed.

QUESTION: What about the set-off -- face-to-face set-off?

MR. RABINOWITZ: Well, so far as the face-to-face set-off is concerned, it is my understanding that that will be recognized by foreign assets control.

QUESTION: Yes.

MR. RABINOWITZ: So, to that extent, the face-to-face set-off, which, of course, was not the subject of this petition for cert.

It is the subject of another petition for

certiorari which Cuba has filed.

QUESTION: I understand that. I understand that. But you don't claim that this present argument you make would rub off on any face-to-face set-off --

MR. RABINOWITZ: No, no.

QUESTION: Or anything like it, as a matter of fact.

MR. RABINOWITZ: As far as I know now, it would not. I don't know what the attitude of foreign assests control would be on that subject, but I am inclined to think that a face-to-face set-off would be recognized by the Treasury Department.

Now, on the question of is there an Act of State here? I don't know whether I ought to be flattered or the contrary at being suggested that I have the power to commit an Act of State. I have no such power and in no statement that I ever made in court is to be considered to be an Act of State.

Cuba here received funds and claimed that it was entitled to those funds. Hence, it refuses to return the money and it has retained counsel to plead its right to those funds and that is what counsel has been doing to the best of its ability.

Now, that claim is not a frivolous or a capricious or an arbitrary claim. It is based, as Mr. Friedman was

kind enough to state, on a nationalization decree, a decree which was adopted on September 17th, 1960 and which purported to nationalize all of the assets of Cuban -- not American -- but Cuban concerns -- the manufacture of tobacco -- cigars -- in Cuba and to nationalize not only the physical property in Cuba, but also the accounts receivable.

The question as to whether this nationalization decree extended to the accounts receivable was litigated. We lost in the District Court. We lost in the Court of Appeals and pursuant to instructions -- specific, I might say -- instructions by my client, I have filed a petition for certiorari which is one of those issues that is pending in the other case and the issue there revolves around this rather metaphysical question, what is the situs of the debt?

If the situs of the debt was in Havana, then it was nationalized. If the situs of the debt was in New York, then it was not nationalized.

That is an issue which is not before us. I mention it only to show that the claim of Act of State here was not disconnected or irrelevant to the nationalization decree because if that nationalization decree did, in fact -- and I am advised that under Cuban law it would have -- if that nationalization decree did, in fact, attach or nationalize the accounts receivable, then we are entitled -- Cuba is entitled to the funds for pre-intervention cigars.

QUESTION: Then could you get them out?

MR. RABINOWITZ: Well, the set-off would be cancelled. We got the money. We have the money.

QUESTION: How did you get it?

MR. RABINOWITZ: We got it because Mr. Dunhill over here paid it to us.

QUESTION: Well, could --

MR. RABINOWITZ: The whole problem now is whether we have to pay it back.

QUESTION: Yes, I understand that. But for post-intervention shipments?

MR. RABINOWITZ: Oh, yes.

QUESTION: You can be paid for those?

MR. RABINOWITZ: Oh, yes, yes.

QUESTION: Can you get the money out?

MR. RABINOWITZ: Can Cuba get the money out? Oh, no, no, it goes into that frozen fund.

QUESTION: That's what I thought.

MR. RABINOWITZ: Oh, no question about that. That is true of all of this Cuba litigation.

QUESTION: So you are litigating -- what you are litigating, I hear, is on funds to add to the --

MR. RABINOWITZ: Right.

QUESTION: -- claims account.

MR. RABINOWITZ: We are trying as hard as we can

in all of these cases to build that fund up as high as it can. The same question was raised, I think, by Mr. Justice Blackmun in the City Bank case. Our goal in this case and in the Chase case -- which is behind us -- hasn't come up here yet -- is just to increase that fund because that is what my client thinks is in his best interest and that is what we are trying to do.

QUESTION: Now, with Dunhill kindly paying that account, that was before the seizure or --?

MR. RABINOWITZ: It was after the seizure.

QUESTION: After the seizure.

MR. RABINOWITZ: After the seizure. It was --

QUESTION: Did any of it bracket the seizure, some before and some after?

MR. RABINOWITZ: Oh, yes, all during the month of August, September, October, November, December, it continued to send money down to Cuba. Now, why it did it, I am not altogether sure. Various reasons have been given and had it been prudent, as events later show, with the advantage of hindsight, it would have stopped. When the nationalization occurred, it would have said -- had it had sufficient foresight. We don't know who is entitled to this money and therefore, we are not going to pay it to anybody but it didn't do that. It continued to send the money down to Cuba -- it says -- and I will assume, for purposes of this

argument that that is exactly what happened because --

QUESTION: Now, this is all pre-intervention, is it?

MR. FRIEDMAN: All pre-intervention and a little bit of post-intervention. I think perhaps --

QUESTION: A little bit of post -- well --

MR. FRIEDMAN: But there is no issue about that.

QUESTION: Well, now, if they are entitled to any of it back -- if you have to pay anything back, it comes out of only this frozen fund?

MR. FRIEDMAN: The court held that the former owners are entitled to a set-off -- are entitled to a judgment against Cuba which is a set-off -- it is very complicated --

The court held that the former owners were entitled to that money. They are entitled to the money from Dunhill, which was the debtor and therefore, Dunhill is ordered to pay that money to the former owners.

Dunhill, however, paid the money to Cuba -- said the court -- by mistake. Therefore, it is entitled to get that precise sum back from us so whatever it has to pay the former owners, it collects from us, except for this $53,000 because we contend there is no way in which it can collect an affirmative judgment of $53,000 from Cuba.

I feel a little bad to keep saying "us" in here because it may give the court some idea that I am the state, but I am not. I am just speaking as counsel.

QUESTION: When you -- well, I think you have answered the question I was about to ask.

MR. FRIEDMAN: Now, counsel has made much in his brief and again in his oral argument to the contention or the argument which said that Cuba never admitted receiving the funds. Now, of course, that is not so.

What happened was that the claim was made that large sums of money had been paid. This claim did not come to light until 1967, which was some seven years after nationalization.

By that time, the -- all of the relevant records had been lost, destroyed or at least they were not available and so the Republic of Cuba said, in response to a set of interrogatories, "We do not know. As to $93,000 of the total, yes. We received it." Because there were records. There were endorsed checks. "As to the balance, we do not know whether we received it or not."

The District Court held that the evidence was sufficient that we had received it. The Court of Appeals held that the evidence was sufficient that we had received it. We are not applying for cert on that issue and therefore, I will assume that so far as this record is concerned, we have received it.

Now, of course, if we didn't receive it, then Dunhill has no claim at all. Dunhill's whole claim here is

based on the fact that it paid money to us by mistake. If it didn't pay it, then the whole of Dunhill's claim falls and, therefore, we really think that the Petitioner is faced with the fact that whatever may be ultimate truth -- so far as the record is concerned, Cuba got the money and also it is clear that so far as the record is concerned, Cuba, basing its arguments on a nationalization decree, says it does not have to repay the money and we submit that that is an Act of State because, as has been conceded, no particular formality is required.

QUESTION: What got the money? Was it the fund that got the money or Cuba got the money? Which?

MR. RABINOWITZ: Cuba got the money in September of 1960.

QUESTION: Before the nationalization?

MR. RABINOWITZ: Bridging the nationalization. Some of it before the nationalization, some of it after the nationalization.

QUESTION: But in any event, it didn't go to the fund.

MR. RABINOWITZ: It went to Cuba.

Oh, by that time, money was being shipped to Cuba. The freeze didn't come till 1963. Up to that point, the money went down to Cuba.

Now, it is perfectly clear from all of the cases

cases that a course of conduct is sufficient to constitute an Act of State. We have a great deal of state action here, much more than in Ricaud, Oetjen and Bernstein and the other traditional Act of State cases and as I have indicated, this continuing interest and continuing determination by Cuba to assert this claim is an indication on the part of Cuba that it believes that under its own nationalization decree and its own view of the law, it is entitled to this money.

QUESTION: Mr. Rabinowitz, when you say that while this case is not technically moot in the traditional sense, that it is, for all practical purposes, there is nothing left of it, is that because the claims against the $1 billion 800 million will so far exceed the fund that they will either get nothing or "pennies," as you put it? Is that --

MR. RABINOWITZ: Right, right.

Well, two reasons. That is one. The other is, that at least so far as the precedent of the Soviet Union, Bulgaria, Rumania, Yugoslavia and two or three other similarly-situated countries -- people who didn't file claims with the foreign claims settlement commission don't even get those pennies.

QUESTION: Is there a cut-off date?

MR. RABINOWITZ: Oh, yes, a cut-off date. It was two or three years ago.

QUESTION: Oh, so the claim couldn't be based on --

MR. RABINOWITZ: No.

QUESTION: -- a judgment.

MR. RABINOWITZ: No, the claim could not be based on judgment. Why they didn't file before the foreign claims settlement, I don't know, but there certainly is not the slightest precedent nor could there be the slightest justification for saying that a litigant who ignored the statutory procedures set up by Congress should find himself placed in a better position so far as ultimately collecting this judgment against --

QUESTION: Mr. Rabinowitz, that means -- are you suggesting if Dunhill prevails -- and we reverse and Dunhill judgment is reinstated, it is useless?

MR. RABINOWITZ: Yes, that is exactly what I am saying.

QUESTION: Because they didn't file in the amount of the judgment or the claim, whatever it was, with the Commission.

MR. RABINOWITZ: They didn't -- it is useless for two reasons, your Honor. First place, they didn't file. Second place, even if they had filed the amount -- if they had filed, they wouldn't need a judgment but even if they had filed, the amount involved would have been infinitesimal compared to the amount -- but even -- I don't know what disposition is going to be made of that. All I can say is

that the precedent followed in all of the other cases was to say specifically the judgments will not be permitted and that claims before the -- filed with the Foreign Claims Settlement Commission are the only source of getting money and remember, so far as these settlements in the past have been concerned, the issue beomes -- is really a dual one.

One is between the United States and the foreign country and that settles how much money is to be paid.

The second step is that the United States distributes this money to its citizens and in the treaties that have been entered into with Rumania and the other countries that I have mentioned, the United States has specifically waived, on behalf of its citizens, all judgments which the citizen may have obtained or may in the future obtain against the foreign government for those presettlement claims, shall we say so that while, as I say, I can't even venture to predict what is going to happen here if the Polish and Rumanian and other settlements are reached here, the judgment is really of absolutely no value in this situation and what we are discussing here is very interesting academic and, to me, rather vital questions of law and I am always delighted to discuss them but in terms of the practical effect of what we are getting here, it is going to turn out to be nothing at all.

Now, I would like to --

QUESTION: Are you suggesting that your friend is overly optimistic about Cuba's voluntarily paying any judgments which may be entered against him?

MR. RABINOWITZ: Well, I wouldn't -- I would prefer not to have to characterize that as even with the word "optimism." I think even that is too hopeful a word.

No, I don't know why counsel is doing it. I suppose counsel is here because his client has instructed him to be here and he has got whatever motivation he has to go ahead with this case and maybe he thinks he can in some way or other collect it and if he does, he is doing very well for his client but --

QUESTION: Mr. Rabinowitz, if there is no practical result to all this, why is Cuba defending?

MR. RABINOWITZ: Well, Cuba is defending it right now because this court issued a petition for certiorari and told me to come here and since I always enjoy arguing before this court, here I am. But Cuba is proceeding with all of the other litigation because, as I said before, my client apparently -- nobody has told me this, but I can draw reasonable inference, my client feels that it will be good to have this money in that frozen account as against some day when there is going to be a settlement. And the more money there is in that frozen account, the better it is going to be for my client.

Now, maybe it will be better for everybody, I don't know, but it is going to be better for my client.

To put it another way -- if I may -- I don't suppose this is a breach of professional confidence, as one of my clients said to me -- "Is it better to have a million dollars in that fund or not to have a million dollars in the fund?" And my answer was, "Well, it is better to have a million dollars in the fund."

I don't know exactly why it is better. I just think it is better to have that much money in the fund than not to have that much money in the fund.

QUESTION: You've just stated why it's not moot.

MR. RABINOWITZ: Pardon me?

QUESTION: You have just stated why the case is not moot.

MR. RABINOWITZ: The case is moot in the sense that the amount of money that --

QUESTION: No, but this is a new kind of conception of mootness.

MR. RABINOWITZ: Well, all right.

No, I don't think it is moot in any -- in a constitutional sense. It is certainly a case of controversy.

QUESTION: As a practical matter it is moot.

MR. RABINOWITZ: That is right. I think in my

brief I said as a practical matter it is moot and maybe I shouldn't have used the word "moot."

QUESTION: Well, if you are in control of the freezing mechanism, I suppose that is right. But you are not.

MR. RABINOWITZ: No, we have no connection with the freezing mechanism at all. Quite the contrary. We have tried to break it on a few occasions without any success.

QUESTION: What if Petitioners were to take their judgment to France or England or try to locate Cuban assets there and ask for full faith and credit or whatever the French or English equivalent of that is?

MR. RABINOWITZ: I hadn't thought of that.

I don't know, maybe. I -- I don't know how the French courts or the German courts or the English courts would treat a matter like this and I am sure that they have their own problems so far as foreign relations and the enforcement of a judgment obtained under the circumstances. I don't know.

QUESTION: I suppose Cuba must have some accounts receivable due somewhere for sugar these days.

MR. RABINOWITZ: I have read newspapers -- newspaper stories that indicate that that may be the case.

I -- I just don't know.

I -- anyhow, I, to conclude this part of "Is there

an Act of State?" I submit that we have here as much evidence, as much of an act -- I don't know what counsel means when he keeps talking about a public act. I don't know what exactly a public act is.

In the French against Banco Nacional in the New York Court of Appeals, the act involves a piece of paper called an "instruction," which was posted on the bulletin board of the Nacional Banc or the Currency Stabilization Board in Cuba and that was regarded as an Act of State.

QUESTION: Well, sometimes it is a document of --

MR. RABINOWITZ: Oh, certainly.

QUESTION: -- for an office of the sovereign filed in the litigation, is it not?

MR. RABINOWITZ: No question at all that sometimes it is. But sometimes it is the expropriation of a load of hides as in Oetjen, or a load of silver, as in Ricaud.

The seizure of these commodities by an army in the field and this has been held to be an Act of State and these are, as I say, the classic cases.

QUESTION: Are you free -- and I put that limitation on it -- are you free to offer a hypothesis as to why the Government of Cuba has not made any formal claim of Act of State, but has simply depended upon a litigation position asserted by you?

MR. RABINOWITZ: You mean, why it has not made a

decree or written a piece of paper?

QUESTION: Written letters. The Secretary of State of the United States often does in these circumstances.

MR. RABINOWITZ: I think that the opinion of the Cuban Government is that the nationalization decree is quite sufficient and that there is no particular point in repeating over and over again that it claims that it nationalized these accounts receivable and, therefore, it is entitled to that money.

QUESTION: That is, the decree of September 15th, 1960?

MR. RABINOWITZ: September, 1960, yes, sir.

QUESTION: That nationalized everything, didn't it?

MR. RABINOWITZ: That's right, it nationalized everything and I suppose that there is no -- the Government does not feel any compulsion to keep repeating this because governments are not always quick to issue documents.

QUESTION: Is not part of the debate whether that decree of nationalization reached assets outside of Cuba?

MR. RABINOWITZ: Yes, that is part of the debate and there is no question --

QUESTION: No one is challenging in this litigation that Cuba, by its decree of nationalization, could seize and exert sovereign power over assets in Cuba.

MR. RABINOWITZ: Oh, no. No, that is not at issue.

QUESTION: Well, an asset somewhere else is another matter, is it not?

MR. RABINOWITZ: Exactly, that is an issue, but whether that seizure is valid under United States law, the seizure of accounts receivable, I mean.

It is valid under United States laws or not valid under the United States law has nothing to do with whether it is an Act of State. The fact is, it is an Act of State.

Now, maybe they attempted to do something that they couldn't do. If it is true that a debt has its situs, and as I said before, it is a rather metaphysical problem, but a debt has its situs in the home of the debtor, then this was an ineffective nationalization decree because it sought to nationalize property outside the territory.

But in the Cuban view, this was not so and I have, as I say, so argued in this petition for certiorari which is before the Court pending at this moment.

I would like to procede to the second question, which is the so-called "counterclaim" rule. As your H$_o$nors will recall, in Sabbatino, this court held with only one judge dissenting that the courts of the United States would not examine into the legality of the conduct of a sovereign done within its own territory.

When the City Bank came before it three years ago, the Court had before it a claim by City Bank first that there was or should be a counterclaim exception to the Act of State Doctrine and, second, the Court had before it, a letter from the State Department and that State Department said that the Act of --

QUESTION: We will resume here after lunch.

MR. RABINOWITZ: How much time do I have left, your Honor?

MR. CHIEF JUSTICE BURGER: Five minutes.

(Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:01 o'clock p.m.)

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: You may proceed whenever you are ready, Mr. Rabinowitz.

MR. RABINOWITZ: Thank you, sir.

I would like to spend my remaining time on the whole problem of the counterclaim area but, just for a moment before I get to that, I would like to make one thing clear if it is not already clear:

While I said that the nationalization decree of September, 1960 nationalized not only the physical property but also the accounts receivable and therefore the problem arose as to where these accounts receivable were located, of course it is true that shortly after -- two or three months after the nationalization decree, the money represented by these accounts receivable did, in fact, get to Cuba so that it was no longer a question of nationalizing intangibles which were located in a foreign country, but then became a question of the effect of the nationalization decree on that money which was then in Cuba so that from the position of the Respondent --

QUESTION: Is that all of it? Mr. Rabinowitz --

MR. RABINOWITZ: Pardon me?

QUESTION: Is that all of it that was involved --

MR. RABINOWITZ: All of it that was involved, yes.

QUESTION: -- in the Dunhill claim.

MR. RABINOWITZ: Yes, all of it came to Cuba and that is why Cuba is under an obligation to pay it back and, of course, the nationalization decree --

QUESTION: That is the preintervention payments?

MR. RABINOWITZ: Yes.

QUESTION: I mean, payments for preintervention tobacco sold.

MR. RABINOWITZ: Payment for -- that's right. So that as that money came back, it was -- down there -- it was the position of the Cuban Government that as it entered Cuba, the nationalization decree --

QUESTION: I thought you said earlier there was no freeze order until long after --

MR. RABINOWITZ: Long after, three years later. Three years later.

Now, on the question of the counterclaim rule, as I said, in the City Bank case this Court had before it a letter from the State Department which said that the Act of State Doctrine in this opinion was not to be applied in the counterclaim situation and I quote, "The amount of the relief to be granted is limited to the amount of the foreign state's claim and the foreign policy interests of the United States do not require application of the doctrine."

The letter then went on to say that the foreign policy interests of the United States do not require the

application of the Act of State Doctrine to bar adjudication of a Defendant's claim or set-off against the Government of Cuba in these circumstances and hence the Act of State Doctrine should not be applied in this or like cases.

Now, there is no State Department letter here, of course, and I must, with due respect, your Honor, say that at least so far as the cases I am familiar with, the State Department has never suis ponte, written a letter.

In the Sabbatino case, the State Department participated, not only as Amicus, but in argument, but that was on the motion of the Court, not on its own motion, or not by its own request.

QUESTION: As a matter of fact, in the Sabbatino case, they refused to come into the Court of Appeals, didn't they?

MR. RABINOWITZ: Yes, they did, sir. Yes, they did and in -- quite right. And in the City Bank case, it is my understanding that they came in at the request of City Bank or at least at the suggestion of City Bank and since then, in other cases which are pending in the District Court -- in one case, they did submit a letter. In other cases they have refused to submit letters. What motivates them one way or the other, I don't know.

The most recent was a refusal to submit three letters in cases involving three banks.

Now, the Petitioner's argument here is based on three assumptions, none of which, I respectfully submit, is valid.

First, that there was a ruling by this Court in the City Bank case that there was a counterclaim exception to the Sabbatino rule.

Second, that the Stevenson letter submitted in City Bank is applicable to this case.

And, third, that there is an exception to what I contend is a non-existent counterclaim rule which would permit the Petitioner to get an affirmative judgment in this case.

Now, as your Honors I am sure will recall in the City Bank case, there was only one opinion out of Mr. Justice Douglas which opted for a straight out-and-out counterclaim exception to the Sabbatino case.

Three judges thought that there should be a counterclaim exception when there was a State Department letter, as there was in that case.

Five judges, as I read the opinion, felt that there should not be a counterclaim exception to the Sabbatino rule. So it is rather difficult to say -- talk about a counterclaim rule in the National City Bank case, because, as I read those opinions, the vote would have been, on that issue, four to five.

QUESTION: I hope that the Court doesn't follow my lead.

MR. RABINOWITZ: Your Honor, I hope it doesn't because with all due respect, I think your lead was a wrong one.

QUESTION: Well, you are protected by the First Amendment.

MR. RABINOWITZ: I understand that. I understand that, and I am going to take advantage of it by saying that I think --

QUESTION: It is an exception to Sabbatino.

MR. RABINOWITZ: As an exception to Sabbatino and I am going to take advantage of it by suggesting --

MR. CHIEF JUSTICE BURGER: Finish your sentence.

MR. RABINOWITZ: -- that the counterclaim rule is improper for two reasons. First, because, as Mr. Justice Brennan pointed out in the defense in City Bank, all the reasons for the Sabbatino case are equally valid with respect to a counterclaim and, second, that more often than not, the question of whether a case comes up as a counterclaim or an affirmative claim depends on who gets to the courthouse first because in all of these cases, it could have operated in exactly the other way if the other party had come in first.

QUESTION: So the subject matter of a petition of

yours is not yet acted on, is it, that there shouldn't be any set-off in this case?

MR. RABINOWITZ: Oh, yes. Yes, sir. And just may I say, in final conclusion, that I would suggest that this Court dispose of this matter here in one of two ways:

Either grant those other two petitions that are pending and that we really go at this rather tangled situation and decide all of the issues or else that the petition be dismissed as inadvertently granted. Of course, I --

QUESTION: Do you suggest it be denied?

MR. RABINOWITZ: Pardon?

QUESTION: If this is dismissed as improvidently granted, do you suggest we deny the other two?

MR. RABINOWITZ: If this is dismissed, I would think that the others ought to be denied, yes.

If this is entertained, I think the others ought to be entertained, unless your Honors --

QUESTION: Which would you prefer?

Which would you prefer, dismissal as improvidently granted or an affirmance?

QUESTION: At least that dismissal, if inadvertently granted, was improvident.

MR. RABINOWITZ: No, it wasn't inadvertent, your Honor.

QUESTION: No, it was not, I can assure you.

MR. RABINOWITZ: No, I am certain it was not inadvertent. I misspoke. I think it was improvidently granted.

Which would I prefer? Well, I do love to argue cases --

QUESTION: It is very difficult, isn't it?

MR. RABINOWITZ: Yes, it is difficult. I love to argue cases before this Court and the prospect of another go-round at this is very attractive to me.

QUESTION: Still.

MR. RABINOWITZ: But still, I think it might be best if every -- if we let the Court of Appeals --

QUESTION: I would have guessed you wouldn't have wanted it affirmed.

MR. RABINOWITZ: I think -- I think I would like it to be -- either affirmed -- I have no objection to an affirmance.

QUESTION: Well, would you prefer that to a dismissal?

MR. RABINOWITZ: I don't know that it matters --

QUESTION: All right.

MR. RABINOWITZ: -- a great deal. I think I would prefer dismissal to an affirmance.

QUESTION: It isn't very often we give a counsel the choice.

(Laughter.)

MR. RABINOWITZ: I am under no illusion that you are giving me the choice.

MR. CHIEF JUSTICE BURGER: Mr. Friedman, we will extend your time to five minutes from your previous three.

MR. FRIEDMAN: Thank you, Mr. Chief Justice.

REBUTTAL ARGUMENT OF

VICTOR S. FRIEDMAN, ESQ.

MR. FRIEDMAN: I would just like to respond to a few remarks made by counsel for Respondent.

I turn first to the question again of what is the Act of State in this case?

Mr. Rabinowitz has indicated that it may proceed from one of two standpoints and I am still confused as to where we really look to it.

I simply want to point out again, however, that if it is the decree, I do not believe that this Court can rule with respect to that issue on this petition.

Now, that is something that has not been raised by the Respondents previous to this time and I respectfully suggest that would affect rights of other parties to this action who are not now before this Court.

If, on the other hand, we are still dealing with the question of the possible seizure or retention of assets independently of the decree, I would suggest again that the

remarks in our brief are fully applicable and that is, that there has been no proof whatsoever of any sovereign act on the part of Cuba in any form that is acceptable as evidence in our courts.

I'd like to turn now to the questions that counsel has raised with respect to the enforceability of this judgment.

I do not pretend for a minute that it will be a simple matter of simply going into court and enforcing this judgment the way one would any other civil judgment.

I do not agree with counsel for Respondents, though, that this is a worthless piece of paper. There are a number of possible ways the judgment might be enforced and I do not believe that this Court need consider how likely those possibilities are or just exactly what our chances will be to obtain a recovery under the judgment.

The fact of the matter is that there are possibilities and we should be entitled to pursue them, certainly.

QUESTION: Well, your set-off is money in the pocket, isn't it?

MR. FRIEDMAN: The set-off is not money in the pocket, no, sir.

QUESTION: Well, what -- it is money you don't have to pay?

MR. FRIEDMAN: It is money we -- the money that we

owe for the post-intervention shipments, that has already been paid to Cuba --

QUESTION: Yes.

MR. FRIEDMAN: -- for the preintervention shipment.

QUESTION: Yes.

MR. FRIEDMAN: To the extent that those are payments for the preintervention shipments, we still must pay the owners.

QUESTION: Yes.

MR. FRIEDMAN: So there is no money in the pocket there. In fact, if we were to recover on this judgment in full, there still would not be a single penny coming to Dunhill that would stay with Dunhill. Dunhill would simply have to turn that money over to the owners.

The only question is, whether we are going to have to pay the owners and not recover back from the -- from Cuba.

There is no way that Dunhill would recover a single penny here that goes into Dunhill's pockets.

That really raises another issue that was alluded to by counsel for Respondents and that is the question of why didn't Dunhill file a claim?

The simple answer is here that Dunhill was never seeking anything from anybody. The only reason that Dunhill is in the position that Dunhill is in now is because of the conflicting claims that were asserted against it by both the

owners and the interventors; Dunhill, as well as the other importers, always considering themselves in the position of stakeholder and along those same lines, I would suggest that the cut-off date which was alluded to for filing of claims, we do not think is at all applicable here for at least two reasons:

First, that refers to expropriations of property and as I have indicated, we do not believe there ever was any expropriation here.

Secondly, whatever the claim is that we might file, to our knowledge was not in existence as of that cut-off date sometime in 1967.

If your Honors will recall, at --

QUESTION: It isn't yet, or until litigation is over here?

MR. FRIEDMAN: Well, I would hope not, Mr. Justice. The problem is that, as of that point in time, Cuba was still contesting that they had ever received any money, so it hardly lay in our mouths to make a claim against them for money which the Court might later adjudge Cuba owed us but we couldn't collect on.

QUESTION: When did the owners start to press Dunhill? When did the owners start to press Dunhill for payment?

MR. FRIEDMAN: The owners brought suit in either

February or March of 1961.

QUESTION: Was that the first knowledge Dunhill had of the owners' claim?

MR. FRIEDMAN: So far as the record shows, yes.

QUESTION: Was it asserted as a defense in those cases that the money was owed to and payable to Cuba, as the owner?

MR. FRIEDMAN: Mr. Chief Justice, as far as I know, as soon as those cases were filed, the interventors then started their action against the owners' counsel and all proceedings vis-a-vis the importers were stayed.

So far as I know, I don't believe that the importers had any connection with these cases, except to be named as defendants by the owners, until 1967 -- or 1966, I guess.

I would just make one other point with respect to the question of a license. Counsel has stated that the Office of Foreign Assets Control has said in no uncertain terms that a license will not be issued. I think if the Court will look at the Appendix to Respondents' brief, which contains the exchange of correspondence between Respondents and that office, it will find that that is not the position of that office. They have set forth a general policy, but that does not say that that is their final position or, if it is, that it would not be subject to review in the courts

or that it might not be influenced by a ruling by this Court in this proceedings.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:13 o'clock p.m., the case was submitted.)