In the

Supreme Court of the United States

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

v.

THE REPUBLIC OF CUBA ET AL.,

Respondents.

No. 73-1288

Washington, D.C.
January 19, 1976

Pages 1 thru 77

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

Washington, D. C.

Monday, January 19, 1976

The above-entitled matter came on for argument at 11:02 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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For Petitioner

ANTONIN SCALIA, ESQ., Assistant Attorney General, Department of Justice, Washington, D. C. 20520
For United States as amicus curiae

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For Respondents

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, Dunhill against the Republic of Cuba and Daniel Solano Pinera.

Mr. Friedman, you may begin whenever you are ready.

ORAL ARGUMENT OF VICTOR S. FRIEDMAN, ESQ.

ON BEHALF OF PETITIONER

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

We are here pursuant to this Court's order of last June which restored this case to the calendar for reargument, directing the parties to address the question of whether this Court's holding in Banco Nacional de Cuba versus Sabbatino should be reconsidered.

The United States filed a brief amicus and we have ceded 15 minutes of our time for oral argument to the Government.

On this question, our position, supported by the United States, is that Sabbatino should be reconsidered insofar as it may be read to permit a foreign sovereign to utilize the active state doctrine to repudiate its commercial obligations.

The amount of foreign trade being conducted by government agencies continues to increase in size and

importance.

Largely as a result of that, the Doctrine of Sovereign Immunity in the United States and elsehere has been restricted so that a foreign government acting in a commercial capacity may not assert sovereign immunity as a defense to defeat adjudication of claims properly brought against it.

QUESTION: Is that true even though the foreign government is the defendant, say, maybe just as a ship in New York harbor and is libeled by a private plaintiff?

MR. FRIEDMAN: Well, the assertion of a claim against the property of the foreign government stands on a somewhat different footing but the actual adjudication of claims against the foreign government, when you eliminate the property difficulties that some courts have had --

QUESTION: Well, how do you get your jurisdiction over a foreign government other than by attaching a property?

MR. FRIEDMAN: We can, in some occasions serve a trading agency if it has an office in the United States, can serve it under some long-arm statutes. One can get jurisdiction.

QUESTION: And in that case, even though they are a defendant and are not seeking any relief, your position is that the claim of the private plaintiff can be

adjudicated.

MR. FRIEDMAN: Absolutely, your Honor. Certainly, under the restrictive theory of sovereign immunity. There have been some difficulties where the State Department, for example, may come in and suggest immunity even though the case would seem to be covered by the restrictive theory but absent such a suggestion, the rule today is fairly unanimous in the United States courts that such a claim can be adjudicated.

And we do not see any reason why the foreign government should be able to accomplish the same results that it could have accomplished under sovereign immunity, simply by characterizing the repudiation of its obligations as an act of state.

Before addressing this question more fully, however, we feel compelled to stress here as we have in our b riefs that this issue need be reached by the Court only if certain threshold issues are passed.

In particular, we do not believe this issue need be reached unless this Court agrees with the Court of Appeals that the act of state in issue here was indeed Cuba's repudiation of its obligation to return to Dunhill certain payments that Dunhill had made to Cuba for cigars.

I stress this because Cuba now appears to argue with us, contrary to its prior position -- and although for

different reasons, that this holding of the Court of Appeals was incorrect.

In order to put these contentions in context and explain some of these threshold questions, I'd like very briefly to review the history of the litigation, in a capsule form.

The litigation, of course, arose out of the 1960 decree in Cuba which nationalized or intorvened certain of the Cuban cigar factories.

Dunhill and two other United States importers, for a number of years simply stood on the sidelines as stakeholders while the former owners of these businesses in Cuba battled with the courts of the United States to determine which of them was entitled to payments for cigars shipped both before and after the intervention.

In the prior action not involving Dunhill or the other importers, Palicio against Brush and Bloch, it was held by the Second Circuit that the interventors could recover for all of the post-intervention shipments of the cigars.

The interventors, at that point, stipulated that the owners could recover for the pre-intervention shipments because, in their view, the amounts were too small to worry about.

After those threshold issues were resolved,

both the owners and the interventors pressed their claims against the importer. That is this action.

And it later developed in this action that the fundamental assumption which underlay that stipulation was incorrect because it turned out that as of the date of the intervention, there was unpaid almost a half a million dollars for preintervention shipments of cigars.

It further developed in our case -- and it was strenuously contested by the interventors -- that the importers had paid those sums shortly after the intervention and it further developed that those payments had found their way to the Cuban Government.

As a matter of law, the District Court ruled that those amounts were still owed by the importers to the owners. We had paid the wrong people. But that we could recover those amounts from Cuba.

In the case of Dunhill, because the amounts transmitted to Cuba exceeded by some $55,000 the amount due for cigars shipped after the intervention, the District Court entered an affirmative judgment in favor of Dunhill against Cuba in that amount.

The Court of Appeals affirmed the District Court's rulings in every respect except one. It set aside the affirmative judgment against Cuba in favor of Dunhill.

The Court of Appeals held -- again over Cuba's

vigorous opposition, that the evidence showed that Cuba had received all of the post-intervention payments but it also held that Cuba's -- and I quote -- "failure to honor the importer's demand " for return of the payments constituted an act of state and therefore, under the Sabbatino and First National City Bank, no affirmative judgment could be entered against Cuba.

Dunhill, of course, is seeking --

QUESTION: Is that the only act of state the Court of Appeals identified?

MR. FRIEDMAN: Absolutely, your Honor.

QUESTION: With respect to --

MR. FRIEDMAN: With respect to Dunhill.

QUESTION: Their holding was not based on the notion that Cuba had nationalized an accounts receivable?

MR. FRIEDMAN: No, your Honor, on that issue -- on that issue, the issue of the accounts receivable, the Court held that since the accounts receivable had a United States situs, that no act of state would be recognized.

QUESTION: I see.

MR. FRIEDMAN: The net effect, of course, of the Court of Appeals' ruling is to impose double liability against Dunhill for the amounts which it now cannot recover in Cuba. Under the rulings of the court now, that money is still owed by Dunhill to the owners and there is no recovery over

it.

The first threshold question before we reach Sabbatino, of course, remains the principle question on which certiorari was duly granted.

That is, whether statements by counsel for Cuba that Petitioner's unjust enrichment counterclaim would not be honored by his client, constitute or evidence an act of state.

We continue to urge, as we did before, that in our view, that those statements that Cuba would refuse to make any such repayments did not and could not constitute an act of state and we will not belabor that argument here again. We note only that if our position is accepted in that regard, reexamination of Sabbatino, however desirable, is unnecessary to a decision of the case.

The result would simply be to revert to Judge Brien's ruling and to reinstate the affirmative judgment he entered against Cuba.

A second major threshold issue is created by Cuba's complete shift in position as to precisely what constitutes the operative act of state against Dunhill in this case. The Court of Appeals, of course, found it to be the repudiation of the obligation to repay Dunhill.

QUESTION: You don't assume that -- assume you were right that there was no act of state such as the

Court of Appeals described. Then you say that the barrier would be removed to your having a judgment?

MR. FRIEDMAN: Yes, your Honor. Yes, your Honor, because --

QUESTION: There is no question of sovereign immunity or anything like that?

MR. FRIEDMAN: Sovereign immunity has never been asserted by Cuba in this case and indeed, your Honor, it could not have been asserted because of the restrictive theory about sovereign immunity now adopted by the courts and although Cuba has never requested a suggestion of sovereign immunity from the State Department, I think with the State Department's present position that would be unlikely.

QUESTION: Mr. Friedman, has Cuba ever acknowledged an obligation to repay the importers? Are you contending they repudiated an obligation that they never acknowledged to exist is what I am really asking.

MR. FRIEDMAN: So far as we know, Mr. Justice Stevens, Cuba, qua Cuba, has never said anything about this obligation. Cuba brought all of the contentions into the United States courts seeking the moneys which it later turned out they had already received.

So it is difficult for me to address your question in these terms.

QUESTION: Well, I perhaps stated it wrong. I don't understand them to be contending that they repudiated an existing obligation but rather that their act of state was to, in effect, appropriate the property of your clients when it was in Cuba, namely the cash when it was paid on account.

MR. FRIEDMAN: If I may, your Honor, let me respond to you. This is a third position that Cuba is now taking, as I see it, for the first time, in its reply to the Government's amicus brief. One of the great difficulties we have had, I think, in analyzing an act of state issue here, is identifying it. It is quite clear that up to the time that certiorari was granted in this case, the only act of state on which Cuba was relying was this repudiation of the asserted obligation.

If I may read from its brief in opposition to our petition for certiorari, Cuba said, "But here, the Republic of Cuba is a party to the suit. For seven long years it has been asserting that its repudiation of the debt was its act of state." That assertion was made in the District Court, in the Court of Appeals and is now being made in this Court.

QUESTION: And it was the foundation for the Court of Appeals' judgment.

MR. FRIEDMAN: Absolutely, your Honor,

absolutely. Now, contrast that with the position that Cuba took in the brief on reargument in which Cuba now says, "We do not agree that the act of state doctrine does not apply to commercial transactions but find no need to argue the point here. It is, of course, absurd to characterize this as an ordinary commercial controversy.

"It arose, not out of the normal international trade but out of an intervention and it is the intervention which is the act of state, not the repudiation of a commercial debt."

So we are faced with a rather threshold difficulty here in analyzing just what it is that Cuba says is the act of state.

There was, of course, no proof of anything at the trial other than the fact that a decree had been entered.

With respect to the decree itself, there are some very difficult issues presented by Cuba's present -- what I consider Cuba's present position. That is that the decree now somehow constitutes the act of state.

The theory of that, of course, is that the decree, having nationalized the accounts receivable of the owners, somehow operated to give a claim of right to Cuba's appropriation of the funds as they arrived in Cuba.

The difficulty is that to deal with that issue,

I do not believe that the proper parties are before the Court. The net effect of reversing the lower court's conclusions on that issue would be to adversely affect the rights of the owners. They are the real parties in interest.

Dunhill, in fact, has no real stake in this because if the accounts receivable were appropriated by Cuba in an act of state that would be recognized by the United States Court, we paid the right people.

QUESTION: Let me ask you, suppose we disagreed with you and agreed with the Court of Appeals that there was an act of state in the repudiation and that the ruling of Sabbatino was therefore to be contended with. That would bar any consideration of whether or not there was a violation of international law.

MR. FRIEDMAN: If Sabbatino were followed and that ruling and that version of the Sabbatino case were to be followed, yes.

QUESTION: Well, assume Sabbatino were not followed in that respect. Would you claim it was a violation of international law in the repudiation of Cuba of this debt?

MR. FRIEDMAN: Yes, we would, your Honor, but I don't think we would even necessarily reach that question --

QUESTION: Because?

MR. FRIEDMAN: Because in our view Sabbatino

should not apply to --

QUESTION: Well, I understand that, but -- oh, should not apply?

MR. FRIEDMAN: Should not apply to a sovereign's repudiation of a debt incurred in the course of a commercial transaction so that one does not even reach the question of whether such a repudiation is a violation of international law.

QUESTION: You say, such a repudiation is not an act of state for purposes of Sabbatino?

MR. FRIEDMAN: One can analyze it in one of two ways, your Honor, Mr. Justice Rehnquist. One can either say it is not an act of state or one can say, although it may be an act of state, such an act of state will not be given recognition as a defense by the sovereign who is committing the act of state to its commercial obligation.

QUESTION: So you say that whether or not it violates international law, you have another reason for saying that the act of state would not bar recovery.

MR. FRIEDMAN: Yes, absolutely. Absolutely.

If I may just follow that for a minute. There may be a situation -- and this is getting very theoretical -- where if the repudiation appears to be something considerably different from the repudiation but has the

effect of repudiating commercial obligations.

If that act itself is in clear violation of international law, we might also say -- I think we would also take the position that that should not be recognized by United States courts. But we do not need to reach that in this case at all, on our theory of how Sabbatino should be read to deal with repudiation of commercial obligations.

I would like to address myself for a minute to Mr. Justice Stevens' question regarding the last known position, at least, of Cuba with respect to what the act of state is.

Cuba now appears to take the position in its reply to the Government's amicus brief that the act of state may have been neither the decree itself nor the later repudiation but somehow a seizure of the funds as they arrived in Cuba -- perhaps under the authority of the original intervention decree.

Our response to that is that that factual assertion is so contrary to the actual position taken by Cuba in the courts below during the course of this litigation that it should be rejected out of hand.

It must be recalled that in --

QUESTION: Let me just get that straight because I have some difficulty following these changes of position. In those briefs in opposition to the petition

for certiorari, they contended that the nationalization included the nationalization of the accounts receivable, that the decree itself-- that the act of state included nationalization of the accounts receivable.

MR. FRIEDMAN: But that -- no, I do not believe that to be correct, sir. I believe that their basic position there which was set forth on pages three and four of their brief --

QUESTION: That is what I am looking at.

MR. FRIEDMAN: Well, it says that "seven long years it has been asserting that its repudiation of the debt was its act of state.

QUESTION: You are reading from the petition for certiorari?

MR. FRIEDMAN: The brief in opposition to the petition for certiorari. That is correct. I thought that is what you referred to, your Honor.

QUESTION: That is. As I read it, on page three, it says, "They argued that even if they had received the payments, the payments were not recoverable in this suit because one, the nationalization of the owner's property included the nationalization of the owner's accounts receivable and hence the interventor was entitled to payments in question. Maybe that is the wrong document.

MR. FRIEDMAN: Your Honor, reading on it then

says , "And, two, in any event the Act of State Doctrine was a complete defense."

Those were alternative arguments.

The first argument was that the act of state vis-a-vis the owner was to --

QUESTION: Take their accounts receivable.

MR. FRIEDMAN: Take their accounts receivable.

QUESTION: Correct.

MR. FRIEDMAN: And therefore they were entitled -- you don't even reach the Act of State Doctrine. They were therefore entitled to these payments as they came in.

That was not the act of state against Dunhill. The act of state against Dunhill was the repudiation.

QUESTION: But it seems to me there isn't such a great difference between an argument that they nationalized the accounts receivable and an argument which they now make that in all events we nationalized the payments on account of the accounts receivable as they came in.

MR. FRIEDMAN: I think there is an enormous difference, your Honor, because the nationalization of the accounts receivable is the nationalization of a Cuban asset, one that does not even raise the issue of out-of-state, or one that affects the rights of American citizens.

When you talk about nationalizing payments, that is a very different question because those payments were

payments of Dunhill.

QUESTION: But I suppose their theory would be that when they arrived they became the payments of the prior owners.

MR. FRIEDMAN: Well, if the prior nationalization was effective to nationalize the accounts receivable. The courts below have both held that not to be so, for purposes of American law because the accounts receivable were held by both the district court and the Court of Appeals under the Republic of Iraq case to have a situs in the United States and therefore not subject to the act of state doctrine.

QUESTION: And do they clearly retain their situs in the United States when payment is made on the account? Or is that part of the problem?

MR. FRIEDMAN: That is a different issue, though, your Honor, because we start with the premise now from the rulings of the courts below that the accounts receivable were not nationalized so that if the payments -- if it is now true disposition that it was the payments that were nationalized as they went down by some affirmative act of the sovereign, my response is somewhat different.

My response there is that that so contradicts the factual position that Cuba took through 15 years of litigation in our courts, that they should not be heard to

urge it at this point.

It must be recalled that in 1961, shortly after the alleged seizures took place, Cuba came into our courts and sought to recover them. Later on, in the Palicio against Bloch litigation, when it became -- when they thought that the payments were insignificant, they gave up their right to them.

Then, in our litigation when it developed again --

QUESTION: They stipulated that they would not seek to recover them in that litigation. Is that a complete abandonment of the right to them?

MR. FRIEDMAN: No, your Honor, and that is not my point. I am not arguing whether that stipulation was effective or not. I am simply saying, when it later developed in our case that the amounts were substantial, they reasserted their right to the money.

QUESTION: Right.

MR. FRIEDMAN: When it turned out that not only had they been paid but the court found that they had received them over their vigorous opposition, they still maintained that they were entitled to the money and that they hadn't received them. They maintained that as late as the Court of Appeals.

And how can Cuba now come in and say, with that history, 15 years of denying that they ever received the

money and claiming that they wanted it, to now say, wait a minute. At the very beginning of all of this, we forgot to tell you. We really took this money in the first instance.

In our view, that claim of the factual basis for the act of state makes all of the proceedings that went on below a charade.

For the reasons I have stated, we conclude that the Sabbatino issue that is now framed by the Court need be reached only if the Court concludes -- as did the Court of Appeals that counsel's statements were sufficient to evidence the act of state and that act of state was the repudiation by Cuba of its obligations to Dunhill.

Now, once past that threshold issue, we believe that Sabbatino should be reconsidered, as I have indicated and the act of state doctrine should not be available as a defense to a sovereign in the effort to repudiate its commercial obligations.

We begin from the premise that the act of state doctrine is a doctrine of judicial extension.

QUESTION: In this respect, are you more or less in agreement with the United States?

MR. FRIEDMAN: I think we are,your Honor.

QUESTION: Yes.

MR. FRIEDMAN: Yes, I think we are. There may be differences in phraseology, but I think we come out

fairly close and for fairly much the same reasons.

Indeed, having argued at length in our brief that we did not believe that the executive branch could be embarrassed by such a ruling and that there would be no interference with our foreign relations or separation of powers problem created by that, we obviously are gratified that the executive branch, in its views, concurred and, indeed, I think that with the Court's permission, I would like to defer my argument on that subject in view of the time element to government counsel.

I would like, with the Court's permission, to stress a slightly different approach to the problem and that is, based on our own experiences as counsel to clients engaged in a considerable volume of international trade.

The government, obviously, has far greater expertise in dealing with the foreign relations aspect. Perhaps the private counsel can add something to the issue.

Obviously, trade is conducted today with a variety of energies overseas; sometimes, obviously, private entities and in some instances governmental. In some instances some mixture, which may be analagous to some of our forms, sometimes not.

As a commercial lawyer, I start with the premise that the law ought to reflect, in dealing with commercial problems, as nearly as possible the expectations of the

parties to commercial transactions.

Those expectations, I can assure the Court, do not vary, depending on whether the party on the other side of the transaction is an agency of a foreign government, is a private trader, or is some combination of the two.

Indeed, in many instances, with the numerous forms that now exist in the commercial world, it is difficult to know and, indeed, one may never know precisely what the form of the other entity is.

There are types of trading companies throughout the world that have no analog in our system. There may be some government ownership. There may be some private ownership. The interests to be served may never fully be known by the other party to the transaction but in entering into agreement with those entities as well as with the state trading companies or with private traders, the expectations of the parties do not vary.

The considerations do not vary. There is as much difference in dealing from one government to another -- with one government as to another government as there is between large company and small company, as between one country and another country. The differences vary by all of these considerations.

I am saying that there simply is no reason for making any distinction, in my view, between the obligations

and the rights of parties dealing with foreign sovereigns in the commercial context as opposed to when they deal with private traders.

I cannot argue with Cuba when Cuba says that government agencies will not lightly repudiate their commercial transactions. I take that to be a given, particularly countries which engage in state trading on a large scale, have a vital interest in protecting their reputation in the international community.

But the same is true of the private trader in the international community. Indeed, in international trade, perhaps more so, even, than in domestic trade, because of the smaller opportunity for face-to-face contact, trading reputations are of particular importance but I suggest that those do not vary.

The importance of that does not vary, depending on whether one is dealing with a state trading agency or with a significant private trading agency.

With the Court's permission, I should like to reserve my last five minutes for rebuttal.

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

Mr. Scalia.

ORAL ARGUMENT OF ANTONIN SCALIA, ESQ.

ON BEHALF OF UNITED STATES

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

The principle purpose of the government's appearing as amicus in the present case is to preserve the vitality of a legal document which is not itself technically at issue in the case but which the opinion of the court below, if accepted by this Court, would effectively destroy.

I refer, of course, to the restrictive document of sovereign immunity under which it is not all of the activities of a foreign sovereign as to which that sovereign will not be held accountable in our courts but rather only those activities which are of a governmental as opposed to a private nature.

At the time the famous Tate letter was issued by the State Department in 1952, that modern doctrine of sovereign immunity had already been adopted by virtually all of the important trading nations of the west. The significant exceptions were England and the United States.

Since that time, only last November, in the Philippine Admiral case, the Privy Council has made it clear that England is no longer an exception.

It has likewise been assumed that the United States is no longer an exception to the restrictive theory

of sovereign immunity.

Although the matter has never reached this Court, it has been considered a number of times by lower federal courts and by state courts. Their decisions are uniform in accepting it.

In view of those decisions, in view of the Tate letter and in view of the deference which this Court has normally accorded to the State Department's views in this area of sovereign immunity, it has, I think, properly been assumed that the applicable United States law does adopt the restrictive theory of sovereign immunity.

Respondents have not asserted sovereign immunity in the present case for the obvious reason that the assertion would not have been permitted. Under the restrictive theory, there are several other reasons why the assertion may not have laid as well.

But clearly there was no way in which the merchandising of tobacco or the receipt of an erroneous payment in connection with that merchandising activity could have been considered a governmental activity rather than a commercial activity on the part of the Respondent.

That being so, it would surely reduce the law to ineffectiveness and perhaps expose it to ridicule if the Respondent, having been denied the claim of sovereign immunity, were able to achieve precisely the same result by

simply appearing and repudiating the obligation as to the very acts on which the claim of sovereign immunity was denied.

Nothing occurred in this case except the appearance of an attorney who, instead of asserting any sovereign immunity, simply asserted that the Government of Cuba would not honor the obligation and what is claimed is that the effect of that statement should be the same as far as the rights of these parties are concerned as the assertion of sovereign immunity under the old absolute theory.

Respondent's reply brief seeks to calm our fears on this point by assuring us that repudiation of a commercial obligation will be unlikely.

Respondent says, and I am quoting his brief, his reply brief to the government now, "It is only in the unusual case and we suggest primarily in the political case in which this defense is called upon, that is the act of state doctrine."

He continues,"It is likely that the more naked the repudiation"-- that is, the more unconnected with governmental functions --"the more political the background."

The trouble with all of these hopeful assurances is that they are destroyed by the experience of this very case. There could not have been a more naked repudiation

than the mere statement of counsel in the case and as to the high political background of the repudiation, it's non-existence is shown by the fact that up until the point when it was discovered that we were talking about a lot of money, Cuba was willing to stipulate on the point and indeed did so. That is one of the issues below.

So there is no high political background here. It is simply a question of a lot of money and until it was clear that it involved a lot of money, Cuba didn't care about the point.

I suggest, then, that despite what Respondent asserts in the reply brief, if the theory of act of state that Respondent is arguing in this case is adopted, that we can expect the state trading nations to use it precisely where they previously used the doctrine of absolute sovereign immunity. That is, wherever they do not wish to be held liable.

How, then, can one avoid this absurd result of on the one hand saying the foreign state has no sovereign immunity but on the other saying,which means the sovereign must simply appear and say that it doesn't want to pay.

In the view of the United States, it is difficult not to avoid that result. If one simply regards the statement and the application of the act of state doctrine as it has historically been described and applied

by this Court.

Respondents would have us believe that the act of state doctrine applies to all acts of the sovereign power but whether one chooses the old cases or the new ones, whether one takes the formulation in Underhill or in Sabbatino, the description of the doctrine has always shown that this is not so.

There have been qualifications, not simply a statement that an act of state is not examinable. In Underhill, for example, the doctrine of act of state was described as applicable to acts done by sovereigns within their own states in the exercise of governmental authority.

Two qualifications: in their own states and in the exercise of governmental authority.

In Sabbatino it was described as being applicable to public acts of a recognized foreign sovereign power, committed within its own territory.

There are, in other words, two conditions attached. The first is the territorial condition that the act of state must have been performed within the government's own territory.

One may interpret that territorial condition literally, I suppose and if it is interpreted literally the only act of state that appears on the record in the present case occurred within the United States, consisting of the

statement of counsel for Cuba.

There is no evidence of any other action on the part of the government of Cuba.

The government -- the United States, as described in our brief --

QUESTION: Mr. Scalia, is that statement of the lawyer's contradicted any place? Up until now.

MR. SCALIA: No, sir, I don't believe there was any contrary evidence educed to show that the lawyer was not authorized and I think --

QUESTION: Is that true as of now?

MR. SCALIA: I believe that is true as of now, yes, sir. I don't think that the issue of whether the statement of the lawyer was, in fact, authorized is really present in this petition. Of course, if he were not authorized then the matter would be much simpler but for purposes of the present case I think it is assumed that the statement was authorized to be made by Cuba but nevertheless the only act of Cuba --

QUESTION: Was the statement made to authorize it made in Cuba?

MR. SCALIA: There is -- I don't know, sir. I don't believe there is anything in the record which shows that.

QUESTION: I mean, you say it is here but the

statement was that something was done in Cuba.

MR. SCALIA: Well, certainly something was done in Cuba but I would not consider a government --

QUESTION: Well, has the government got any contrary evidence of any kind? I would assume they would have shown it.

MR. SCALIA: Contrary evidence to what effect, sir?

QUESTION: The fact that he wasn't talking about the treaty.

MR. SCALIA: Yes, I think that is correct.

QUESTION: And the fact that the government hasn't produced it after all these years leads me to what conclusion?

MR. SCALIA: I think the conclusion that the statement of the lawyer was authorized and again, I am not contesting that. But the point is, the only action, the only public act committed by Cuba as far as we know -- surely, the authorization to the lawyer, even if it was given in Cuba, does not constitute a public act any more than the authorization by the President to one of his delegates in the United States for that delegate to do a particular act constitutes the act itself. The act is --

QUESTION: Now that I have interrupted, I'll ask you one more question. Do you want Sabbatino overruled

or not? I thought that was what it was all about.

MR. SCALIA: Yes, sir. Well, I think, as described in the government's brief we think that the issue of Sabbatino is not involved in this case because the act of state doctrine, properly understood, is not involved in this case. There was no act of state, therefore, there is no reason for Sabbatino to be presented to the Court in this case.

If, however, the Court should disagree with our interpretation of the act of state doctrine and if the Court should find that when Sabbatino spoke of an act of state it meant an act of state which could even consist of a simple repudiation of a contractual obligation, then I would assert that Sabbatino should be reexamined but there -- on that point, whether there is -- whether a commercial act can be an act of state but in the view of the government there is really no need to get to that issue because it would be reading Sabbatino to be unnecessarily wrong if one were to read its description of act of state to include this simple repudiation.

As I was saying, the Court's decisions and the application of the act of state doctrine have brought forward two conditions, the territorial condition, which can be interpreted literally or, as the government suggests in its brief, perhaps can better be interpreted, not literally so

as to mean the act of state must be committed within the territory of the state and/if it is committed within that territory, that is enough. And if it is not, that is absolutely conclusive that there is no act of state.

Rather, we think that the expression of territoriality is really a description of the most common situation in which the foreign governmental act constitutes an act as to which there is such a preeminent claim of the foreign government to exclusive legislative jurisdiction over the matter that the courts of the United States should not interpose our reexamination of that foreign state's action.

But it is the second qualification to the act of state doctrine which is, I think, squarely raised in the present case and which is of most importance to the government. That is, the qualification that the act of state is an act performed in the exercise of governmental authority and that it is a public act.

Respondents would have us believe that these qualifications mean nothing, that they are mere surplusage, and entirely redundant, that when one says act of state, one has said it all. So long as the state has acted, that is it.

But the cases haven't described it that way. They have felt constrained to say, an act of the state in the exercise of its governmental authority or to say, public

acts of state.

I would assert, to the contrary of Respondent's contention, that it is not the government's position on this matter that is new or novel. What is truly novel and inventive is the repudiation which occurred in this case.

If the act of state doctrine indeed were understood to be as Respondent represents it, it is indeed marvelous that such a repudiation before an American court has never, to our knowledge, previously occurred. That is the novelty of the case, not the government's assertion of what I believe has been understood to be the correct interpretation of the act of state doctrine.

We assert, in other words, that the decision of the Second Circuit in the Victory Transport case, which involved precisely this issue, whether the denomination by a state of a port in a commercial contract as a safe port amounted to an act of state and therefore could not be reexamined in litigation.

The Second Circuit held, of course, that the denomination of a safe port in a contract is a commercial act which merchants do all the time. The mere fact that it was done by a state or by a state-trading agency makes no difference and does not prevent the government from -- excuse me, does not prevent the courts from inquiring into the case.

QUESTION: Does that opinion address any

distinction between the Second Circuit opinion and this case?

MR. SCALIA: Excuse me, sir?

QUESTION: Does that opinion -- you said that was also a Second Circuit decision?

MR. SCALIA: Yes, sir.

QUESTION: And did that opinion address any distinctions?

MR. SCALIA: That was an earlier opinion, sir.

QUESTION: In the Second Circuit, the State Department took the position that they weren't going to intervene because the court matter was pending, Sabbatino.

The court asked for the State Department's opinion and the State Department said, "Since this is a court matter, we won't give you our opinion."

Remember that?

MR. SCALIA: Yes. But the position of the State Department in the present case is -- it has not sought to intervene in the present case here.

The position of the government on the matter is simply that the interpretation we are urging of the act of state doctrine is in the interest of the executive branch and should be adopted by the courts for the simple reason that the two purposes sought to be achieved by the act of state doctrine are neither of them served by application of the doctrine to commercial transactions

because if you are concerned about that, first of all, the avoidance of embarrassment to United States' foreign policy, the Tait letter makes it clear that there is no such embarrassment in the case of commercial transactions and it is made further clear by the Appendix to the government's brief in this case.

The second purpose, the purpose of enabling the Court to avoid cases which do not have manageable legal standards, that purpose also is not served by adopting an active state doctrine in the commercial field which is almost a prototype of a field where there are manageable legal standards.

QUESTION: Mr. Scalia, does any country that you know of concede or admit today that it applies the act of state doctrine to commercial transactions?

MR. SCALIA: It is said that the act of state doctrine is applied by a number of other countries but their application is a good deal less clear than our own has been and I am unaware of any statement by another country that it applies to commercial transactions. I am just guarding that statement with the fact that I tend to think the application by other countries has been a good deal less rational than our -- at least their description of it has been a good deal less rational than our own in any event.

QUESTION: You mean generally.

MR. SCALIA: Generally.

QUESTION: It may be de facto in its application perhaps without conceding that that in fact is what is being done.

MR. SCALIA: I am certain that there are cases in foreign countries in which, in a commercial transaction, where what Respondent would call an act of state has occurred. The foreign court has given no regard -- has not given it any special treatment.

I see that my time has expired. Thank you.

MR. CHIEF JUSTICE BURGER: Yes.

Mr. Rabinowitz.

ORAL ARGUMENT OF VICTOR RABINOWITZ, ESQ.

ON BEHALF OF RESPONDENTS

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

I am glad that I can find one point of agreement with the government in this case in the assertion that the Sabbatino case is not involved in this litigation.

I agree completely with that statement. I think that my analysis is different but I think I can agree that the Sabbatino case, the issue of the Sabbatino case need not be and in fact, as I understand the situation, cannot be reached on this issue.

Let me first address myself to what has been the

principle burden of the Petitioner's argument, namely, was there an act of state by the government of Cuba and what was it?

Yes, there was an act of state and the act of state was the intervention decree of September 16th, 1960 and everything that has happened since that time has been based on that intervention decree.

Of course, it was not a single act. No political act and perhaps no human act is a single act. It had consequences and the consequences are that it resulted in a refusal to -- ultimate consequences are that it resulted in a refusal to honor an obligation which the District Court some ten years later found that it had to Dunhill.

A great deal has been said in this case on the prior argument and in the opinion briefs of counsel and in the opinion of the District Court about statements of counsel that the act of state here consisted only of statements of counsel and since I was the counsel, I have felt a heavy burden here to justify my attempting to act as a sort of a sovereign and passing acts of state and so I looked at the record to see what it was that counsel had said at the District Court level and I found in closing argument words which I have reproduced in the footnote to the brief filed in response to the -- in reply to the brief of the United States as amicus curiae.

It appears at the bottom of page five of that brief. It is the last of the many briefs that have been filed here.

"Under the act of state doctrine --" I'm reading in the middle. I don't want to take too much time on this.

"Under the act of state doctrine, the Cuban Government in accepting, expropriating, seizing, nationalizing, whatever word you want, to take this money, has done so pursuant to a regulation, a law, a decree of the Government of Cuba and therefore the courts of this state will not look into the matter nor will the federal court."

"Now, I am not talking about the extraterritorial effect of an act of state. I am talking about a territorial effect, namely, the seizure or the acceptance or the appropriation of this money when it got down to Cuba.

"We are not concerned with whether they expropriated debts on September 15th. The question is what happened on October 1st and October 15th and November 8th and December 12th when the money came down. At that time the Cuban Government took this money and under the act of state doctrine it belongs to the Cuban Government."

And the decree to which counsel was referring in that case was, of course, the nationalization decree of September 15th, 1960 and not to any other act of state

which counsel made up or created or passed for the benefits of his argument.

QUESTION: Mr. Rabinowitz, would you agree that your characterization in that part of the transcript of the act of state is quite different from your characterization when you said"For seven long years it has been asserting that its repudiation of the debt was its act of state"?

They are two quite different concepts, are they not?

MR. RABINOWITZ: I don't think they are two different concepts, your Honor.

QUESTION: But the debt couldn't have arrived until the money arrived.

MR. RABINOWITZ: I do think that they are different formulations, at least in my mind. They were different formulations of the same problem. The repudiation of which we spoke there was not a naked repudiation of a commercial debt. It wasn't a repudiation which was created in a vacuum.

At all times it has been clear that the Cuban position has been based on the intervention decree of 1960 and there was never any suggestion that there was any subsequent action --

QUESTION: But Mr. Rabinowitz, the debt did not exist at the time of the decree. Isn't that correct?

MR. RABINOWITZ: Well, I don't know whether the debt existed at the time of the decree.

QUESTION: Well, what were you referring to as the debt when you referred to the repudiation of the debt in your brief?

MR. RABINOWITZ: The debt that we are talking about as a result of the rather strange way in which this case is developed -- this debt that we are talking about, I suppose perhaps was not created.

QUESTION: It is clear that that referred to your obligation to return the money that had been delivered to Cuba. That is what you are talking about there.

MR. RABINOWITZ: But the obligation, the debt was not -- the debt is Dunhill's -- was not created until --

QUESTION: That debt should not exist at the time of the decree.

MR. RABINOWITZ: Pardon me?

QUESTION: That debt should not exist at the time of the decree.

MR. RABINOWITZ: That debt I would say did not exist until the district court handed down its opinion in 1970.

QUESTION: Well, but that is just another way of saying it did not exist at the time of the decree.

MR. RABINOWITZ: I suppose that that is true.

QUESTION: Therefore, the decree could not be the repudiation of a subsequently-created debt.

MR. RABINOWITZ: Well, perhaps the word "repudiation" was an unwise one. The Cuban Government from the very beginning has taken the position that this money belonged to it. It belonged to it and it collected the money in, much as the receiver who is appointed by a court in the United States and given authority to take over the property and the assets of a company will acquire and will take in and will take title to accounts receivable or other money that happened to come into his possession. An interventor is very like a receiver, except that it is an executive rather than a judicial officer and the functions that he was to perform under the intervention decree were precisely to take into his possession all of the property of the intervened company.

Now, when that money came down into Cuba, it took it.

When subsequently --

QUESTION: Again, Mr. Rabinowitz, was it at that time property of the intervened company?

I think it has been held that it was not.

MR. RABINOWITZ: Cuba claimed that it was property of the intervened company, of course.

There was some question at that time -- I suppose

there might have been a question, was this property of the intervened company or was it property of the former owners?

No one dreamed at that point that it would turn out to be property of Dunhill. At least, I don't think anybody dreamed of it. Dunhill didn't even make a claim to this money until 1969 on the last day of the trial in district court Dunhill came in and amended its answer to claim the money. It hadn't even claimed it up to that time.

At this point it became apparent as a result of what developed in the trial that a possible outcome of this complex set of affairs would be that Cuba would be directed to pay the money back to Dunhill. Up to this point it had never even demanded it.

QUESTION: The short of it is, though, that if you were correct as to what -- as to the consequences of the intervention, your argument certainly should be and I suppose it was, that this so-called debt should never have been adjudicated.

MR. RABINOWITZ: Certainly.

QUESTION: That you didn't owe anything.

MR. RABINOWITZ: That was our position as --

QUESTION: Because it was your money in the first place.

MR. RABINOWITZ: Exactly.

QUESTION: But those judgments, the judgments of

the court still stand, I take it, that you owed the money and was it your claim -- I thought that was what you claimed in your response to your petition for certiorari, that even if you owed it, you repudiated it.

MR. RABINOWITZ: Oh, I don't think that that was what we claimed. What we claimed was that we didn't owe it because it was an act of state.

QUESTION: Well, did the Court of Appeals suggest that if you owed the money you nevertheless had repudiated the debt as an act of state?

MR. RABINOWITZ: In the Court of Appeals we made what I considered then and still consider to be an alternative argument and it is a very broad argument and I don't find it necessary to repeat it here and it was picked up by the Court of Appeals and was accepted by the Court of Appeals which may be the reason for all of the trouble here now.

The Court of Appeals took a very broad position and as I read the opinion and, incidentally, I wasn't alone in so doing, it followed the decision of the New York Court of Appeals in the French case and quoted from it, I think, extensively and it took the position at that time that any repudiation, any refusal of a sovereign to pay a debt was an act of state.

QUESTION: Well, now, you defended that judgment

in your response to your petition for certiorari.

MR. RABINOWITZ: I would defend that judgment here today if I had to.

QUESTION: Yes, but you did in your response to your petition for certiorari.

MR. RABINOWITZ: I suppose I did.

QUESTION: Yes.

MR. RABINOWITZ: Yes, and I would do it today and I think it was an accurate, a sound decision, but I don't believe I have to go that far. I don't think I have to go nearly that far because I think that we have here a long time prior to that position a clear and unequivocal act of state which has resulted in Cuba's contention that it was entitled to this money from the very beginning. It was claiming the money as a result of the intervention decree and it was therefore entitled to the money under the act of state document.

QUESTION: On that basis you claim that there shouldn't have been any set-off either, I take it.

MR. RABINOWITZ: On that basis I claim that there shouldn't have been any set-off and that issue, your Honor, is raised in the petition --

QUESTION: In your petition --

MR. RABINOWITZ: -- for certiorari which this Court has up to this point at least refused to either --

QUESTION: I understand, I understand.

MR. RABINOWITZ: Exactly.

QUESTION: It is one way or the other, isn't it?

QUESTION: On that basis, there never was any debt. Is that right?

MR. RABINOWITZ: On that basis there never was any debt, yes, sir, and I argued that in my petition for certiorari and so far the Court has not passed upon that and I wish it would. But --

QUESTION: Well, it may be we will.

MR. RABINOWITZ: I am getting a little tired of this case.

[Laughter.]

Now, I think that that is of importance here because I have apparently been charged with having, as I say, committed an act of state and it is not an offense to which I am prepared to plead guilty.

That really is the issue that I see in this case. Was there an act of state? The answer is yes.

What was the act of state? Here it was, Cuba is entitled to this money and is under no obligation to pay it back. I think we are entitled to a lot of other money as well but that can await disposition of the petition for certiorari.

Remember, I said here last time that I didn't

even think this petition for certiorari should have been granted . I thought the whole thing was a mistake. The Court obviously does not see it my way or I wouldn't be here now and so I am not stressing that point at this time.

The Court, when it originally granted the petition for certiorari here the first time put forth a second question. That second question said, assuming an act of state may petition again an affirmative judgment on its counterclaim in the circumstances of this case -- I am not reciting the full language of it.

Now, I am not going to discuss that here unless the Court wants me to. It was not raised at all by Respondent. It is fully discussed in the brief. I think that the question assumes something which is not a fact, namely, that this Court in the National City Bank case adopted our so-called "counter claim" ruled, as I recall the situation there were only four judges, only one judge who opted for a clear counter claim rule and that was Mr. Justice Douglas. Three judges opted for a counter claim rule when supported by a State Department letter and the other five judges voted against it altogether so I am not going to discuss it because as I said, I think that counsel hasn't urged the point and I don't want to build a non-existent argument here.

The order for reargument, however, and the

Government's brief here do raise two very important international law questions. I don't believe that either of them are raised on the second but they are interesting. I think it is a mistake for a court to decide questions just because they are interesting.

I think that the rule that a court should decide only the cases before it is a salutory rule.

However interested we may be in the broader questions, those broader questions will get here soon enough. They are back in the District Court in the Southern District of New York. We are going to be here with them, I think sometime pretty soon and all of the questions about the National City Bank cases, the Sabbatino case and so forth, will be here and sufficient unto the day.

But these issues were raised by the Court and the Solicitor General and I think that out of respect I should answer them.

MR. CHIEF JUSTICE BURGER: I think we will let you answer them at one o'clock.

[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: Mr. Rabinowitz, you may continue.

MR. RABINOWITZ: May it please the Court.

Mr. Justice White, did you have a question on your mind when we recessed? I think you did.

QUESTION: Apparently I was so hungry I have forgotten.

QUESTION: I had a question on my mind even though I didn't indicate so, Mr. Rabinowitz. If you are right in your argument thus far, then don't you have to confront the government's argument? Or would you say this is not a commercial transaction?

MR. RABINOWITZ: I was just about to get to that.

QUESTION: Okay.

MR. RABINOWITZ: I think there has been some confusion here about the Sabbatino decision and what it held.

The Sabbatino case did not create the act of state doctrine. All that the Sabbatino case did was to say that the act of state doctrine was not a defense when it was alleged that the act was a violation of international law.

It is not my understanding that the dissenting opinion in the Sabbatino case or any of the other

academicians who have written extensively on the subject of the Sabbatino case have ever urged that the act of state doctrine should be abolished or that the act of state doctrine was wrong, but merely that the Sabbatino decision was wrong in failing to allow an international law exception.

QUESTION: Let's assume that in a case the act of state doctrine is raised as a defense to an action and the other side says, well, it shouldn't be a defense because this is a violation of international law.

Now, Sabbatino, you suggest, says that that prior response isn't worth very much.

MR. RABINOWITZ: That's right.

QUESTION: Now, if it were worth something and the act of state doctrine would not bar an action if it were in violation of international law you have to go through the process of deciding whether it would be in violation of international law.

MR. RABINOWITZ: Yes, certainly.

QUESTION: And if it is decided that the act doesn't violate international law, the act of state doctrine is a defense.

MR. RABINOWITZ: Exactly. Exactly.

QUESTION: But if you are going to go through that process of deciding whether it is a violation of international law, where does Sabbatino stand?

MR. RABINOWITZ: Well, I don't think you do go through that process. I don't think it is necessary to go through it. If the Sabbatino decision holds then the answer --

QUESTION: You mean, you are supposed to stop before you ever decide whether it is an --

MR. RABINOWITZ: That is my understanding of Sabbatino.

Well, the government here has urged a position which I think has nothing at all to do with Sabbatino but it has a great deal to do with the act of state doctrine. It is urging here, for the first time, I believe, in our history, that the act of state doctrine should be subject to a limitation, namely that it does not apply to commercial as compared with political transactions proceeding on the assumption that --

QUESTION: Without regard to whether there is a violation of international law.

MR. RABINOWITZ: Having nothing to do with whether there is a violation of international law. That is my understanding of the Solicitor General's brief. As a matter of fact, I thought that is what the Solicitor General's representative said when he was here.

As a matter of fact, as I read the Solicitor General's brief, that is the issue that it is interested in.

It is not interested in the intervention and it says specifically that it is not taking any position on Cuba's contention that it had the right to receive and retain the funds on the basis of the intervention decree.

Rather, it assumes that we have here what it refers to as a "naked repudiation of a commercial obligation" or something like that and it says that the act of state doctrine should not apply to that kind of a dispute.

Now, this is a major innovation in our law. The act of state doctrine has never been so limited up to this point.

QUESTION: Well, perhaps the act of state doctrine itself was an innovation when it came along, wasn't it?

MR. RABINOWITZ: Well, of course, of course and I am not suggesting that innovations are as appropriate once in a while as our law develops.

QUESTION: Does that have any basis except for the national interest of a country when a foreign sovereign comes into our courts asking for the benefits of our legal system?

MR. RABINOWITZ: Well, I think now you are getting into the counter claim problem which is a somewhat different one and I think that Mr. Justice Brennan's answer to that in the National City Bank case was an adequate one

and it was namely that when he asks for our system of laws he is asking among other things for the act of state doctrine and that the reasons for the act of state doctrine have nothing to do with the convenience of the foreign sovereign. It has to do with our own problems, our own division of responsibilities between the executive and the judicial branch of the government and while it may be true that we don't want to insult foreign sovereigns, the important burden of the Sabbatino decision, and I think of the dissent in the City Bank case was that the important problem was the embarassment in between the executive branches and the judicial branches of the government rather than the embarrassment between the United States and some foreign country.

QUESTION: In other words, it was a matter of deference by the judiciary towards the foreign policy problems of the executive branch.

MR. RABINOWITZ: No, sir, I would say that it was an effort on the part of the judiciary to maintain its independence by not putting itself in a political position which would make it very difficult for it to do so and if your Honor would take a reference on that, I think that in my last brief in the response to the government's brief I cited in a rather extensive footnote the comments by former Attorney General Katzenbach in discussing the

Rosemarie case in which he pointed to a notorious example in which the judiciary of Great Britain was forced into a position where it had to make a finding in one way or the other on an issue because the government had so committed itself to that position that to have done otherwise would have resulted in a very serious conflict between the judiciary and the government and this is precisely what I think the act of state doctrine is designed, among other things, to accomplish.

But when we get to the question of political versus commercial obligations and the government's, I say, contention that we now should have a restrictive theory of act of state, the government's contention here is based on -- first the government says that this is, I think primarily, that this is by analogy, by analogy to the restrictive theory of sovereign immunity.

We have a restrictive theory of sovereign immunity, a theory which, incidentally, has never been passed upon by this Court and therefore we should have a restrictive theory of act of state as well and the restrictive theory is, as formulated by the Tate letter and State Department, was that sovereign immunity should not apply to jure gestionis or commercial transactions, business transactions I guess would be a better translation, but should apply only to jure imperii.

Now, that distinction which was established by the state letter -- by the Tate letter, has not had the kind of a history that should commend itself to its extension.

Every commentator as far -- almost or/every commentator discussing that question has found it very difficult to make this distinction. The usual example given is the contract by which a government buys shoes for its army.

The government in its brief in this case says well, that is obviously a commercial transaction.

The Court of Appeals in the Victory Transport case said it finds such a contention astonishing, it is obviously a governmental action.

The fact of the matter is that the dichotomy between commercial and political or commercial and business and government is, in the era in which we live, a false one because there are many acts which are both commercial and highly political.

We need only read the newspapers to see that large numbers of our commercial transactions, whether it be oil from the middle east or it be wheat to Russia or it be copper from the Allende-operated copper mines in Chile -- all of these which on their surface appear to be commercial transactions, in effect, have tremendous political implications and therefore, what I suggest is a slick and an easy distinction between the two, is one that should be

accepted with a great deal of caution.

Now, let's take this case. Counsel various times in briefs here have referred to this as a commercial transaction. As I did my best to point out this morning, this was not a commercial transaction at all. It was a transaction not involving a debt between tobacco merchants, as someone put it in one of the briefs, but a transaction which arose out of -- it was one of a long series of political decrees in the Republic of Cuba in the course of the transformation of the economic, social and political system of that government which took place beginning in 1960 and, I suppose, extending right on into the present.

This intervention decree was one of many intervention decrees which nationalized private property in Cuba. In no sense was it a commercial transaction.

Since that time, Cuba has engaged in extensive commercial transactions between tobacco merchants. As a matter of fact, one of the best of the customers of Cuba throughout the world is Dunhill, which purchases cigars in large numbers and sells them throughout Canada and England and perhaps in other parts of the world without any problem about commercial repudiation of debts or anything like that.

Those are ordinary commercial transactions. No questions are raised about sovereign immunity. That act of state, when there is a dispute about whether the cigars are

wormy or not wormy or whatever else happens to cigars, the disputes are settled in the normal course. Nobody pleads sovereign immunity. Nobody pleads acts of state. The business goes on in a perfectly normal way.

This is not that kind of a transaction at all. This transaction was a transaction that was originally a transaction which expropriated -- in which Cuba expropriated the property, not of Dunhill, expropriated the property of its own citizens.

It was a political act and in no way a commercial act and that has been the guts and the source and the origin of the problem that existed here.

The formulation that Mr. Justice Stevens referred to awhile ago in, I believe it was a brief in petition to -- opposition to the petition for certiorari, must be read, I submit, in, against the background of this.

It wasn't a mere repudiation of commercial debt. It was an old position that had been taken from the very beginning.

I think that the origin of the formulation which I agree now was an unfortunate one is due to the fact that at that time we were talking about a court of appeals decision. We were trying to dissuade this Court from issuing certiorari to review a court of appeals decision and we used the language that perhaps the court of appeals

used but certainly it was never regarded by anyone as a commercial as distinguished from a political transaction.

Now, the fact is that the restricted theory of sovereign immunity which the government places a great deal of reliance on has not been applied at all by the State Department in delicate and difficult and troublesome situations.

I referred to, in my brief, to three notorious cases in which this is true. In Rich against Naviera Vacuba, in Spacil against Crowe and I believe in Isbrandtsen against President of India, there were three transactions which were perfectly normal, every day commercial transactions involving sale of copper, the sale of wheat and an attachment by a longshoreman who wanted wages and in everyone of those cases, the State Department filed a suggestion of immunity in direct contradiction to the Tate letter and when it was asked to explain, it said, "We don't have to explain. That is executive discretion. We don't have to explain anything. We can apply the Tate letter or not apply the Tate letter, as we wish."

Now, I respectfully suggest that this is not a rule of law that should be automatically, without much more thought, be extended to the act of state doctrine.

There is a great deal of difference between sovereign immunity and act of state. Sovereign immunity

never goes to the merits of a situation at all. Sovereign immunity merely relates to a question of jurisdiction and it has, in historical terms, a base involving commity between nations, the fact that a country might be insulted if it was sued in the courts of the United States, that this is an affront to a foreign sovereign to sue it in the United States.

We have a doctrine of sovereign immunity in our own laws affecting the right of a citizen to sue the United States. It is modified by statute but still a doctrine which, in the absence of statute, exists.

There is nothing strange or revolutionary or restrictive about the ancient doctrine of sovereign immunity.

The act of state doctrine is quite a different matter. Now we are concerned, and for the first time, unlike in the sovereign immunity case, we are concerned with passing on the question of the validity, vel non of the act of a foreign sovereign. This is the question that never arises in connection with sovereign immunity. It will, I think, always arise in connection with act of state.

It is only in the act of state area that we get to the question of the merits of the controversy. In the sovereign immunity situation we stop at the very beginning and say, either we have jurisdiction or we don't have jurisdiction.

When we get to act of state, the problem is a

much more serious one and as I say, it seems to me that the extension of a sovereign immunity doctrine which has not been noticeable for its success should not be made so quickly to the act of state area and particularly is that true because so far as this case is concerned, as I have pointed out, I do not believe we have in any sense of the word a commercial transaction.

It is a political transaction. I suppose it has commercial aspects just like many political acts have commercial aspects but primarily and in its essence, the issue that was raised here is a political issue and not a commercial issue and the extension of the doctrine of sovereign immunity will raise all sorts of problems.

I don't know how the courts could have handled Rich against Naviera Vacuba had it not been for the wise judgment of the State Department in filing a suggestion of immunity in that case in clear violation of the Tate letter because it would have resulted in a most difficult and troublesome problem. The matter is discussed at great length in my brief and in texts that I have referred to in the brief and I think it will appear clear there that the Court would have been placed in an intolerable position had it not been for the State Department bailing it out with the suggestion of immunity.

QUESTION: Well, Mr. Rabinowitz, your argument

on the sovereign immunity point seems to be that you approve of this sort of discretion in the State Department to on occasion invoke sovereign immunity.

MR. RABINOWITZ: If I had my choice, I would prefer an absolute theory of sovereign immunity.

QUESTION: Nonetheless you are willing to tolerate it in the area of sovereign immunity.

MR. RABINOWITZ: I am willing to tolerate it because no one has got -- if you proceed with the theory of restrictive immunity, then there has to be an escape hatch. There must be an escape hatch. Otherwise, how do we deal with Naviera Vacuba?

QUESTION: Well, then, but nonetheless you are very opposed to the notion of the Bernstein letter and --

MR. RABINOWITZ: Yes, indeed.

QUESTION: -- in the area of the act of state. I think there is a fair analogy between them.

MR. RABINOWITZ: Well, I think not, with all due respect. I do not believe, and I was going to come to that in a little while in connection with the latest Bernstein letter -- I suppose we call it the Lee letter now -- and I was going to come to that and I will in a few minutes.

I think that the necessity of having an escape hatch, a door out to save the Court from, really, a very serious embarrassment in the Naviera Vacuba situation, is an

unfortunate thing in that it would have been saved had we had an absolute theory of sovereign immunity to begin with. We didn't and therefore we had to find this alternative method. I think it would be better if we didn't have to find it because we may not always have a State Department as alert to the needs of the situation as existed at that time.

In any event, I would have preferred not to have to rely on executive discretion, concerned as it is with many political considerations in a situation like that.

However, really, what I, in closing on this point, I just want to say what counsel has already refuted before I said it, I don't believe that the doctrine of act of state or the doctrine of sovereign immunity is part of the arsenal of the trading nation.

I think that most trading nations rely upon act of state or sovereign immunity in only very rare situations and only when I suggest the political issue is somewhere hidden deep. I don't want to make this an absolute rule, but I would say it is probably true as a generality.

Only when there is a political issue which is hidden deep in the background of the case, which makes it difficult to defend the case on other grounds and therefore the Court must -- the Defendant must rely on one of the

other defenses.

The letter of the legal advisor in this case is not clear whether it is a part of the Justice Department's brief or not. This legal advisor, unlike his predecessors in the Bernstein case and the City Bank case, makes very broad pronouncements of State Department policy which look far into the future.

The last sentence of his brief, for example, is "It is our view that if the Court should decide to overrule the holding in Sabbatino so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the future policy of the United States."

We congratulate the State Department on its ability to see so clearly into the future. That talent was unfortunately not shared by its predecessor State Departments.

The State Department, in the Sabbatino case, took a directly contrary position. There it strongly supported the Sabbatino case in argument before this Court. It opposed any changes in the doctrine in opposing the Hickenlooper Amendment.

Attorney General Katzenbach, as I said, has written extensively on the subject since and it is obvious that other State Departments have not been able to see the

future as clearly as the present State Department does.

QUESTION: In how many countries, Mr. Rabiniwitz, is the act of state doctrine or its substantial equivalent followed by the courts?

MR. RABINOWITZ: Your Honor, it is very difficult to tell. Foreign decisions are not readily assimilable to ours. If you'll look at the example of the Anglo Iranian cases you'll find that the Italian and Japanese cases came to the same conclusion, came to an act of state conclusion even though they didn't refer to act of state, they referred to other grounds.

QUESTION: Does Cuba apply it?

MR. RABINOWITZ: I don't know of any decision in Cuba at all.

I might say, the government makes a great play of the foreign decisions. I might say that foreign law differs from the law of the United States in many respects and I think that the law of the United States is vastly superior to the law of many foreign countries and the fact that other countries do not adopt the act of state doctrine does not seem to me to be decisive as to what we ought to do. We have our own Constitution. We have our own relationship between judiciary and executive. The independence of the judiciary is, to us, a very critical point in our existence and in our constitutional structure and the

act of state doctrine may not be so important to other countries which have different constitutions and different traditions.

Now, I, in just closing with respect to the Lee letter and really in respose to what Mr. Justice Rehnquist said a little while ago, I don't believe that this Court can be expected to follow the State Department around when one State Department says, "We consider the act of state doctrine to be essential to the independence of the judiciary," this Court is supposed to say, "Yes, we think so, too."

And when another State Department comes along and says, "We don't think the act of state doctrine or the Sabbatino doctrine has any significance whatsoever. We don't anticipate any embarrassment in the future," I don't believe that this Court is supposed to say, "That's right also."

QUESTION: But you are perfectly willing to have us follow the State Department around in the area of sovereign immunity.

MR. RABINOWITZ: I am not willing to do it, your Honor. I don't have a choice.

QUESTION: Well, you may not have a choice here, either.

[Laughter.]

MR. RABINOWITZ: That may be. I don't mean that I don't personally have a choice. I think that the State Department, the Ex Parte Peru doctrine and its -- well, let me put it this way. The doctrine which seems to be followed by many of the district courts, namely, that the State Department's view not only as to the granting of immunity but as to the denial of immunity is conclusive.

I would suggest that that doctrine would be unnecessary if we had a theory of sovereign immunity.

Now, since we -- I mean, an absolute theory of sovereign immunity.

Now, since we have a restricted theory of sovereign immunity which for reasons I have just set forth I don't think is workable, we have to find a way out because it is not workable and so we have these letters such as the suggestions which were filed in the Spacil case, Naviera Vacuba and Isbrandtsen case, all of which appeared on their face to be commercial transactions but the State Department apparently held that they were political.

I'd like not to get to Sabbatino. As I said a few moments ago, the Sabbatino case held that the act of state doctrine will apply even when the question at issue is alleged to be -- or the act in question is alleged to be a violation of international law and therefore we met at the threshold with a problem so far as this case is concerned.

What is the question of international law in this case?

Counsel for the Petitioner has been able to suggest no question of international law at all.

QUESTION: Unless you reconsider, there is nothing to talk about on that.

MR. RABINOWITZ: Well, what is there to reconsider? If there --

QUESTION: Well, there is nothing to talk about. I mean, if you are going to consider whether there is a question of international law, you are not obeying Sabbatino. You are not supposed to go into the merits of the international law question.

MR. RABINOWITZ: I'm sorry. We misunderstand each other or I misunderstand you, perhaps.

QUESTION: It could be either way.

MR. RABINOWITZ: Could be.

Under the Sabbatino decision, as I understand it, when an act of state is alleged, it is no response -- or an act of state is pleaded as a defense it is no response to say -- not a valid response to say, the act of state doctrine is not applicable in this case because there is a violation of international law.

That is what the Court held, as I understand it, in Sabbatino and it is on that issue that your Honor

dissented.

Therefore, the problem here as to whether the Sabbatino decision applies -- and I might say that nobody even mentioned Sabbatino in the lower courts in this case. It wasn't until the reargument in this Court that anybody even dreamed for a moment that Sabbatino had anything to do with this case and the reason that nobody dreamed that Sabbatino had anything to do with the case was because the first step was never taken, namely, Cuba pleaded act of state and no one said, your act of state is a violation of international law and no one said it because there is no grounds for saying it.

QUESTION: But might they not have refrained from saying it because they considered Sabbatino as being binding?

MR. RABINOWITZ: I would doubt it, your Honor.

It is possible. But even now, when the Court has directed that the matter be reargued no one has been able to point to a respect in which the act of state that we are talking about is a violation of international law. Even now no one claims that it is a violation of international law.

It is true that the Petitioner, because the Court asked him to consider the question and therefore he had to do it, he says, oh, there is a violation of

international law, discrimination.

What discrimination? At no point are we told what the act of discrimination is so where is the violation of international law?

What has happened here? Cuba seized the property of its own nationals. No violation of international law there.

Money came down into Cuba. There was a dispute at the time about whether this money belonged to the former owners or to the Cuban Government but there was never a dispute about whether it belonged to Dunhill. Dunhill owed the money and it was paid.

No question of international raised yet.

Finally we get to the district court because that is the next thing that happened and the district court hands down a decision which says -- and Dunhill makes demand, that Dunhill paid this money by mistake.

Dunhill, incidentally, argued all the way through here that they had not paid the money by mistake, that they were paying their debt. That was what they had to do and they did it. And that is also one of these petitions for certiorari that is pending before your Honors.

But Dunhill said, now argued that, well, if we have to pay the former owners, then we paid this money by mistake and we want it back and so the court issued a decree.

Well, a decree of the United States Court does not transform an act of Cuba done in Cuba from an act which is consistent with international law to an act which is inconsistent with international law. At no point here -- I'm sorry, my time is up -- at no point here have we had any definitions of the illegal act which would give rise to any question at all as to whether the Sabbatino decision applies.

QUESTION: Suppose, Mr. Rabinowitz, that the -- if you just looked at what the court of appeals held, that the act of state, if there was one, was in the repudiation of some later debt. Is there any -- you say the same thing about that?

MR. RABINOWITZ: Oh, I have never heard it suggested that a failure to pay a debt is a violation of international law.

QUESTION: I know, but an act of state with respect to a so-called debt that has some situs in the United States.

MR. RABINOWITZ: Failure to pay a debt has never been suggested as a violation of international law.

QUESTION: Owned by an alien.

MR. RABINOWITZ: It doesn't matter. It may be a breech of contract, but it doesn't make it a violation of international law. It is my understanding -- again, I can

refer to my brief -- that it has always been the position of the United States -- commentators. There aren't too many decisions on it -- that a mere breech of contract, refusal to pay money is not a violation of international law, in the absence of discrimination or some other conduct which would indicate improper dealing with an alien. Breech of contract is not such.

QUESTION: But the act of state, the court of appeals found, was your refusal to pay back money which it found you had wrongfully received and wrongfully taken.

MR. RABINOWITZ: No, I don't think it found that we had --

QUESTION: That you repudiated -- they say it was Dunhill's money and you took it. Now, isn't that what the court of appeals said?

MR. RABINOWITZ: The district court said, a long time after, that the money had been paid by mistake, Dunhill's mistake, not Cuba's mistake.

QUESTION: I understand that.

MR. RABINOWITZ: Dunhill's mistake. The money had been paid by Dunhill by mistake and therefore Cuba was entitled to -- was required to pay it back. Well, certainly, the refusal of Cuba to obey a decree of the courts of the United States is not a violation of international law any more than it would be a violation of international law if

the converse were true, if Cuba made a decree and the United States courts refused to accept it, that would hardly be a violation of international law.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr. Rabinowitz.

Mr. Friedman, do you have anything further?

MR. FRIEDMAN: If I may, your Honor.

MR. CHIEF JUSTICE BURGER: Yes. You have about seven minutes left.

REBUTTAL ARGUMENT OF VICTOR S. FRIEDMAN, ESQ.

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

I'd like to start by picking up Mr. Justice White's comments.

The reason that nobody in the courts below ever took up Cuba on the question of whether or not there had been some violation of international law was very simply that in our view, and the view of the other parties to the case, no act of state was ever shown in the courts below.

The only thing that we had on the record that was ever asserted as an act of state against the importers were statements by counsel talking of the repudiation that Cuba would not pay back to the importers any judgments entered against it.

There was no act of state at that time asserted against the importers. There was nothing to which anyone

could point and say, that is a violation of international law.

The first time an act of state was defined, really, in this case was by the court of appeals and there for the first time the suggestion was that it was the repudiation of the claim, the unjust enrichment claim of Dunhill that Cuba had evidenced through statements of counsel at the trial.

That, we suggest, if the issue need be reached, can constitute a violation of international law. It is nothing more than a discriminatory taking of property belonging to Dunhill which erroneously found its way to Cuba.

Now, if that property were the property of the owners rather than of Dunhill, as counsel for Cuba maintains, then the decree should have said, Cuba owes that money back to the owners, not the pass-through that puts Dunhill in the untenable position that the court of appeals rulings have done.

Let me return now to the -- again, to the issue that I still consider critical and that is, just precisely what was the act of state in this case?

I now have gathered that Cuba's position is that the act of state was, in fact, a decree, that everything that flowed, whether it was a taking of the money as it

reached Cuba or whether it was the subsequent repudiation of the obligation -- all of that arose somehow similarly out of the original decree which seized the accounts.

But Dunhill is put in an absolutely untenable position by that reasoning. The courts below have held that the decree was ineffective to seize the account and that therefore when Dunhill paid the money to Cuba, it was paid to the wrong party. That is precisely what has put Dunhill in the position it now finds itself.

I suggest that for the Court to find that somehow the act of state was the decree itself and charge Dunhill with that as a valid act of state unrelated to a commercial transaction is to fly in the face of the key holdings of the court below and not deal with all of the issues that are presented in the case.

If the Court is to get to the issue of whether or not that decree was the act of state, I see no way it can do it without granting or dealing, at least, with the other petitions for certiorari and that includes both Cuba's cross-petition as well as the conditional cross-petition of the importers.

I'd like to talk just for a minute about the comments that counsel for Cuba has made on the difference between the act of state and sovereign immunity and why it is inappropriate to apply the principles of one doctrine

into the other.

We had suggested in our brief and we submit now that when you are dealing with a sovereign who is acting in a commercial context, the question of whether or not it can interpose sovereign immunity defense or act of state defense because it wants to repudiate that obligation has no difference.

I think this case illustrates it well. Other cases, certainly the same is true.

Now, the question here is not whether an act of state is valid. The only question here is whether the act of state asserted can be used as a defense to justify a repudiation of otherwise commercial transactions.

I'd like also to comment on the inability that counsel for Cuba finds to make the distinction between the commercial and the political transaction which we have suggested in somewhat different terms in our argument.

The fact that there may be difficult cases such as shoes for the military does not mean that the basic distinction between commercial and political transactions cannot be made and obviously in this case nobody would suggest that the purchase and sale of cigars was anything other than a normal commercial transaction.

QUESTION: Mr. Friedman, would you contend that the intervention of the cigar companies was a commercial or

a political transaction?

MR. FRIEDMAN: Oh, I would concede that that was a political transaction.

QUESTION: That that was political.

MR. FRIEDMAN: Yes.

By the same token, there are obviously easy cases on the other side where nobody would argue that the act of the foreign state was clearly a political act unrelated to its commercial activity but with the volume of normal commercial activities being carried on by state trading agencies throughout the world today, it is folly to suggest that in most cases one is not going to be able to say, this is a commercial transaction and should be treated, and the sovereign should be treated as though it is a party to a commercial transaction, not a sovereign exercising some kind of sovereign rights.

QUESTION: Mr. Friedman, if you win the case and you win a judgment over and above the amount of the set-off, how are you supposed to collect it?

MR. FRIEDMAN: Well, let me -- I want to comment on that. Counsel for Cuba has suggested that we have perhaps abandoned the second argument on which we relied in the first instance. That is not so. I simply did not want to repeat our position in that regard and that, you will recall, deals with the question of whether, given the nature of these

cases against the importers, that they all can be treated as one.

QUESTION: In what?

MR. FRIEDMAN: For purposes of pool.

QUESTION: Yes.

MR. FRIEDMAN: And that would be one way. There may be other ways in terms of --

QUESTION: So you, in effect, would put it within the prior -- within the First National City Bank?

MR. FRIEDMAN: That is right. In that sense it falls within the First National City Bank if you treat this whole case as a pool because on balance there is more money going from the importers as a group to --

QUESTION: But the situation hasn't changed since you were here last.

MR. FRIEDMAN: No. No, it has not, your Honor.

QUESTION: Mr. Friedman, let me ask one more question. If you view the act of state as the retention of the payments pursuant to the decree, as Cuba argues, even though you say we must grant your cert petition if we do that, but in that event, would the act be commercial or political?

MR. FRIEDMAN: In that event, your Honor, I would still hold that the act is commercial because to the extent that Cuba were to say that it was retaining payments

made in the normal commercial sense, I don't see any difference between a retention of payments or even if it were a decree saying, we seize the payments, if that arises out of a course of commercial dealings, I see no difference.

Let me give a different example, if I may. Let's suppose the transaction were an equal transaction where goods were going down to Cuba.

It seems to me it makes no difference at that point whether the foreign government says,"We refuse to pay for the goods," or "We seize the goods." It is the same repudiation of a commercial transaction.

I see my time is up. Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:41 o'clock p.m., the case was submitted.]