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The Act of State Doctrine: Reconciling Justice and Diplomacy on a Case-by-Case Basis

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I. INTRODUCTION

The act of state doctrine[1] is a principle of decision[2] imposing

1. Section 443 of the Restatement (Third) of Foreign Relations Law of the United States expresses the act of state doctrine as follows:

> (1) In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.
>
> (2) The doctrine set forth in Subsection (1) is subject to modification by an act of Congress. *See* Section 444.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987).

2. In many cases, the act of state doctrine may be seen as a special rule of conflict of laws. The normal choice of law rule in most act of state cases would point to application of the law of the state where the act took place. That rule may be disregarded in certain instances in which the law thus chosen would violate the strong public policy of the forum, for example, a policy against expropriation without compensation. *Id.* § 443 reporter's note 1; *see also* Henkin, *Act of State Today: Recollections In Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 178-82 (1967).

upon courts in the United States the responsibility of self-restraint when actions of other sovereign states are called into question by litigants. The doctrine, binding upon both federal and state courts,[3] has become a matter of increasing concern because it affects international commercial litigation. Although compelled by neither international law nor the United States Constitution, the doctrine has constitutional underpinnings that derive from its impact on the separation of powers among branches of government.[4] The doctrine recognizes that in certain situations the judiciary might not be the appropriate forum in which to resolve a dispute. In effect, the doctrine questions the competency of the judicial branch to make and implement decisions of certain kinds in the area of international relations. It expresses a strong sense that the courts, were they to pass on the validity of foreign acts of state, might hinder, rather than further, this country's pursuit of its foreign policy goals.[5]

The act of state doctrine has been the basis of several lower court decisions in cases of alleged conspiracies by foreign governments, acting alone or in combination with private companies, in violation of United States laws.[6] Generally, commentators suggest that the courts have reached inconsistent results in these cases.[7] Nevertheless, the United States Supreme Court consistently has denied petitions for writs of certiorari.[8]

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3. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964).

4. *Id.* at 423.

5. *Id.*

6. *See* International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354 (9th Cir. 1981) (In an action by union members against OPEC member nations alleging price setting in violation of United States antitrust laws, the act of state doctrine was held to bar adjudication.), *cert. denied,* 454 U.S. 1163 (1982); Occidental of Umm Al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978) (The act of state doctrine barred adjudication of a conversion action by one holder of an oil concession against another holder who received a concession for the same area from a different sovereign.), *cert. denied,* 442 U.S. 928 (1979); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.) (Adjudication of a United States oil company's suit against other companies was barred by the act of state doctrine because the court refused to consider Mu'ammar Al-Qadhafi's motivation for nationalizing the plaintiff company's oil fields.), *cert. denied,* 434 U.S. 984 (1977); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 461 F.2d 1261 (9th Cir.) (The act of state doctrine barred adjudication of a dispute in which a United States oil company claimed that the Ruler of Sharjah fraudulently issued a territorial decree which enabled another United States oil company to exploit oil and gas in the area covered by the decree.), *cert. denied,* 409 U.S. 950 (1972).

7. *See* Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law,* 79 A.J.I.L. 68 (1985); *and reply,* Henkin & Lowenfeld, *Act of State and the Restatement,* 79 A.J.I.L. 717 (1985); *see also* Bazyler, *Abolishing the Act of State Doctrine,* 134 U. PA. L. REV. 325, 344-59 (1986). *But see* Swan, *Act of State at Bay: A Plea on Behalf of the Elusive Doctrine,* 5 DUKE L.J. 807 (1976).

8. *See* cases cited *supra* note 6.

This Comment identifies the relevant criteria used to determine the correct application of the act of state doctrine. What emerges from the cases is a judicial elaboration of a group of factors, application of which is becoming a coherent body of law. Two recent cases are especially helpful points of departure in order to understand the doctrine. The recent Third Circuit decision in *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*[9] appears on first impression to be in irreconcilable conflict with *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*[10] The factual settings of the two cases are set out in detail in Section IV of this Comment, but a brief introduction is appropriate at this point. In *Clayco*, an oil exploration company, Clayco, alleged that a competitor, Occidental, had received a concession to drill for oil in Umm Al Qaywayn because Occidental had bribed that country's oil minister.[11] Clayco further alleged that Clayco would have been awarded the concession but for the illegal payment.[12] The United States Court of Appeals for the Ninth Circuit held that adjudication was barred by the act of state doctrine.[13] In *Environmental Tectonics* a defense contractor, Environmental, alleged that as a result of bribes distributed to Nigerian government officials, its competitor, Kirkpatrick, was awarded a contract that Environmental otherwise would have received.[14] The United States Court of Appeals for the Third Circuit held that adjudication was not barred by the act of state doctrine.[15]

Although the outcomes of these two facially similar cases appear to be diametrically opposed, this Comment illustrates that both were correctly decided. More importantly, *Clayco Petroleum* and *Environmental Tectonics* serve as the benchmarks for analyzing the emerging body of considerations employed to determine whether the doctrine applies in a given case. Part II of this Comment provides a brief discussion of the origins of the act of state doctrine. In Part III, several illustrative cases are analyzed to outline the parameters of the doctrine. Part IV identifies relevant considerations that the courts should weigh in determining the applicability of the doctrine. Finally, Part V of this Comment discusses the advantages to be derived from careful analysis of the suggested considerations.

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9. 847 F.2d 1052 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3001 (U.S. June 17, 1988) (No. 87-2066).

10. 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 444 U.S. 1040 (1984).

11. *Id.* at 405.

12. *Id.*

13. *Id.* at 409.

14. *Environmental Tectonics*, 847 F.2d at 1056.

15. *Id.* at 1062.

II. ORIGINS OF THE DOCTRINE

Underhill v. Hernandez[16] was an early act of state doctrine case in which Underhill, an American citizen, claimed that he had been assaulted, coerced, and detained unlawfully in Venezuela by Hernandez.[17] The United States Supreme Court refused to inquire into the acts of Hernandez, a Venezuelan revolutionary military commander whose government had been recognized by the United States by the time of the Court's consideration.[18] In what has been cited as the classic American statement of the doctrine,[19] Chief Justice Fuller said for a unanimous Court:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[20]

The rule of *Underhill* has been followed and expanded in subsequent act of state doctrine cases.[21]

Most early act of state doctrine cases involved the expropriation of property by a foreign state.[22] In 1964, for example, the United

16. 168 U.S. 250 (1897).

17. *Id.* at 251.

18. *Id.* at 254.

19. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1962).

20. *Underhill*, 168 U.S. at 252.

21. *See* United States v. Pink, 315 U.S. 203 (1942) (The State of New York does not have the power to reject the policy underlying recognition of Soviet Russia by the United States.); United States v. Belmont, 301 U.S. 324, 331 (1937) ("In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."); Shapleigh v. Mier, 299 U.S. 468, 472 (1936) (If an expropriation decree is lawful and effective under the Constitution and laws of Mexico, it will be recognized as lawful under the laws of the United States.); Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918) ("[W]hen it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision."); Oejtan v. Central Leather Co., 246 U.S. 297, 302-03 (1918) ("[W]hen a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence."); American Banana Co. v. United Fruit Co., 213 U.S. 347, 353 (1908) ("Redress for injuries caused to a citizen of a foreign nation by another nation through the exercise of *de facto* powers, even though maintained by means of force alone, cannot be had in the ordinary municipal courts of another nation, nor even in the courts of the offending nation without its consent.").

22. As of this writing, the Supreme Court has not passed on the applicability of the doctrine to an act of a foreign government with respect to property outside the state's territory, an act of a government not recognized by the United States, or an act alleged to violate a provision of a treaty, other unambiguous agreement, or principle of customary law not in

States Supreme Court decided the leading act of state doctrine case, *Banco Nacional de Cuba v. Sabbatino*,[23] which involved the Cuban government's expropriation of American sugar interests in Cuba.[24] Banco Nacional de Cuba brought an action in the United States District Court for the Southern District of New York to recover from an American company proceeds of a sale made by the American company's Cuban sugar operation shortly before the operation was nationalized.[25] Citing the act of state doctrine, Banco Nacional argued that the expropriation, an act of a foreign sovereign, could not be considered as a defense against the claim that the proceeds had been withheld unlawfully by the American former owners.[26] The former owners argued, however, that the sweeping interdiction of the doctrine should not apply in a case such as this, because the expropriation was a clear violation of international law.[27] The district court denied recovery, holding that the doctrine was inapplicable because the confiscation violated international law in that it was retaliatory, confiscatory, and discriminatory.[28] The United States Court of Appeals for the Second Circuit affirmed the district court's judgment on different grounds.[29]

The United States Supreme Court reversed, however, applying the act of state doctrine.[30] Writing for the majority, Justice Harlan stated:

> [R]ather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates

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dispute. The Supreme Court has not applied the doctrine recently to a case not involving the taking of property, as it did in *Underhill*. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 444 comment b (1987).

23. 376 U.S. 398 (1964).

24. *Id.* at 401.

25. Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964).

26. *Id.* at 420.

27. *Id.*

28. *Id.* at 375.

29. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964). The Court of Appeals affirmed the district court's decision on the basis of the *Bernstein* exception, under which courts defer to executive pronouncements concerning the applicability of the act of state doctrine. For a discussion of the impact of the *Bernstein* exception in act of state cases, see *infra* note 89 and accompanying text.

30. *Sabbatino*, 376 U.S. at 439.

customary international law.[31]

The Supreme Court recognized that there was authority in international judicial[32] and arbitral[33] decisions, as well as in the expressions of national governments[34] and commentators,[35] for the view that a taking of the kind in *Sabbatino* violates international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation.[36] Nonetheless, the Court observed that communist countries commonly recognize no obligation to provide compensation.[37] The Court noted that, although capital exporting nations universally condemn expropriations, capital importing nations do not.[38] Thus, implicit in the *Sabba-*

31. *Id.* at 428.

32. *Id.* at 398; *see* Oscar Chinn Case, 1934 P.C.I.J. (ser. A/B), No. 63, at 87 ("The form of discrimination which is forbidden is . . . discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups."); Chorzow Factory Case, 1928 P.C.I.J. (ser. A.) No. 17, at 46, 47 (An illegal seizure requires reparation that "as far as possible, wipes out all the consequences of the illegal act and reestablishes the situation which would, in all probability, have existed if that act had not been committed.")

33. *Sabbatino*, 376 U.S. at 422; *see, e.g.*, Marguerite de Joly de Sabla, American and Panamanian General Claims Arbitration 379, 447, 6 R. Int'l Arb. Awards 358, 366 (1955) ("It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility."); Norwegian Shipowners' Case (Norway v. United States), 1 R. Int'l Arb. Awards 307, 334, 339 (Perm. Ct. Arb. 1922) (1948) (A state has a duty to carry out its obligations arising from treaties and other sources of international law, and it may not invoke provisions of its own laws as an excuse for failure to adhere to its duty.); Norwegian Claims Case (Norway v. United States), Hague Ct. Rep. 2d (Scott) 39, 74 (Perm. Ct. Arb. 1922) ("No state can exercise toward the citizens of another civilized State the 'power of eminent domain' without respecting the property of such foreign citizens or without paying just compensation as determined by an impartial tribunal, if necessary.").

34. *Sabbatino*, 376 U.S. at 422; *see, e.g.*, Note to the Cuban Government, July 16, 1960, 43 Dept. State Bull. 171 (1960) ("[T]he Government of the United States considers Cuba's 'Nationalization Law' to be manifestly in violation of international law, because it is discriminatory, arbitrary and confiscatory."); Note from Secretary of State Hull to Mexican Ambassador, July 21, 1938, V Foreign Relations of the United States 674 (1938) ("We cannot admit that foreign government may take the property of American nationals in disregard of the rule of compensation under international law."); Dispatch from Lord Palmerston to British Envoy at Athens, Aug. 7, 1846, 39 British and Foreign State Papers 1849-50, at 431-32 ("[I]n all countries it is understood that when land belonging to a private individual is required for purposes of great public utility or of national defense, private right must so far yield to public interest, that the individual is compelled by law to give up his land to the public, provided always that he shall receive for it from the public its full and fair value.").

35. *Sabbatino*, 376 U.S. at 422; *see, e.g.*, McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 NETHERLANDS INT'L L. REV. 218, 243-53 (1959) (Nationalization of foreign-owned private property must be motivated by a bona fide social purpose, must be free of discrimination, and must be accompanied by prompt and adequate compensation.); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 444 (1987).

36. *Sabbatino*, 376 U.S. at 429.

37. *Id.* at 429.

38. *Id.* at 430. The Court pointed out that the disagreement between the relevant

tino decision was the notion that a United States court, as an instrument of a capital exporting country, might not be viewed as an impartial forum for purposes of determining whether the expropriation violated international law.[39] Therefore, the Court concluded, the act of state doctrine was indeed applicable.[40]

III. SETTING THE OUTSIDE BOUNDARIES OF THE DOCTRINE

In *Sabbatino*, the Supreme Court identified a number of considerations to be balanced "on a case-by-case basis:"[41] (1) the degree of codification or consensus concerning a particular area of international law, (2) the importance of the issue to United States foreign relations, and (3) whether the government that perpetrated the act is still in existence.[42] In addition, the federal courts have recognized other relevant considerations: whether the sovereign action in question is

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standards reflected the divergence between the national interests of capital exporting nations, in a free enterprise system, and the social ideologies of countries that favor state control of the means of production. *Id.*

39. *Id.*

40. In response to the *Sabbatino* decision, Congress enacted the Second Hickenlooper Amendment, Pub. L. No. 89-171, 79 Stat. 653 (1964) (codified at 22 U.S.C. § 2370(e)(2) (1982)). The statute provides:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law including the principles of compensation and other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Id. Upon remand, the district court recognized that the Congressional overruling of *Sabbatino* applied to the *Sabbatino* case itself. The Restatement (Third) of Foreign Relation Law reflects the statutory overruling of *Sabbatino*:

> In the absence of a Presidential determination to the contrary, the act of state doctrine will not be applied in a case involving a claim of title or other right to property, when the claim is based on the assertion that a foreign state confiscated the property in violation of international law.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 444 (1987).

41. *Sabbatino*, 376 U.S. at 428.

42. *Id.*

inherently commercial in character,[43] the purpose of the sovereign's act,[44] the strength of the United States' regulatory interest,[45] and whether the legality of the sovereign action is called into question.[46]

Cumulation of these factors is not important. Instead they are the particulars the courts examine in reaching for a broader perception of the political sensitivities of each case. The factors guide resolution of two related issues: first, whether the judiciary is the appropriate forum in which to settle the dispute, and second, whether adjudication will interfere with the Executive Branch in the performance of its duties. In other words, stating the factors is not very helpful, but after working through the facts of act of state cases with the factors in mind, their cohesiveness becomes apparent. Before analyzing the factors in the contexts of *Clayco* and *Environmental Tectonics*, it will be instructive to consider two earlier cases that illustrate parameters for application of the act of state doctrine.

A. *The* Williams *Case*

Williams v. Curtiss-Wright Corp.[47] is an example of cases in which application of the act of state doctrine is not appropriate. Williams alleged that Curtiss-Wright had employed monopolistic practices to dominate the world-wide market for the sale of surplus J-65 aircraft engines and parts.[48] Curtiss-Wright responded that the act of state doctrine prohibited the court from scrutinizing a foreign government's motive for refusing to purchase engines and parts from Williams.[49] The United States Court of Appeals for the Third Circuit held that the act of state doctrine did not apply because there was no

43. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (Although a plurality of the court embraced a commercial exception to the doctrine, the majority rejected such a sweeping exception.); *infra* notes 195-97 and accompanying text.

44. *See* International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354 (9th Cir. 1981) (The act of state doctrine looks to the underlying purpose of the sovereign's act.), *cert. denied.*, 454 U.S. 1163 (1982); *infra* notes 105-12 and accompanying text.

45. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (The strength of the United States regulatory interest must not be outweighed by the necessity of judicial abstention.); *infra* notes 106-12 and accompanying text.

46. *See* Environmental Tectonics v. W.S. Kirkpatrick Inc., 847 F.2d 1052, 1061 (3d Cir. 1988) (Judicial inquiry into the motivations, as opposed to the legal validity, of the public acts of a foreign state, does not warrant application of the doctrine.), *petition for cert. filed*, 57 U.S.L.W. 3001 (U.S. June 17, 1988) (No. 87-2066); *infra* notes 116-20 and accompanying text. *But see* Hunt v. Mobil Oil Corp., 550 F.2d 68, 77 (2d Cir.) (Examination of the motivation for a foreign sovereign's act inevitably involves scrutinizing the validity of the act.), *cert. denied*, 434 U.S. 984 (1977); *infra* notes 144-64 and accompanying text.

47. 694 F.2d 300 (3d Cir. 1982).

48. *Id.* at 303.

49. *Id.* at 302.

showing that the adjudication would hinder international relations. Absent such a showing, the court stated, the act of state doctrine would not be applied to thwart legitimate American regulatory goals.[50] The court found that Williams' complaint treated the foreign governments not as wrongdoers against Williams, but rather as fellow victims of Curtiss-Wright's unlawful practices.[51]

Several factors indicated that the act of state doctrine was inapplicable to the facts of *Williams*. First, there was no reason to believe that international relations would be affected because the foreign governments were neither parties to the action nor implicated in any wrongdoing. Second, the principal issue in the case was unimportant to United States foreign relations, and the only law called into question was United States antitrust law. Third, the United States had a strong interest in enforcing its regulatory interests. The factors relied on in *Williams* illustrate some of the outer boundaries for determining when the doctrine should not be applied.

B. *The* OPEC *Case*

Conversely, *International Association of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*[52] was a typical case in which the act of state doctrine was applicable. In *OPEC*, the IAM sued OPEC and its member nations, alleging price fixing in violation of the Sherman Act[53] and demanding treble damages and injunctive relief.[54] The IAM claimed that OPEC had targeted and victimized United States markets deliberately and that such actions directly resulted in higher prices to American consumers.[55] The United States District Court for the Central District of California dismissed the complaint and held not only that member nations of OPEC were entitled to sovereign immunity but also that member nations were not persons who could be sued under American antitrust laws.[56]

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50. *Id.* at 304. The court noted that in reality Curtiss-Wright was more concerned with the difficulties of producing evidence than with any disruption of foreign relations. *Id.* at 304. Additionally, the court recognized that if Williams could not obtain direct evidence from the foreign governments, other sources of proof might still be available, and that in any event it was too early in the litigation for the court to foreclose the possibility that the foreign governments involved might cooperate. *Id.*

51. *Id.* at 303.

52. 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

53. 15 U.S.C. § 1 (1982).

54. *OPEC*, 649 F.2d at 1355. These remedies are provided in the Clayton Act, 15 U.S.C. §§ 15-16 (1982).

55. *OPEC*, 649 F.2d at 1356.

56. International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court on the alternative ground that, under the act of state doctrine, the exercise of federal court jurisdiction would be improper.[57] The appellate court emphasized that development and exploitation of a country's natural resources are important governmental functions.[58] In addition, although United States law prohibits cartels, no consensus exists in the international community that cartels are illegal.[59] Furthermore, the impact of the OPEC cartel upon United States foreign relations was another significant reason to invoke the doctrine. As the appellate court noted, a judicial pronouncement against OPEC might have hindered the Executive Branch in negotiations with the cartel.[60] Thus in this case, the strength of the United States' regulatory interest was outweighed by political necessities.

The entire setting of the *OPEC* case showed that it was a problem for politicians and diplomats, not for judges. Had the Ninth Circuit granted relief to the IAM, that relief would have amounted to an order from a United States court, "instructing a group of foreign sovereigns to alter their chosen means of allocating and profiting from their own valuable natural resources."[61] The judiciary was not the proper forum in which to resolve the dispute.

The facts of *OPEC* provided a compelling justification for application of the act of state doctrine, but in other cases, the justification has not been so clear. This difficulty was highlighted in the recent decisions of the United States Courts of Appeals for the Third and Ninth Circuits in *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*[62] and *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*[63] These two cases provide more difficult fact patterns within which to determine the applicability of the act of state doctrine.

Petroleum Exporting Countries (OPEC), 477 F. Supp. 553, 569 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

57. *OPEC*, 649 F.2d at 1361-62.

58. *Id.*

59. *Id.* at 1361. Consider *Sabbatino's* mandate that if there is no consensus in international law, United States courts should not apply United States law, absent compelling circumstances. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

60. *OPEC*, 649 F.2d at 1361.

61. *Id.*

62. 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

63. 847 F.2d 1052 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3001 (U.S. June 17, 1988) (No. 87-2066).

IV. THE FACTUAL SETTINGS OF THE *CLAYCO* AND *ENVIRONMENTAL TECTONICS* CASES

A. *The* Clayco *Case*

In *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, Clayco sued Occidental, which had been its competitor for an oil drilling concession in Umm Al Qaywayn.[64] Clayco's suit apparently resulted indirectly from a 1977 Securities and Exchange Commission (SEC) action alleging that Occidental had made illegal or questionable payments in violation of the Securities Exchange Act of 1934.[65] In that action, Occidental consented to the entry of a permanent injunction prohibiting any additional payments and further agreed to conduct an internal investigation.[66] Occidental also agreed to prepare a special report on the alleged illegal payments for its stockholders and the SEC.[67] The resulting payments report revealed that several illegal payments had been made and inaccurately reported on Occidental's books.[68] In 1978, the Oakland Tribune reported that Occidental had paid approximately thirty million dollars to Sheikh Sultan bin Ahmed Muallah (Sultan), Umm Al Qaywayn's Petroleum Minister and son of its ruler, Sheikh Ahmed Al Mualla (Ahmed), to obtain an oil and gas concession.[69] After publication of the newspaper account, Clayco officials, believing that they had failed in their effort to win the concession because of the Occidental payments, filed suit.[70] The complaint alleged violations of the Sherman[71] and Robinson-Patman Acts,[72] as well as violations of the California Business and Professions Code[73] and common law.[74]

Clayco claimed that the payments in question were bribes to induce Sultan to award the oil drilling concession to Occidental.[75] It further contended that Ahmed, the Petroleum Minister's father, had agreed that Clayco would receive the concession, but that instead the concession had been awarded to Occidental as a direct result of Occidental's illegal payment.[76] Relying on the act of state doctrine, the

64. *Clayco*, 712 F.2d at 404.
65. 15 U.S.C. 77(b)-78KK (1982 & Supp. 1989).
66. *Clayco*, 712 F.2d at 405.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. 15 U.S.C. § 1 (1982).
72. 15 U.S.C. § 13(c) (1982).
73. CAL. BUS. & PROF. CODE §§ 16720, 17045 (West 1941).
74. *Clayco*, 712 F.2d at 405.
75. *Id.* at 406.
76. *Id.* at 405.

United States District Court for the Central District of California dismissed Clayco's claim, noting that exercises of sovereignty were implicated and that adjudication would interfere with United States foreign policy.[77]

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the dismissal, also relying on the act of state doctrine.[78] The appellate court concluded that a sovereign decision authorizing the exploitation of important natural resources effectuated public rather than private interests.[79] Without sovereign activity effectuating public interests, the court noted, the act of state doctrine would not apply.[80] The court also addressed Clayco's argument that the act of state doctrine was inapplicable because judicial examination of the sovereign's action would not be so intrusive as to require application of the doctrine.[81] The court rejected this contention, stating that validation of Clayco's claims depended on proof that the award of the concession had been motivated by the illegal payments and that embarrassment necessarily would result from adjudication.[82] Therefore, the Ninth Circuit held, the act of state doctrine barred adjudication of the dispute.[83]

B. *The* Environmental Tectonics *Case*

The United States Court of Appeals for the Third Circuit reached an apparently opposite result from the Ninth Circuit's result in *Clayco*. The factual situation of *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*[84] was similar to that in *Clayco*. In both cases, the plaintiffs alleged that the defendants, American corporations, had made illegal payments to foreign officials. Nevertheless, the facts of *Environmental Tectonics* provided inadequate justification for application of the act of state doctrine.

In *Environmental Tectonics,* Environmental Tectonics Corporation International ("Environmental") alleged that Kirkpatrick had bribed Nigerian officials in order to obtain a defense contract.[85] Envi-

77. *Id.* at 406.

78. *Id.*

79. *Id.*

80. *Id.* at 407.

81. *Id.*

82. *Id.* Additionally, the court rejected Clayco's contention that a commercial exception to the act of state doctrine should have been recognized. *Id.* at 408; *see infra* Section IV(C).

83. *Clayco*, 712 F.2d at 409.

84. 847 F.2d 1052 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3001 (U.S. June 17, 1988) (No. 87-2066).

85. *Id.* at 1054.

ronmental sought to recover damages[86] after learning that its unsuccessful bid on the disputed contract was lower than Kirkpatrick's winning bid.[87] The United States District Court for the District of New Jersey dismissed the action, citing the act of state doctrine.[88]

Before making its determination, the district court requested a *Bernstein* Letter,[89] an opinion from the State Department as to whether the act of state doctrine should be applied in the circumstances presented.[90] The letter, drafted by Abraham D. Sofaer, Legal Advisor of the State Department, expressed the view that the act of state doctrine is applicable only when the validity or legality of the foreign government's action is called into question.[91] After considering the allegations in the complaint, the State Department opined that the litigation involved judicial inquiry into the motivation for the Nigerian government's award of the contract, as opposed to the legal validity of the award, and thus concluded that the doctrine was inap-

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86. Environmental Tectonics brought this action alleging violations of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962-1968 (1982 & Supp. 1989), the New-Jersey Anti-Racketeering Act, 2 C N.J.C.S. § 41-1 et seq., and the Robinson-Patman Act, 15 U.S.C. § 13(c) (1982). *Id.*

87. The action was commenced shortly after Kirkpatrick pleaded guilty to a charge of violating the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (1982).

88. Environmental Tectonics v. W.S. Kirkpatrick & Co., 659 F. Supp. 1381, 1391-98 (D.N.J. 1987), *rev'd*, 847 F.2d 1052 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3001 (U.S. June 17, 1988) (No. 87-2066). As an alternative ground for dismissal, the court found that Environmental had failed to allege a pattern of racketeering under either RICO or the New Jersey Anti-Racketeering Act. *Id.* at 1389-91.

89. *Id.* app. A at 1402. The term "*Bernstein* Letter" is derived from the Second Circuit's opinion in Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954). Bernstein was a German national who owned a corporation that was confiscated by the Nazi government during World War II. *Id.* at 375. He brought an action in United States courts seeking recovery of damages. *Id.* The Second Circuit initially dismissed Bernstein's suit on act of state grounds. Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947). The court reversed itself after receiving a letter from the State Department that stated that it was United States policy to permit courts to exercise jurisdiction over claims to recover property expropriated by Nazi officials. *Bernstein*, 210 F.2d at 376.

90. *Environmental Tectonics*, 659 F. Supp. 1381 app. A at 1402.

91. Mr. Sofaer relied principally on a United States amicus curiae brief before the United States Supreme Court which stated in part:

> While judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, the doctrine only precludes judicial questioning of the validity or legality of foreign government action. . . . Judicial inquiry into the purpose of a foreign sovereign's act would not entail the particular kind of harm that the act of state doctrine is designed to avoid.

Id. (quoting United States Government briefs amicus curiae in support of petitions for a writ of certiorari in Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); and in Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977)).

plicable.[92] However, Mr. Sofaer went on to warn that apart from the act of state question, inquiries into the motivation and validity of foreign states' actions and discovery against foreign officials might seriously affect United States foreign relations.[93] Mr. Sofaer cautioned that due regard for foreign sovereign sensibilities should be exercised at every stage of the litigation and emphasized the importance of sharply limited discovery.[94]

The district court interpreted the State Department's letter as a sign of ambivalence about whether the doctrine applied and dismissed the State Department's caveat regarding discovery as impractical and unconstitutional.[95] The court found that because a subpoena would have to be issued for records in Nigeria, foreign relations of this country might be adversely affected.[96] Therefore, it held, the doctrine prohibited adjudication of the dispute.[97]

The Third Circuit reversed and held that the act of state doctrine was inapplicable.[98] Although the appellate court found that an award of a defense contract could be a government action of sufficient public importance to suggest application of the doctrine,[99] it held nevertheless that the doctrine was inapplicable on the facts before it.[100] It did so, the court stated, because adjudication of the dispute would not necessarily involve a threat to United States foreign policy[101] and Kirkpatrick had failed to prove that such a threat existed.[102] In addition, the Third Circuit found that the district court had erred in interpreting the State Department's letter as expressing ambivalence about whether the doctrine applied.[103] Rather, the appellate court said, the State Department had indicated clearly that the doctrine did not apply.[104]

V. RELEVANT CONSIDERATIONS

A. *Characterization of the Sovereign's Action*

Courts generally will look to the character of the foreign sover-

92. *Id.* app. A at 1403.
93. *Id.*
94. *Id.*
95. *Id.* at 1398.
96. *Id.* at 1397.
97. *Id.* at 1398.
98. *Environmental Tectonics*, 847 F.2d at 1062.
99. *Id.* at 1061-62.
100. *Id.* at 1062.
101. *Id.* at 1061-62.
102. *Id.*
103. *Id.*
104. *Id.* at 1062.

eign's action as a first step in determining whether the act of state doctrine is implicated in a case. Initially it is important to note that the doctrine is inapplicable when the sovereign activity is effectuating a private rather than a public purpose.[105] In addition, the doctrine's applicability may be determined by the characterization of the sovereign action involved as either ministerial or executive. The Third Circuit's decision in *Mannington Mills, Inc. v. Congoleum Corp.*[106] illustrates this point.

Mannington Mills, an American manufacturer of floor coverings, brought an antitrust action against Congoleum, another American floor covering manufacturer, alleging that Congoleum obtained foreign patents from various countries by fraudulent acts, which, had they been perpetrated in the United States, would have subjected Congoleum to antitrust liability.[107] Congoleum held American patents for the manufacture of chemically embossed vinyl floor coverings and had obtained twenty-six corresponding patents in foreign countries.[108] Mannington Mills alleged that Congoleum, in applying to foreign patent offices, made fraudulent representations as to the performance of the flooring, test data, information regarding the invention, and misleading statements about the status and content of United States patents.[109] Congoleum responded that adjudication of the dispute should be barred by the act of state doctrine because it would require an inquiry into the policies governing foreign governments' grants of patents.[110] As such, the decisions by the foreign governments arguably were giving effect to their political and public interests.[111] The United States Court of Appeals for the Third Circuit held that the granting of a patent was a "ministerial activity" of a commercial branch of government and did not constitute the kind of sovereign action that required application of the act of state doctrine.[112] Thus, in *Mannington Mills*, the sovereign activity merely formed the background to the dispute; the only sovereign governmental action was the neutral application of the sovereigns' laws.

In *Clayco*, the Ninth Circuit found that a sovereign decision authorizing the exploitation of important natural resources, oil

105. International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354, 1360 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

106. 595 F.2d 1287 (3d Cir. 1979).

107. *Id.* at 1290.

108. *Id.*

109. *Id.*

110. *Id.* at 1292.

111. *Id.* at 1294.

112. *Id.*

reserves, effectuated a public purpose.[113] By engaging in judicial scrutiny of sovereign decisions allocating the benefits of oil development,[114] the Ninth Circuit in effect would have been sitting in judgment of the foreign sovereign, an intrusion not present in *Mannington Mills*. In these circumstances a judicial pronouncement could and most probably would increase foreign relation tensions and embarrass the political branches of the United States government in the conduct of foreign policy.[115] Because Umm Al Qaywayn's most precious resource was its oil reserves, the Ninth Circuit was unwilling to say that the sheikdom's grant of drilling rights was the result of an illegal payment by Occidental, rather than an important policy decision by the sovereign.

In *Environmental Tectonics*,[116] the Third Circuit also considered the purpose of the sovereign action. Environmental argued that the district court erred in applying the act of state doctrine because the award of a military procurement contract was not a sufficient expression of a government's public interest to trigger the doctrine.[117] The Third Circuit found that although the award of a defense contract could be a sufficient expression of the government's public interest to be considered an act of state,[118] the doctrine was inapplicable in this case because no proof was offered that adjudication would interfere with United States foreign policy,[119] nor was the legality of Nigeria's actions called into question.[120]

The cases appear to say that a government defense contract, at issue in *Environmental Tectonics*, is a more compelling government interest than the granting of a patent, at issue in *Mannington Mills*, but less compelling than the granting of an oil concession, at issue in *Clayco*. If *Environmental Tectonics* had involved the Nigerian Gov-

113. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406 (9th Cir. 1983), *cert. denied*, 444 U.S. 1040 (1984).

114. *Id.* at 407 (citing Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (D.C. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972)).

115. *See* International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354, 1361 (9th Cir. 1981) ("[C]ourts should not enter at the will of the litigants into a delicate area of foreign policy which the executive and legislative branches have chosen to approach with restraint."), *cert. denied*, 454 U.S. 1163 (1982); Hunt v. Mobil Oil Corp., 550 F.2d 68, 77 (2d Cir. 1977) ("The act of state rubric . . . is perceived by the Supreme Court as a judicial articulation of the separation of powers doctrine."), *cert. denied*, 434 U.S. 984 (1978).

116. Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3001 (U.S. June 17, 1988) (No. 87-2066).

117. *Id.* at 1058.

118. *Id.*

119. *Id.* at 1061.

120. *Id.* at 1062.

ernment's choice between purchasing military aircraft and purchasing tanks, it seems likely that the Third Circuit would have invoked the doctrine in order to avoid intruding on a foreign sovereign's policy decision. In the actual case, however, the Nigerian defense department, an important policy making department of the government, issued the contract, but the litigation involved a commercial selection between equivalent products from competing vendors. Such decisions normally are based on standards with which courts are familiar, questions as to which company offered the lowest bid, which company provided the best service, which system was more reliable, and which delivery schedule met the country's needs.

The underlying sense of the *Clayco* and *Environmental Tectonics* decisions is plain. Measured by any gauge of political sensitivity, there is a vast difference between a foreign sovereign's decision as to how best to exploit a nation's most valued resource and the award of a routine defense contract. *Clayco* is closer to *OPEC*[121] than to *Williams*[122] and *Mannington Mills*;[123] *Environmental Tectonics* edges toward *Williams* and *Mannington Mills*, and away from *OPEC*. Moreover, although *Clayco* and *Environmental Tectonics* both engaged the courts in judging the actions of foreign officials in terms that could have political ramifications, the certitude with which the courts could evaluate those actions—the availability of surer standards—further distinguishes the two cases. *Clayco* required judging the acts of the top policy making levels of government applying the indeterminable standards of executive decision making; *Environmental Tectonics* involved lower level officials performing a more administrative task and applying the ordinary standards of commercial decision making. These sensitivities, worked out over time, "case by case"[124] in the common law tradition, supply an emerging coherence to the act of state decisions.

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121. International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354 (9th Cir. 1981), *cert. denied.*, 454 U.S. 1163 (1982); *see supra* notes 52-61 and accompanying text.

122. Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3d Cir. 1982); *see supra* notes 47-51 and accompanying text.

123. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); *see supra* notes 106-12 and accompanying text.

124. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (An act of state determination involves "cases by case analysis" in order to resolve the issue of whether or not the doctrine should be applied.).

B. *Determination of the Sovereign's Motive*

1. GAUGING THE INTRUSIVENESS OF REVIEWING SOVEREIGN MOTIVATION

Section 469 of the Restatement (Revised) of Foreign Relations Law states that United States courts will refrain from judging the validity of a foreign state's governmental acts done within its borders.[125] In *Sabbatino*, for example, the United States Supreme Court refused to decide whether Cuba's expropriation of American sugar interests located in Cuba was legally valid or a violation of international law.[126] In other kinds of cases, the validity or legality of a foreign sovereign's act may not be challenged specifically, but nonetheless may be implicated in some way. Antitrust and corruption litigation in the international arena frequently involves questions as to whether a foreign sovereign was motivated to perform a certain act by a defendant corporation.[127]

Lower courts[128] and commentators[129] disagree as to whether the doctrine should be invoked when a foreign sovereign's motivation for its action is called into question. This Comment contends that courts should be guided by the degree of intrusion into a foreign sovereign's authority that would result were the court to adjudicate the dispute. In other words, if adjudication would "impugn or question the nobility of a foreign sovereign's motivation"[130] the act of state doctrine should be invoked.

In *Clayco*, the plaintiff argued that judicial examination of the sovereign's action would not be sufficiently intrusive to warrant appli-

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125. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 469 (1987).

126. *Sabbatino*, 376 U.S. at 439.

127. *See* Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3001 (U.S. June 17, 1988) (No. 87-2066); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 444 U.S. 1040 (1984); Williams v. Curtis-Wright Corp., 694 F.2d 300 (3d Cir. 1982); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

128. *Compare Clayco*, 712 F.2d at 408 (act of state doctrine applied where plaintiff's claim depended upon proof that the motivation for the sovereign act was bribery) *and Hunt*, 550 F.2d at 78 (doctrine applicable where the judiciary was asked to decide Qadahfi's motivation for nationalizing his oil fields) *with Environmental Tectonics*, 847 F.2d at 1060 (rejecting *Clayco's* application of the doctrine to ban consideration of the foreign sovereign's motive) *and* Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48, 55 (5th Cir. 1979) (Motivation and validity are not equally protected by the act of state rubric.).

129. *See* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 357 n.190 (1986).

130. *Clayco*, 712 F.2d at 407.

cation of the act of state doctrine.[131] The Ninth Circuit found that the very existence of Clayco's claim depended upon proving that the motivation for the Petroleum Minister's act was bribery, and thus, embarrassment would result.[132] The court noted that two earlier cases similarly had limited an inquiry that would have impugned or questioned the nobility of a foreign nation's motivation.[133]

The *Clayco* court also made note of a related case, *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*,[134] in which the sovereign activity involved was the granting of the identical oil concession at issue in the *Clayco* case.[135] In *Buttes*, Occidental brought a private antitrust action for treble damages and injunctive relief against Clayco Petroleum and Buttes Gas and Oil Company.[136] The complaint alleged that the defendants, Clayco and Buttes, had conspired in restraint of trade to monopolize the exploration and development of petroleum reserves in the Persian Gulf.[137] Occidental and the defendants had held offshore oil concessions that were adjacent to each other in the Persian Gulf, granted by two different sheikdoms, Umm Al Qaywayn and Sharjah respectively.[138] Occidental alleged that the defendants had instigated a dispute between the two shiekdoms over sovereign rights to a portion of the Gulf containing rich oil reserves in order to obtain rights to exploit territory for which Occidental held the concession.[139] The trial court granted Clayco's motion to dismiss for lack of personal jurisdiction, improper venue, and insufficient service of process,[140] and then dismissed the claim against Buttes, citing the act of state doctrine.[141] The court determined that in order for Occidental to prevail in its claim for damages, it would have to prove that the Ruler of Sharjah had issued a fraudulent territorial waters decree because of Buttes' action.[142] The court found that Occidental was asking the court to sit in judgment of the foreign sovereign and that such an inquiry into the sovereign's motivation was the very kind

131. *Id.*
132. *Id.*
133. *Id.* (citing Industrial Inv. Dev. Corp. v. Mitsui, 594 F.2d 48, 55 (5th Cir. 1979).
134. 331 F. Supp. 92 (D.C. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). In *Buttes*, Occidental was the plaintiff and Clayco was one of the defendants. The case against Clayco was dismissed on jurisdictional grounds. *Id.*
135. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 407 (9th Cir. 1983), *cert. denied*, 444 U.S. 1040 (1984).
136. *Buttes*, 331 F. Supp. at 95.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 98.
141. *Id.* at 113.
142. *Id.* at 110.

of intrusion the doctrine was meant to avoid.[143]

In *Hunt v. Mobil Oil Corp.*,[144] the United States Court of Appeals for the Second Circuit also refused to examine a foreign sovereign's motivation. Hunt alleged that Mobil and six other oil companies violated antitrust laws when they conspired with the government of Libya to eliminate Hunt as their competitor in Libya.[145] The case arose after Colonel Mu'ammar Al-Qadhafi assumed power in Libya atop a Revolutionary Command Council.[146] The new government announced a policy of increasing the price of Libyan crude oil, as well as the government's share or "take" in the price, by increasing government control over production and production facilities.[147]

Fearful that the Libyan policy would result in escalated demands by oil producing nations in the Persian Gulf region, seven major oil companies operating in Libya covertly structured their resistance to such demands.[148] In an effort to present a united front, the companies met secretly, after they first obtained a clearance letter from the Department of Justice absolving them of liability for any antitrust violations that might result from their concerted action.[149] As a condition for issuing the letter, the Justice Department insisted that all independent Libyan oil producers be included in any joint action proposed,[150] so the independent producers, including Hunt, were invited to participate in the meetings.[151] The meetings culminated in a sharing agreement that required, in essence, that if Libyan oil production were to be cut back as a result of government action, the oil companies would share proportionately in the cutback.[152] Shortly thereafter, Hunt's fields were nationalized.[153]

In his action for antitrust damages against the oil companies, Hunt alleged that the seven major oil companies had conspired with Libya to eliminate him as their competitor and that the agreement thus had prevented him from independently negotiating with Qadhafi.[154] Hunt claimed that the other oil companies had encouraged him not to negotiate directly with Qadhafi because they

143. *Id.*
144. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).
145. *Id.* at 72.
146. *Id.*
147. *Id.* at 71.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 72.

had known that if he did not negotiate, his fields would be nationalized.[155] Hunt neither challenged the validity of the Libyan government's act nor joined Libya as a party.[156] Nonetheless, the Second Circuit held that adjudication was barred by the act of state doctrine.[157] Specifically, the appellate court found that in order for Hunt to be successful in his claim, he would have to prove that but for the oil companies' combination or conspiracy with the government of Libya, Libya would not have confiscated his property.[158] The Second Circuit noted that adjudication of the dispute would entail a wholesale examination of Libyan policy: how Libya treated other companies, what provoked its displeasure, and whether or not concessions by Hunt would have appeased Qadhafi.[159] Hunt argued that the act of state doctrine is applicable only when a determination of the validity or legality of the foreign sovereign's action is at issue.[160] The court rejected this argument, finding that legality could not be isolated from the issue of motivation of the foreign sovereign.[161] The court held that such an inquiry was not within the factfinding competence of the judicial branch.[162]

A dissenting opinion argued that the majority was incorrect in assuming that simply because Hunt would have had to prove Qadhafi's motivations in order to prove damages, adjudication inevitably would have involved ruling on the validity of Qadhafi's acts.[163] As the majority pointed out, however, the State Department already had characterized Qadhafi's act as a political reprisal against the United States, making the validity of his action a matter on which the political branch of the United States Government already had taken a position.[164] Hunt was asking the court to hold that Libya would not have acted in the same manner were it not for the conspiracy of the defendant oil companies, calling upon the court to judge the same issue that the State Department already had addressed.

The issue of whether courts should consider the motivation of a foreign sovereign's acts is intrinsically tied to whether the validity of a government's act is being called into question. *Hunt* illustrates circumstances that militate against considering sovereign motivation.

155. *Id.*
156. *Id.* at 76.
157. *Id.* at 79.
158. *Id.* at 76.
159. *Id.* at 81.
160. *Id.* at 78.
161. *Id.*
162. *Id.*
163. *Id.* at 80, (Van Graafeiland, J., dissenting).
164. *Id.* at 78.

Because the highest levels of the Libyan government were involved and because there were no judicially manageable standards against which to judge Qadhafi's motivation for nationalizing the oil fields, the court had no basis to form a decision. The essence of Hunt's claim was that the oil companies' agreement with him affected Qadhafi's decision to nationalize his fields. The Second Circuit recognized that this contention would have been difficult, if not impossible, to prove in trial. In addition, the court was being asked to question the State Department's analysis that Qadhafi nationalized Libyan oil fields in retaliation against the United States Government.[165] In order for Hunt to prevail in the litigation, the court would have to find that Qadahfi nationalized Hunt's fields because Hunt would not negotiate with him.

2. CONTRASTING THE INTRUSIVENESS IN THE *CLAYCO* AND *ENVIRONMENTAL TECTONICS* CASES

As in *Hunt*, the facts in *Clayco*[166] provide justification for not considering the sovereign's motivation. If the Ninth Circuit had employed the same motivation analysis in *Clayco* that the Second Circuit used in *Hunt*,[167] then most likely it would have found that in order to prevail in its litigation, Clayco would have had to prove that but for the bribe, Occidental would not have received the oil concession. As in *Hunt*, the trial court would have been expected to make a decision without the benefit of judicially manageable standards. The sovereign act of deciding how best to develop and exploit a country's natural resources involves political as well as economic factors. For instance, Clayco also had been accused of bribing a neighboring ruler to induce him to assert a fraudulent territorial claim to the same oil rich sea beds for which a drilling concession was later granted to Occidental by the Petroleum Minister of Umm Al Qaywayn.[168] It is realistic to assume that an Arab shiekdom would not grant a concession to a company that had attempted to induce a neighboring sheikdom to assert a fraudulent claim to property that the ruler of Umm Al Qaywayn considered to be part of his territory.

In contrast, the *Environmental Tectonics*[169] case provides a less

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165. *Id.* at 77.

166. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406 (9th Cir. 1983), *cert. denied*, 444 U.S. 1040 (1984); *see supra* notes 64-83 and accompanying text.

167. *See supra* notes 144-65 and accompanying text.

168. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (D.C. Cal. 1971), *aff'd*, 461 F. 2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *see supra* notes 134-43 and accompanying text.

169. Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988),

compelling fact pattern for refusing to examine judicially the motive of the foreign sovereign. Environmental alleged that but for the fact that Kirkpatrick had bribed Nigerian officials, Environmental would have been awarded the defense contract.[170] Environmental offered as proof the fact that its bid was significantly lower than Kirkpatrick's bid.[171] Although the case involved a Nigerian defense contract, it would seem that the effect of the bribe could be assessed by reviewing the proposals both companies submitted to the Nigerian government. A judicially manageable standard would appear to exist in this instance because United States courts frequently deal with contract issues in commercial litigation.

C. *The Commercial Nature of the Activity*

1. SETTING THE STAGE — THE *DUNHILL* CASE

In *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*,[172] Clayco argued[173] that the court should recognize the commercial exception that was adopted by a four justice plurality of the United States Supreme Court in *Alfred Dunhill of London Inc. v. Republic of Cuba*.[174] The *Dunhill* case arose after the Cuban government confiscated the businesses and assets of five leading manufacturers of Cuban cigars.[175] All of the companies were organized under Cuban law and previously had sold large quantities of cigars to three American companies: Alfred Dunhill of London, Inc., (Dunhill), Saks & Co. (Saks), and Faber, Coe & Gregg, Inc. (Faber).[176] After the confiscation, the Cuban government named interventors to take possession and operate the businesses.[177] The interventors continued to ship cigars to the United States. The former owners of the Cuban companies, most of whom had fled to the United States, brought actions against the three American importers for trademark infringement and for the purchase price of the cigars that had been shipped from the seized plants.[178] Subsequent to a final decision in related litigation,[179] the Cuban

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petition for cert. filed, 57 U.S.L.W. 3001 (U.S. June 17, 1988) (No. 87-2066); *see supra* notes 84-104 and accompanying text.

170. *Id.* at 1056.

171. *Id.*

172. 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040.

173. *Id.* at 408.

174. 425 U.S. 682 (1976) (plurality opinion).

175. *Id.* at 685.

176. *Id.*

177. *Id.*

178. *Id.*

179. The interventors and the Cuban Government had brought a separate action against the former owners' attorneys seeking to restrain further prosecution of the actions brought by the

interventors and the Republic of Cuba were allowed to participate as parties to the action.[180]

Both the former owners and the interventors asserted claims to the proceeds of $700,000 worth of tobacco shipped to the three importers after the confiscation.[181] In addition, at the time of the confiscation, the three importers had owed $477,200 for cigars shipped before the confiscation.[182] The importers had paid this balance to the interventors after the confiscation because the importers believed that the interventors were entitled to collect the accounts receivable of the confiscated businesses.[183] The former owners demanded payment of these accounts as well.[184]

The District Court held that, under the act of state doctrine, it was required to give full legal effect to Cuba's confiscation insofar as it involved a taking of property owned by Cuban nationals and located in Cuba.[185] Therefore, the court found, the interventors were entitled to collect all sums due and unpaid for shipments made after the confiscation.[186] With regard to the pre-confiscation accounts, however, the court found that because the situs of the accounts receivable was in the United States and not in Cuba, the former owners, rather than the interventors, were entitled to collect the money from the importers.[187] This result was reached even though the American importers already had paid the pre-confiscation accounts receivable to the interventors.[188]

The American importers then claimed that their payment of the pre-confiscation accounts had been made in error and that they were entitled to collect those sums from the interventors by way of set-off and counterclaim.[189] The Cuban government argued that the interventors' obligation to repay was a quasi-contractual debt having a situs in Cuba and that their refusal to pay the debt was an act of state.[190] The district court rejected the Cuban Government's conten-

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former owners. The court determined that the interventors were entitled to the proceeds of sales consummated post-intervention, but the prior owners trademark litigation was permitted to continue. F. Palicio y Compania, S.A. v. Brush, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1101 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967).

180. *Dunhill*, 425 U.S. at 686.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 690.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 688.
190. *Id.* at 689.

tion, finding that the situs of the debt was in the United States and that none of the interventors' acts qualified as an act of state.[191] As a result of the District Court's holding, two of the importers, Faber and Saks, both of whom owed more to the interventors for post-confiscation purchases than the set-off amount for payment of pre-confiscation obligations, were completely satisfied by the judgment.[192] However the third importer, Dunhill, was entitled to more money for the mistaken pre-confiscation payment than it owed for the post-confiscation shipment.[193] Dunhill was granted judgment for the amount due, and the Cuban Government appealed.[194] The Court of Appeals for the Second Circuit found that the situs of the debt was in Cuba and that the obligation to repay had been repudiated during the course of the litigation in a manner that constituted an act of state.[195]

The United States Supreme Court held that adjudication of the *Dunhill* case was not barred by the act of state doctrine.[196] The plurality opinion[197] noted that allowing foreign governments to hide behind their sovereignty when dealing in purely commercial activity would threaten the stability of international trade.[198] The Justices pointed out that subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would attempts to review their governmental acts.[199] The plurality, citing *Sabbatino*, noted that "some aspects of international law touch much more sharply on national nerves than do others."[200] When foreign governments act in a commercial capacity, the powers they exercise are not peculiar to a sovereign.[201] Instead their power is the same as the power exercised by a private citizen who engages in business, the plurality opinion stated.[202]

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191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. Menendez v. Saks & Co., 458 F.2d 1355 (2d Cir. 1973); *rev'd sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (plurality opinion).

196. *Dunhill*, 425 U.S. at 690.

197. No majority view prevailed in determining why the act of state doctrine was inapplicable. Four Justices—White, Burger, Powell and Rehnquist—believed that the act of state doctrine should not be applied to foreign sovereigns in the course of "purely commercial operations." *Id.* at 706 (plurality opinion). Five Justices, however, rejected the application of a "commercial exception" to the act of state doctrine. *Id.* at 715 (Stevens, J., concurring); *id.* at 728 (Marshall, Brennan, Stewart, Blackmun, J., dissenting).

198. *Id.* at 703 (plurality opinion).

199. *Id.* at 703-04.

200. *Id.* at 704 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)).

201. *Id.*

202. *Id.*

2. MISPLACED RELIANCE ON A COMMERCIAL EXCEPTION

The *Clayco* court attempted to distinguish the sovereign action at issue in *Dunhill* by saying that the government action involved in *Clayco* could not have been taken by a private citizen.[203] However, it is also doubtful that the Cuban interventors' refusal to honor debts following the government's expropriation could have been accomplished by a private citizen without government sanction. Instead of carving out a broad commercial exception to the act of state doctrine, courts should take cognizance of *Sabbatino*'s mandate to adjudicate on a "case by case basis."[204] In other words, as a bright line rule for determining the application of the doctrine, reliance on the commercial exception is misplaced. Rather, the commercial nature of the action is only one factor. As the Supreme Court has made clear:

> The greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[205]

The *Dunhill* plurality noted that there is little if any codification or consensus in international law as to the exercise of governmental powers,[206] however, rules governing commercial transactions involving private parties exist under international law.[207]

Act of state cases seem to suggest that whether a foreign sovereign's act is basically commercial in nature is relevant but rarely determinative.[208] Generally, characterizing an act as commercial will mean that the action is in the control of politically less visible officials, that the legal issues are more suitable for judicial determination than otherwise would be the case, and that the action does not engage the larger political or welfare interests of a foreign nation. But it is not

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203. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 408 (9th Cir. 1983), *cert. denied*, 444 U.S. 1040 (1984); *see supra* notes 64-83 and accompanying text.

204. *See supra* text accompanying note 41.

205. *Sabbatino*, 376 U.S. at 428.

206. *Dunhill*, 425 U.S. at 704.

207. Schmitthoff, *The Unification or Harmonization of Law By Means of Standard Contracts and General Conditions*, 17 INT'L & COMP. L.Q. 551, 563-64 (1968); *see also* A. LOWENFELD, INTERNATIONAL PRIVATE TRADE 1-2 (1975); Gal, *The Commercial Law of Nations and the Law of International Trade*, 6 CORNELL INT'L J. 55, 64 (1972).

208. *Dunhill*, 425 U.S. at 715 (Powell, J. concurring) ("[T]he line between commercial and political acts of a foreign state often will be difficult to delineate."); International Ass'n of Machinists (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354, 1360 (9th Cir. 1981) ("[C]ertain seemingly commercial activity will trigger act of state considerations."), *cert. denied*, 454 U.S. 1163 (1982).

difficult to imagine cases of commercial activity in which such reasoning would be inapplicable. *Clayco*, for example, could easily be described as a commercial case. In other words, the appropriate analysis distinguishes between the public and governmental acts of sovereign states on one hand and their private and ministerial acts on the other.[209] In either situation, the acts may or may not be commercial.

3. MISPLACED RELIANCE ON THE FOREIGN SOVEREIGN IMMUNITIES ACT'S DEFINITION OF COMMERCIAL ACTIVITY

Some critics of the act of state doctrine have urged that the Foreign Sovereign Immunities Act[210] (FSIA) definition of a "commercial activity" exception[211] should determine application of the doctrine in appropriate cases.[212] The FSIA provides foreign sovereigns a general grant of immunity from judicial proceedings in the United States,[213] but it does not extend that immunity to activity of foreign sovereigns that is commercial in nature.[214] Congress specifically recognized the distinction between sovereign immunity and the act of state doctrine when it enacted the FSIA.[215] Although the doctrine of sovereign

209. *Dunhill*, 425 U.S. at 704.

210. 28 U.S.C. §§ 1602-1611 (1982).

211. Under Section 1603(d) of the FSIA a commercial activity is defined as "Either a regular course of commercial conduct or a particular commercial transaction or act." The character of an activity is determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. 28 U.S.C. § 1603(d).

212. *See, e.g.*, Bazyler, *supra* note 7, at 352; Kestenbaum, *Antitrust's "Extraterritorial" Jurisdiction: A Progress Report on the Balancing of Interests Test*, 18 STAN. J. INT'L L. 311, 329 (1982); Comment, *Act of State Doctrine: Applicability of United States Antitrust Law*—International Association of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries, 23 HARV. INT'L L.J. 117, 122-23 (1982); Comment, *Antitrust Law-International Law—Act of State Doctrine—Foreign Antitrust Violations*—International Ass'n of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries (OPEC), 27 N.Y.L. SCH. L. REV. 1013, 1940 (1982); Comment, *Act of State and Sovereign Immunities Doctrines: The Need to Establish Congruity*, 17 U.S.F. L. REV. 91, 105-07 (1982).

213. 28 U.S.C. §§ 1602-1611 (1982).

214. 28 U.S.C. § 1603(d) (1982).

215. International Ass'n of Machinists v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d at 1354, 1359 (1981), *cert. denied*, 454 U.S. 1163 (1982); *see, e.g.*, H.R. REP. NO. 1487, 94th Cong., 2d Sess. 20 n.1 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6619 n.1 ("The Committee has found it unnecessary to address the act of state doctrine in this legislation."); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 29-57 (1976); *Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims & Governmental Relations of the Comm. on the Judiciary*, 93d Cong., 1st Sess. 20 (1973) (The FSIA "in no way affects existing law concerning the extent to which the act of state doctrine may be applicable in similar circumstances."). *But see* Bazyler, *supra* note 7, at 352 nn.160-61 (Criticizing the OPEC Court for taking the above quotations out of context.).

immunity is like the act of state doctrine in that it recognizes the need to respect the sovereignty of foreign states, it is unlike the act of state doctrine in that it deals mainly with the subject matter jurisdiction of the federal and state courts.[216] Even if subject matter jurisdiction is conferred by the FSIA in a particular case, the court still must determine whether abstention based on the act of state doctrine is required[217] because sovereign immunity is based on comity between nations,[218] while the act of state doctrine is based on the United States Constitution's plan of separation of powers.[219] Although Congress has expressly denied jurisdictional immunity to foreign sovereigns if the nature of the sovereign activity is commercial,[220] the act of state doctrine looks to the underlying purpose of the sovereign activity.[221] If the purpose of the foreign sovereign's act is public or governmental, the act of state doctrine still may be invoked appropriately.[222] However, if the purpose of the foreign sovereign's act is only commercial, not unlike the power of its private citizens to carry on commerce, then the doctrine should not be applied.[223]

In *OPEC*,[224] the union argued that the FSIA superseded the act of state doctrine.[225] The court held[226] that the act of state doctrine was not replaced by the definition of "commercial" in the FSIA.[227] In addition, the court rejected the union's assertion that the act of state doctrine ignores the purpose of the sovereign's act.[228] This is impor-

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216. *See OPEC*, 649 F.2d at 1359. *See generally* Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385 (1982).

217. *See OPEC*, 649 F.2d at 1359.

218. *See* Kane, *supra* note 216, at 390.

219. *See supra* note 4 and accompanying text.

220. *See supra* notes 210-14 and accompanying text.

221. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 comment (c) (1987) (Under the act of state doctrine, courts should look to the purpose of the sovereign act); *see also OPEC*, 649 F.2d at 1360 ("While the FSIA ignores the underlying purpose of a state's action, the act of state doctrine does not.").

222. *See, e.g.*, Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3001 (U.S. June 17, 1988) (No. 87-2066); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 444 U.S. 1040 (1984); *OPEC*, 649 F.2d 1354; Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977).

223. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 698 (1975) (Purely commercial activity does not require judicial deference under the act of state doctrine.).

224. International Assoc. of Machinists (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *see supra* notes 52-61 and accompanying text.

225. *Id.* at 1359.

226. *Id.*

227. 28 U.S.C. § 1603(d); *see supra* note 211.

228. *OPEC*, 649 F.2d at 1360.

tant because the result of an act of state determination may differ depending upon whether it is the commercial nature or the purpose of the sovereign act that is considered by the court.[229] The nature test focuses on the act itself and is objective.[230] It provides a narrow focus, resulting in a restrictive approach to judicial abstention.[231] This approach is consistent with congressional intent under the FSIA.[232] The purpose test, however, looks to whether the foreign sovereign's act was a policy decision in furtherance of sovereign ends and is subjective.[233] This test grants broader immunity because even a commercial activity might have an important governmental purpose.[234] In other words, the FSIA might confer jurisdiction on the courts in situations in which the courts still would abstain because of the act of state doctrine.

Several cases discussed previously illustrate the different results obtainable depending upon whether the nature test or the purpose test is applied. In *Dunhill*,[235] the interventors repudiated a commercial debt. Although the nature of that act arguably was in furtherance of their governmental mandate to operate the state owned enterprise, the purpose of their act was simply to repudiate a purely commercial obligation of one of Cuba's commercial instrumentalities.[236] Similarly, in *Clayco*, the sovereign's act of granting an oil concession might have been considered commercial in nature because the ultimate outcome of granting the concession was the achievement of profits, but the purpose of granting the concession was the exploitation of important natural resources through a basic policy determination.[237] In *OPEC*, although the IAM alleged that the nature of the oil cartel's sovereign act was price fixing, a commercial activity, the purpose of the cartel's act was the establishment of terms and conditions for the removal of a major natural resource.[238]

VI. RELIANCE ON EXECUTIVE PRONOUNCEMENTS

It is not greatly disputed that the act of state doctrine should not

229. *Id.* at 1356 n.4.
230. *See id.* at 1357 n.6.
231. *Id.*
232. *See supra* notes 210-14 and accompanying text.
233. *OPEC*, 649 F.2d at 1357 n.6.
234. *Id.*
235. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1975); *see supra* notes 175-202 and accompanying text.
236. *Dunhill*, 425 U.S. at 695.
237. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406 (9th Cir. 1988), *cert. denied*, 444 U.S. 1040 (1984).
238. *OPEC*, 649 F.2d at 1358.

be applied to thwart legitimate regulatory goals of the United States in the absence of a showing that adjudication of a dispute will hinder foreign affairs.[239] In *Environmental Tectonics*,[240] adjudication of the dispute was proper because the federal government's interest in enforcing its laws against bribery was established[241] while the degree of judicial scrutiny necessary for a determination on the merits did not intrude enough upon United States foreign policy interests to warrant dismissal on act of state grounds.

In other cases, the extent of the government's foreign policy interest may be more problematic, given constitutional mandates. The constitutional doctrine of separation of powers contemplates that the different branches of government act within "a framework ultimately supervised by a disinterested judiciary."[242] This principle is violated when the judiciary purports to rely on executive pronouncements[243] in assessing the applicability of the act of state doctrine.

In *Banco Nacional de Cuba v. Sabbatino*,[244] the Supreme Court rejected the argument that the act of state doctrine is applicable only when the Executive expressly states that it does not wish the court to hear the case.[245] It opined that such a presumption would detrimentally affect United States diplomacy because often the State Department may wish to refrain from taking an official position on the matter.[246] In addition, if the Executive had to determine whether it wished the court to hear a particular case, its decision most likely would be based on what it thought the outcome of the case would be.[247] The court considered it "highly questionable" whether adjudication should hinge on the Executive's educated guess as to the outcome and noted that if the Executive's guess were to be incorrect, embarrassment to the Executive in its dealings with other countries might result.[248]

In *First National City Bank v. Banco Nacional de Cuba*,[249] Banco Nacional, a Cuban bank, brought an action against First National

239. Williams v. Curtiss-Wright Corp., 694 F.2d 300, 305 (3d Cir. 1982).

240. Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3001 (U.S. June 17, 1988) (No. 87-2066); *see supra* notes 84-104 and accompanying text.

241. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-78kk (1982 & Supp. IV 1986).

242. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-1, at 15 (1978).

243. The *Bernstein* Letter is an example of an executive pronouncement. *See supra* note 89 and accompanying text.

244. 376 U.S. 398 (1964).

245. *Id.* at 436.

246. *Id.*

247. *Id.*

248. *Id.*

249. 406 U.S. 759 (1972) (plurality opinion).

City Bank, an American bank, seeking to recover proceeds that resulted from First National's sale of collateral securing a loan.[250] First National sold the collateral after the Cuban government seized the American bank's assets located in Cuba.[251] First National realized $1.8 million in excess of the debt owed by the Cuban bank to First National.[252] The Cuban bank brought an action to recover the excess. First National, by way of set-off and counterclaim, sought to recover damages caused by the expropriation of its property in Cuba.[253] The United States Supreme Court held that the act of state doctrine did not bar adjudication of the dispute.[254] Three Justices[255] relied on a letter from the State Department that opined that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba.[256] Justice Rehnquist stated that the doctrine "justifies its existence primarily on the basis that judicial review of acts of state could embarrass the conduct of foreign relations by the political branches of the government."[257] He concluded that when the Executive Branch expressly states that application of the doctrine would not advance American foreign policy goals, the doctrine should not be invoked by the courts.[258] The other six Justices, including the two concurring Justices,[259] rejected the so called *Bernstein* exception.[260]

Justice Brennan's dissent[261] strongly objected to Justice Rehn-

250. *Id.* at 760.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 770.

255. *Id.* at 760. Justice Rehnquist wrote an opinion that was joined by Chief Justice Burger and Justice White.

256. *Id.* at 762.

257. *Id.* at 765.

258. *Id.* at 768; *see, e.g.*, Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1061 (3d Cir. 1988) (placing emphasis on a letter from the State Department advocating adjudication), *petition for cert. filed*, 57 U.S.L.W. 3001 (U.S. June 17, 1988) (No. 87-2066); Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422, 424 (6th Cir. 1984) (relying in part on a joint amicus brief from the Departments of State, Treasury, and Justice, urging that the doctrine was inapplicable where a treaty covered the subject of the litigation). *But see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (The Supreme Court refused to rely solely on Executive pronouncements in making its determination.).

259. Justices Douglas and Powell each filed an opinion concurring in the result. 406 U.S. at 770 (Douglas, J., concurring); Justice Brennan filed a dissenting opinion in which Justices Stewart, Marshall, and Blackman joined. *Id.* at 776. (Brennan, Stewart, Marshall and Blackman, J., dissenting).

260. *See supra* note 89.

261. *First National City Bank*, 406 U.S. at 776-96 (Brennan, J., dissenting).

quist's position on the purposes of the doctrine.[262] Justice Brennan expressed the view that reliance on Executive pronouncements abdicates the courts' role in enforcing separation of powers and allows politics, not law, to dictate judicial results.[263] Justice Brennan contended that *Sabbatino* held that in certain circumstances the validity of a foreign act of state is a political question[264] and that embarrassment to the Executive in the conduct of foreign affairs is only one of the factors the courts look at in determining whether a political question is raised.[265]

The act of state doctrine deals with the competency of the court to adjudicate a dispute.[266] "Its continued vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[267] It stands to reason that the courts should not rely solely on executive pronouncements in deciding whether the doctrine applies. In *OPEC*,[268] for example, an executive pronouncement calling for adjudication of the dispute would not have affected the outcome because the court did not base its decision on whether or not the Executive would be embarrassed by the litigation.[269] Its decision was based on several factors: the lack of consensus in international law concerning the legality of cartels,[270] the foreign relations tensions that could be generated by an adjudication on the merits,[271] the lack of any judicially manageable standard with which to decide the

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262. *Id.* at 765 (Brennan, J., dissenting).

263. *Id.* at 790-93 (Brennan, J., dissenting).

264. *Id.* at 787 (Brennan, J., dissenting). The classic formulation of the political question doctrine is as follows:

> Prominently found on the surface of any case held to involve a political question is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1982).

265. *First National City Bank*, 406 U.S. at 788 (Brennan, J., dissenting).

266. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1963).

267. *Id.* at 428-29.

268. International Ass'n of Machinists and Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *see supra* notes 52-61 and accompanying text.

269. *Id.*

270. *Id.* at 1361.

271. *Id.*

case,[272] and the affront to sovereignty that would have resulted if a United States court had attempted to dictate to the OPEC countries how they should allocate and profit from their natural resources.[273] Reliance on executive pronouncements threatens to undermine the integrity and independence of the judiciary, just as reliance upon the Executive's determinations that change with the shifting political winds threatens the equitable principle of treating like cases alike.

VII. CONCLUSION

The act of state doctrine has been criticized by scholars and commentators because of the inconsistent results it allegedly produces.[274] This Comment has attempted to dispel that common misperception. However, the nature and purpose of the doctrine mandate that each case must be decided in light of particularly sensitive attention to its unique facts. The doctrine imposes self-restraint on the courts whenever a foreign sovereign's policy acts are called into question by the litigants. If inconsistency appears to exist, it is because, on detailed examination, cases that may appear to be facially similar will implicate vastly different national concerns of the foreign sovereigns, and as a result, vastly different foreign policy interests of the United States. The constitutional separation of powers in our government requires application of the doctrine whenever the judiciary is not the proper forum to resolve the dispute because adjudication would interfere with foreign policy goals of the United States.

Commentators should reconsider their criticism of the doctrine in light of the *Sabbatino* mandate, which called for analysis of relevant considerations to be identified on a case by case basis before determining whether the doctrine bars adjudication. The factors that seem to be determinative include: (1) the degree of codification or consensus concerning a particular area of international law,[275] (2) the importance of the issue to United States foreign relations,[276] (3) the characterization of the sovereign's act as either "ministerial" or "executive",[277] (4) the intrusiveness of reviewing the sovereigns motivation,[278] and (5) the commercial nature of the activity.[279] No one

272. *Id.*

273. *Id.* at 1360-61.

274. Bazyler, *supra* note 7; Comment, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U.L. REV. 202 (1984).

275. *See supra* notes 41-42 and accompanying text.

276. *See supra* notes 59-60 and accompanying text.

277. *See supra* notes 105-24 and accompanying text.

278. *See supra* notes 125-65 and accompanying text.

279. *See supra* notes 210-38 and accompanying text.

factor is determinative, nor is the cumulation of these factors important. Instead, their significance lies in their tendency to illuminate the political sensitivities underlying the litigation. Once the political sensitivities of a case are unearthed, the court can decide whether the judiciary is the appropriate forum in which to resolve the dispute or whether adjudication would interfere with the Executive's foreign policy duties. The more politically sensitive the case, the less likely it is that judicial intervention is desirable. In other cases, when more objective non-political standards are available to assist the judiciary in making its determination, adjudication is proper.

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