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Motivation Cases and *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*

INTRODUCTION

Prior to the Supreme Court's decision in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*,[1] there were two formulations of the act of state doctrine. One, the traditional formulation as enunciated by the Supreme Court and adhered to by several circuits, stated that domestic courts may not sit in judgment of the validity of a foreign state's actions taken within its own borders.[2] The other, developed in the Second and Ninth Circuits,[3] stated that the act of state doctrine precludes United States courts from inquiring into not only the validity of, but also the motivations behind, a foreign sovereign's conduct.[4]

The conflict in the circuits regarding the proper scope of the act of state doctrine existed for almost twenty years,[5] before being resolved in 1990 by the Supreme Court. *Kirkpatrick* reaffirmed the traditional formulation[6] and thereby significantly restricted the doctrine's potential to interfere with the functioning of the judicial process. This Note explores the propriety of the Court's decision

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[1] U.S. , 110 S. Ct. 701 (1990).

[2] *See, e.g.*, Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (adopting language from Hatch v. Baez, 14 N.Y. Sup. Ct. 596 (App. Div. 1876)).

[3] The source of this expanded version of the act of state doctrine is important. The Ninth and Second Circuits contain the major United States financial and international business centers. Presumably, courts from those circuits would have a profound effect on the development of this area of the law in other circuits and perhaps even in the Supreme Court. As it turned out, however, once the issue reached the Supreme Court in W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l., ____ U.S. ____, 110 S. Ct. 701 (1990) [hereinafter *Kirkpatrick III*], it was the Fifth and Third Circuit view that prevailed.

[4] *See, e.g.*, Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 461 F.2d 1261 (9th Cir. 1972), *aff'g* 331 F. Supp. 92 (C.D. Cal. 1971), *cert. denied*, 409 U.S. 950 (1972).

[5] The conflict started in 1971 with the district court's decision in *Buttes Gas*. However, the groundwork for controversy was laid much earlier, in American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[6] *See Kirkpatrick III*, ____ U.S. at ____, 110 S. Ct. at 707.

and its likely impact on a variety of concerns, including separation of powers,[7] international business transactions,[8] the enforcement of domestic laws,[9] and the development of international law.[10]

Part I of this Note focuses on the history and purposes of the act of state doctrine as illuminated by Supreme Court precedent.[11] Part II introduces the genesis of the controversy regarding the validity/motivation distinction and examines opinions from the various circuits adopting the two formulations.[12] Part III discusses *Kirkpatrick* and its ramifications for a number of issues.[13] The Note concludes that *Kirkpatrick* is a sound decision that will change act of state jurisprudence in some rather significant ways.[14]

I. THE DOCTRINE'S HISTORY AND PURPOSES

A. Act of State Defined

In its predominant form, the act of state doctrine precludes the courts of one country from inquiring into the validity or legality of a foreign sovereign's actions within that sovereign's borders.[15] *Underhill v. Hernandez*,[16] the first Supreme Court case to discuss the doctrine in-depth, stated:

> 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.[17]

As the above language indicates, the doctrine favors resolution of disputes stemming from actions outside the United States at the public international law level. Accordingly, actions of foreign sov-

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[7] *See infra* notes 174-94 and accompanying text.
[8] *See infra* notes 195-204 and accompanying text.
[9] *See infra* notes 205-24 and accompanying text.
[10] *See infra* notes 225-32 and accompanying text.
[11] *See infra* notes 15-73 and accompanying text.
[12] *See infra* notes 74-132 and accompanying text.
[13] *See infra* notes 133-232 and accompanying text.
[14] *See infra* note 233-end and accompanying text.
[15] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 469 (1986).
[16] 168 U.S. 250 (1897).
[17] *Id.* at 252.

ereigns and their agents acting within the scope of their authority should not be examined in domestic courts.[18]

The possible scope of the doctrine is expansive.[19] Unlike sovereign immunity,[20] which may be invoked only by a nation or its agents acting within the scope of their duties, the act of state doctrine may be employed by private litigants that are not members of, or related to, any government.[21] The doctrine is often applied to prevent adjudication in cases between two private parties within the United States.[22] Foreign governments may also use the doctrine in United States courts when they lack protection under the Foreign Sovereign Immunities Act.[23] The doctrine has been applied in almost every type of factual dispute imaginable. At least prior to the Supreme Court's decision in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*,[24] courts even invoked the doctrine in cases where foreign sovereign actions were at the periphery of the issues in the case.[25] Although most of the Supreme

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[18] *E.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3d Cir. 1979).

[19] *See* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 344 (1986).

[20] As a doctrine of international law, sovereign immunity traditionally required the courts of one sovereign to relinquish jurisdiction over a case in which another sovereign was named as a defendant. *See* Deletelier v. Chile, 488 F. Supp. 665, 670 (D.D.C. 1980) (citing The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812)). The United States now adheres to the restrictive view of sovereign immunity.

[21] *See* Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir. 1983); Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3d Cir. 1982).

[22] *See Mannington Mills*, 595 F.2d 1287.

[23] *See, e.g.*, Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985); *see also* Note, *Callejo v. Bancomer S.A.: The Need for a Commercial Activity Exception to the Act of State Doctrine*, 7 NW. J. INT'L L. & BUS. 413 (1985) (arguing for a commercial exception to the act of state doctrine to preview evisceration of the FSIA (28 U.S.C. §§ 1 note, 1330, 1332, 1391, 1441, 1602-11 (1988)).

[24] ___ U.S. ___, 110 S. Ct. 701 (1990) [hereinafter *Kirkpatrick III*].

[25] *See* Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983) (Court of Appeals affirmed the District Court's dismissal of an action on the basis of the act of state doctrine where Plaintiff brought an antitrust action charging Defendant with making secret payments to official of Umm Al Qaywayn in order to obtain unlawfully an offshore oil concession.); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977) (Court of Appeals affirmed the District Court's dismissal of an action on the basis of the act of state doctrine when Plaintiff, a Libyan oil producer, brought action against other oil producers to recover for an alleged violation of antitrust laws and for breach of contract.); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 461 F.2d 1261 (9th Cir. 1972), *aff'g* 331 F. Supp. 92 (C.D. Cal. 1971), *cert. denied*, 409 U.S. 950 (1972) (The District Court held that the act of state doctrine required dismissal of an antitrust suit alleging that defendants, who had an oil concession from Trucial State Sharjah covering their territorial and offshore waters, conspired with Sharjah, adjacent Trucial State Umm al Qaywayn,

Court cases applied the act of state doctrine to foreign expropriations, the lower federal courts and state courts have implemented the doctrine in cases involving bribery of foreign officials,[26] wrongful expulsion and transportation from a country,[27] breach of contract,[28] violation of federal securities laws,[29] conspiracies to preserve competitive advantage and other violations of antitrust laws,[30] issuance of patents,[31] RICO claims against foreign leaders,[32] issuance of timber licenses,[33] granting of oil concessions,[34] and defamation of foreign presidents.[35] The act of state doctrine even arose in a case where the plaintiff challenged lobbying efforts of a competitor in a foreign country.[36] It is the obvious potential for near limitless application that causes many to criticize the doctrine,[37] but a discussion of such criticism will have to wait until after an examination of the early Supreme Court cases and the purposes underlying them.

The combination of precedent and myriad purposes behind the act of state doctrine created the threat of overapplication in the first place. In large part, the threat came to pass.

B. The Supreme Court Precedents and the Purposes Behind the Doctrine

According to one source, the act of state doctrine dates from seventeenth century England, where it had a close kinship to sovereign immunity.[38] Originally, sovereign immunity protected only

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Great Brittain, and Iran to deprive plaintiffs of the richest area of plaintiff's offshore oil concession from Umm al Qaywayn.).

[26] *See Kirkpatrick III*, ___ U.S. ___, 110 S. Ct. 701; Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990); *Clayco Petroleum*, 712 F.2d 404; *Buttes Gas*, 461 F.2d 1261.

[27] *See* Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980); Galu v. SwissAir: Swiss Air Transport Co., Ltd., 734 F. Supp. 129 (S.D.N.Y. 1990).

[28] *See Northrop*, 705 F.2d 1030; Compania de Gas de Nuevo Laredo, S.A. v. Entex, 686 F.2d 322 (5th Cir. 1982); *Arango*, 621 F.2d 1371; *Hunt*, 550 F.2d 68; Phoenix Canada Oil Co. v. Texaco, 749 F. Supp. 525 (S.D.N.Y. 1990).

[29] *See* West v. Multibanco Comermex, S.A., 807 F.2d 820 (9th Cir. 1987); Braka v. Bancomer, S.N.C., 762 F.2d 222 (2d Cir. 1985).

[30] *See* International Ass'n of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1981).

[31] *See Mannington Mills*, 595 F.2d 1287.

[32] *See* Republic of Phillipines v. Marcos, 862 F.2d 1355 (9th Cir. 1988).

[33] *See* Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48 (5th Cir. 1979).

[34] *See Clayco Petroleum*, 712 F.2d 404.

[35] *See* DeRoburt v. Gannett Co., 733 F.2d 701 (9th Cir. 1984).

[36] *See* O.N.E. Shipping v. Flota Mercante Grancolumbiana, 830 F.2d 449 (2d Cir. 1987).

[37] *See* Bazyler, *supra* note 19, at 344; Note, *supra* note 23, at 413.

[38] *See* Bazyler, *supra* note 19, at 330.

the sovereign, leaving state officials subject to liability.[39] The act of state doctrine was created as an addition to sovereign immunity to fill the gaps.[40]

Although first recognized in *The Schooner Exchange v. M'Faddon*,[41] the doctrine was not invoked by the Supreme Court until eighty years later, in *Underhill v. Hernandez*.[42] The plaintiff in *Underhill* sued the defendant, a Venezuelan general, for damages occurring immediately following a government takeover. In dismissing the case, the Supreme Court enunciated the previously quoted language,[43] thus creating the traditional formulation of the doctrine.

Over the following twenty years, the Court decided three cases, *American Banana Co. v. United Fruit Co.*,[44] *Oetjen v. Central Leather Co.*,[45] and *Ricaud v. American Metal Co.*,[46] that expanded the act of state doctrine beyond its gap-filling role in *Underhill*.[47] All three cases involved seizures by foreign governments that led to claims over ownership. In these cases, the Court invoked the act of state doctrine to preclude domestic adjudication because the validity of a foreign sovereign's conduct within its own borders would have been challenged. Such an inquiry, the Court held, would damage territorial principles of choice of law and cause international disputes.[48]

The next series of act of state cases developed during the 1960s and 1970s as a result of the Cuban Revolution. The first modern act of state case, *Banco Nacional de Cuba v. Sabbatino*,[49] involved ownership of the proceeds from a sale of sugar that was nationalized by the Cuban government. Invoking the wide-ranging language from *Underhill*, the Supreme Court held that the act of state doctrine precluded the judicial branch from examining whether the seizure was retaliatory, discriminatory, and confiscatory under international law.[50] The Court arrived at its holding by balancing the relevant considerations, including whether the international legal

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[39] *Id.* at 331.
[40] *Id.*
[41] 11 U.S. (7 Cranch) 116, 146 (1812).
[42] 168 U.S. 250.
[43] *See id.* at 252; *supra* text accompanying note 17.
[44] 213 U.S. 347 (1909).
[45] 246 U.S. 297 (1918).
[46] 246 U.S. 304 (1918).
[47] *See* Bazyler, *supra* note 19, at 332-33.
[48] Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918).
[49] 376 U.S. 398 (1964).
[50] *Id.* at 439.

principles involved were ill-defined and whether judicial resolution of the case would embarrass the executive branch in the conduct of foreign relations.[51] The latter factor in the balancing test introduced a new source or rationale for the act of state doctrine, separation of powers. *Sabbatino* created the flexible approach or balancing test that continues to dominate act of state analysis.

Following *Sabbatino*, the Supreme Court, in 1972, decided *First National City Bank v. Banco Nacional de Cuba*,[52] a case involving Cuban expropriation of the defendant's branch banks. After the expropriation, First National City Bank ("Citibank") sold collateral belonging to Banco Nacional de Cuba. The Cuban bank brought suit and Citibank counterclaimed.[53] The Court held that the act of state doctrine did not apply.

The confusing opinions rested on several grounds. Three justices focused on a Bernstein letter[54] from the State Department indicating that the act of state doctrine should not apply to the case because judicial inquiry would not harm separation of powers.[55] One justice held that the act of state doctrine did not apply because the Cuban bank brought the claim in the first place. Therefore, Citibank should in fairness and equity have been allowed to pursue its counterclaim.[56] A fifth justice rejected the rationale of the others but nevertheless held that the act of state doctrine did not apply because he saw no potential for separation of powers concerns.[57] Thus, this fractured decision, based on three rationales, by five different justices, many of whom explicitly

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[51] *Id.* at 427-32.

[52] 406 U.S. 759 (1972).

[53] First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 760-61 (1972).

[54] A Bernstein letter is an opinion from the State Department advising the court whether the act of state doctrine should apply in a given case. Such letters are usually based on the State Department's analysis of the foreign policy implications of allowing a suit to continue. Although a majority of the Supreme Court has never adopted, and has indeed rejected, the Bernstein letter as an exception to the act of state doctrine, many lower courts, fearing adverse consequences, apply the act of state doctrine absent executive branch permission to proceed. Case Comment, *International Commercial Bribery and the Act of State Doctrine*, 67 WASH. U.L.Q. 601, 602 n.11 (1989) [hereinafter Case Comment, *International Commercial Bribery*]; *see also* Comment, *Rationalizing the Federal Act of State Doctrine and Evolving Judicial Exceptions*, 46 FORDHAM L. REV. 295, 299-300 (1977) [hereinafter Comment, *Rationalizing the Federal Act of State Doctrine*].

[55] *Citibank*, 406 U.S. at 768-70 (Rehnquist, J., joined by Burger, C.J., and White, J.).

[56] *Id.* at 772 (Douglas, J., concurring in the result). This opinion initiated yet another exception to the act of state doctrine, the so called counterclaim exception.

[57] *Id.* at 774-75 (Powell, J., concurring in the judgment).

rejected the reasoning of the others, added little more than confusion to act of state jurisprudence. Perhaps the only theme that ran through all the opinions, including the dissent,[58] was that an act of state inquiry must focus on separation of powers concerns.

Alfred Dunhill of London, Inc. v. Republic of Cuba[59] completed the Supreme Court's analysis of the doctrine prior to its most recent decision. In *Dunhill*, the Cuban plaintiffs sued for trademark infringement and the value of cigars expropriated by the Cuban government and sold to the defendant.[60] The Court held that the doctrine did not apply. A majority rejected the existence of a commercial exception,[61] however, and the holding rested on the narrow ground that the defendants failed to prove that their actions were public acts of state.[62]

An examination of the Supreme Court cases discloses at least four rationales or purposes for the act of state doctrine. Originally conceived as a gap-filling addition to sovereign immunity, the act of state doctrine also is based on the preservation of territorial principles of choice of law, the avoidance of international confrontations, and most recently, the sanctity of separation of powers.[63]

The separation of powers rationale merits the most attention because it is the driving force behind recent Supreme Court jurisprudence,[64] and it is the source of the lower courts' expansion of the doctrine to cover motivation cases.[65] Separation of powers prevents the coequal branches of the federal government from interfering with the constitutional duties of every other branch.

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[58] *Id.* at 790-93 (Brennan, J., dissenting).

[59] 425 U.S. 682 (1976).

[60] Alfred Dunhill of London, Inc. v. Repulic of Cuba, 425 U.S. 682, 685-86 (1976).

[61] *Id.* at 706. Four justices in *Dunhill* asserted yet another exception to the act of state doctrine, though a majority of the Court did not accept its existence. The exception would prevent application of the act of state doctrine when the government's activities are not sovereign in nature. *See generally* Blau and Friedman, *Formulating a Commercial Exception to the Act of State Doctrine: Alfred Dunhill of London, Inc. v. Republic of Cuba*, 50 ST. JOHN'S L. REV. 666 (1976) (analyzing the Dunhill decision and approving the creation of the exception); Note, *supra* note 23 (arguing that a commercial exception is needed to protect the integrity of the Foreign Sovereign Immunity Act); Comment, *Rationalizing the Federal Act of State Doctrine*, *supra* note 54 (discussing the four principal exceptions to the act of state doctrine).

[62] *Dunhill*, 425 U.S. at 694 (noting that interventors did not prove theirs was a "public act of those with authority to exercise sovereign powers.").

[63] *See* Bazyler, *supra* note 19, at 334.

[64] *See Kirkpatrick III*, ___ U.S. at ___, 110 S. Ct. at 704.

[65] *See Buttes Gas*, 331 F. Supp. at 110.

The constitution delegates the responsibility for conducting foreign relations, in large measure, to the executive branch.[66] The judicial branch, by contrast, is given no foreign affairs power besides the inherent power to decide cases and controversies.[67]

The lower courts, giving weight to the disparity in powers delegated to the various branches of governments, began to employ several approaches to act of state issues. They deferred to the executive branch when it spoke on the matter, sometimes even applying the doctrine to situations where the State Department said it should not apply.[68] Where the executive branch was silent, the courts engaged in a completely independent analysis of whether separation of powers purposes would be harmed.[69]

There are many facets to the separation of powers inquiry under the act of state doctrine.[70] Most importantly, courts focus on whether a judicial determination of the case would prevent the executive branch from effectively conducting foreign relations. This includes the possibility of embarrassing the executive branch.[71] Embarrassment of the president or of a foreign sovereign could create international tensions and harm diplomatic efforts on matters completely separate from the legal inquiry. As in the political question doctrine, embarrassment stems from multifarious and contradictory pronouncements or stances taken by two branches of government. For example, if the president is trying to cultivate better diplomatic relations with a foreign country, it would do little good for the judicial branch to declare an action taken by that foreign country, within its own borders, invalid or unlawful. Such conflicting positions by the branches of government are difficult for a foreign state to reconcile. Believing they are incompetent to explore the foreign policy consequences of their decisions, lower courts are anxious to apply the act of state doctrine.[72]

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[66] *See* U.S. CONST. art. I. The executive branch shares power over foreign affairs with the legislative branch.

[67] The only power related to foreign affairs expressly given to the judiciary is the Supreme Court's original jurisdiction over cases involving ambassadors. *See* U.S. CONST. art. III, § 2, cl. 2.

[68] *See* Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., 659 F. Supp. 1381, 1397 (D.N.J. 1987) [hereinafter *Kirkpatrick I*], *rev'd*, 847 F.2d 1052 (3d Cir. 1988), *aff'd*, ___ U.S. ___, 110 S. Ct. 701 (1990).

[69] *See, e.g.*, *Clayco*, 712 F.2d at 409 (making no mention of executive branch advice on the act of state issue, but nevertheless applying the doctrine).

[70] *See Sabbatino*, 376 U.S. at 432 (stating that the act of state doctrine has "constitutional underpinnings in the separation of powers doctrine").

[71] *Id.*

[72] *See* Bazyler, *supra* note 19, at 328.

Against this backdrop of confusing and conflicting precedents, it is not surprising that lower courts have used the broad language and wide-ranging purposes announced in *Underhill* and *Sabbatino* as a blank check with which to apply the act of state doctrine. Justifiably, few courts relish the opportunity to deal with complicated international issues, especially where the foreign relations of the United States may be harmed.[73]

One area of doctrinal expansion was completely unwarranted, however. In the early 1970s lower courts began to apply the act of state doctrine to cases in which the validity of a foreign sovereign's conduct was *not* challenged. These courts concluded that the separation of powers concerns underlying the doctrine are so powerful that merely examining the motivations of foreign state's actions is inappropriate. Their conclusion was wrong, as the Supreme Court's decision in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International* points out. An inquiry of why this conclusion is so is postponed until later. For now, an analysis of the role of motivation in lower court cases must be examined in order to understand what *Kirkpatrick* says and does not say.

II. THE ROLE OF MOTIVATION

A. The Supreme Court's View of Examining Motivation Prior to W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International

American Banana Co. v. United Fruit Co.[74] began the controversy over whether the act of state doctrine precludes United States courts from examining the motivations or factual circumstances surrounding a foreign sovereign's actions. The case dealt with the plaintiff's allegations under the antitrust laws that the defendant conspired with a foreign government to ruin its banana plantations. The Costa Rican government, acting in its sovereign capacity, had seized the plaintiff's foreign lands.[75]

Like plaintiffs in later cases, the plaintiff in *American Banana* did not challenge the validity or legality of the foreign sovereign's

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[73] *See id.*; *see also* Note, *Limiting the Act of State Doctrine: A Legislative Initiative*, 23 VA. J. INT'L L. 103, 104 (1982) (discussing proposed legislation to destroy the doctrine).

[74] 213 U.S. 347 (1909).

[75] *Id.* at 354-55.

actions.[76] Rather, it sought to prove the conspiracy element of its antitrust claim by inquiry into the motivations behind Costa Rican governmental actions. Had the Supreme Court decided the case, the legality of the expropriation would not have been questioned and the seizure would not have been undone.

The Supreme Court, in an opinion by Justice Holmes, refused to question the foreign state's actions. The opinion is based on several grounds. First, and most importantly, the court held that antitrust laws did not reach the defendant's actions taken in a foreign state; these laws had no extraterritorial application.[77] Second, the Court argued, "[A] seizure by a state is not a thing that can be complained of elsewhere in the courts."[78] This statement had the potential for broad impact on not only the antitrust laws but also the act of state doctrine in general, because in the factual setting of *American Banana*, the plaintiff did not challenge the validity of a foreign government's actions. Instead, it challenged the sovereign's motives. The Court's holding, combined with Holmes' dictum, suggested that such an inquiry was forbidden.

Although the holding—that the antitrust laws had no extraterritorial effect—was substantially overruled by later cases,[79] Holmes' dictum took on a life of its own in several lower court opinions.[80] Courts examining claims in which only a foreign government's motivations were challenged often held that they were precluded from making any inquiry that might impugn the dignity of the sovereign's actions.[81] Some courts, even when refusing to dismiss on act of state grounds, cited the *American Banana* rationale as

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[76] By doing this, the plaintiff, in a sense, started a trend that will last even through W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l, ___ U.S. ___, 110 S. Ct. 701 (1990) [hereinafter *Kirkpatrick III*]. For years, plaintiffs have sought to avoid application of the act of state doctrine by arguing that they were not challenging the validity of a foreign state's conduct. *See* Hunt v. Mobil Oil Corp., 550 F.2d 68, 75 (2d Cir. 1977) (Plaintiff tried to characterize foreign government as a victim to show that a validity inquiry would not be necessary). Of course, after *Kirkpatrick*, plaintiffs will continue this argument because absent a challenge to validity, courts may *not* apply the act of state doctrine. *Kirkpatrick III*, ___ U.S. at ___, 110 S. Ct. at 707.

[77] *American Banana*, 213 U.S. at 357.

[78] *Id.* at 357-58.

[79] *See* Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962).

[80] *See, e.g.*, Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983); *Hunt*, 550 F.2d at 68; Occidental Petroleum Corp. v. Buttes Gas and Oil Co., 461 F.2d 1261 (9th Cir. 1972), *aff'g* 331 F. Supp. 92 (C.D. Cal. 1971), *cert. denied*, 409 U.S. 950 (1972).

[81] *Clayco*, 712 F.2d at 407 (citing Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 607 (9th Cir. 1976)).

presenting a valid factor to be considered in the *Sabbatino* balancing test.[82]

B. Cases Precluding Examination of a Foreign Sovereign's Motivations

Occidental Petroleum Corp. v. Buttes Gas & Oil Co.[83] was one of the first lower court cases to invoke the teachings of *American Banana*. In *Buttes*, the plaintiff corporation sued the defendant under various antitrust laws for conspiring with several Persian Gulf sheikdoms to deny it oil concession profits. The complaint alleged that the defendants conspired to restrain trade and create and maintain a monopoly over the oil resources in the territorial waters of the Trucial States.[84] The plaintiff maintained that it was not challenging the validity or legality of the foreign sovereign's actions. Instead, the plaintiff wanted to inquire into the sheikdom's actions only to the extent necessary to determine the role of the defendant's conduct in causing those actions. In other words, the plaintiff's theory of conspiracy demanded an inquiry into the foreign government's motivations.

The district court began its discussion of the act of state issue by citing Justice Holmes' dictum from *American Banana*. Although recognizing the error in his jurisdictional holding, the court stated that the remainder of the opinion was controlling and that the act of state doctrine precluded examination of foreign actions induced or procured by an antitrust defendant.[85]

After this unambiguous statement, the district court's opinion becomes less clear. The court seemingly rejected the plaintiff's claim that it was not challenging the validity of the foreign sovereign's actions. Noting that two portions of the complaint suggested that the plaintiff was challenging the sheikdoms' conduct, the court held that the act of state doctrine clearly precluded such an inquiry.[86]

The court did not end its analysis, which up to this point rested on firm ground.[87] It continued by establishing another perceived

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[82] *See Timberlane*, 549 F.2d at 607 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965)).

[83] 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972).

[84] *See id.* at 95.

[85] *See id.* at 110.

[86] *See id.* at 113.

[87] If the court had ended its analysis here it would have been but another typical act of state opinion based on challenged validity of a sovereign's actions.

evil that violated act of state principles. Since the allegations required that the plaintiff prove that a foreign government issued a fraudulent territorial water decree and that another sovereign seized an island at the urging of the defendant, the court would be called on to inquire into the motivations behind those actions. This inquiry, the court concluded, would create the very diplomatic friction and international complications that the act of state doctrine was meant to prevent.[88] Inquiry into a sovereign's motivations, without more, could preclude domestic adjudication of a matter if the purposes and principles underlying the act of state doctrine would be implicated. Thus, even without the previously necessary factual predicate of challenging the legality or validity of a foreign government's actions, the principles behind the act of state theory were so strong that they became a doctrine unto themselves. For the first time, the tail began to wag the dog.

Buttes Gas was followed six years later by *Hunt v. Mobile Oil Corp.*,[89] one of the most criticized,[90] but often cited, act of state opinions. Hunt, the plaintiff, alleged that seven major oil companies conspired to exclude it from the oil market in violation of United States antitrust laws. In reliance on representations made by the seven oil companies, Hunt refused to negotiate with the Libyan government concerning its oil concessions. After Hunt's refusal to negotiate, Libya refused Hunt the right to export oil and eventually nationalized Hunt's holdings.[91] The plaintiff's theory was that the seven oil companies had made an agreement with Hunt that prevented it from negotiating with Libya so that the seven could maintain the competitive advantage Persian Gulf crude oil had over Libyan oil. Hunt maintained that the alleged agreement caused the Libyan government to act aggressively toward it, eventually resulting in the asset seizure. As in *Buttes Gas*, the plaintiff did not sue the foreign sovereign and, similarly, the government's motivations, not the legality of its actions, were at issue in the case.[92]

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[88] *Buttes Gas*, 331 F. Supp. at 110.

[89] 550 F.2d 68 (2d Cir. 1977).

[90] *See* Bazyler, *supra* note 19, at 347 (criticizing *Hunt*'s broad application of the act of state doctrine because it runs the risk of closing domestic courts to most international transaction litigation); Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247, 1260 (1977) (criticizing *Hunt* because it encourages wrongdoers to involve a foreign country in violations of the antitrust laws in order to guarantee application of the act of state doctrine).

[91] *Hunt*, 550 F.2d at 71-72.

[92] *Id.* at 76 ("Here it is urged that Hunt makes no claim that Libya acted illegally at

The district and circuit courts both held that the act of state doctrine precluded an examination of the reasons why the Libyan government nationalized Hunt's holdings, even though the validity of those actions was not challenged. After rejecting the plaintiff's claim that expropriation was merely a nonpublic commercial act under *Alfred Dunhill of London v. Republic of Cuba*,[93] the court of appeals noted that Libya had acted with a political motive. The expropriation was undertaken as a reprisal against the United States and the coercive practices of multinational corporations.[94] The court concluded that any further inquiry was impermissible because it would require the court to sit in judgment of Libya's actions. This, the court reasoned, would violate the principles of the act of state doctrine, in general, and Justice Holmes' dictum in *American Banana*, in particular.[95]

The plaintiffs countered by arguing that the Libyan government's actions would not be challenged because Libya itself was actually a victim of the defendant's conspiracy. The court held that the characterization of Libya as a victim was not sufficient to distinguish the case from *American Banana* and *Buttes*. This holding rested on two grounds. First, to prove causation for its antitrust claim, the plaintiff would still have to inquire into the motivations behind Libya's actions. Second, the court stated that any inquiry into motivation would necessarily involve examination of the validity of Libya's actions, even though the plaintiff did not allege that Libya had violated international or United States law. Any examination of Libya's actions, the court reasoned, would violate the purposes and policies underlying the act of state doctrine.[96] The court further reasoned that whether the legality of the foreign sovereign's actions, or merely its motivations, were involved, the case ran the risk of harming United States foreign policy and embarrassing the executive branch.

The next major case outside the Second Circuit to adopt the *Hunt* rationale was *Clayco Petroleum Corp. v. Occidental Petro-*

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all, simply that as a matter of fact its 'lawful' act was induced by the unlawful conduct of the named defendants. While we agree that these points . . . distinguish [*Buttes Gas*] . . . the distinctions . . . are of no substance . . . .").

[93] 425 U.S. 682 (1976); *see also supra* notes 59-62 and accompanying text.

[94] *See Hunt*, 550 F.2d at 73; A. ROVINE, DIGEST OF UNITED STATES PRACTICE INTERNATIONAL LAW 335 (1973).

[95] *Hunt*, 550 F.2d at 73, 74.

[96] *Id.* at 77 ("Another inquiry could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention. . . .").

leum Corp.[97] The plaintiffs in *Clayco* alleged that the defendants had violated the antitrust laws by bribing a foreign government official to procure a valuable oil concession.[98] To prove the causation element of their claim, the plaintiffs had to prove that the bribes induced the foreign government to award the defendant the oil concession.

The district court granted the defendant's motion to dismiss on act of state grounds because evaluation of the claim would have required an examination of the "*ethical* validity" of the sovereign's actions.[99]

After establishing that the awarding of an oil concession was a public and sovereign act, the Ninth Circuit, with Judge, now Justice, Anthony Kennedy sitting on the panel,[100] upheld the district court's dismissal. The court rejected the plaintiff's claim that the act of state doctrine does not preclude judicial inquiry into the motivations behind a foreign sovereign's actions. In doing so, the court stated that it did not reject the Fifth Circuit's holding in *Industrial Investment Development Corp. v. Mitsui & Co.*,[101] because in *Clayco*, "the very existence of plaintiff's claim depend[ed] upon establishing that the motivation for the sovereign act was bribery, thus embarrassment would result from adjudication."[102] The court went on to hold that any such inquiry would "impugn or question the nobility of a foreign nation's motivation."[103] Thus, the plaintiffs could not argue that the sovereign's motivations were not protected, even when the foreign government was not a named defendant. As long as the purposes behind the doctrine might have

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[97] 712 F.2d 404 (9th Cir. 1983).

[98] *Id.* at 405.

[99] *Id.* at 406 (emphasis added). Although the court initially couched the issue in terms of "ethical validity," there is little doubt that nothing but an inquiry into the foreign state's motivations was required. The court later stated: "We recently reaffirmed our unwillingness to resolve issues requiring 'inquiries . . . into the . . . motivation of the acts of foreign sovereigns.' Appellants thus cannnot argue that inquiry into motivation in this case is unprotected." *Id.* at 408 (citations omitted).

[100] Justice Kennedy must have changed his mind regarding the scope of the act of state doctrine. He joined the opinions in both *Hunt* and *Kirkpatrick*, two cases reaching opposite results.

[101] 594 F.2d 48 (5th Cir. 1979); *see infra* notes 108-13 and accompanying text.

[102] *Clayco*, 712 F.2d at 407. The court almost certainly misconstrued *Mitsui* because that case explicitly stated that the act of state doctrine did not equally protect motivation and validity, a conclusion that is inconsistent with *Clayco*. *See* Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 58, 55 (5th Cir. 1979).

[103] *Clayco*, 712 F.2d at 407 (quoting *Timberlane*, 549 F.2d at 607).

arisen, the court did not care that the factual predicate of challenging validity or legality was not present.

The plaintiffs next argued that the case was justiciable under two exceptions to the act of state doctrine. The court countered by first rejecting the notion that the granting of an oil concession was merely a commercial act.[104] Next, the court held that the Foreign Corrupt Practices Act[105] did not create a new exception to the act of state doctrine. Again, the court's analysis focused on whether separation of powers would be harmed by such exceptions.[106] Once again, the tail wagged the dog.

After examining a number of act of state cases, one could easily conclude that the effect of the *Buttes Gas-Hunt-Clayco* line of cases is more pronounced than it actually is. This is because a number of other opinions cite language from these cases in dicta. In some cases, where the validity of the foreign sovereign's actions is clearly in issue, courts have carelessly quoted passages from *Buttes Gas* and its progeny stating that the doctrine requires judicial abstention not only with regard to the legality of the actions but also the motivations behind the actions.[107]

C. Cases Allowing Examination of a Foreign Sovereign's Motivations

Cases in the Third and Fifth circuits have explicitly rejected the *Buttes Gas-Hunt-Clayco* line, and several opinions from the Ninth Circuit seem to modify the earlier broad interpretations of the act of state doctrine. The Fifth Circuit, in *Mitsui*, was the first to challenge *Hunt*'s expansive reading of the act of state doctrine. The plaintiff sued the defendant corporations for antitrust violations stemming from an alleged conspiracy between the defendants and members of the Indonesian government. According to the plaintiff's allegations, the Indonesian Department of Forestry refused to grant the plaintiffs a timber license due to the defendant's improper conduct.[108]

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[104] *See id.* at 408.

[105] 15 U.S.C. §§ 78dd-1 to -2 (1982); *see infra* notes 220-22 and accompanying text.

[106] *See Clayco*, 712 F.2d at 408-09 (citations omitted) ("There is no question . . . that any prosecution under the act entails risks to our relations with the foreign governments involved.").

[107] *See* O.N.E. Shipping v. Flota Mercante Grancolumbiana, 830 F.2d 449, 453 (2d Cir. 1987); Braka v. Bancomer, S.N.C., 762 F.2d 222 (2d Cir. 1985).

[108] *See* Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48, 50 (5th Cir. 1979).

The district court followed the *Hunt* rationale and held that there was a *per se* prohibition against judicial inquiry into the motivations of a foreign sovereign's actions, no matter how unscrupulous they might have been.[109] The court of appeals reversed this holding. It first embarked on an effort to distinguish adverse precedent. *American Banana* and *Buttes Gas* were distinguished from facts at hand because the former cases dealt with the right to ownership while the latter case did not.[110] The court further distinguished *Buttes Gas* on the ground that the sovereign in *Buttes Gas* was more intimately involved in sovereign activities than was the Indonesian government.[111] The court then faced the problem of *Hunt*'s apparent blanket preclusion of inquiry into motivation. Realizing that there was no principled way to distinguish *Hunt*, the court chose to disagree explicitly with its rationale. The court held, "[m]otivation and validity are [not] equally protected by the act of state rubric."[112] This result was necessary, according to the court, to guarantee the effectiveness of United States antitrust laws.[113] Although examination of a foreign sovereign's motivations was a factor favoring application of the act of state doctrine, the *per se* rule from *Hunt* was impermissibly broad, especially where the possibility of an adverse political reaction from Indonesia was minimal.

Three years after its initial determination of the motivation issue, the Fifth Circuit reaffirmed its commitment to the *Mitsui* approach. In *Compania de Gas de Nuevo Laredo v. Entex*[114] the court of appeals upheld the district court's determination that the act of state doctrine precluded judicial determination of the case. It did so, however, based on different grounds than those used by the lower court. The district court had held that the *Hunt* approach applied, mandating that it refrain from hearing the merits of the plaintiff's claim, which alleged that the defendants illegally had conspired under Texas law to take control of the plaintiff's Mexican assets. The appeals court took great pains to point out that its

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[109] *See id.* at 49-50.

[110] *See id.* at 53-54.

[111] *See id.*

[112] *Id.* at 55.

[113] *See id.* The court said, "Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action." *Id.*

[114] 686 F.2d 322 (5th Cir. 1982).

affirmance of the lower court's decision was based on the more restrictive *Mitsui* approach to the doctrine.[115] Additionally, the court leveled the same criticisms against *Hunt* that were used in its earlier decision.[116]

In the same year that *Entex* was decided, the Third Circuit joined the fray by following the *Mitsui* formulation. In *Williams v. Curtiss-Wright Corp.*,[117] the plaintiff alleged that the defendant had engaged in unfair commercial practices designed to monopolize the engine and spare parts market for several outdated American fighter aircraft. The district court refused to dismiss the case, relying on a misapplication of an earlier opinion, *Mannington Mills, Inc. v. Congoleum Corp.*,[118] which the court believed created a new, ministerial exception to the act of state doctrine. The court of appeals rejected the lower court's interpretation of *Mannington Mills*.[119] It affirmed the district court's decision, however, after engaging in the *Sabbatino* balancing test of relevant factors. The appeals court reasoned that the act of state doctrine is a flexible theory that cannot be applied according to all-encompassing rules. Rather, each case must be examined on its own merits according to "the nature of the questioned conduct and the effect upon the parties in addition to the sovereign's role."[120]

After extolling the virtues of the flexible approach espoused in *Sabbatino*, the court countered the defendant's argument that the doctrine prevented examination of a foreign sovereign's motivations. Relying principally on *Mitsui*, the court skirted the motivation issue. It first tried to distinguish *Hunt*, arguing that such expropriation cases are traditionally barred by the act of state doctrine. The court then employed two arguments typically present in *Mitsui*-type cases: application of the act of state doctrine would needlessly defeat the purpose of United States antitrust laws and

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[115] *See* Compania de Gas de Nuevo Laredo v. Entex, 686 F.2d 322, 325 (5th Cir. 1982).

[116] *See id.* The court concluded, "Hunt was unduly broad . . . ." *Id.*

[117] 694 F.2d 300 (3d Cir. 1982).

[118] 595 F.2d 1287 (3d Cir. 1979).

[119] See Williams v. Curtiss-Wright Corp., 694 F.2d 300, 302-03 (3d Cir. 1982). The district court misinterpreted *Mannington Mills*'s discussion of the importance of the foreign sovereign's conduct in balancing the relevant factors. The district court believed that if the state's conduct was ministerial, not involving a truly sovereign act, then the act of state doctrine would not apply. What the *Mannington Mills* court really meant was that the less important the foreign state's act, the more likely it would be that the act of state doctrine would not apply. *See id.* at 303.

[120] *Id.* at 303 (quoting *Mannington Mills*, 595 F.2d at 1293).

judicial determination of the case would not harm the foreign relations of the United States.[121]

The Ninth Circuit, the very court that decided *Buttes Gas* and *Clayco*, has not been immune from the influence of the flexible approach, or the criticisms vehemently leveled at *Hunt*. Ironically, it was a pre-*Mitsui* Ninth Circuit opinion, *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*,[122] that strongly influenced other courts to adhere to the flexible approached employed in *Sabbatino*. The Ninth Circuit also adopted this flexible approach in at least two other cases, in which the respective district courts had held that the act of state doctrine prevented judicial analysis of foreign sovereigns' motivations. In *DeRoburt v. Gannett Co.*,[123] a former president of the nation of Nauru sued the defendants for libel stemming from a newspaper article that accused the plaintiff of making an illegal loan to the Marshall Islands Political States Commission.[124] In a now familiar pattern, the appeals court reversed the district court's reliance on *Buttes Gas* and its progeny. Following the *Timberlane* approach, the court balanced the relevant factors, placing special emphasis on the potential for damaging United States foreign relations.[125] After concluding that some of the plaintiff's allegations would not tread too heavily on foreign policy concerns, the court allowed part of the action to continue.[126] It did note, however, that the trial judge retained the power to reexamine the issue should the plaintiff seek to prove his case with state documents or other such materials.[127]

The Ninth Circuit had followed similar logic in *Northrop Corp. v. McDonnell Douglas Corp.*,[128] a case involving an alleged breach of contract and illegal antitrust activities arising from a teaming agreement between the parties. As in *DeRoburt* and a host of other

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[121] *See id.* at 304.

[122] 549 F.2d 597 (9th Cir. 1976).

[123] 733 F.2d 701 (9th Cir. 1984).

[124] DeRoburt v. Gannett Co., 733 F.2d 701, 702 (9th Cir. 1984).

[125] *See id.* at 703. The court described its analysis as "a balancing test with the critical element being the potential for interference with our sovereign relations." *Id.* (citations omitted).

[126] *See id.* at 704 ("After a review of the fourth amended complaint, this court believes the balance tips in favor of the plaintiff and against the application of the act of state doctrine . . . . Although resolution of the instant controversy might to some degree encroach on areas best left untouched . . . this court believes any such intrusion would be minimal . . . .").

[127] *See id.* It should be noted that earlier parts of the complaint were dismissed under the *Hunt* rationale. Thus, *DeRoburt* is a case employing both approaches.

[128] 705 F.2d 1030 (9th Cir. 1983).

cases,[129] the district court dismissed the action because it would have required an examination of a foreign sovereign's motivations in adopting a military procurement policy. Using Orwellian doublespeak, the court of appeals began its analysis of the act of state issue by citing *Buttes Gas* for the proposition that the doctrine precludes inquiry into motivation.[130] This language suggested adoption of the *per se* formulation, but the court did not follow that path. Rather, it went on to adopt the flexible balancing test, under which an examination of another government's motivations is merely a factor in determining the act of state issue. The court's holding rested on dual principles. First, the court did not want alleged violations of law to be shielded from inquiry by the potentially broad scope of the act of state doctrine.[131] Second, the court determined that the analysis required by the case would not create foreign policy tensions.[132]

D. Conclusions Regarding the Propriety of Examining a Foreign Sovereign's Motivations

The foregoing analysis indicates that the conflicting precedents regarding the motivation issue surprisingly rest on similar rationales. The common denominator that runs through all the motivation cases is a recognition that courts should decide act of state issues based on whether a judicial determination of the case will harm the foreign policy of the United States or embarrass the executive branch in the conduct of its constitutionally mandated duties. As noted earlier, separation of powers is the axis around which these issues revolve. The difference between the *Buttes-Hunt-Clayco* line of cases and the *Mitsui* approach is that the former views an examination of a foreign government's motivations as creating a *per se* violation of separation of powers principles, while the latter recognizes that such an inquiry does not always give rise to significant foreign policy concerns. Thus, the *Mitsui* approach favors flexible, case by case determinations.

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[129] It cannot be emphasized enough that there is a recurring pattern of district court dismissals with subsequent reversals on act of state grounds. This fact makes *Kirkpatrick*'s clarity even more appreciable.

[130] Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1047 (9th Cir. 1983).

[131] *See id.* at 1048.

[132] *See id.*

III. *Kirkpatrick* and Its Aftermath

A. The Case

In many ways, *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*,[133] is a microcosm of the previous motivation cases. Both in terms of law and fact, it contained most of the elements previously discussed in reference to other cases,[134] and for that reason offered an ideal opportunity for the Supreme Court to refine the law on this matter.

The plaintiff, Environmental Tectonics Corp., International, sued the defendant, W.S. Kirkpatrick & Co., for violations of antitrust[135] laws and RICO. Environmental Tectonics alleged that the defendant bribed Nigerian officials in order to win a contract to build an aeromedical facility at a Nigerian air force base. Prior to the civil action, the Justice Department had prosecuted Kirkpatrick and its chief executive officer, Carpenter, for violations of the Foreign Corrupt Practices Act.[136] Both defendants had pled guilty to those charges. At the plea colloquy in the criminal case, the United States attorney indicated that both the State Department and the Nigerian government were very concerned about political fallout from identification of officials receiving bribes.[137] The State

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[133] ___ U.S. ___, 110 S. Ct. 701 (1990) [hereinafter *Kirkpatrick III*].

[134] The common factors that Kirkpatrick shared with other cases include the following: claims based on several major domestic legislative programs (RICO, FCPA and antitrust laws), two private United States litigants, allegations of bribery, invocation of several doctrinal exceptions, reliance on *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.* and its progeny by the trial court, State Department involvement in determining whether to apply the doctrine, and a heavy emphasis on separation of powers concerns.

[135] The plaintiffs relied on the Robinson-Patman Act, 15 U.S.C. § 13(a), (b) (1988).

[136] Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., 659 F. Supp. 1381, 1386-87 (D.N.J. 1987) [hereinafter *Kirkpatrick I*], *rev'd*, 847 F.2d 1052 (3d Cir. 1988), *aff'd*, ___ U.S. ___, 110 S. Ct. 701 (1990).

[137] *See id.* at 1387. The United States attorney stated:

> Your Honor, I guess I would also like to say that the political impact of this case cannot be underestimated . . . . I can say that the government of Nigeria as well as the State Department [of the United States] have shown a vital interest in the case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the corporation.
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> . . .
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> This is not a case where there is not a victim.

Id.

Department dispatched a Bernstein letter that sent somewhat conflicting signals to the district court judge. At the outset, the State Department opined that the act of state doctrine did not apply to the case. Later, however, the letter stated:

> Apart from the act of state question, however, inquiries into the *motivation* and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.[138]

The Nigerian government's opinion was also requested but the court did not receive any response.[139]

The district court's decision to dismiss the case on act of state grounds rested heavily on *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*,[140] *Hunt v. Mobil Oil Corp.*,[141] and *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*[142] The opinion proceeded from the broad proposition that inquiry into motivation is foreclosed by the act of state doctrine because it would violate separation of powers principles. Although the court flexibly read *Hunt* and *Clayco* as not requiring *per se* dismissal, its decision to dismiss confirms this Note's characterization of them as *per se* cases.[143] In an effort to explore the matter thoroughly, the court entered into a balancing test, using *Buttes Gas*, *Hunt*, and *Clayco* as illustrative cases. The court concluded that the necessary depth of inquiry into the Nigerian motivations for awarding the contract to Kirkpatrick was at least as intrusive as the examination would have been in *Hunt*.[144] Such an inquiry was forbidden. Moreover,

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[138] *Id.* (emphasis added).

[139] *See id.* at 1388.

[140] 461 F.2d 1261 (9th Cir. 1972), *aff'g* 331 F. Supp. 92 (C.D. Cal. 1971), *cert. denied*, 409 U.S. 950 (1972).

[141] 550 F.2d 68 (2d Cir. 1977).

[142] 712 F.2d 404 (9th Cir. 1983).

[143] This Note describes *Hunt* as creating a *per se* rule against inquiring into a foreign government's motivations. There, the court held that it is impossible to separate a motivation inquiry from a validity inquiry. *See Hunt*, 550 F.2d at 77. Moreover, several district courts have read *Hunt* as creating what amounts to a *per se* rule. *See* Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48, 54-55 (5th Cir. 1979) (discussing district court holding).

[144] *See Kirkpatrick I*, 659 F. Supp. at 1395.

the court found that *Clayco* was persuasive because any analysis of bribery of foreign government officials would harm United States foreign policy.[145] This position was bolstered by citation to the State Department letter, which, although indicating that the act of state doctrine should not apply, suggested that examination of a foreign sovereign's motives might cause foreign relations tensions. As a parting concern, the court also rejected the State Department suggestion that it conduct the case with an eye toward avoiding sensitive foreign policy issues.[146] This, the court concluded, would be not only impractical, but unconstitutional.[147] When faced with these myriad foreign relations and separation of powers concerns, the court invoked the act of state doctrine to dismiss.

On appeal, the Third Circuit reversed the district court's dismissal.[148] The appeals court rejected the lower court's reliance on *Clayco* and *Hunt* as being at odds with traditional hesitance to invoke the act of state doctrine.[149] The court also suggested that *Hunt*'s analysis was not at all "flexible" because it precluded examination of a foreign sovereign's motivations.[150]

After rejecting *Hunt* and *Clayco*, the court determined that its earlier decision, *Williams v. Curtiss-Wright Corp.*,[151] suggested the proper outcome. Thus, unless the defendant could prove that the case presented a demonstrable, concrete, and nonspeculative threat to foreign relations, the act of state doctrine would not apply.[152] Relying in part on the specific language at the beginning of the Bernstein letter, the court determined that no such threat existed.[153]

The Supreme Court, in a remarkably short and unfootnoted opinion, upheld the Third Circuit's decision to allow the case to continue.[154] The Court first noted that it was not necessary to

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[145] *See id.* at 1396.

[146] *See id.* at 1397-98.

[147] *See id.* at 1397 n.17.

[148] Environmental Tectonics Corp., Int'l. v. W.S. Kirkpatrick & Co., 847 F.2d 1052 (3d Cir. 1988) [hereinafter *Kirkpatrick II*], *aff'd*, ___ U.S. ___, 110 S. Ct. 701 (1990).

[149] *See id.* at 1060 (citation omitted) ("Clayco's expansive application of the act of state doctrine seems at variance with the principle which has guided this court, that the doctrine 'is not lightly to be imposed. . . .'").

[150] *See id.*

[151] 694 F.2d 300 (3d Cir. 1982).

[152] *See Kirkpatrick II*, 847 F.2d at 1061.

[153] *See id.* at 1062. The court also relied on the trial judge's ability to manage discovery properly in the case. It noted that foreign government's often are offended by expansive discovery under the federal rules. *See id.* at n.11.

[154] Justice Scalia wrote the unanimous opinion of the court. *See Kirkpatrick III*, ___ U.S. ___, 110 S. Ct. 701.

determine whether the Bernstein or commercial exceptions defeated application of the act of state doctrine.[155] Rather than exploring these alleged exceptions, the court's holding rested on the defendant's failure to prove the necessary factual predicate for application of the doctrine.[156] The factual predicate to which the Court referred was one in which adjudication would require the judicial branch not merely to examine a sovereign's motivations or actions as part of the background of a case, but to decide the legal effect or validity of a foreign government's conduct. The Court stated:

> Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. . . . Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit and there is thus no occasion to apply the rule of decision that the act of state doctrine requires.[157]

In reaching the above holding, the court reexamined the meaning of Justice Holmes' dictum in *American Banana Co. v. United Fruit Co.*[158]—the language that created the motivation controversy in the first place. Justice Scalia, writing for the unanimous Court, conceded that Holmes might have meant that adjudication could not proceed if a foreign government's conduct would be impugned, even if such examination did not challenge the validity or legality of that conduct.[159] The Court disposed of *American Banana*'s precedential effect, however, by noting that Holmes' statement was unnecessary to the decision in the case and that whatever the value the case might have had, later developments in antitrust law overcame its importance.[160] Moreover, Justice Scalia bluntly stated that *American Banana* was "not an act of state case."[161]

Next, the Court directly examined the distinction between cases that require an analysis of motivation and those involving the validity of sovereign conduct. The United States, as *amicus curiae*,

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[155] *See id.* ___ U.S. at ___, 110 S. Ct. at 704.

[156] *See id.* at ___, 110 S. Ct. at 704.

[157] *Id.* at ___, 110 S. Ct. at 705.

[158] 213 U.S. 347 (1909).

[159] *Kirkpatrick III*, ___ U.S. ___, at , 110 S. Ct. at 705.

[160] *See id.* at ___, 110 S. Ct. at 705 (noting that *American Bananna*'s denial of extraterritorial application to antitrust laws had been "substantially overruled").

[161] *Id.* at ___, 110 S. Ct. at 706.

urged the Court to decide the case on the narrowest possible grounds because in the future there might be a case in which an examination of motivation alone would sufficiently "touch on 'national nerves'" to warrant preclusion of a suit.[162] Although noting that the United States' suggestions were deceptively analogous to arguments made in *Banco Nacional de Cuba v. Sabbatino*,[163] the Court rejected this approach.[164] It reiterated the need for the proper factual predicate as a prerequisite to any balancing test: only after a defendant proves that litigation would challenge the validity of a foreign government's conduct might any balancing test be appropriate. The doctrine was the law, and the purposes of avoiding foreign relations tensions and preventing executive branch embarrassment were secondary and subordinate.[165] The underlying policies of the act of state doctrine simply were not a doctrine in their own right.[166] The tail could no longer wag the dog.

B. Jurisprudential Impact

The most immediate consequence of the Supreme Court's decision in *Kirkpatrick* is the limiting of the act of state doctrine in some important respects. An entire class of cases—those dealing solely with the motivations, but not the validity, of foreign sovereign actions—has been eliminated from act of state jurisprudence. *Buttes Gas*, *Hunt*, *Clayco* and their progeny are overruled insofar as they hold that the act of state doctrine precludes judicial inquiry into a foreign sovereign's motivations. Numerous other cases are undermined with respect to dicta suggesting that in certain cases

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[162] *Id.*, 110 S. Ct. at 706. Further, "We should not, the United States urges, 'attach dispositive significance to the fact that this suit involves only the motivation for rather than the validity of, a foreign sovereign act.'" *Id.*, 110 S. Ct. at 706.

[163] 376 U.S. 398 (1964).

[164] *See Kirkpatrick III*, U.S. at ____, 110 S. Ct. at 706-07 ("We suggested that a sort of balancing approach could be applied—the balance shifting against application of the doctrine, for example, if the government that committed the 'challenged act of state' is no longer in existence. . . . But what is appropriate in order to avoid unquestioning judicial acceptance of the acts of foreign sovereigns is not similarly appropriate for the quite opposite purpose of expanding judicial incapacities where such acts are not directly (or even indirectly) involved. It is one thing to suggest, as we have, that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked; it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the doctrine . . . into uncharted fields.").

[165] *See id.* at ____, 110 S. Ct. at 706.

[166] *See id.* at ____, 110 S. Ct. at 707.

having the potential for harm to United States foreign policy the act of state doctrine prohibits a motivation analysis. Moreover, dozens of cases citing *Hunt*'s broad reformulation of the doctrine are now worthless with regard to those statements.

In addition to having a significant impact on the precedential value of lower court opinions, *Kirkpatrick* makes it difficult to find any part of *American Banana* that remains intact. In the areas of act of state and antitrust jurisprudence, *American Banana* stood for two propositions. First, it held that the antitrust laws had no extraterritorial effect.[167] This conclusion was implicitly overruled by later cases, such as *Continental Ore Co. v. Union Carbide & Carbon Corp.*[168] Second, Justice Holmes' dictum regarding a domestic court's inability to hear challenges to foreign seizures was often cited as an act of state principle forbidding judicial analysis of a foreign government's motivation.[169] This dictum did not survive *Kirkpatrick*.

An example of how the act of state doctrine has been ameliorated, and how future cases will be decided, is the recent decision, *Lamb v. Phillip Morris, Inc.*[170] In *Lamb*, apparently the only circuit court decision to decide a claim based on foreign sovereign motivations since *Kirkpatrick*,[171] domestic tobacco growers sued Phillip Morris, Inc. for antitrust and Foreign Corrupt Practices Act violations. The plaintiffs alleged that the defendant made illegal contributions to a Venezuelan charity, managed by the Venezuelan president's wife, in exchange for price controls on Venezuelan tobacco. The court began its analysis by determining whether or not the defendant had established the necessary "factual predicate" for application of the doctrine.[172] The defendants failed to prove that the plaintiff's claims would require an examination of the validity of any Venezuelan act. The best the defendants could do was to maintain that the case would necessitate an improper analysis of a foreign government's motivations under *Hunt* and

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[167] *See American Banana*, 213 U.S. at 359.

[168] 370 U.S. 690, 704-05 (1962).

[169] *Buttes Gas*, 331 F. Supp. at 111-114.

[170] 915 F.2d 1024 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 961 (1991).

[171] Although *Lamb* is the only circuit court opinion to evaluate the meaning of *Kirkpatrick*, several district courts have examined the matter briefly. *See* Phoenix Canada Oil Co. v. Texaco Ltd., 749 F. Supp. 525 (S.D.N.Y. 1990); Galu v. Swiss Air: Swiss Air Transport Co., 734 F. Supp. 129 (S.D.N.Y. 1990).

[172] Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1026 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 961 (1991).

Clayco.[173] Citing *Kirkpatrick*, the circuit court reversed the district court's dismissal, thus allowing the antitrust claims to proceed.

Lamb demonstrates how *Kirkpatrick* has simplified analysis of act of state cases—at least those dealing with motivation. No longer will courts initially have to discuss the balancing test and policy considerations that were prevalent under pre-*Kirkpatrick* cases. Nor will courts first have to wade through the half dozen or so alleged exceptions to the act of state doctrine. Additionally, the complicated issue of whether or not alleged conduct is sovereign in nature will not be necessary as a preliminary matter. Rather, a single factual finding is all that will be necessary to determine the *technical* availability of the doctrine. Granted, should a court find that the validity of a foreign government's action is challenged, it will have to analyze the previously mentioned issues. Dozens of cases, however, now can be summarily decided or even avoided because courts and defendants know that, in light of *Kirkpatrick*, parties must carry a heavy burden before they can invoke the act of state doctrine.

C. *Impact on Act of State Problems*

1. *Separation of Powers*

Over the years, one of the principal criticisms of the act of state doctrine and its expansion has rested on separation of powers concerns.[174] This should not be surprising, even though the modern justification for the doctrine *is* separation of powers. In many ways the division of power among the branches of government is a zero-sum game. Whenever power is given to one branch of government, it is taken from another, unless, of course, it comes from the people.

In the modern act of state context, the judiciary originally relinquished power to the executive branch so that the President's ability to conduct foreign affairs would not be hindered.[175] The judiciary's surrender of power, in the Supreme Court cases, is somewhat understandable because in those cases adjudication may well have inhibited executive branch efficiency. All but one of the

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[173] *Id.* at 1026-27.

[174] *See* Bazyler, *supra* note 19, at 375-76.

[175] *See Sabbatino*, 376 U.S. at 432.

cases dealt with expropriation,[176] a subject about which there is little international agreement and a great deal of strife. Additionally, in only one modern case has the Supreme Court determined that the act of state doctrine applied to the merits.[177] Moreover, a majority of the court has never accepted an executive branch Bernstein letter as being dispositive regarding the doctrine's application in a case.[178] Thus, Supreme Court interpretation of the doctrine has not been overly deferential to the executive branch. When the executive has been silent, the court has exercised the doctrine with prudence.

The approach taken by *Buttes Gas*, *Hunt*, *Clayco* and their progeny is not appropriate, however. These courts gave up tremendous amounts of power in a variety of factual scenarios, many of which had nothing to do with foreign government takings. They not only deferred to executive branch wishes, but they also gave up power where the executive branch was silent, refusing to hear cases based on their own findings that foreign relations would somehow be harmed if the suits continued. Although this approach is theoretically sound in validity cases, where it is better that courts make their own determinations instead of relying on State Department pronouncements, it should never have been used in motivation cases. It is one thing for courts to refuse to sit in judgment of the legality of a sovereign's actions, but it is quite another to refuse to examine a foreign state's motivations. In the former case, the possibility of international offense is great because, in adjudicating, United States courts possibly would not give legal effect to a foreign sovereign's conduct and laws. In the latter case, however, there is little chance for diplomatic harm since the legal effect of a government's actions will be honored absolutely in the United States, even by the judicial branch.[179] The only possible source of embarrassment or diplomatic tension, in the latter case, thus stems from the disclosure of improper motivations of foreign government officials. Surely a few lines in a published judicial opinion, embarrassing though they may be, are not sufficient to outweigh the

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[176] The only Supreme Court case not dealing with a foreign confiscation was Underhill v. Hernandez, 168 U.S. 250 (1897).

[177] *See Sabbatino*, 376 U.S. at 398.

[178] *See* Comment, *Rationalizing the Federal Act of State Doctrine*, *supra* note 54, at 299-300.

[179] *See Kirkpatrick III*, U.S. at ____, 110 S. Ct. at 705 (requiring that courts deem foreign governments' actions valid).

judiciary's duty to decide cases and controversies[180] properly presented.[181] The act of state doctrine is, after all, designed to protect the conduct and laws of other nations, not the people that govern those nations.

Careless judicial self-restraint, through refusal to decide cases involving a foreign government's motivations, threatens the judiciary's role in the American tripartite system of government. Justice White, in his dissent in *Sabbatino*, reflected this argument when he stated, "[O]ur courts are obliged to determine controversies on their merits, in accordance with the applicable law."[182]

The most dangerous situation occurs when the act of state doctrine is invoked in motivation cases as a result of cajoling by the executive branch. As one commentator has stated: "The separation of powers doctrine contemplates that courts will decide cases independently and without direction or influence from the executive or legislative branches. The bulwark of democracy is an independent judiciary."[183] The use of Bernstein letters, in general, damages this judicial independence,[184] but in the context of motivation cases it is more egregious because, as discussed previously, it is difficult to imagine any fact pattern dealing with motivation alone that would warrant subordination of the judiciary's article III duties. A refusal to determine the merits of a matter, without proper justification, threatens the legitimacy of the courts and destroys the judiciary's image as an independent, neutral, and apolitical body.[185] These very concerns led Congress to adopt a restrictive view of sovereign immunity in the Foreign Sovereign

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[180] *See* U.S. CONST. art. III, § 2, cl. 2.

[181] This is especially true considering that many published opinions applying the act of state doctrine to motivation cases detail the allegations of the complaint and the preliminary evidence. It is ironic that courts such as *Hunt*, under their own analysis, risked harming diplomatic relations by examining whether or not to hear the case.

Courts may be concerned about another source of embarrassment, wide-ranging discovery. This can be managed easily by controlling the scope of discovery. Only narrow requests would be relevant to most cases, since a plaintiff usually need show only that an act occurred resulting in injury.

[182] *Sabbatino*, 376 U.S. at 450-51 (White, J., dissenting).

[183] Bazyler, *supra* note 19, at 375.

[184] *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 790 (1972) (Brennan, J., dissenting) (arguing that adherence to executive branch advice on act of state issues "politicizes the judiciary").

[185] *See* Bazyler, *supra* note 19, at 375. *See generally* Comment, *Legitimacy: The Sacrificial Lamb at the Altar of Executive Privilege*, 78 KY. L.J. 817 (1989-90) (discussing the importance of the Supreme Court's continued legitimacy).

Immunity Act.[186] Through this Act, Congress sought to release the courts from executive branch influence.[187]

Lower courts, too, have worried about the act of state doctrine's effects on judicial independence and competency. In *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*,[188] the court stated that the applicability of the act of state doctrine "is a legitimate exercise of an Article III court, not to be controlled by the expressed view of the executive branch in a given case."[189]

In the *Kirkpatrick* litigation, the district court discussed several concerns raised by the State Department's warnings regarding how to try the case.[190] In analyzing the State Department's suggestion that the court tread lightly in certain areas that might have given rise to foreign policy problems, the court stated that it was not competent to evaluate the foreign policy impact of trial decisions.[191] Although the court mainly feared that executive branch functions would suffer, it also seemed bothered by the image such policy determinations would create. The opinion hypothesized a foreign policy advisor to the court, which surely would create an appearance of impropriety, not to mention other concomitant separation of powers concerns.[192] It must be conceded, however, that the district court's resolution of these separation of powers issues was to refuse to hear the case, a conclusion that goes against the Supreme Court's later holding and analysis. Nevertheless, the court's arguments do suggest that the judiciary is harmed when the executive involves itself in act of state determinations.

The constitutional functions of Congress are also damaged when the judicial branch abstains from hearing the merits of motivation cases,[193] whether or not such a decision is taken at the behest of the executive branch. When courts refuse to determine the merits of a motivation case, they also refuse to enforce public policy as manifested by the enactment of laws. Although the same is true of validity cases, judicial abstention in motivation cases is

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[186] *See* Bazyler, *supra* note 19, at 375-76.

[187] *See id.*

[188] 830 F.2d 449 (2d Cir. 1987).

[189] O.N.E. Shipping v. Flota Mercante Grancolumbiana, 830 F.2d 449, 452 (2d Cir. 1987) (citation omitted).

[190] *See Kirkpatrick I*, 649 F. Supp. at 1397.

[191] *See id.* at n.17.

[192] *Id.*

[193] *See Mitsui*, 594 F.2d at 55 (stating that application of the act of state doctrine would thwart Congressional antitrust laws).

inexcusable because there is no countervailing justification to outweigh the court's refusal to follow public policy. As demonstrated previously, there is no legitimate concern because executive branch functions cannot be damaged by following domestic laws in motivation cases. The result has been that major legislative programs, such as the Foreign Corrupt Practices Act, RICO and myriad federal antitrust laws, are not enforced when defendants prove that a foreign government's motivations lurk somewhere in the background of the case.[194] These problems are discussed at length later in this Note, but for present purposes it is sufficient to say that the functions of all branches of government are threatened by application of the act of state doctrine to motivation cases.

The Supreme Court's decision in *Kirkpatrick* resolves many of the previously discussed problems by creating a *per se* rule stating that pure motivation cases must be heard, even when the executive branch objects. The Court rejected the government's position that in the future there may be some motivation cases that would sufficiently threaten the executive branch's power to warrant application of the doctrine. The Court answered the government's argument—that the motivation/validity distinction should not be dispositive—by reaffirming that under no circumstances will the policies behind the doctrine be sufficient to bar adjudication unless the *validity* of a foreign sovereign's conduct is challenged. Only after the court determines that the factual predicate is met will executive branch opinions and suggestions be considered as part of the *Sabbatino* balancing test. Similarly, a court itself will not independently examine a case's potential impact on foreign policy and separation of powers until the defendant proves that more than just motivations are involved. If validity is not questioned, the act of state doctrine does not apply.

Kirkpatrick's restriction of the act of state doctrine should protect the separation of powers doctrine better than the *Hunt* line of cases. The executive branch's power will not be harmed because judicial inquiry into a foreign government's motivation will not offend the foreign state or embarrass the executive branch in its conduct of foreign affairs. The legislative branch's power will be preserved because courts will enforce domestic laws and public policy, in the absence of a countervailing need to protect executive power, which will exist in validity cases only. The judiciary's power

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[194] *See* Bazyler, *supra* note 19, at 376-81; Note, *supra* note 23, at 413; Note, *supra* note 90, at 1260-61.

will similarly be guarded because courts will fulfill their constitutional duty to decide cases and controversies. Additionally, the judiciary's decision on act of state issue will be influenced by the executive branch in only those cases where there is truly a threat to the functions of a coordinate branch of government.

2. *International Business Transactions and Individual Litigants*

Critics of the act of state doctrine often point out that application of the doctrine leads to uncertainty in international business transactions[195] and hardships for individual litigants.[196] Several concerns are present with regard to planning international transactions. Typically, when entering into an agreement, private parties seek to allocate risks according to prevailing legal standards and possible adverse occurrences. For example, where one of the parties is a foreign country, the other parties to the transaction may seek a waiver of sovereign immunity so that recovery will be allowed in domestic courts should the transaction fail due to actions by the foreign state. Sophisticated international businessmen rely on state, federal, and international law to structure deals that are beneficial to all parties concerned. Moreover, liability risks are bargained for so that their costs are ultimately included in the economics of the deal.

Careful planning and reliance by international dealers can be frustrated, however, by application of the act of state doctrine. The conduct of parties to the transaction, as well as independent third parties, may be illegal, giving rise to claims in domestic courts. However, the potential plaintiffs may find that their forum for legal remedy, the courts, is not available because of the act of state doctrine.

The potential scope of the doctrine under the *Hunt* line of cases is expansive, because the motivations of foreign states' actions are potentially involved in many transactions.[197] This is especially true in the Third World where many industrial development projects involve at least some governmental action, even if it is only the granting of a concession, license or permit.[198] In some cases, government involvement may be more direct and substantial, as in

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[195] *See* Note, *supra* note 73, at 131-32 (arguing that more United States involvement in international law will stabilize law despite what critics say).

[196] *See id.* at 118-19.

[197] *See* Note, supra note 90, at 1260.

[198] *See, e.g., Mitsui*, 594 F.2d at 48.

military procurement cases.[199] No matter how important the government action, the doctrine threatens to prevent aggrieved parties from obtaining redress, even when the foreign government is not a defendant and the suit is between two American litigants. Moreover, under the *Hunt* analysis, the validity of governmental actions is not a prerequisite to the doctrine's applicability.

When a court invokes the act of state doctrine to dismiss a claim, the careful planning involved in international transactions may unravel. Consequently, the distribution of risks among the parties is unsettled, because application of the doctrine sometimes cannot be foreseen in motivation cases. Even if a foreign government's involvement in a transaction is anticipated, the importance of its motivations rarely can be. Thus, any reliance on state, federal, or international law is misplaced and unadvised. Moreover, if the foreign sovereign itself is named as defendant, then any waiver of sovereign immunity is worthless, because the act of state doctrine serves as a second source of defense.[200] Such uncertainty and instability ultimately result in greater transaction costs for businessmen, who will seek more security in their dealings.

Application of the act of state doctrine in motivation cases not only undermines international transactions, but it also denies individual litigants a meaningful chance to seek justice.[201] The *Hunt* line of cases, with its broad scope encompassing almost any litigation where a defendant can make a colorable claim of foreign sovereign involvement, has lead many lower courts to dismiss on act of state grounds. Some courts have jumped at the opportunity, provided by *Hunt*, to apply the act of state doctrine.[202] After all, dockets are congested and act of state cases typically involve complicated international law issues.[203] The Supreme Court cases, on the other hand, do not afford lower courts with an easy way out. Rather, they allow courts to dismiss only where the validity of a foreign government's actions is involved.[204]

The *Hunt* expansion of earlier Supreme Court precedent is difficult for a private litigant suing another private litigant in a domestic court to understand. If the validity of the foreign state's

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[199] *See, e.g., Curtiss-Wright*, 694 F.2d at 300.

[200] *See* Callego v. Bancomer S.A., 764 F.2d 1101 (5th Cir. 1985); Note, *supra* note 23, at 415.

[201] *See* Note, *supra* note 73, at 118.

[202] *See* Bazyler, *supra* note 19, at 328.

[203] *See id.*

[204] *See Kirkpatrick III*, U.S. at ____, 110 S. Ct. at 704-05.

actions is not involved, it is hard for the plaintiff to reconcile judicial dismissal of the case because the separation of powers rationale is not truly implicated. Granted, the plaintiff that does not have his day in court is always disappointed. But the act of state doctrine, unlike the political question and sovereign immunity doctrines, is more difficult to understand, because in the latter case the government itself is almost always involved and the validity of a government's actions is usually challenged, while in the former case, foreign sovereigns are usually not defendants and, at least under *Hunt*, the contested validity of their acts is not a prerequisite to dismissal of the case.

Kirkpatrick eliminates some of the problems of the act of state doctrine's impact on international transactions and individual litigants. By significantly limiting the scope of this doctrine, *Kirkpatrick* has removed an entire class of concerns for the international deal maker. At least in cases where validity is not involved, the act of state doctrine no longer bars adjudication of cases. Simply by reimposing the factual predicate that always existed under Supreme Court cases, *Kirkpatrick* has, for the most part, relegated the act of state doctrine to foreign takings cases and a few other factual scenarios, few of which involve circumstances that are planned for, or take place in, garden-variety international transactions. The reduction of the risk of dismissal under the act of state doctrine could further grease the wheels of international commerce and create efficiencies resulting from reduced costs.

3. *Enforcement of Domestic Laws*

The act of state doctrine in its *Buttes-Hunt-Clayco* formulation impeded the effectiveness of several major legislative programs.[205] In addition to raising the separation of powers concerns addressed previously, the incapacitation of domestic laws threatens to damage business practices and competition both at home and abroad.[206]

The principal legislative casualty of *Hunt*'s expansive reading of the doctrine is the federal antitrust laws. The antitrust laws

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[205] *See* Bazyler, *supra* note 19, at 376-81 (arguing that the act of state doctrine in general harms the effectiveness of United States law); Note, *supra* note 23 (arguing for a commercial exception in order to bring doctrine in line with the Foreign Sovereign Immunities Act of 1976); Note, *supra* note 90, at 1260-61 (arguing that the act of state doctrine, in its *Hunt* formulation, affects adversely the Foreign Corrupt Practices Act of 1977 and antitrust laws).

[206] *See Mitsui*, 594 F.2d at 55.

apply to foreign actions that have a "direct and substantial effect" on United States commerce.[207] Since the time of *United States v. Sisal Sales Corp.*, and *Continental Ore Co. v. Union Carbide & Carson Corp.*, courts have entertained extraterritorial antitrust claims, for the very reason that international commerce has the potential to affect domestic commerce and competition adversely. Enforcement of the antitrust laws is dependent on private suits, which are encouraged through the awarding of treble damages.[208] Application of the act of state doctrine often precludes these private enforcement actions, even where only motivations of a foreign government are involved.

To understand how the antitrust laws were threatened by *Hunt*'s analysis, one need only examine the shear number of act of state cases that are based on antitrust claims.[209] *Hunt* itself is such a case.[210] By allowing defendants to invoke the act of state doctrine in motivation cases, the lower courts have encouraged violations of the antitrust laws. Would-be violators simply had to read *Hunt* to find an easy escape from antitrust liability. Anyone wishing to avoid the Sherman Act could do so as long as a foreign government was involved enough to warrant application of the doctrine under *Hunt*'s policy-based analysis.[211]

The court in *Industrial Investment Development Corp. v. Mitsui & Co.*[212] realized the danger of *Hunt*'s reasoning. It made two points. First, the court stated, "Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act . . . uselessly thwart[s] legitimate American goals where adjudication would result in no embarrassment to executive department action."[213] Second, the court argued that the act of state doctrine should not shield private conspirators simply because they are able to procure a foreign state as a coconspirator.[214]

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[207] *See* Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597, 610 (9th Cir. 1976).

[208] *See* Bazyler, *supra* note 19, at 378-79.

[209] *See, e.g.*, *Kirkpatrick III*, U.S. at ____, 110 S. Ct. at 701; *O.N.E. Shipping*, 830 F.2d 449; Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir. 1983); *Clayco*, 712 F.2d 404; *Curtiss-Wright*, 694 F.2d at 300; International Ass'n of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1981); *Mitsui*, 594 F.2d 48; Mannington Mills Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); *Timberlane*, 549 F.2d 597; *Buttes Gas*, 461 F.2d 1261.

[210] *See Hunt*, 550 F.2d at 68.

[211] *See* Bazyler, *supra* note 19, at 379.

[212] 594 F.2d at 48.

[213] *Id.* at 55.

[214] *See id.*

Although *Kirkpatrick* did not address the motivation issue by analyzing effects on domestic laws, the court might have intended to solve this problem. In many ways, *Kirkpatrick* represents a conflict of laws approach to the act of state doctrine.[215] A basic premise of conflict of laws is that courts should apply the laws of the sovereign that created them if applying other law would violate domestic public policy.[216] To do otherwise would damage separation of powers. The act of state doctrine can be seen as an exception to this basic rule.[217] In other words, the act of state doctrine precludes domestic courts from invoking domestic law even when applying foreign law would violate United States public policy.[218] Moreover, the doctrine requires that United States courts deem foreign government actions legal under foreign law.[219]

Kirkpatrick indicates that the proper reasons for refusing to apply domestic law are very narrow and difficult to prove. The act of state doctrine is only justified when the validity of a foreign state's actions is in question. Where motivation is the sole issue, the justifications for application of the doctrine do not outweigh the basic conflict of laws rule that requires United States courts to apply congressional law. *Kirkpatrick* indicates that public policy, as manifested in the antitrust laws, overrides the act of state doctrine in motivation cases because the basic conflict of laws rule must be honored when no other interests exist. This same analysis holds true for the application of RICO and other laws to defendants in motivation cases. By rendering the *Buttes Gas-Hunt-Clayco* line of cases impotent, the Supreme Court in *Kirkpatrick* has reinstated congressional primacy in all but a narrow class of cases. Only when legitimate countervailing interests are concerned will domestic laws go unenforced.

Another legislative program threatened by lower court motivation cases was the Foreign Corrupt Practices Act.[220] Passed in 1977, the Act criminalizes bribery to foreign officials for business purposes.[221] The Act's existence represents a public policy deter-

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[215] *See generally* Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 178-79 (1967); Note, *supra* note 73, at 106-08.

[216] *See* Henkin, *supra* note 215, at 178.

[217] *See* Note, *supra* note 73, at 107.

[218] *See id.*; *see also* Henkin, *supra* note 215, at 178.

[219] *See Kirkpatrick III*, U.S. at ____, 110 S. Ct. at 707.

[220] 15 U.S.C. § 78dd-1 to -2 (1982).

[221] *See id.*

mination by two branches of government that such practices are dangerous enough to warrant criminal sanctions.[222]

In *Clayco*, the Ninth Circuit refused to apply the Foreign Corrupt Practices Act when it invoked the act of state doctrine. The act of state exception to the basic conflict rule was not warranted because only a foreign state's motivations were involved. Thus, there were no countervailing interests to merit not applying the anti-bribery laws. By refusing to find a bribery exception to the act of state doctrine in motivation cases brought under the FCPA, the court destroyed any possibility for private enforcements under the Act. After all, by definition, a violation of the Act requires inquiry into the conduct of a foreign official or agency.

In addition to hindering the effectiveness of antitrust, RICO and anti-bribery laws, application of the act of state doctrine to motivation cases also had the potential to undermine federal securities laws.[223] These laws, passed to protect investors, have been applied extraterritorially. Although few claims arising under the securities laws were dismissed on act of state grounds, the potential for expansion of the *Hunt* rationale into another legislative program menaced the separation of powers and conflict of laws origins of the doctrine. By eviscerating *Hunt*, the Supreme Court, in *Kirkpatrick*, ended another threat before it became reality.

Kirkpatrick's holding not only restored federal law to its proper stature, but it also reinstated a plaintiff's ability to invoke state law claims in motivation cases. Under the *Buttes Gas-Hunt-Clayco* line of cases, state claims based on tort, contract, libel, and a host of other theories were either dismissed, or ran the risk of being dismissed, under the act of state doctrine.[224] By requiring that a defendant prove the factual predicate, *Kirkpatrick* protects the power of state legislatures, because courts may apply the doctrine only when there are sufficient justifications to outweigh domestic public policy. Thus, state courts and federal district courts sitting in diversity will be required to apply state law to act of state cases unless the validity of a foreign government's actions is questioned.

4. *Development of International Law*

Since the time of *Sabbatino*, commentators and Congress have criticized the act of state doctrine because it removes the United

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[222] *See* Note, *supra* note 90, at 1261.

[223] *See* Bazyler, *supra* note 19, at 379.

[224] *See, e.g.*, DeRoburt v. Gannett Co., Inc., 733 F.2d 701 (9th Cir. 1984); Compania de Gas De Nuevo Laredo, S.A. v. Entex, 686 F.2d 322 (5th Cir. 1982).

States courts from the process of developing international law.[225] In its classic formulation, the doctrine precludes domestic courts from inquiring into the validity of a foreign sovereign's actions. This definition prohibits judicial scrutiny of domestic as well as international validity or legality. In fact, all but one of the Supreme Court cases until *Kirkpatrick* dealt with the international validity of a foreign state's conduct. Some have concluded that application of the act of state doctrine has hindered the development of international law because, like common law, it matures over time through trial and error, custom and practice.[226] Since *Sabbatino*, and the more restrictive *Hunt*, limit a plaintiff's access to domestic courts, the judicial branch has been afforded fewer and fewer opportunities to delve into emerging international policy issues, such as expropriations, bribery, and antitrust. Thus, some of the most respected legal thinkers in the world have not been allowed to explore those issues. In part, these concerns led Congress to act on several occasions to abolish the act of state doctrine.[227] In a world where the United Nations and the International Court of Justice are not very effective,[228] and infrequently used, the rule of international law must be developed in the domestic courts of the world. Until now, one of the major players has been missing from the scene.

The Supreme Court's decision in *Kirkpatrick* serves only a limited role in remedying the problem. It is true that more cases involving international issues will proceed in domestic courts, but the depth and scope of their analysis may be limited for two reasons. First, motivation cases, the class of litigation now allowed under all circumstances, are the disputes that most indirectly involve international law. Typically, the plaintiff's claim in a motivation case rests on domestic laws, such as the Sherman Act or the FCPA. Usually, when motivation cases involve expropriation or other controversial international issues, they can be reclassified

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[225] *See* Bazyler, *supra* note 19, at 381-84; Note, *supra* note 73, at 122-26.

[226] *See* Bazyler, *supra* note 19, at 381-84; Note, *supra* note 73, at 124.

[227] Congress' first attempt to limit the act of state doctrine was the Hickenlooper Amendment, which sought to require United States courts to adjudicate foreign confiscation cases. *See* 22 U.S.C. § 2370(e)(2) (1982). It was poorly drafted and had little effect on the act of state doctrine.

The next major attempt to destroy the doctrine came in 1981 with the Mathias Bill, which would have required United States courts to hear cases in which the defendant had violated international law. *See* S.1434, 97th Cong., 1st Sess. (1981).

[228] It is very difficult for a private party to overcome State Department inertia.

as validity cases. Thus, they would contain the act of state factual predicate, precluding further inquiry.

On the other hand, where a case involves solely a foreign government's motivations, these international issues will not be examined in detail because *Kirkpatrick* does not allow analysis of validity.[229] To the contrary, in motivation cases, the act of state doctrine requires domestic courts to deem the foreign sovereign's actions legal.[230] The issue in a motivation case is not the legality of the conduct, but that the conduct occurred.[231] The occurrence of the event (e.g., the bribe) and the resulting foreign action are all that is involved in most motivation cases. The legality of the government conduct normally is not at issue.

The second limitation on *Kirkpatrick*'s ability to reintroduce domestic courts into the international arena, is its failure to alter *Sabbatino*'s balancing test appreciably in validity cases. Once the factual predicate has been met, the courts are still free to apply the act of state doctrine where this balancing test so warrants. The act of state doctrine will continue to provide grounds for dismissal in the very cases in which courts would have an opportunity to explore, define, and implement international law.

Perhaps *Kirkpatrick* offers a few glimmers of hope for those that want domestic courts to enter the international legal arena. In motivation cases, it is possible that a few brave, but unwise, courts will, in dicta, comment on or condemn a foreign state's actions and their relationship to international law. This is unlikely, however, because few courts would dare to expand an opinion in this context beyond what is necessary. It is also possible that public discussion of foreign sovereign action in motivation cases will lead to more of a consensus on international matters.

In validity cases, *Kirkpatrick* may represent a continuation of the Court's restriction of the act of state doctrine. The Court reemphasized, by its holding, that the doctrine is not to be lightly invoked.[232] One must remember that the last time the Supreme Court applied the doctrine was in *Sabbatino*, a case decided more than twenty-five years ago. Despite these speculations, there is simply not enough discussion of validity cases in *Kirkpatrick* to

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[229] *See Kirkpatrick III*, U.S. at ____, 110 S. Ct. at 707.
[230] *See id.*
[231] *Id.* at 705.
[232] *Id.* at 707.

anticipate whether courts will seize the opportunity to examine international law.

CONCLUSION

The Supreme Court's decision in *W.S. Kirkpatrick v. Environmental Tectonics Corp.*[233] makes significant contributions toward resolving decades-old act of state problems. Particularly in the areas of separation of powers, international business transactions, and the enforceability of antitrust, anti-bribery, and RICO laws, the decision retakes ground lost to earlier lower court decisions. *Kirkpatrick* does not, however, resolve problems in the area of United States judicial involvement in the development of international law. Resolution of this issue would most likely require a near complete abolition of the act of state doctrine, something the court is not yet willing to do, or for that matter, may never be willing to do. This last question is one that interests courts, scholars, and litigants alike. *Kirkpatrick* offers little indication about whether its restriction of the act of state doctrine stems from a desire to reign the doctrine in so that it will be saved from legislative destruction, or from a willingness to beat Congress to that task. Whether *Kirkpatrick* represents a funeral pyre or a phoenix, only time will tell.

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[233] ____ U.S. ____, 110 S. Ct. 701 (1990).

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