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ABSTRACT

This Article analyzes the Supreme Court's recent decisions involving the act of state doctrine. This doctrine, which is based upon notions of international comity, prevents the courts of one state from adjudicating the acts of a foreign state that occur within the foreign state's territory. This respect for foreign tribunals reduces friction between states and promotes more cooperative interaction in the international arena.

The Article first defines comity and explains its importance in international litigation. Professor Swanson then outlines the diminishing role of comity as a basis for the act of state doctrine. In early opinions, United States courts refused to question a foreign sovereign's act of state. Professor Swanson asserts that during the last century, the Supreme Court has backed away from the act of state doctrine and has left the doctrine's parameters in disarray. As a result, the task of defining the doctrine has been left to the lower courts. In this context, Professor Swanson discusses significant Supreme Court and lower court decisions.

The Article pays particular attention to a recent Supreme Court case, W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. *In* Kirkpat-

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rick, *a unanimous court held that the validity of a foreign state's actions must be in question before the act of state doctrine is applicable. Professor Swanson interprets this decision as an attack on the act of state doctrine. Moreover, Professor Swanson asserts that this decision gives courts free reign to retain or reject cases for reasons completely unrelated to comity and other political concerns. Professor Swanson concludes that by narrowing the doctrine's scope, the Supreme Court has shown a lack of respect for the laws and practices of other states.*

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I. INTRODUCTION

The act of state doctrine has long been the subject of dispute among scholars, judges, and policymakers.[1] The doctrine provides that United States courts will not sit in judgment on a foreign sovereign's acts done within that state's own jurisdiction.[2] Commentators disagree about the

1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 comment a (1987) [hereinafter RESTATEMENT].

2. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3d Cir. 1979). In Underhill v. Hernandez, 168 U.S. 250 (1897), the Supreme Court articulated the classic definition of the act of state doctrine: "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." *Id.* at 252.

Unlike the foreign sovereign immunity doctrine, the act of state doctrine is applicable in suits in which a state is not a party. The foreign sovereign immunity principle is now codified in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-1611 (1988).

doctrine's origins, underlying rationale, application, and continued viability.[3]

Throughout the debate, the doctrine has restrained overzealous judges and advocates from imposing United States legal notions abroad.[4] The act of state doctrine was designed to prevent the negative effect such actions could have on foreign relations and international law's development in the international community.[5] The doctrine stems from the notion of comity, a concept that requires one nation's courts to respect a foreign sovereign's actions.[6] Comity is a traditional principle that balances the needs of the forum state, foreign sovereigns, and the international legal system.

Recent Supreme Court decisions de-emphasize the importance of comity in preventing international disputes and encouraging international cooperation.[7] In *W.S. Kirkpatrick & Co. v. Environmental Tectonics*

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3. For interesting discussions of the doctrine, see Note, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 STAN. L. REV. 327 (1983); Note, *The Nonviable Act of State Doctrine: A Change in the Perception of the Foreign Act of State*, 38 U. PITT. L. REV. 725 (1977); Achebe, *The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?*, 13 MD. J. INT'L L. & TRADE 247 (1989); Chow, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, 62 WASH. L. REV. 397 (1987); Note, *The Act of State Doctrine and U.S. Antitrust Law: A Reassessment of* Hunt *and* Timberlane, 18 GEO. WASH. J. INT'L L. & ECON. 721 (1985); Note, *Adjudicating Acts of State in Suits Against Foreign Sovereigns: A Political Question Analysis*, 51 FORDHAM L. REV. 722 (1983); Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILL. L. REV. 1 (1990); Domke, *Act of State:* Sabbatino *in the Courts and in Congress*, 3 COLUM. J. TRANSNAT'L L. 99 (1964); Davis, *Domestic Development of International Law: A Proposal for an International Concept of the Act of State Doctrine*, 20 TEX. INT'L L.J. 341 (1985); Hoagland, *The Act of State Doctrine: Abandon It*, 14 DEN. J. INT'L L. & POL'Y 317 (1986); Halberstam, Sabbatino *Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AM. J. INT'L L. 68 (1985); Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967).

4. Such attempts often result in resistance by foreign states that disagree with United States notions of justice. For example, foreign states have enacted blocking legislation in response to United States attempts to obtain discovery abroad. *See, e.g.*, Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612 (1979).

5. *See* Oetjen v. Central Leather Co., 246 U.S. 297, 303 (1918).

6. *Id.*

7. *See* Swanson, *Comity, International Dispute Resolution Agreements, and the Supreme Court*, 21 LAW & POL'Y INT'L BUS. 333 (1990) (outlining the Supreme Court's movement away from the comity doctrine in Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988)).

Corp.,[8] the Court declined the opportunity to affirm the importance of comity in deciding act of state cases. In deciding whether the investigation of a foreign state's motivations implicates the act of state doctrine, the Court spurned the chance to apply the flexible act of state test that lower courts had developed since the Supreme Court's last decisive statement in *Banco Nacional de Cuba v. Sabbatino*.[9] Instead, the Court chose a bright-line rule that limits the act of state doctrine's application to only those cases in which the court specifically examines the validity of the foreign sovereign's actions. This short-sighted threshold test ignores comity and restricts the development of international law.

This Article examines comity, briefly traces its origins, and explains its significance in decisions affecting international litigation. With the comity framework in place, the Article then addresses the act of state doctrine's jurisprudential background and its foundation in the comity principle. Then the Article explores the *Kirkpatrick* act of state decision in light of the comity principle. Finally, the Article concludes that *Kirkpatrick* erroneously limited the act of state doctrine and that proper application of the doctrine requires more sensitivity to the concerns of comity.

II. THE COMITY DOCTRINE

Comity is a broad jurisprudential principle designed to help courts address problems of transnational significance. The doctrine provides guidance in a variety of contexts, including conflicts problems, enforcement of foreign judgments, recognition of foreign law disputes, and other international civil litigation matters.[10]

The doctrine's origins are found in ancient history. Although conceptually different from modern notions of comity, the doctrine was present in ancient Roman legal thought.[11] Ulrik Huber, the noted Dutch legal scholar, introduced the notion to modern legal thought by way of the

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8. 110 S. Ct. 701 (1990).

9. 376 U.S. 398 (1964).

10. One authority describes comity as

> complaisance; courtesy; respect; the granting of a privilege, not of right, but of good will; concession or good will; a sense of mutual regard founded on identity of position and similarity of institutions; courtesy between equals, or friendly civility; judicial courtesy between the courts undertaking to deal with the same matter; reciprocity; a disposition to accommodate.

15 C.J.S. *Comity* 364-65 (1967) (footnotes omitted).

11. *See* Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 n.4 (1982); Note, *Comity*, 12 VA. L. REV. 353, 356 (1926).

following three maxims in his *De Conflictu Legum*:

> I. The laws of each state are valid within the boundaries of this state and bind all its subjects, but not beyond. . . . II. All persons who are found within the boundaries of a state are held to be its subjects, whether they dwell there permanently or temporarily. . . . III. The rulers of states arrange it by comity that the laws of each nation which are enforced within its boundaries maintain their validity everywhere, to the extent that the power or the laws of the other state and its citizens are not prejudiced.[12]

Although some dispute exists over how the doctrine came to the United States,[13] Justice Story's *Commentaries on the Conflict of Laws* influenced its widespread acceptance.[14] Story analyzed Huber's maxims, noting that the notion of comity most accurately addresses the duty a state has toward other state's laws.[15] The best known discussion of comity in United States jurisprudence, however, arose in the Supreme Court's decision in *Hilton v. Guyot*.[16] In a lengthy opinion,[17] Justice Gray addressed all the authority supporting the notion of comity, concluding that laws have no force outside of the territory where they were promulgated.[18]

Justice Gray explained that comity is not an obligation or a gesture of goodwill, but rather a domestic recognition of other states' laws in the

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12. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 26 n.52 (1966).

13. *See* Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230 (1961).

14. For an excellent treatment of Story's impact on American conflicts law, see Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934).

15. In the context of Huber's maxims, Story asserted that:

> [Comity of nations] is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter; and is inadmissable, when it is contrary to its known policy, or prejudicial to its interests.

J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 38 (6th ed. 1865) (footnote omitted).

16. 159 U.S. 113 (1895).

17. The *Hilton* opinion stretches over 68 pages in the United States Reports, and discusses numerous cases. *Id.*

18. Specifically, Justice Gray held that:

> No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations."

Id. at 163.

context of the international community and the recognizing-state's own interests.[19] He also noted that although the phrase "comity of nations" has been criticized, no one has suggested a better alternative.[20]

Over the years, the comity doctrine has continued to resurface in Supreme Court jurisprudence. In early cases, the Court applied comity in many diverse fields. In *Brown v. Duchesne*,[21] for example, Chief Justice Taney relied on notions of comity to determine the reach of United States patent laws. In *The Belgenland*,[22] the Court used comity to determine jurisdiction in certain admiralty cases. Chief Justice Waite, in *Wildenhus's Case*,[23] similarly relied on the doctrine in determining which state's disciplinary and criminal laws should apply to a foreign ship in a United States port.[24] In *Berizzi Bros. Co. v. Steamship Pesaro*,[25] the Court referred to comity in deciding whether to exercise jurisdiction over a merchant ship owned by a foreign government when the ship is in a United States port. In *Lauritzen v. Larsen*,[26] the Court used comity to determine whether the Jones Act applied to a foreign seaman serving on a foreign ship.

More recent Supreme Court cases have examined comity in analyzing international dispute resolution agreements.[27] In *Mitsubishi Motors*

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19. *Id.* at 163-64.

20. *Id.* Contrary to the modern trend, the opinion also engrafts a reciprocity requirement for the enforcement of foreign judgments:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Id.

21. 60 U.S. (19 How.) 183 (1856) (The Court held that a United States patent was not infringed when the allegedly protected device was used aboard a foreign ship in a United States port.).

22. 114 U.S. 355 (1885) (The Court held that general maritime law applies in cases arising on the high seas beyond the jurisdiction of any nation.).

23. 120 U.S. 1 (1887) (The Court held that disorderly conduct aboard a ship may be suppressed by local authorities when there is a disturbance of the "public peace.").

24. *Id.* at 18.

25. 271 U.S. 562 (1926) (The Court held that United States courts do not have jurisdiction over a commercial ship owned by a foreign government.).

26. 345 U.S. 571 (1953) (The Court refused to apply the Jones Act in a suit sought by a Danish sailor against the Danish owner of a Danish ship, and held that the law of the flag governed the action.).

27. *See* Swanson, *supra* note 7, at 333.

Corp. v. Soler Chrysler-Plymouth, Inc.,[28] the Court considered whether a general arbitration clause in an international sales agreement compelled the arbitration of Sherman Antitrust Act violations.[29] Finding that arbitration was required, Justice Blackmun relied in part on the comity principle, concluding that notions of international comity required the Court to enforce the agreement.[30]

Similarly, the Court relied on a comity analysis in *Société Nationale Industrielle Aérospatiale v. United States District Court*,[31] which questioned the Hague Evidence Convention's[32] applicability to a request for foreign discovery. The Court adopted a case-by-case comity analysis that looks to the "particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective."[33]

The Supreme Court's most recent decision implicating comity fails to recognize the doctrine's importance. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*,[34] the Court ignored important international comity concerns in finding that the Hague Service Convention[35] did not apply to service on a foreign corporation's subsidiary for the purposes of serving the foreign parent. Strictly reading the Convention's terms, Justice O'Connor effectively gutted the principle by deciding that each state had the right to determine what constitutes "service abroad" under the Convention.

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28. 473 U.S. 614 (1985) (The Court listed concerns of international comity as factors in its decision to require arbitration of antitrust claims pursuant to the Arbitration Act.).

29. At issue was the applicability of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. Congress enacted legislation making the provision law in 1970. *See* Federal Arbitration Act, Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified as amended at 9 U.S.C. §§ 201-208 (1982)).

30. *Mitsubishi Motors Corp.*, 473 U.S. at 629. Justice Blackmun explained,

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Id.

31. 482 U.S. 522 (1987).

32. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

33. 482 U.S. at 544.

34. 108 S. Ct. 2104 (1988). For an in-depth discussion of this failure, see Swanson, *supra* note 7, at 363-65.

35. Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163.

This short summary of the United States Supreme Court's application of the comity doctrine indicates the doctrine's scope, but disregards many cases in which the Court applied some form of comity analysis in reaching its decisions. As stated above, comity is a broad principle designed to assist courts in deciding difficult issues of international import. The notion of comity, although not mandated by international law, is a notion that civilized nations have created to enhance international cooperation. The doctrine's goal is to further the development of the international system by recognizing that acts of goodwill effectively encourage such development.[36]

Comity serves a number of functions. First, the doctrine reduces the possibility of friction between states. When a state respects another state's laws, disputes are less likely to arise. Second, the comity doctrine helps preserve international intercourse by recognizing the integrity of the individual states that make up the international legal system.[37] When one state ignores these values in favor of short-term expediency, the choice damages the international system, not just the relations between the states involved. Such short-sighted conduct rejects the principle of respect that must be paid to the value systems of other states. In the long run, respect will develop international law more effectively through diplomatic channels than through the unilateral exercise of authority by national court systems.[38]

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36. Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT'L L. 239, 252-53 (1986).

37. Professor Maier has explained this concept:

> Employing the comity concept merely calls into play the fundamentally pragmatic principle that nations need to treat each other as they themselves would be treated in the same or similar circumstances. Cooperation and reciprocal acts of goodwill not only prevent international friction in specific instances but, more importantly, are essential to the long-term functioning of the international legal system. That system is a consensual system whose principal energizing force must necessarily be the self-interest of its members in nurturing and preserving a legal framework for effective interaction.

Id. at 253.

38. Professor Falk has made this point:

> In a divided world, there will be divided law. Under such conditions, rules of deference applied by domestic courts advance the development of international law faster than does indiscriminate insistence upon applying challenged substantive norms in order to determine the validity of the official acts of foreign states.
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> . . . .
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> The defense of the rules of judicial deference has sometimes formed a part of an argument in favor of a national or internal consolidation over the subject matter of foreign relations. In this kind of analysis, the emphasis is upon the inadequacy of litigation as a means of resolving those disputes with international implications.

A third justification for the comity doctrine is that courts which use it reinforce the legitimacy of their decisions. Judicial systems that reject comity overreach their authority, interfering in disputes that arise out of other states' sovereign acts with the likely result of the loss of the participants' respect. Such courts are perceived as favoring local interests over the interests of foreign sovereigns in ruling their own states, simply because the local interests are local. A failure to adhere to the comity doctrine thus reduces a foreign judicial system's legitimacy in the international arena.

Recent Supreme Court decisions relating to international litigation reveal a movement away from comity principles towards a more parochial view. This movement exacerbates the very problems that comity was intended to prevent and impedes the development of an effective international system for resolving disputes. The Supreme Court had the opportunity to reverse this shift in *Kirkpatrick* by clearly defining the applicability of a previously confusing act of state doctrine in light of comity concerns, but declined to do so.

III. JURISPRUDENTIAL UNDERPINNINGS OF THE ACT OF STATE DOCTRINE

A. *Supreme Court Authority*

In the United States, the origins[39] of the act of state and foreign sovereign immunities doctrines are found in Justice Marshall's opinion in *The*

> Deference, then, is defended as a way of getting the controversy out of the courts and into the foreign office. The executive has a flexibility in the negotiating context that enables consideration of special circumstances, whereas the judiciary is confined by craft and by tradition to a narrow definition of the legal problem. Executive solutions can cover a category of cases rather than a single controversy. The diversity of alien social systems can be tacitly respected by the executive official without arousing domestic passions and special interest groups. The privacy of the executive process and the control over timing offer additional reasons in support of internal deference.

R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 6-9 (1964) (footnotes omitted). Professor Falk identifies exceptions to this judicial deference. First, when the dispute "is governed by substantive norms of international law that are adhered to by an overwhelming majority of international actors," deference may not be appropriate. *Id.* at 9. Second, the judiciary should not lose its independence from the executive branch through such deference. *Id.* at 10.

39. The doctrine's roots can be found in a number of English cases. *See* Blad v. Bamfield, 3 Swans. 605 (Ch. App. 1674); *see also* Luther v. Sagor, [1921] 1 K.B. 456; Duke of Brunswick v. King of Hanover, 6 Beav. 1 (1844), *aff'd*, 2 H.L. Cas. 1 (1848). For a thorough discussion of the English approach to the act of state doctrine, see Singer, *The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to*

Schooner Exchange v. McFaddon.[40] This case examined whether a private citizen could assert ownership over a foreign sovereign's navy vessel in a United States court when the ship is within the United States territorial waters.[41] Justice Marshall, finding that the private citizen had no cause of action, based his decision on the "perfect equality and absolute independence of sovereigns" and the "mutual benefit" that is provided by the intercourse that arises under such immunity.[42] In other words, the Court held that all nations are entitled to equal respect, and one nation's courts should not sit in judgment of another state's actions. If a complaint is to be made, it should be made by the government's political branches rather than the judiciary.[43] By introducing these notions of respect, *The Schooner Exchange* presented the underpinnings for the act of state doctrine.

The classic statement of the act of state doctrine came in the United States Supreme Court decision in *Underhill v. Hernandez.*[44] Here, the Court 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."[45] The Court based this statement on notions of equal-

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United States Practice, 75 AM. J. INT'L L. 283 (1981). Other states have been concerned with the policies behind the doctrine as well:

> Nevertheless, the courts of most states have exercised judicial restraint in adjudicating challenges to expropriations by foreign states, whether by application of the act of state doctrine, by narrow construction of the responsibility of states to alien investors, or by application of local public policy (*ordre public*) to oust normal rules of conflict of laws.

RESTATEMENT, *supra* note 1, § 443 reporter's note 12 (citations omitted).

40. 11 U.S. (7 Cranch) 116 (1812). For an extensive discussion of this case, see Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959).

41. 11 U.S. (7 Cranch) at 135.

42. *Id.* at 136-37.

43. The Court stated:

> The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention.

Id. at 146.

44. 168 U.S. 250 (1897). The case involved a suit by a United States citizen against a Venezuelan revolutionary officer for wrongful imprisonment during a coup. The claim was dismissed based on the act of state doctrine.

45. *Id.* at 252.

ity of states and comity, reflecting an appropriate concern that a United States court's actions not offend a foreign sovereign's rights.[46]

The Supreme Court further defined the doctrine's parameters in *American Banana Co. v. United Fruit Co.*[47] Writing for the majority, Justice Holmes issued an opinion that has been overruled regarding the extraterritorial application of United States antitrust laws,[48] but his discussion of the act of state doctrine remains valid. Here, the plaintiff alleged that the defendant caused the Costa Rican government to use its military and judicial powers to take over the plaintiff's banana plantation in an attempt to monopolize the banana market.[49] Justice Holmes found that United States antitrust laws were not designed to extend to acts occurring legally within a foreign state. To reach this finding, Justice Holmes focused on the propriety of a United States court's reviewing a foreign government's acts and gave credence to the proposition that it is inappropriate for a United States court to consider private parties' claims that question a foreign sovereign's actions.[50] Two subsequent cases, *Oetjen v. Central Leather Co.*[51] and *Ricaud v. American Metal Co.*,[52]

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46. *Id.* at 254.

47. 213 U.S. 347 (1909).

48. *See* United States v. Sisal Sales Corp., 274 U.S. 268 (1927). On the other hand, Justice Scalia maintains that "*American Banana* was not an act of state case; and whatever it said by way of dictum that might be relevant to the present case has not survived *Sisal Sales*." W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 110 S. Ct. 701, 706 (1990).

49. 213 U.S. at 354.

50. Specifically, Justice Holmes noted that

> a seizure by a state is not a thing that can be complained of elsewhere in the courts. . . . The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.

Id. at 357-58.

51. 246 U.S. 297 (1918). In *Oetjen*, the Supreme Court addressed the issue of two large consignments of hides, which plaintiff claimed to own as assignee of Martinez & Company, a partnership in Torreon, Mexico, but which defendant claimed to own by purchase from Finnegan-Brown Company, a Texas corporation that allegedly purchased the hides in Mexico from General Francisco Villa. *Id.* at 299. The transaction involved occurred in the midst of a tumultuous civil war in Mexico. General Villa captured the City of Torreon and levied a military contribution on the citizens to support his army. Martinez, an adherent of the opposition to Villa, fled the city, failing to pay the assessment. Villa seized Martinez's hides and sold them in Mexico to the Finnegan-Brown Company. *Id.* at 300-01. The Court, after a lengthy discussion, found that Villa's actions were the actions of a legitimate Mexican government and therefore not subject to review

reaffirmed this principle. These decisions established the importance of comity in resolving act of state disputes and displayed a sensitivity to other states' value systems and the needs of the international community. These early opinions indicate that the abstention requirement was absolute; no United States court would question a foreign sovereign's "act of state."

The Supreme Court first questioned the act of state doctrine's absolute nature in *United States v. Sisal Sales Corp.*,[53] an antitrust suit peripherally involving a foreign government. The United States claimed that the appellees had influenced Mexican authorities to pass legislation that discriminated in favor of appellee's sisal[54] exportation business, creating a monopoly in the sisal trade with fixed prices.[55] Finding the issues justiciable, the Court distinguished the case from *American Banana.*[56] Regarding the Sherman Act's applicability, the Court concluded that the sisal conspiracy was created and effectuated within the United States.[57]

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in United States courts. The Court stated:

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest consideration of international comity. . . . To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would . . . *"imperil the amicable relations between governments and vex the peace of nations."*

Id. at 303-04 (emphasis added).

52. 246 U.S. 304, 309 (1918). *Ricaud* involved facts similar to *Oetjen* and arose during the same revolutionary period in Mexican history. *Ricaud,* however, involved the sale of bullion by the Penoles Mining Company, a Mexican Corporation doing business at Bermejillo, Mexico, to the American Metal Company. The Court, citing *Oetjen* stated:

> The fact that the title to the property in controversy may have been in an American citizen, who was not in or a resident of Mexico at the time it was seized for military purposes by the legitimate government of Mexico, does not affect the rule of law that the act within its own boundaries of one sovereign state cannot become the subject of reexamination and modification in the courts of another . . . whatever rights such an American citizen may have can be asserted only through the courts of Mexico or through the political departments of our government.

Id. at 310. *See* Comment, *The Act of State Doctrine Applied to Acts of Mexican Revolutionists,* 27 YALE L.J. 812 (1918).

53. 274 U.S. 268 (1927).

54. Sisal is the fiber of the henequen plant, which was used to make harvesting twine for grain crops. *Id.* at 272.

55. *Id.* at 272-74.

56. *See supra* text accompanying note 47. The Court distinguished *American Banana* on the ground that it arose from acts in Costa Rica that were not unlawful there, whereas the acts before it arose in the United States. *Sisal Sales Corp.*, 274 U.S. at 276.

57. *Id.*

The Court held that although the conspirators may have been "aided by discriminating [foreign] legislation," their deliberate acts in the United States brought about the illegal purpose.[58] The Court viewed the foreign government's acts as too peripheral to trigger the act of state doctrine's application.[59]

The Court reaffirmed the *Sisal* approach in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[60] which involved an antitrust suit alleging that Union Carbide had influenced Electro Metallurgical Company, Canada's authorized agent for vanadium[61] imports, to exclude plaintiff from the Canadian vanadium market. The Supreme Court rejected defendant's act of state argument that the involvement of Canada's agent precluded plaintiff's claim. The Court noted that plaintiff's claim did not question the validity of a Canadian action, but questioned the attempt to influence Canada. The Court, citing *Sisal*, established that the conspiracy began and was effectuated, in part, in the United States.[62] Thus, *Sisal* and *Continental Ore* suggest that, at least in antitrust cases, government actions at the instigation of an antitrust conspirator do not always implicate the act of state doctrine.[63]

Banco Nacional de Cuba v. Sabbatino signalled the judicial death of the absolute abstention principle.[64] Although the case upheld the act of state doctrine, the Supreme Court redefined its basis, interpreting it not as a steadfast rule, but deciding that the judiciary would not address a foreign state's action within that same foreign state.[65] The Court also questioned the doctrine's primary principle of respect for other sovereigns.[66] Justice Harlan indicated that the act of state doctrine was a

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58. *Id.*

59. *Id.*

60. 370 U.S. 690 (1962).

61. Vanadium is a metal, the oxide of which is used as an alloy for hardening steel. *Id.* at 692.

62. *Id.* at 706.

63. *See* Sage Int'l, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896 (E.D. Mich. 1981).

64. 376 U.S. 398 (1964).

65. Specifically, the court noted that

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

Id. at 428.

66. "We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, . . . or by some

method of recognizing the separation of powers contained in the United States Constitution. If the judiciary interferes in the foreign relations of the United States, the handling of which may be assigned more properly to the other governmental branches, serious consequences could result.[67] Harlan stated that the doctrine's application to international law requires a balancing of such issues as the international consensus on the law in question, the importance of the national interest at stake, and the status of the government whose acts are questioned.[68] *Sabbatino* limits the importance of comity as a basis for the act of state doctrine as a result of the Court's disregard of the principles embodied in the doctrine. The *Sabbatino* opinion was the last act of state decision to receive a majority vote from the Supreme Court until *Kirkpatrick.*

In *First National City Bank v. Banco Nacional de Cuba,*[69] Justice Rehnquist's concurring opinion, which represented only three members of the Court, adopted the "Bernstein Exception"[70] to the act of state doctrine. The "Bernstein Exception" requires that the judiciary defer to the executive branch in determining whether to adjudicate issues with sensitive foreign affairs questions. Although the Rehnquist opinion did not gain a majority, it contains some interesting language. In particular, while examining the act of state doctrine's origins, Rehnquist stated that "both the act of state and sovereign immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal government."[71] While the opinion speaks at length of the importance of the separation of powers issue, it also identifies comity's importance in act of state determinations.[72] Thus,

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principle of international law." *Id.* at 421 (citations omitted).

67. *Id.* at 432.

68. *Id.* at 428.

69. 406 U.S. 759 (1972). An in depth discussion of this case can be found in Note, *Act of State—Cuban Expropriations—Executive Suggestion*—Bernstein *Exception Applied to Restrict Role of Act of State Doctrine*—First National City Bank v. Banco Nacional de Cuba, 92 S. Ct. 1808 (1972), 14 HARV. INT'L L.J. 131 (1973); Recent Decision, *Act of State—Act of State Doctrine Not a Bar to Adjudication of a Counterclaim,* 6 VAND. J. TRANSNAT'L L. 272 (1972).

70. *See* Bernstein v. Van Heyghen Freres, S.A., 163 F.2d 246 (2d Cir.), *cert. denied,* 332 U.S. 772 (1947); Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954). In the first of these cases, the court found that the act of state doctrine prevented adjudication of a claim that plaintiff was forced to transfer property by Nazi officials. Following that decision, the State Department informed the court that it had no objection to adjudicating such claims. The Second Circuit then allowed the lower court to adjudicate the claim. 210 F.2d at 376.

71. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. at 759 (1972).

72. *Id.* at 765.

Rehnquist's view appears to adopt pre-*Sabbatino* justifications for the act of state doctrine.

In dissent, Justices Brennan, Stewart, Marshall, and Blackmun argued that it is inappropriate for the courts to defer to an executive determination.[73] Contending that the basis for the act of state doctrine resembles the basis for the political question doctrine,[74] the dissent argued that executive branch embarrassment is merely one factor to be considered in determining whether a political question exists.[75]

The Court was divided similarly in *Alfred Dunhill, Inc. v. Republic of Cuba*,[76] a case involving Cuba's nationalization of cigar manufacturers following the revolution. The Cuban government appointed interventors to run the businesses. The former owners, now in the United States, sued the United States importers to recover payments for past and future cigar shipments. The Cuban interventors subsequently joined the action.[77] The lower courts decided that the act of state doctrine compelled payment of post-intervention amounts to the interventors. The United States importers then argued for offset of amounts owed for pre-intervention shipments. Although the interventors contended that these debts had a situs in Cuba and also should be covered by the act of state doctrine, the district court disagreed and allowed the set-off. Since the Alfred Dunhill, Inc. (Dunhill) claim for pre-intervention shipments exceeded the amount owed for post-intervention shipments, Dunhill obtained a judgment for the difference.[78] The court of appeals found the

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73. *Id.* at 776-78, 790-93.

74. Professor Tribe summarizes the political question doctrine:

> The political question doctrine is in a state of some confusion. The confusion is perhaps most clearly revealed in the Supreme Court's purportedly "definitive" statement of the political question doctrine in *Baker v. Carr*. "Prominent on the surface of any case held to involve a political question is found" either: (1) "a textually demonstrable constitutional commitment to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-13 (2d ed. 1988).

75. 406 U.S. at 785-89.

76. 425 U.S. 682 (1976). For an in depth discussion of the *Dunhill* case, see Williams, *The Act of State Doctrine:* Alfred Dunhill of London, Inc. v. Republic of Cuba, 9 VAND. J. TRANSNAT'L L. 735 (1976).

77. *Alfred Dunhill, Inc.*, 425 U.S. at 685.

78. *Id.* at 688.

debt to be situated in Cuba and held that the affirmative judgment in Dunhill's favor was barred by the act of state doctrine. The interventors' failure to return the importer's money upon request was deemed an act of state by the appellate court.[79]

The Supreme Court reversed, with Justice White writing for the majority. A plurality concluded that the act of state doctrine did not apply to a foreign sovereign acting in a commercial capacity.[80] A majority agreed, however, that the doctrine was not applicable because the debt repudiation lacked sufficient formality to constitute an act of state.[81] Absent a sovereign exercise of power, the Court would not apply the act of state doctrine. The plurality's creation of a commercial exception, however, caused the dissenters much consternation. The dissenters[82] argued against the adoption of a broad exception to the act of state doctrine for commercial activities. Instead, they favored the case-by-case balancing approach suggested in *Sabbatino*.

These Supreme Court decisions left the parameters of the act of state doctrine in disarray. Because of a philosophical split on the Court, it remains unclear what role comity will play in the separation of powers analysis suggested in *Sabbatino*. Consequently, lower courts are left to define the doctrine, and none of the suggested exceptions has attained a majority.

B. *Lower Court Opinions*

1. Setting the Stage: *Occidental Petroleum*

Occidental Petroleum Corp. v. Buttes Gas & Oil Co.[83] set the stage for the act of state dispute that followed in the lower courts. This case

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79. *Id.* at 689.

80. The Court stated that "the concept of the act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities." *Id.* at 695.

81. The Court reasoned that

> the only evidence of an act of state other than the act of nonpayment by interventors, was "a statement by counsel for the interventors during trial, that the Cuban Government and the interventors denied liability and had refused to make repayment. . . . No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due three foreign importers.

Id. at 694-95 (citation omitted).

82. Justices Marshall, Brennan, Stewart, and Blackmun dissented. *Id.* at 715.

83. 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). For a more thorough discussion of this case, see Recent Decision,

presented the act of state issue in the context of a private antitrust suit. Occidental Petroleum Corp. (Occidental) sued Buttes Gas & Oil Co. (Buttes) for a series of conspiratorial attempts to restrain and monopolize trade in oil resources off the coast of the Trucial States in the Persian Gulf.[84] In 1969, Occidental obtained oil concessions from Umm al Qaywayn[85] that covered the state's offshore waters. Buttes previously had obtained similar concessions from Sharjah, a neighboring Trucial State. When it became apparent that a great deal of oil existed in an area claimed by Umm al Qaywayn, Buttes allegedly incited the Sharjah's leader to make a claim for the area. When Great Britain rejected this contention, Buttes convinced the Iranians to claim the area. British authorities then forced Occidental and Umm al Qaywayn to desist in drilling efforts until the competing claims were resolved. In response, Occidental sought monetary damages and injunctive relief.[86]

In addition to other defenses, Buttes asserted the act of state doctrine. Occidental argued that the act of state doctrine was inapplicable because the complaint challenged defendant's acts in encouraging the foreign sovereign, not the sovereign's own actions.[87] The court rejected this argument, following Holmes' reasoning in *American Banana* that it is inappropriate to question a foreign sovereign's acts done within its own territory.[88] Moreover, the court opined that the act of state doctrine would bar the judicial inquiry needed to resolve the dispute, because such inquiry would raise diplomatic friction and complications between the states.[89] Thus, the court concluded that the act of state doctrine pre-

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Act of State Doctrine—Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), 12 VA. J. INT'L L. 413 (1972); Comment, *Jurisdiction*—Occidental Petroleum Corp. v. Buttes Gas & Oil Co. (C.D. Cal. 1971), 11 COLUM. J. TRANSNAT'L L. 317 (1972); Recent Decision, *Extraterritorial Jurisdiction—Efforts to Secure Action by a Foreign State Conducive to Monopolization Not Privileged: Act of State Doctrine Bars Antitrust Claim Arising from Acts of a Foreign Sovereign Allegedly Induced by Defendant*, 5 VAND. J. TRANSNAT'L L. 251 (1971).

84. For a detailed discussion of the facts, see *Occidental Petroleum Corp.*, 331 F. Supp. at 99-100 n.11.

85. Abu Dhabi, Ajman, Dubai, Fujairah, Ras al Khaimah, Sharjah, and Umm al Qaywayn, the former Trucial States, became the United Arab Emirates in 1971.

86. *Occidental Petroleum Corp.*, 331 F. Supp. at 101.

87. *Id.* at 100-01.

88. *Id.* at 109-10. The plaintiffs themselves had referred to a foreign state as a co-conspirator in their pleadings and alleged international law violations on Sharjah's part. *Id.*

89. The court reasoned:

> to establish their claim as pleaded plaintiffs must prove, *inter alia*, that Sharjah issued a fraudulent territorial waters decree, and that Iran laid claim to the island

cluded judicial consideration on several different levels.

The *Occidental Petroleum* case starkly presented some key conflicts in interpreting the act of state doctrine's application. Is the doctrine implicated when the courts are required to investigate the foreign state's motivation, or must the legality or validity of the sovereign's action be questioned? Is it possible that these are not even the right questions to be asking? Although such formulae appear to provide certainty as to when the doctrine should be applied, the wisdom of such "certainty" remains to be seen.

2. The Second Circuit's Broad Application: *Hunt v. Mobil Oil*

In the first major analysis of the many questions that remained after the *Occidental Petroleum* decision, the Second Circuit Court of Appeals reviewed an antitrust and breach of contract action brought by Nelson Bunker Hunt against the seven major oil companies in *Hunt v. Mobil Oil Corp.*[90] Hunt's independent oil company was granted a Libyan oil concession in 1957. When Mohamar Qadhafi seized control of Libya in 1969, his government announced that oil prices would increase and that the state would be taking a larger share of the profits generated by oil operations.[91] When Libya made additional demands in 1971, the Seven Sisters[92] met to plot a strategy[93] in which the smaller oil producers were invited to join the majors in a "sharing arrangement." Under the agreement's terms, if any of the signatories lost a portion of their Libyan oil, the other participants would share the loss by providing that member with a portion of their oil. If necessary, supplies would be provided at cost out of Persian Gulf oil supplies.[94]

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of Abu Musa at the behest of the defendants. Plaintiffs say they stand ready to prove the former allegation by use of "internal documents." *But such inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert.*

Id. at 110 (footnote omitted) (emphasis added).

90. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

91. *Id.* at 70-71.

92. "Seven Sisters" refers to the seven major oil companies. *Id.* at 70. The seven major oil producers are Mobil Oil Corp.; Exxon Corp.; Shell Petroleum Corp., Ltd.; Texaco, Inc.; Standard Oil Company of California; British Petroleum Co., Ltd.; and Gulf Oil Corp. *Id.*

93. Realizing that such a plan could have antitrust implications, the Seven Sisters obtained a "clearance letter" from the Justice Department stating that no action would be taken arising out of any such agreement, provided that the smaller oil companies were included in the plan. *Id.* at 71.

94. *Id.*

When Libya nationalized one of the majors' interests and asked Hunt to market the oil, Hunt refused on the basis of the sharing agreement. Libyan officials responded by expelling Hunt's personnel from Libya and by reducing Hunt's oil allotment.[95] The other signatories abided by the agreement and provided oil to Hunt. Late in 1972, Libya demanded a fifty percent ownership stake in Hunt's Libyan interests, which Hunt refused. Libya then cut off Hunt's oil exports and the following year nationalized all of Hunt's interests in Libya.[96]

As part of its complaint, Hunt alleged that the Seven Sisters had used the sharing agreement to lessen competition in Libyan oil.[97] Hunt indicated that the agreement had prevented his attempts to obtain a competitive advantage in dealings with Libya and effectively allowed the majors to control Hunt to such an extent that Hunt was eventually nationalized.[98] The Second Circuit Court of Appeals agreed with the lower court's conclusion that the case would require an impermissible inquiry into the foreign sovereign's motivation.[99] Thus, the court rejected the suggestion that the act of state doctrine only applied when the validity of the foreign action is in question.[100] Although the *Hunt* approach pro-

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95. *Id.*

96. *Id.* at 71-72.

97. *Id.* at 72.

98. *Id.* Although Hunt did not claim Libyan involvement in this conspiracy, the trial court determined that the case would require the determination of whether the agreement caused Hunt's nationalization. This inquiry would require that the "acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions" be investigated. Thus, the act of state doctrine barred the court's inquiry. Hunt v. Mobil Oil Corp., 410 F. Supp. 10, 24 (S.D.N.Y. 1976).

99. The Second Circuit held that:

> The attempted transmogrification of Libya from lion to lamb undertaken here does not succeed in evading the act of state doctrine because *we cannot logically separate Libya's motivation from the validity of its seizure.* The American judiciary is being asked to make inquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far reaching national concern.

550 F.2d at 77 (emphasis added).

100. *Id.* at 78. The Second Circuit affirmed this approach in O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449 (2d Cir. 1987), *cert. denied*, 488 U.S. 923 (1988). That case involved an antitrust challenge to agreements entered into pursuant to Colombia's cargo reservation laws that were passed to protect Colombia's maritime industry. The court found that the act of state doctrine is applicable to suits that would require inquiry into the motivation of a foreign sovereign. *Id.* at 453.

The United States District Court for the District of Columbia was faced with a simi-

vides the broadest deference to the foreign sovereigns' acts, the *Hunt* motivation test may prove too inflexible in cases having minimal governmental involvement.

3. A Balancing Approach

The Ninth Circuit Court of Appeals adopted a more flexible application of the act of state doctrine in *Timberlane Lumber Co. v. Bank of America.*[101] In this antitrust suit, Timberlane claimed that Bank of America and others in the United States and Honduras conspired to prevent Timberlane from establishing itself in the Honduran timber export business. As part of this conspiracy, the defendants allegedly used Honduran judicial and police officials to enforce their security interests in the plaintiff's Honduran facility, effectively halting plaintiff's operations.[102] Defendants argued that this governmental involvement required the application of the act of state doctrine.

The Ninth Circuit, reviewing the Supreme Court's cases on the act of state doctrine, determined that a foreign sovereign's involvement in an entity's activities does not automatically insulate that entity from antitrust liability.[103] Instead, the court favored a balancing approach.[104] Although conduct required by a foreign state would not be punished,

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lar situation in General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3 (D.D.C. 1979), in which the plaintiff alleged antitrust violations against the defendant relating to lost sales to foreign governments. The court found that adjudicating these claims would require that the plaintiff establish injury, thereby requiring the court to look to the motivation of the foreign sovereign. The act of state doctrine forbids this. *Id.* at 7.

101. 549 F.2d 597 (9th Cir. 1976), *as amended on denial of reh'g* en banc Mar. 3, 1977. *See* Recent Decision, *Act of State Doctrine—Limitation on Application of the Act of State Doctrine in Extraterritorial Private Antitrust Suit,* 10 VAND. J. TRANSNAT'L L. 475 (1977).

102. 549 F.2d at 605.

103. *Id.* at 606.

104. The court proposed seven elements to be weighed in determining whether to exercise jurisdiction:

(1) The degree of conflict with foreign law or policy;
(2) The nationality, location, and principal places of business of the parties;
(3) The extent to which enforcement by either state can achieve compliance;
(4) The relative significance of effects on the United States as compared with those elsewhere;
(5) The existence of intent to harm or affect American commerce;
(6) The foreseeability of such effect; and
(7) The relative importance of conduct in the United States as compared with conduct abroad.

Id. at 614.

"mere governmental approval or foreign governmental involvement which the defendants had arranged does not necessarily provide a defense."[105] The court noted that the key factor in the balancing analysis was the "potential for interference in our foreign relations . . . ."[106]

The Ninth Circuit indicated the importance of not challenging a foreign state's sovereignty, policy, or motivation. These concerns are lessened, however, when the foreign policy concerns are diminished. The court's primary consideration was whether the foreign state's public policy was at stake.[107] In the instant case, the government action complained of was the routine enforcement of a legal security interest against the plaintiff. Since the foreign state's public policy was not implicated, the court found that the act of state doctrine did not require dismissal of the case.

The court also addressed the extraterritorial application of United States antitrust laws, suggesting that such a determination also is based on a balancing approach that weighs an amalgam of conflict, national allegiance, expected enforcement, and possible effects.[108] Many of these

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105. *Id.*

106. *Id.* at 607.

107. In support of this position, the court cited the *Second Restatement*:

> Except as otherwise provided by statute or the rules stated in §§ 42 and 43, a court in the United States, having jurisdiction under the rule stated in § 19 to determine a claim asserted against a person in the United States or with respect to a thing located there, or other interest localized there, will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests.

RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965).

The court pointed to the public interest requirement in support of its position. *Timberlane*, 549 F.2d at 607. Most private litigation in a foreign state would not implicate such policy concerns. For example, the actions of a foreign bankruptcy trustee did not implicate the act of state doctrine in Remington Rand Corp. v. Business Systems, Inc., 830 F.2d 1260 (3d Cir. 1987).

108. The Ninth Circuit offered a litany of factors to be considered in a balancing approach:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the location or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct done within the United States as compared with conduct abroad. A difference in law or policy is one likely sore spot, though one which may not always be present. Nationality is another; though foreign governments may have some concern for the treatment of

factors are equally relevant in making the act of state balancing determination.[109] These factors are based on essentially the same policies that support the act of state doctrine and reflect the balancing approach suggested in *Sabbatino*.[110] *Timberlane* is an important decision, because it suggests a flexible balancing approach that considers issues based on international comity as well as United States concerns for its laws and constitutional separation of powers.

The Third Circuit Court of Appeals adopted the *Timberlane* approach in *Mannington Mills, Inc. v. Congoleum Corp.*,[111] an antitrust case involving allegations of fraudulently procured foreign patents. The Third Circuit dismissed the act of state defense, concluding that granting patents did not constitute sovereign activity meant to be protected by the act of state doctrine. The Third Circuit developed a list of factors, which was quite similar to the list that the *Timberlane* court established, to be considered in determining whether to exercise extraterritorial jurisdic-

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American citizens and business residing there, they primarily care about their own nationals. Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.

549 F.2d at 614-15 (footnotes omitted).

109. For another case applying the *Timberlane* approach, see Sage Int'l, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896, 905 (E.D. Mich. 1981) (act of state doctrine did not preclude plaintiff's claim against defendant for damages relating to defendant's attempt to monopolize the foreign market in armored cars). In *Sage International*, the court applied the *Timberlane* balancing approach in its act of state determination. In doing so, it considered the factors articulated in *Timberlane's* discussion of extraterritorial effect to be relevant to the act of state determination:

> In sum, the availability of the act of state defense hinges on policy considerations that are best accounted for by attention to the kinds of factors identified in *Timberlane* and *Mannington Mills*. The tendency to attempt resolution of the question by use of reflexive terms such as "validity" or "commercial" is indicative of the understandable urge to reduce complex issues to simple, mechanical formulations. Yet a candid assessment, for instance, of the "validity" approach reveals that, in deciding what label to attach, the decisionmaker has, in fact, given at least tacit consideration to the other factors. Those other factors are enumerated in *Timberlane* and *Mannington Mills* in the context of a jurisdictional analysis, but they are similarly pertinent to a fully informed decision on applicability of the Act of State Doctrine, especially where jurisdictional challenges have not been raised, so the court is without a means, other than act of state analysis, to account for the policy factors. Such a formulation assures that a flexible case-by-case approach will evolve, in keeping with *Sabbatino's* caution that there is no "inflexible and all-encompassing rule."

Id. at 905-06.

110. *Id.*

111. 595 F.2d 1287 (3d Cir. 1979).

tion.[112] The court also discussed the importance of comity in the multi-factored approach used in the *Timberlane* balancing analysis.[113]

In *International Association of Machinists & Aerospace Workers v. Organization of the Petroleum Exporting Countries,*[114] the Ninth Circuit Court of Appeals applied the act of state doctrine to a price fixing antitrust action against the Organization of the Petroleum Exporting Countries (OPEC). Applying the *Sabbatino* balancing test, the court found the foreign policy implications of determining OPEC's legality too great to proceed with the adjudication. The court concluded that such matters were better left to the executive and legislative branches.[115]

Similarly, the Ninth Circuit held that the act of state doctrine barred a court's investigation of alleged corruption in *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*[116] Clayco alleged that Occidental made ille-

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112. The Third Circuit suggested a 10 factor approach:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation here;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in a position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstance; and
10. Whether a treaty with the affected nations has addressed the issue.

Id. at 1297-98.

113. *Id.* at 1297. *See* Note, Mannington Mills, Inc. v. Congoleum Corp.: *A Further Step Toward a Complete Subject Matter Jurisdiction Test,* 2 NW. J INT'L L. & BUS. 241 (1980); Recent Decision, *Act of State Doctrine Does Not Preclude Adjudication of Antitrust Claim Involving Alleged Fraudulent Procurement of Foreign Patents,* 12 VAND. J. TRANSNAT'L L. 757 (1979). The *Mannington* approach was reaffirmed in Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3d Cir. 1982).

114. 649 F.2d 1354 (9th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982). *See* Recent Development, *Act of State Doctrine: Applicability of United States Antitrust Laws*—International Association of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries, 649 F.2d 1354 (9th Cir.), cert. denied, 50 U.S.L.W. 3548 (U.S. Jan. 11, 1982) (No. 81-645), 23 HARV. INT'L L.J. 117 (1982).

115. 649 F.2d at 1359.

116. 712 F.2d 404 (9th Cir. 1983), *cert. denied,* 464 U.S. 1040 (1984). For a more thorough discussion of the case, see Comment, *Foreign Corrupt Practices: Creating an*

gal payments to Sheikh Sultan bin Ahmed Muallah, the Umm Al Qaywayn Petroleum Minister and son of its ruler, Sheikh Ahmed al Mualla, to obtain off-shore drilling rights in violation of the Sherman and Robinson-Patman Acts. The district court dismissed the case under the act of state doctrine, and the Ninth Circuit affirmed. The Ninth Circuit rejected Clayco's argument that the investigation of motivation should not trigger the act of state doctrine, stating that its previous decisions had "limited inquiry which would 'impugn or question the nobility of a foreign nation's motivation.' "[117] In this case, the court held that "the very existence of plaintiff's claim depends upon establishing that the motivation for the sovereign act was bribery, thus embarrassment would result from adjudication."[118] The court also held that the case did not fall within any exception to the act of state doctrine.[119]

Although the Fifth Circuit applied a similar balancing test to the act of state doctrine in *Industrial Investment Development Corp. v. Mitsui & Co*,[120] it reached a very different conclusion. In the late 1960s, Indonesia enacted the Foreign Capital Investment Act, which required in relevant part special licensing for timber harvesting and that foreigners conducting business in Indonesia had to do so through joint ventures with Indonesians. Industrial Investment Development Corporation (IID) formed a joint venture with Indonesia's P.T. Telaga Mas Kalimantan Company (Telaga Mas). IID was to provide technical services, money, and equipment, and Telaga Mas was to assist in obtaining the necessary licensing for timber harvesting.[121] Negotiations to obtain the appropriate license began, and the joint venture reached an agreement with the Indonesian government. The agreement provided that Indonesia could cancel the license if the joint venturers did not comply with the agreement.

Plaintiffs alleged that defendant's agents then took control of Telaga Mas to drive IID out of the Indonesian lumber market.[122] An Indonesian court determined that a dissident shareholder group in fact con-

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Exception to the Act of State Doctrine, 34 AM. U.L. REV. 203 (1984) [hereinafter Comment, *Foreign Corrupt Practices*]; Comment, *The Act of State Doctrine: A Shield for Bribery and Corruption*, Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983), 16 U. MIAMI INTER-AM. L. REV. 167 (1984); Comment, Clayco Petroleum Corp. v. Occidental Petroleum Corp.: *Should There be a Bribery Exception to the Act of State Doctrine?*, 17 CORNELL INT'L L.J. 406 (1984).

117. 712 F.2d at 407.

118. *Id.*

119. *Id.* at 408-09.

120. 594 F.2d 48 (5th Cir.), *cert. denied*, 445 U.S. 903 (1979).

121. *Id.* at 49-50.

122. *Id.* at 50.

trolled Telaga Mas. The Indonesian government subsequently canceled its license agreement with the joint venture, indicating that it was receptive to reaching a new agreement with the new Telaga Mas and IID.[123]

The district court found that the act of state doctrine precluded any investigation of the foreign sovereign's motivation and dismissed the case. The Fifth Circuit reversed and remanded, finding the act of state doctrine inapplicable. According to the appellate court, previous Supreme Court cases required the balancing of executive and judicial interests.[124] The Fifth Circuit rejected the contention that motivation alone required the act of state doctrine's application. The court concluded that a motivation threshold requirement might prevent legitimate adjudication of important disputes even when no likelihood of embarrassment to the executive branch was present.[125]

The Fifth Circuit reaffirmed this approach in *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, but reached the opposite result.[126] This case involved allegations that the defendant had conspired with the Mexican government to take plaintiff's property. Because a decision would have required an examination of the legality of the Mexican government's action and could have affected adversely the relationship between the United States and Mexico, the Fifth Circuit applied the act of state doctrine and refused to hear the action.[127]

Absent coherent guidance from the Supreme Court, lower courts have adopted comity-sensitive tests for determining whether the act of state doctrine should apply. The Second Circuit achieves this through its hard-and-fast rule precluding judicial inquiry into the "validity" of a foreign government's actions. The court's definition of validity addresses motivation and encompasses more than simply the legality of a foreign state's acts.[128] This approach shows deference to comity and supports the

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123. *Id.*

124. *Id.* at 52. In this case, the court felt that "[t]here are no special political factors which outbalance this country's legitimate interest in regulating anti-competitive activity both here and abroad. . . . To determine whether there has been a violation of American antitrust law it is not necessary to resolve the propriety of Indonesia's failure to issue a cutting license." *Id.* at 53.

125. *Id.* at 55.

126. 686 F.2d 322 (5th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983).

127. *Id.* at 326. In another case, the Fifth Circuit made the following statement: "Both the sovereign immunity and act of state doctrines are rooted in principles of international comity; both involve a balancing of our interest in providing a forum to injured parties against our interest in maintaining amicable relations with other nations by respecting their sovereign acts." Callejo v. Bancomer, S.A., 764 F.2d 1101, 1125 (5th Cir. 1985).

128. The Second Circuit, addressing the issue of validity, stated:

legal and cultural diversity of national legal systems by looking beyond parochial United States interests to consider the international system's needs. The Second Circuit's approach, however, can be criticized as inflexible. The hard-and-fast rule could trigger the act of state doctrine even when the foreign government's involvement is peripheral and there is little chance of embarrassment to the United States executive branch, the nations involved, or the international system.

The balancing approach suggested by the *Timberlane* and *Mannington* courts provides a greater level of flexibility by considering comity principles as well as the separation of powers concerns outlined in *Sabbatino*. This test, however, also is not above reproach. First, the balancing test is subject to the potential abuses inherent in any subjective analysis. Given the opportunity, United States courts display their familiarity with and belief in United States laws by favoring findings that permit their adjudication of the case. In addition, lower courts may lack the sophistication necessary to apply the balancing analysis appropriately. Finally, balancing tests lack predictability. This is of particular concern in the international arena, where it is beneficial for businesses and states to predict how courts will handle their actions.

These criticisms certainly do not suggest that the *Timberlane/Mannington* approach should be abandoned. Significantly, this is the sole approach that takes into account all of the policies behind the act of state doctrine. Instead of abandoning a facially valid standard, the Supreme Court should minimize the application problems by creating a clear set of guidelines.[129] The *Timberlane/Mannington* standards provide the le-

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It is true that traditional and textbook definitions of the act of state doctrine provide that courts in the United States are precluded from inquiring into the validity of the public acts of the foreign sovereign committed in its own territory. However, while the skilled pleader here has meticulously attempted to avoid the issue of validity, its claim is admittedly not viable unless the judicial branch examines the motivation of the Libyan action and that inevitably involves its validity.

Hunt v. Mobil Oil Corp., 550 F.2d 68, 77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (citations omitted). The examination of motivation necessarily "require[s] a wholesale examination of Libyan policy—how did it treat other companies, what provoked its 'displeasure,' how far could concessions by Hunt appease President al-Qadhafi." *Id.* at 78 (footnote omitted). "To dismiss this examination as an issue of fact and not of law and therefore beyond the ambit of the act of state doctrine is, in our view, neither conceptually nor pragmatically sound." *Id.*

129. The *Restatement* does little to clarify the confusion:

(1) In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, *or from sitting in judgment on other acts of a governmental character done*

gal framework for such development.

IV. THE *Kirkpatrick* LITIGATION

The Supreme Court displayed a lack of concern for the policies underlying the comity doctrine and the act of state doctrine in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*[130] This case arose when Environmental Tectonics Corporation (Environmental Tectonics) sued W.S. Kirkpatrick & Company (Kirkpatrick) and others[131] for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO),[132] the New Jersey Anti-Racketeering Act,[133] and the Robinson-Patman Act.[134] In 1981, Harry Carpenter, Kirkpatrick's Chairman of the Board and Chief Executive Officer, entered into an agreement with Benson Akindele, a Nigerian national, to assist in obtaining a contract to create a medical center at a Nigerian Air Force Base. If Kirkpatrick obtained the contract, the agreement provided that Akindele would receive a twenty percent commission for his services and for bribes to Nigerian officials.[135] When Kirkpatrick successfully obtained the contract, Environmental Tectonics, one of the unsuccessful bidders, notified the Nigerian Air Force and the United States Embassy of the bribery. The United States subsequently charged Kirkpatrick and Carpenter under the Foreign Corrupt Practices Act,[136] and both pled guilty.

Environmental Tectonics brought suit in the United States District Court for New Jersey. Kirkpatrick moved to dismiss the action on the grounds that it was barred by the act of state doctrine. The district court determined that the act of state doctrine was applicable "if the inquiry

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by a foreign state within its own territory and applicable there.

RESTATEMENT, *supra* note 1, § 443 (emphasis added). Comment d, however, provides that "whether a particular act of a foreign state not involving expropriation comes under the act of state doctrine depends on the extent to which adjudication would require the United States court to consider the propriety of the acts and policies, or probe the motives, of the foreign government." The *Restatement* provides no guidance on how intrusive United States action must become before the act of state doctrine is applicable.

130. 110 S. Ct. 701 (1990).

131. The other defendants were: Development International Corp. (DIC) (dropped in an amended complaint); DIC (Holding) Inc.; IDC International S.A. Luxembourg; Harry G. Carpenter; Benson "Tunde" Akindele; John M. Krankel; W.S. Kirkpatrick & Co. International; International Development Corp., S.A.; Emro Engineering Co., Inc.; Robert W. Rupert; Ross E. Saxon; and R. H. Edwards. *See id.* at 702-03.

132. 18 U.S.C. §§ 1961-1968 (1988).

133. N.J. STAT. ANN. 2C 41-2-41-6.2 (1982).

134. 15 U.S.C. §§ 13(c)-36 (1988).

135. 110 S. Ct. at 702-03.

136. 15 U.S.C. §§ 78dd-1-dd-2 (1988).

presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States."[137] The court indicated further that the act of state doctrine requires the court to determine whether a bribe was paid and whether the Nigerian government knew of the bribe in awarding the contract.[138] Treating the motion to dismiss as one for summary judgment, the court granted judgment for Kirkpatrick, concluding that the act of state doctrine precluded the motivational inquiry. Despite what appeared to be a "Bernstein Letter"[139] from the State Department, the court found that the State Department had failed to "sign off on the application of the act of state doctrine in this case."[140]

The Third Circuit reversed the New Jersey District Court's deci-

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137. Environmental Tectonics Corp. v. W.S. Kirkpatrick & Co., 659 F. Supp. 1381, 1392-93 (D.N.J. 1987).

138. *Id.* at 1393.

139. *See supra* text accompanying notes 70-71.

140. 659 F. Supp. at 1402. The letter stated:

Dear Judge Lechner:

I am writing on behalf of the Department of State in reply to the Court's invitation to the Department to express its views on the above-referenced civil action in light of defendant's motion to dismiss on the basis of the act of state doctrine. This court has indicated in particular that it might become necessary to examine the motivation of officials of the Republic of Nigeria in taking certain public actions.

. . . .

If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.

. . . .

Apart from the act of state question, however, inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials might seriously affect United States foreign relations. These concerns, in the context of this 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.

. . . .

Sincerely,

/s/Abraham D. Sofaer

Abraham D. Sofaer

Id. (citations omitted). Despite the relatively clear position taken in this letter, the court relied on the language in the penultimate paragraph as a basis for applying the act of state doctrine.

sion.[141] Rejecting the broad act of state approach of *Clayco*, Judge Pollack's opinion stated that "these cases require that a defendant come forward with proof that adjudication of a plaintiff's claim poses a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the United States government."[142] The Third Circuit refused to apply the act of state doctrine primarily on the basis of the State Department's communication that judicial inquiry into a foreign sovereign's motivation should not necessarily be treated the same as questions involving the validity of a foreign government's actions.[143] Although the comments were not dispositive, the Third Circuit determined that the State Department's view on whether the suit would prejudice United States interests was "entitled to substantial respect."[144]

Writing for a unanimous Supreme Court, Justice Scalia agreed that the act of state doctrine was inapplicable to the instant case.[145] According to the opinion, unlike previous Supreme Court act of state decisions, this litigation did not require a judicial determination of the validity of the foreign sovereign's act performed within its territorial sovereignty.[146] Kirkpatrick argued that for Environmental Tectonics to prevail, it would be necessary to establish that the contract was unlawful under Nigerian law. Even so, Scalia felt that this inquiry would not trigger an act of state finding, because it is appropriate only when "a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign."[147] Since the legality of the Nigerian government's action was not before the court, the act of state doctrine was inapplicable.[148]

Kirkpatrick and the United States both advanced the important poli-

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141. Environmental Tectonics Corp. v. W.S. Kirkpatrick & Co., 847 F.2d 1052 (3d Cir. 1988).

142. *Id.* at 1061.

143. *Id.*

144. *Id.* at 1062.

145. 110 S. Ct. at 707.

146. Justice Scalia reviewed the decisions in Underhill v. Hernandez, 168 U.S. 250 (1897); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), and argued that *Underhill* "would have required denying legal effect to acts of a military commander representing the authority of the revolutionary party as government, which afterwards was recognized by the United States." 110 S. Ct. at 704-05. According to Justice Scalia, *Oetjen* and *Ricaud* would have required a finding that the Mexican government's seizure of plaintiff's property was ineffective. *Id.* at 705. Similarly, *Sabbatino* would have required that the Cuban expropriation be declared invalid. *Id.*

147. 110 S. Ct. at 705 (emphasis original).

148. *Id.*

cies underlying the act of state doctrine, including "international comity, respect for the sovereignty of foreign nations in their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations."[149] Although the United States government urged that any decision should reflect these policies, the government preferred that the balance result in adjudication of the merits.

Justice Scalia agreed that a balancing analysis could be appropriate in determining the act of state doctrine's applicability, but held that this analysis was unnecessary in *Kirkpatrick* because the validity of the foreign state's actions was not in question.[150] Thus, the Court created the threshold requirement that the validity of the foreign government's act be called into question. This rule does not require consideration of the relevant policy issues supporting the act of state doctrine. Instead, if there is no question of validity, the doctrine is automatically inapplicable no matter how seriously those policy concerns are implicated. In addition, the application of the rule in the *Kirkpatrick* case indicates that validity will be construed narrowly. The act of state doctrine, therefore, is applicable only when the court is forced to decide on the effectiveness of the foreign action.

V. ANALYSIS

Kirkpatrick was the first act of state case considered by the Supreme Court since *Dunhill*. Considering the lack of uniformity in recent act of state decisions issued by the Supreme Court,[151] the *Kirkpatrick* opinion is significant in determining the direction the act of state doctrine is moving. Justice Scalia's narrow approach suggests that the Supreme Court

149. *Id.* at 706.

150. Justice Scalia explained that:

> 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 act of state doctrine (or, as the United States puts it, unspecified "related principles of abstention") into new and uncharted fields.
>
> The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. The doctrine has no application to the present case because the validity of no foreign sovereign act is at issue.

Id. at 706-07.

151. *See supra* text accompanying notes 69-82.

consciously is restricting the act of state doctrine's application.[152] On the other hand, the Court may have viewed *Kirkpatrick* as an easy case for rejecting the act of state doctrine, not fully appreciating the restrictive import of Scalia's opinion. The unanimity of the Court in *Kirkpatrick* is also significant. After years of division on the act of state doctrine, the Justices attained complete agreement in a decision sharply narrowing the doctrine. This unanimity is due partly to the recent departure of Justice Brennan, a staunch supporter of the act of state doctrine and the political question approach.[153]

The *Kirkpatrick* opinion also is important for what it does not say. Arguably, several act of state doctrine exceptions would have applied under the facts in *Kirkpatrick*. First is the *Bernstein* exception. Although the Legal Advisor's Office advised that the act of state doctrine should not preclude the court's adjudication,[154] Justice Scalia refused to consider the *Bernstein* exception, arguing that "the factual predicate [questioning validity] for application of the act of state doctrine does not exist."[155] This refusal could indicate the absence of a majority view of the *Bernstein* exception, or the Court's inclination to craft a decision broader than the exception.

For the same reason, *Kirkpatrick* fails to consider the commercial exception, which arguably could apply to building a medical facility.[156] Although the building of a medical facility for a military base might constitute sovereign activity, the Court could have avoided the larger issues by finding a commercial contract. Again, since Scalia's opinion does not address this argument, the Court provides no guidance regarding application of the commercial exception. Similarly, the Court could have decided that the actions of Nigerian officials lacked the formality necessary to constitute an act of state. The alleged conduct did not involve a judicial or legislative decree, but rather the private attempts of individuals to enrich themselves.[157] The Court also could have adopted the cor-

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152. *See* Recent Decision, *Act of State Doctrine—A Bribery Exception to the Act of State Doctrine? Act of State Doctrine Bars Judicial Inquiry Into the Validity of a Foreign Sovereigns Acts, But Not Into the Motivations Behind the Acts*, W.S. Kirkpatrick, Inc. v. Environmental Tectonics, 22 VAND. J. TRANSNAT'L L. 1231 (1990).

153. *See Banco Nacional de Cuba*, 406 U.S. at 776-78.

154. *See supra* note 140 and accompanying text.

155. 110 S. Ct. at 706. Indeed, Justice Scalia felt that the Sofaer letter did not constitute the State Department's signing off on adjudication, but merely the State Department's technical opinion that the act of state doctrine was not applicable to this case. *Id.*

156. *See supra* text accompanying note 80.

157. *See* Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986); Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, Jimenez v. Hixon,

ruption exception promoted by some commentators, but did not.[158]

Rather than limiting the decision, Justice Scalia's majority opinion is a broadside attack on the act of state doctrine. Justice Scalia formalized a threshold test for the doctrine's application: the validity of the foreign state's actions must be in question.[159] Unless the adjudication depends on the legitimacy of a foreign sovereign's official acts, the act of state inquiry ceases without regard to the possibility of crucial comity policy implications.

The most obvious problem with Scalia's approach is the definition of "validity" as presented by the threshold test. Justice Scalia contended that only the Nigerian officials' motivation was at issue, although it appears that the legal effect of their actions was the real issue. Adjudication would require a determination of whether Nigerian officials accepted bribes as a matter of common practice. The determinative factor in the plaintiff's case would be the validity of the Nigerian award to the defendant. Plaintiff would have to show that it would have received the contract but for the defendant's illegal bribe of Nigerian officials. Since bribery is illegal under Nigerian law, a determination that bribery took place would amount to a finding that the contracts were invalid. Thus, how Scalia interpreted "validity" as not including the instant issues is unclear. Although the Nigerian government's motivation may have been one issue for consideration, the validity of its actions certainly was implicated.

This validity test is murky at best and provides the courts broad power to reject the act of state doctrine. As a result of *Kirkpatrick*, the doctrine's application may now turn on mere semantics rather than on legal reasoning. As the Second Circuit stated in *Hunt*, "we cannot logically separate Libya's motivation from the validity of its seizure."[160] Certainly, other courts will face the same problem. Manipulation of the terms "validity" and "motivation," however, will enable courts to retain or reject cases for reasons unrelated to comity and other policy concerns.

The United States argued against the validity rule adopted by the Court.[161] Pointing out that "[s]ome cases that concern only a foreign gov-

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373 U.S. 914 (1963) (act of state doctrine does not apply to common crimes).

158. The corruption exception provides that the act of state doctrine does not apply to corrupt acts by foreign governmental officials. *See* Comment, *Foreign Corrupt Practices*, *supra* note 116, at 203; Note, *International Law—Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases?*, 59 NOTRE DAME L. REV. 455 (1984).

159. *W.S. Kirkpatrick*, 110 S. Ct. at 707.

160. 550 F.2d at 77.

161. Brief for the United States as amicus curiae Supporting Respondent 9-10, W.S.

ernment's motivation plainly do raise significant act of state concerns," the United States preferred a flexible formula that considered comity and separation of powers issues.[162] Under such a flexible approach, the United States concluded that the *Kirkpatrick* result would still be the correct one: a broad consideration of comity and separation of powers issues should not trigger the act of state doctrine under the instant facts. More importantly, the flexible test would permit the doctrine's application in another case questioning only a foreign power's motivation. Similarly, the Republic of China advocated a flexible rule based on the policies underlying the act of state doctrine, comity, and separation of powers.[163]

The problems of application and interpretation under the rigid Scalia test highlight a larger concern presented by the Supreme Court's movement away from a reasoned approach to the act of state doctrine. Ever since *Sabbatino* rewrote the basis for act of state jurisprudence, the Supreme Court has narrowed the doctrine's scope. Until *Kirkpatrick*, however, these attempts failed to obtain a majority on the Court.[164]

The *Kirkpatrick* decision signals a lack of respect for the laws and practices of other states, the very respect that the comity doctrine embodies. Scalia's opinion exhibits insensitivity both toward the needs of for-

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Kirkpatrick & Co. v. Environmental Tectonics Corp., 110 S. Ct. 701 (1990).

162. The United States argued:

> Although the Court's prior decisions had appeared to take a rather rigid view of the act of state doctrine, *Sabbatino* expressly declined to lay down or reaffirm any inflexible or all-encompassing rule for application of the doctrine in future cases. Consistent with *Sabbatino*, and in recognition of the widely divergent circumstances in which the issue may arise, we do not urge any rigid formula or the resolution of the act of state cases generally. In particular, we do not urge the Court to choose among the expressions in judicial opinions and commentary that have variously sought to explain the act of state doctrine as a rule of judicial abstention, an aspect of the political question doctrine, a choice-of-law rule, a broader conflict of laws rule that incorporates choice-of-forum and choice-of-law notions, or a principle of repose that treats the act of a foreign sovereign as conclusively settling its legality in the courts of the United States, much as the judgment of a court operates under principles of issue or claim preclusion. Each of these analytical theories may furnish useful insights in one setting or another. But at least for the case at hand, we believe that whatever guidance they impart is sufficiently subsumed in the more general understanding, synthesized in *Sabbatino*, that the doctrine "effectuate[s] general notions of comity among nations and among the respective branches of the Federal Government."

Id.

163. Brief for the Republic of China as amicus curiae, W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 110 S. Ct. 701 (1990).

164. *See supra* text accompanying notes 69-82.

eign states to have different cultures and for the international legal system itself. Simply put, the *Kirkpatrick* decision permits any United States court to question a foreign government's action so long as the court is not necessarily questioning the action's validity.

As the United States itself contended in its brief, such an approach is undesirable. For example, a court could determine that United States allies are corrupt, involved in improper business practices, or even incorrectly using their armed forces, all without triggering the act of state doctrine under the rigid validity test. Such judicial determinations could, however, create serious ramifications for United States foreign policy by impairing negotiations between the United States and another state or even by disrupting the foreign government's stability and internal affairs. Certainly, an insensitive and inappropriate adjudication could impact negatively on United States relations with other governments.

Most importantly, insensitive decisions by United States courts could have an adverse effect on the international system itself, which is based upon a fragile consensus. It is difficult to maintain a consensus when one state's judiciary undercuts another state's governmental acts using the forum's parochial notions of justice. Such activities lead to resentment on the part of the state being questioned. The United States must act in a particularly responsible way because of its massive political and economic power. Attempts to impose United States notions of justice on the world could lead to justified cries of "legal imperialism" from the international community.

Governments most effectively obtain international consensus through their political rather than judicial branches. States are better able to explain legal and cultural differences through their political branches. The courts do not possess expertise and sophistication in this area and often lack sensitive information needed to make informed decisions. Most United States lawyers lack knowledge about specific foreign legal systems and the international legal system and, therefore, caution should be exercised.[165] Fortunately, the State Department ultimately determined

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165. The *Kirkpatrick* case, for instance, carried the potential for a negative impact. At the criminal sentencing for Kirkpatrick, the Assistant United States Attorney made the following statement:

> 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 . . . have shown a vital interest in this 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. . . .
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> . . . .

that the case could proceed without detrimentally affecting United States interests. In another case, however, a motivational inquiry could have such an effect. Even with a State Department request not to adjudicate the case, the Scalia approach enables the court to hear the case if the threshold validity test is not met. Scalia's inflexible rule, therefore, undercuts the legal rationales underlying the act of state doctrine, comity, and separation of powers. United States interests could be harmed merely to further the interests of one plaintiff. In addition, the growth of the international legal system could be slowed if the United States court system failed to respect the actions of other world community members.

If validity is not the best inquiry, what is? The *Hunt* rule is overly broad because it suggests that the act of state doctrine automatically will apply whenever any foreign government is involved in the activity in question. On the other hand, the *Kirkpatrick* rule deletes a class of crucial cases from the doctrine's protection. A well articulated balancing approach that takes into account the comity needs of the international system as well as the separation of powers issues would best serve as the inquiry in determining the act of state doctrine's applicability. In *Kirkpatrick*, the Court should have shaped the *Timberlane/Mannington* standards[166] to match the policy concerns behind the act of state doctrine, thus following the balancing test suggested in *Sabbatino*. Portions of the *Timberlane/Mannington* tests are particularly appropriate in making an act of state determination.[167]

In addition to these relevant factors, courts also should consider the potential effects on the international legal system's development. For in-

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This is not a case where there is not a victim. Shagari, who was the president of Nigeria at the time of this contract[,] is now under house arrest. Some of these other individuals[,] and I can name them if the Court is interested, are very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names . . . .

659 F. Supp. at 1387.

166. *See supra* text accompanying notes 101-13. Of course some of these standards are specifically included for determining jurisdiction to prescribe and should be deleted.

167. The factors that should be taken into consideration include:

1. The degree of conflict with foreign law or policy and effect on foreign relations;
2. The nationality and location of the parties;
3. The effects of the activity on the United States as opposed to the other country and the relative importance of the United States law violation compared to the interest of other countries;
4. Intent to harm United States interests, as well as foreseeability that such harm will occur;
5. Availability of another forum; and
6. Acceptability in this country of a similar exercise of power by a foreign court.

stance, in *Sabbatino*, the Supreme Court determined that a decision from the United States Supreme Court relating to expropriations would negatively affect the development of international law. The inclusion of such an additional element would ensure that courts would respect the needs of the international system and that parochial attempts to impose United States law abroad would be rejected.

VI. CONCLUSION

The act of state doctrine was formulated to recognize the equality of sovereigns in a time when monarchies controlled much of the world. Although the historical setting has changed, the strong need for the act of state doctrine remains. The doctrine is based on comity, a notion of international respect that perhaps is more important today than ever before. Legal systems must work cooperatively to reduce friction between states and promote growth of the international system in an era of increasing international interdependence.

Recent Supreme Court decisions forsake comity principles in favor of a more parochial view that ultimately may prove detrimental to United States foreign policy and the international system. In *Kirkpatrick*, the Supreme Court exacerbated the problem by applying a bright line validity test to the act of state doctrine. Such a test is unworkable and unwise because it lacks the flexibility necessary to reflect the critical concerns that the act of state doctrine was designed to protect. A better decision would have drawn upon the balancing test framework first suggested in *Sabbatino* and provided the lower courts with a list of factors to be considered in making the act of state determination. Instead, Scalia's opinion promulgated a mechanical analysis that turns on a meaningless distinction between validity and motivation. The international legal system deserves a more rational, sensitive treatment of the act of state doctrine because the United States plays such a prominent role in that system.