CASE COMMENTS

INTERNATIONAL COMMERCIAL BRIBERY AND THE ACT OF STATE DOCTRINE

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

In *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*[1] the United States Court of Appeals for the Third Circuit held that the act of state doctrine[2] does not bar lawsuits[3] against individuals who bribe foreign officials.[4]

After soliciting bids to construct an aeromedical center for the Nigerian Air Force, the Nigerian Defense Ministry awarded the defendant, W.S. Kirkpatrick,[5] the contract. The plaintiff, Environmental Tectonics Corporation International[6] initiated an investigation upon learning that it had submitted a substantially lower bid than Kirkpatrick on the same project. Environmental Tectonics investigation revealed a detailed scheme of illegal payments made by Kirkpatrick to Nigerian military and political officials in order to secure the contract.[7] Environmental Tecton-

1. 847 F.2d 1052 (3d Cir. 1988).

2. Under the act of state doctrine, both federal and state courts will refrain from adjudicating cases which raise sensitive foreign policy concerns even though they have proper jurisdiction. *See infra* notes 15-20.

3. The plaintiff, Environmental Tectonics, brought antitrust charges pursuant to the Robinson-Patman Act, 15 U.S.C. § 13(c) (1938) and racketeering charges under the New Jersey Anti-Racketeering Act, 2C N.J.S.A. § 41-1 and the Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1970).

4. 847 F.2d at 1067.

5. W.S. Kirkpatrick & Co. Inc. is a New Jersey corporation which sells and brokers aircraft equipment, parts and facilities to airlines and foreign air forces. Other named defendants included Kirkpatrick International, its wholly owned subsidiary, which was formed specifically to carry out W.S. Kirkpatrick's duties under this particular Nigerian contract; Carpenter, Kirkpatrick's chief executive officer; and Akindele, a Nigerian citizen and Kirkpatrick's agent. 847 F.2d at 1055.

6. Environmental Tectonics Corporation International is a Delaware corporation with its principal place of business in Pennsylvania and, like Kirkpatrick, it manufactures and sells aircraft equipment and facilities. *Id.*

7. Kirkpatrick's chief executive officer, Carpenter, hired a Nigerian national, Akindele, to act as Kirkpatrick's local agent in all matters pertaining to the contract at issue. Akindele informed Carpenter that to secure the contract, Kirkpatrick would have to pay a sales commission totalling 20% of the contract price. Most of the 20% was to be paid to Nigerian political and military officials. Through a written agreement with Akindele, Kirkpatrick agreed to pay the commission to two Panamanian corporations controlled by Akindele. In turn, those corporations were to pay the commission to the Nigerian officials. Shortly thereafter, the Defense Ministry awarded Kirkpatrick

ics reported its findings to the Nigerian and United States governments. An investigation by the United States Justice Department culminated in criminal sanctions[8] against defendant under the Foreign Corrupt Practices Act (FCPA).[9] After Kirkpatrick's sentencing, Environmental Tectonics filed suit to recover damages resulting from the lost contract. Kirkpatrick filed a motion to dismiss on the ground that the act of state doctrine barred adjudication of the claim.[10]

After receiving a "*Bernstein* letter" from the State Department,[11] the

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the contract and paid it in four installments. After Kirkpatrick received each installment, it funnelled payments via the United States mails and wire transfers to the two Panamanian corporations controlled by Akindele. Akindele then distributed the funds, totalling $1.7 million. *Id.*

8. During plea bargaining, Kirkpatrick and Carpenter agreed to submit offers of proof setting forth the entire bribery scheme. The district court imposed a $75,000 fine on Kirkpatrick, payable over a five year period, and sentenced Carpenter to two hundred hours of community service and a fine of $10,000. *Id.* at 1056.

9. Congress enacted the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-2(a)(1) (1977), to stem the growing tide of corruption abroad. These corrupt practices create foreign policy problems by embarrassing friendly governments, lowering the esteem of the United States, and casting doubt on the credibility of American enterprise. H.R. Rep. No. 640, 95th Cong., 1st Sess. (1977). The relevant portion provides:

> (a) It shall be unlawful for any domestic concern . . . or any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to -
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> (1) any foreign official for purposes of -
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> (A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or
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> (B) inducing such foreign officials to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.
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> in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person. . .

15 U.S.C. §§ 78dd-2(a)(1).

10. Kirkpatrick also filed a motion to dismiss the racketeering claim under Federal Rule of Civil Procedure 12(B)(6), contending that Environmental Tectonics had failed to allege a "pattern of racketeering activity" as required by federal and state racketeering statutes. 847 F.2d at 1056. *See supra* note 3.

11. A "*Bernstein* letter" from the State Department will authorize the court to either go forward with or abstain from deciding the merits of a claim that may impede relations between the United States and the foreign sovereign that is party to the suit. The term has its origin in a 1954 suit brought by a German Jew, Arnold Bernstein, to recover properties expropriated by the Nazis during World War II. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71, 75-76 (2d Cir. 1949), *amended*, 210 F.2d 375, 375-76 (2d Cir. 1954). The Second Circuit initially refused to hear the claim because the act of state doctrine precluded judicial review. After the Second Circuit declined to adjudge the validity of the acts of the German government, Bernstein obtained a letter from the State Department stating that in cases involving Nazi expropriations the Executive branch had a policy to allow aggrieved parties to pursue their claims in federal

United States District Court for the District of New Jersey concluded that the act of state doctrine barred adjudication of the case because the cause of action required the plaintiff to prove that Nigerian officials violated Nigerian law.[12] The district court reasoned that such a finding would implicitly criticize Nigeria's handling of its internal affairs and threatened to hinder the relations between Nigeria and the United States.[13] On appeal, the Third Circuit reversed and *held*: the act of state doctrine does not foreclose judicial inquiry into the motivations of foreign governments if the potential negative impact on foreign relations is merely speculative and if application of the doctrine would thwart the United States legitimate interest in implementing its regulatory policies.[14]

The act of state doctrine precludes U.S. courts from inquiring into the validity of public acts that a recognized foreign sovereign power commits within its own territory. The Supreme Court first adopted the doctrine in 1897.[15] The Supreme Court has struggled to define the act of state

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courts. The Second Circuit accordingly amended its original order and allowed Bernstein to proceed with his claim.

As used in this comment the term "*Bernstein* exception" refers to a scenario in which the State Department states in its *Bernstein* letter to the court that it has no objection to the suit going forward. Although the *Bernstein* exception has not been adopted by a majority of the Supreme Court most lower federal courts refuse to act in the absence of the State Department's approval. *See infra* notes 37 and 65.

12. *Environmental Tectonics Corp., International v. W.S. Kirkpatrick & Co., Inc.*, 659 F. Supp. 1381,1391-98 (D.N.J. 1987). Both bribery and acceptance of a bribe by a government official are illegal under Nigerian law. *See* Decree No. 38 (November 2, 1975) in Federal Republic of Nigeria Official Gazette Extraordinary, No. 59, December 2, 1975.

13. 659 F. Supp. at 1391-98. ETC reported the findings of its investigation to the Nigerian Air Force and made several futile attempts to trigger governmental action.

14. 847 F.2d at 1060-61.

15. Underhill v. Hernandez, 168 U.S. 250 (1897). Underhill, an U.S. businessman, brought a damages claim against Hernandez, a revolutionary Venezuelan military commander. Underhill claimed that Hernandez unlawfully denied him a passport, and coerced him into operating his waterworks business for the benefit of the Venezuelan revolutionary forces. The Court refused to inquire into the alleged illegal acts of Hernandez because he committed the acts under the authority of a *de facto* government that the United States later recognized. *Id.* at 254. Thus, the Court invoked the defense of sovereign immunity and barred Underhill's claim. *Id. See infra* note 17.

In dictum, Chief Justice Fuller, speaking for a unanimous Court, laid the foundation for 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. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

doctrine's parameters ever since the doctrine's inception.[16] The Court's early decisions attributed the origins of the doctrine to principles of sovereign immunity,[17] conflict of laws,[18] and international comity.[19] Modern act of state analysis, however, rests on the separation of powers doctrine.[20]

The Court first used the separation of powers analysis in *Banco Nacional de Cuba v. Sabbatino*.[21] In that case, the Castro regime, in retaliation for U.S. actions against Cuba, adopted a law that gave Cuba discretionary power to nationalize, by forced expropriation, property or enterprises in which U.S. nationals had an interest.[22] Despite the fact

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Id. at 252.

One commentator has suggested that this statement "detached the doctrine from its personal immunity moorings and allowed it to drift into unchartered territory." Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 333 (1986).

16. *See infra* notes 17-38 and accompanying text.

17. The doctrine of sovereign immunity grants to officials personal immunity from liability for acts committed in the scope of their government duties. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602-1611 (1982). The act of state doctrine originally emerged as a corollary to sovereign immunity, extending immunity to individual officials acting on behalf of the foreign government. Today, the sovereign immunity defense is available only to the government or government official that is a party to the suit, whereas private litigants may raise the act of state defense if the cause of action implicates a foreign government. *See* Bazyler, *supra* note 15, at 331.

18. Under the traditional principles of conflict of laws, the laws of each state have force within the boundaries of the state and bind all subject to it. However the state's law has no extraterritorial effect except to bind those persons whose rights vested within the limits of the state. Once vesting has occurred the law of the state in which the vested rights were acquired applies in any jurisdiction. *See* Ricaud v. American Metal Co., 246 U.S. 304, 310 (1918) (barring adjudication of an expropriation suit because the act was deemed lawful under Mexican law, although contrary to American policy). *See also* LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 163-66 (1947).

19. Oetjen v. Central Leather Co., 246 U.S. 297, 303 (1918) (the act of state doctrine "rests at last upon the highest considerations of international comity and expediency").

20. The separation of powers doctrine precludes one branch of the national government from impeding the function of another branch. Additionally, the separation of powers doctrine forbids one branch from expanding its power beyond its constitutionally delegated authority. Historically, the doctrine served two purposes. First, the division of labor among the three branches and the concentration of executive power in the President promotes efficiency. Second, the doctrine prevents tyranny: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47 (J. Madison). *See generally* G. STONE, L. SEIDMAN, C. SUNSTEN, & M. TUSHNET, CONSTITUTIONAL LAW, 339-346 (1986); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 2-1 to 2-4 (1978).

For an argument that the act of state doctrine violates the doctrine of separation of powers, see Bazyler *supra* note 15, at 375.

21. 376 U.S. 398 (1964).

22. *Id.* at 401-02. The United States had reduced Cuba's sugar quota and froze Cuban assets in the United States. *Id.*

that such a taking violated international law,[23] the Court refused to examine the validity of a taking of property by a foreign sovereign government within its territory. The Court found that the judicial branch should defer to the executive branch in matters of sensitive foreign policy because judicial intervention may actually "hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.[24]

The Court recognized that although the "text" of the Constitution does not require the act of state doctrine, the doctrine does have "constitutional underpinnings" arising out of the relationships between branches of government in a system of separation of powers.[25]

Although subsequent legislation overruled *Sabbatino's* holding regarding international takings[26] the Court's flexible analysis based on a "balancing of relevant considerations"[27] has survived. However, the Court's failure to identify the precise factors to be weighed,[28] its refusal to for-

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23. *Id.* at 428-29.

24. *Id.* at 423.

25. *Id.*

26. In reaction to the *Sabbatino* decision, Congress enacted the "Hickenlooper Amendment" in 1964. The amendment states in pertinent part:

> no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state . . . based upon (or traced through) a confiscation of other taking . . . by an act of that state in violation of the principles of international law. . . .

22 U.S.C. § 2370(e)(2) (1982).

27. 376 U.S. at 428.

28. The Court suggested that the following factors were relevant considerations: the sensitive nature of the issue, the ability of the executive branch to redress the grievances and the consensus of international law on the subject. *Id.* at 428. The Court also emphasized the ideological discord between capitalistic and communistic countries concerning the state's power to expropriate the property of aliens. The Court, however, suggested that the existence of a "treaty or other unambiguous agreement" might alter its analysis. *Id.* at 428-31.

Alternatively, one court incorporated the balancing test normally employed in the context of extraterritorial jurisdiction. The Ninth Circuit considered the following factors relevant in determining extraterritorial jurisdiction:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties, the locations 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 an explicit purpose to harm or affect U.S. commerce, the foreseeability of such an effect, and the relative importance to the violation charged of conduct within the United States as compared with conduct abroad.

Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 614 (9th Cir. 1976). *See also* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3rd Cir. 1979) (applying the *Timberlane* factors in the extraterritorial jurisdiction context). Only one court, however, has

mulate an inflexible rule of noninterference in international affairs[29] and its limited application of its own test[30] have generated confusion among the lower courts concerning possible exceptions to the act of state doctrine.[31]

The Court's post-*Sabbatino* decisions have added to the uncertainty in the area because no one exception to the act of state doctrine has attracted a majority of the Court. For example, in *First National City Bank v. Banco Nacional de Cuba*[32] the *Bernstein* exception garnered the support of only three Justices.[33] Similarly, in *Alfred Dunhill of London, Inc. v. Republic of Cuba*[34] only a plurality could agree that the act of state doctrine should not encompass commercial acts by foreign sover-

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applied the *Timberline* test in the act of state context. *See* Sage Int'l, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896, 903-08 (E.D. Mich. 1981). *See generally* Note, *Foreign Sovereign Compulsion In American Antitrust Law*, 33 STAN. L. REV. 131, 136 (1980).

29. 376 U.S. at 428. The Court noted that,

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

Id. The Court suggested that the judiciary might interfere if the issue involved touched less sharply on national nerves. *Id. See also supra* note 28.

The Court noted that international law is divided on the limits of a state's power to expropriate alien property. *Id.* at 428-31.

30. 376 U.S. at 428. The Court has never applied the *Sabbatino* analysis in any context other than expropriation of property cases. Subsequent to *Sabbatino*, the Court has only expounded on the scope and application of the doctrine on two occasions, and both instances involved the nationalization of U.S. property interests by the Castro regime. *See infra* notes 34-37.

31. The federal courts of appeals have disagreed whether a treaty or valid agreement exception to the act of state doctrine exists. *Compare* Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 684 F.2d 1032 (D.C. Cir. 1981) (refusing to enforce an otherwise binding arbitration agreement between the plaintiff and Libya) *with* Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984) (enforcing a treaty between the United States and Ethiopia forbidding takings without adequate compensation).

32. 406 U.S. 759 (1972). In *Citibank*, the Castro government seized all Cuban branches of the petitioner's bank without just compensation. Respondent defaulted on a loan by petitioner, and petitioner sold the loan collateral and applied the proceeds toward the loan. The proceeds, however, exceeded the unpaid balance of the loan and respondent sought to recover the excess. The petitioner counterclaimed for damages resulting from the expropriation of its property by the Cuban government. The Court distinguished *Sabbatino* because of the differing foreign policy positions of the executive branch in each case. In *Sabbatino* the executive branch took a neutral position, while in *Citibank* it expressly represented to the Court in a *Bernstein* letter that it did not support application of the act of state doctrine. Thus, the *Citibank* opinion focused on the *Bernstein* exception as a valid exception to the doctrine. *See infra* note 37.

33. *See infra* note 37.

34. 425 U.S. 682 (1976).

eigns.[35] Writing for the plurality, Justice White reasoned that "more discernable rules of international law have emerged with regard to commercial deals of private parties in the international market."[36]

Despite the Court's inability to agree on exceptions to the act of state doctrine,[37] some lower federal courts and commentators have argued that both bribery and antitrust should be exceptions to the doctrine.[38] The lower federal courts, however, are divided on whether to inquire into

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35. In *Dunhill*, the Cuban government confiscated the business and assets of the five leading manufacturers of Havana cigars. The foreign government appointed intervenors to occupy the seized businesses. Dunhill, an U.S. importer, mistakenly paid sums due for accounts receivable which accrued prior to the intervention. The former owners demanded payment from Dunhill who in turn sought to recover its mistaken payments from the Cuban intervenors. The intervenors claimed that the repayment obligation was a debt whose situs was in Cuba and that their refusal to pay was an act of state.

Four members of the Court (the Chief Justice, Justice White, Powell and Rehnquist) concluded that the refusal to pay did not constitute an act of state because of the commercial, as opposed to governmental, nature of the transaction. The plurality justified its position on two grounds. First, the plurality analogized to the commercial activity exception to the doctrine of sovereign immunity. *Id.* at 698. Second, the plurality noted that there is a greater consensus as to the rules governing the commercial dealings of private parties in the marketplace compared to the rules concerning governmental powers. *Id.* at 704.

36. *Id.*

37. A majority of the Supreme Court has never endorsed the *Bernstein* exception, *see supra* note 11, as a valid bar to act of state immunity. In *Sabbatino*, the Court expressly avoided ruling on the validity of the exception. 376 U.S. at 420. In *Citibank*, however, three justices (Rehnquist joined by the Chief Justice and White) adopted the *Bernstein* exception, while two justices (Douglas and Powell) decided the case on other grounds and four justices (Brennan joined by Stewart, Marshall and Blackmun) unequivocally rejected the *Bernstein* exception. The issue does not arise very frequently, however, because the State Department has issued only seven *Bernstein* letters since 1954.

38. Lower federal courts have proposed several arguments in support of a corruption or bribery exception. For instance, some have suggested that a corrupt or illegal act does not constitute an act of state. *See, e.g.*, Jimenez v. Aristeguieta, 311 F.2d 547, 557-58 (5th Cir. 1962), *cert. denied sub nom.* Jimenez v. Hixon, 373 U.S. 914 (1963) (financial crimes and embezzlement by a former Venezuelan chief executive do not constitute acts of state). *See generally* McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 237 (1976) (advocating a sovereign/non-sovereign dichotomy).

Others have relied on the policy argument that the United States has a great interest in the effective enforcement of the Foreign Corrupt Practices Act, *see supra* note 9. *See* Sage Int'l, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896, 909 (E.D. Mich. 1981); Comment, *Should There Be a Bribery Exception to the Act of State Doctrine*? 17 CORNELL INT. L. REV. 401, 419 (1984). *But see* Note, *Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad*, 10 CORNELL INT. L. REV. 231, 235-36 (1977) (quoting *Foreign and Corporate Bribes: Hearings on S. 3133 Before the Senate Committee on Banking Housing and Urban Affairs*, 94th Cong. 2d Sess. 84-85 (1976) (testimony of John McClay)). A special review committee investigating questionable payments made by multinational corporations testified before the Senate Committee that it "could not identify a single country where a bribe of a government official to induce a government to enter into a contract with any company for the supply of its product to that government was not illegal in that country."

the motivation behind a foreign government's actions. For example, in *Hunt v. Mobil Oil Corp.*[39] the Second Circuit espoused an expansive interpretation of the doctrine by foreclosing judicial inquiry into the motive of a foreign government because to do so would inevitably involve a determination of the validity or legality of the government's actions.[40] In *Hunt*, a small oil producer claimed that Mobil and six other competitors conspired among themselves, in violation of U.S. antitrust laws, and with the Libyan government, to eliminate Hunt from competition by Libyan nationalization of Hunt's oil properties.[41] Hunt challenged only its competitor's actions in catalyzing the government's response and not the validity of Libya's taking itself.[42] The court dismissed Hunt's claim under the act of state doctrine because it reasoned that in order to properly adjudicate the matter its inquiry would necessarily involve an examination of the Libyan government's motive. Because an examination into motive might raise doubts about the validity of the taking, the *Hunt* court abstained from reviewing the merits of the case.[43]

In *Industrial Investment Development v. Mitsui & Co., Ltd.*[44] the Fifth Circuit expressly rejected *Hunt's* dual protection of motivation and validity and held that precluding all inquiry into the motivation behind the sovereign act would uselessly thwart legitimate U.S. goals if adjudication would not result in an embarrassment to the executive branch. In *Mitsui* the court concluded that the Indonesian government's revocation of the plaintiff's timber license, allegedly due to the defendant's monopolistic tactics, did not raise sufficient foreign policy concerns to trigger the application of the act of state doctrine.[45] In finding an antitrust exception to the doctrine contrary to the per se approach advanced in *Hunt*, the *Mitsui* court stated that motivation and validity are not equally protected

39. 550 F.2d 68 (2d Cir. 1976).

40. *Id.* at 76-78. For contemporaneous criticism of *Hunt*, see Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247 (1977); Note, *The Act of State Doctrine: Antitrust Conspiracies to Induce Foreign Sovereign Acts*, 10 INT'L LAW AND POLITICS 495 (1978).

41. *Id.* at 70-72.

42. *Id.* at 70. The complaint did not allege corruption on the part of Libya, nor did it name any Libyan officials as defendants. *Id.*

43. *Id.* at 77-78. The court relied heavily on a State Department pronouncement characterizing the event as a political reprisal and economic coercion. Libya proclaimed that its purpose was to give the United States a "big hard blow in the Arab area on its cold, insolent face." *Id.* at 73 (quoting *Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Policy Relations*, 93rd Cong., 2d Sess., pt. 6, at 316-17 (1974) (statement of the State Department)).

44. 594 F.2d 48, 55 (5th Cir. 1979).

45. *Id.*

by the act of state doctrine.[46] In *Mitsui* the court allowed the question concerning the foreign government's motivation only to the extent of measuring damages.[47] Because the public interest in preserving and maintaining effective competition in this country outweighed the minimal political repercussions which might result from inquiry into the motive behind the granting of a timber license, the court concluded that the act of state doctrine was inapplicable.[48]

Similarly, in *Williams v. Curtiss-Wright Corp.*,[49] the Third Circuit refused to invoke the act of state doctrine to immunize the anti-competitive conduct of a defendant who dealt in a market composed of foreign governments.[50] In *Curtiss-Wright*, the court distinguished *Hunt* as an expropriation case but nevertheless criticized its broad holding.[51] The court focused on the degree of intervention required to meet the plaintiff, Curtiss-Wright's, burden of proof. The court recognized that the burden would require obtaining direct evidence from the foreign government.[52] However, because the complaint treated the foreign sovereigns as victims, not co-conspirators,[53] the court concluded that Curtiss-Wright's challenges did not question the validity of the foreign governments' acts but rather the motivation behind them.[54]

To the contrary, in *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*,[55] the Ninth Circuit embraced the *Hunt* rationale in the bribery context. There, Clayco claimed that Occidental bribed government officials of Umm Al Qaywayn to secure a valuable off-shore oil concession.[56] Clayco's complaint implicated the government of Umm Al Qaywayn as an active participant in the scheme.[57] In holding that the act of state doctrine barred Clayco's suit, the court noted that the doctrine would

46. *Id.*

47. *Id.*

48. *Id.* at 55-56. *See also* U.S. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962) (a conspiracy to monopolize U.S. commerce is not outside the reach of the Sherman Act just because part of the conduct occurred in a foreign country).

49. 694 F.2d 300 (3d Cir. 1982).

50. *Id.* at 301. Defendant's actions purportedly led to the boycott of plaintiff's products by numerous foreign governments.

51. *Id.* at 304 n.5.

52. *Id.*

53. *Id.* at 303-04.

54. *Id.* at 304.

55. 712 F.2d 404 (9th Cir. 1983).

56. *Id.* at 405.

57. *Id.* at 406.

not apply unless the sovereign activity affected the public interest.[58] The court decided that the case did implicate public interests because the underlying dispute involved a sovereign decision affecting important natural resources.[59] Thus, in declining to follow *Mitsui,* the *Clayco* court concluded that it was unwilling to resolve issues requiring it to judge the motivations behind a foreign sovereign's acts.[60]

In *Environmental Tectonics v. Kirkpatrick, Inc.*[61] the Third Circuit rejected the strict view of *Clayco* and *Hunt* and held that the act of state doctrine does not bar a suit which at most requires it to examine the motives behind, rather than the legality of, a foreign government's acts.[62] Although the nature of Nigeria's act constituted a sufficiently formal expression of the government's public interest,[63] the court concluded that its inquiry did not focus on the validity or legality of the Nigerian government's acts. Accordingly, the court employed the flexible approach enunciated in *Sabbatino.*[64]

First, the court accorded the position of the State Department in its *Bernstein* letter[65] significant weight, finding that the district court had misconstrued the intent of the letter.[66] Next, the court reaffirmed *Curtiss-Wright*[67] to illustrate its continuing unwillingness to allow litigants to shield themselves from the consequences of United States regulatory

58. *Id.* (citing Int'l Ass'n of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354, 1360 (9th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982).

59. *Id.* at 407. The *Clayco* court reconciled this factor with another decision in the Ninth Circuit using the act of state doctrine to bar a similar cause of action. *See* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C. D. Cal.), *aff'd,* 461 F.2d 1261. (9th Cir. 1971), *cert. denied,* 409 U.S. 950 (1972) (involving an act of state bar to review antitrust claims spurred by a foreign sovereign's issue of a fraudulent territorial decree).

60. 712 F.2d at 406. The court refused to pass on the validity of the commercial exception to the doctrine, *id.* at 407, and found that the bribery exception did not extend to private lawsuits. *Id.* at 409.

61. 847 F.2d 1052 (3d Cir. 1988).

62. *Id.* at 1062.

63. *Id.* at 1058. The court acknowledged that contracts are usually considered commercial acts; however, it found the commercial exception inapplicable because the bidding system of defense contracts is by its nature governmental. *Id.* at 1059.

64. *See supra* notes 27-28 and accompanying text.

65. *See supra* note 11.

66. 847 F.2d at 1059. The district court relied on one line in the letter stating that the court should proceed with due care and caution to justify complete abstention. The Third Circuit, however, concluded that the lower court read this line out of context with the rest of the letter which expressly stated that the State Department would allow adjudication under these facts.

67. *See supra* notes 49-54 and accompanying text.

policies by merely doing business abroad.[68] Finally, the court concluded that judicial inquiry into motive did not raise the type of institutional conflict between the executive and judicial branches that would justify applying the act of state doctrine.[69]

Although correctly recognizing a bribery exception to the act of state doctrine, the *Environmental Tectonics* court employed both incomplete and flawed reasoning. First and foremost, though the court purported to follow *Sabbatino*, it failed to consider several relevant factors. For instance, the court ignored the lack of consensus in international law on the impropriety of bribery.[70] One could argue, therefore, that absent global consensus regarding the impropriety of bribery to procure government defense contracts,[71] the involvement of Nigerian government officials alone should implicate the doctrine.[72] Hence, under *Sabbatino* and its progeny, such foreign government involvement could outweigh the United States interest in stemming the growing tide of international bribery regardless of whether the inquiry examined motive or validity.[73]

Second, the court improperly focused on the nature of the act rather than the role of the sovereign. The court erroneously followed *Curtiss-Wright* on the oversimplified ground that both cases involved government contracts. This reliance is misplaced because the court failed to note a critical distinction between the two cases. In *Curtiss-Wright*, the foreign governments were victims, rather than active participants in the scheme.[74] Moreover, because the foreign governments in *Curtiss-Wright* were guilty of no wrongdoing, an investigation in that case would neither unduly embarrass those sovereigns or interfere with the United States' foreign policy. Again, however, in *Environmental Tectonics*, the Nigerian government played an integral role in the illicit scheme. Although this factor militates against adjudicating the case, the court failed to address the unique issues raised by the bribery allegation. In particular, the

68. 847 F.2d at 1062.

69. *Id.*

70. *See supra* note 25. *See generally* Note, *Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad*, 10 CORNELL INT. L. REV. 231, 235-36 (1977).

71. Although it may be illegal in the United States and other western nations to procure contracts through bribery, *see supra* note 9 and accompanying text, it is not necessarily recognized as such in Nigeria, a third world nation. *But see supra* note 38 and accompanying text (discussing the possibility of an international recognition of bribery as a crime).

72. The *Clayco* court considered this argument. *See supra* notes 55-60 and accompanying text.

73. *See supra* notes 49-54 and accompanying text.

74. *See supra* note 48 and accompanying text.

court never addressed the issue of whether the acceptance of a bribe constitutes an act of state.

Environmental Tectonics provides an essential countervailing precedent to the *Clayco* decision. *Clayco* effectively foreclosed all judicial inquiry into bribery and justly has been criticized as providing a shield for corruption and bribery. Although *Environmental Tectonics* is the first case to recognize bribery as a legitimate exception to the act of state doctrine, its specious conclusion may not hold much merit for future reviewing courts. If in fact bribery is a crime universally condemned,[75] bribery may be a valid exception to the act of state doctrine. However, the *Environmental Tectonics* decision does not focus on this factor in carving such an exception, but instead focuses on the limited embarrassment an inquiry into motive will have on the Nigerian government. If later courts considering bribery as an exception to the act of state doctrine avoid the *Environmental Tectonics* pitfall and look to the *Sabbatino* orthodoxy, they may create a more solid, lasting bribery exception to the act of state doctrine.

D.E.B.

75. *See supra* note 9.