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Environmental Tectonics Corp. v. W.S. Kirkpatrick, Inc.: The Act of State Doctrine and the Problem of Judicial Inconsistency*

I. Introduction

The act of state doctrine is a judicially created tenet developed to restrain courts from inquiring into the public acts of a foreign government committed within its own territory.1 Although the act of state doctrine has a long judicial history,2 neither courts nor commentators have been able to agree on its scope or the policies underlying its application.3 Consequently, the doctrine has been applied inconsistently and has fostered a confusing legacy of case law. The case of Environmental Tectonics Corp. v. W.S. Kirkpatrick, Inc.4 (ETC) is a recent example of the difficulties engendered by the doctrine.

In ETC, the Court of Appeals for the Third Circuit addressed the use of the act of state doctrine as a defense to a claim which arose between private parties and which implicated the questionable acts of officials of a foreign government. The Third Circuit held that the doctrine did not bar adjudication, and reversed the district court's dismissal of the claim.5

This Note examines the reasoning behind the court's decision in

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1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 comment a (1986) [hereinafter RESTATEMENT (THIRD)].
2 In The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812), the Supreme Court first recognized the act of state doctrine:

The arguments in favor of [the doctrine] which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description . . . 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 for diplomatic, rather than legal discussion.

Id. at 146.

The Supreme Court has recognized that the roots of the doctrine can be traced back to the 17th century. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (citing Blad v. Bamfield, 36 Eng. Rep. 992 (Ch. 1674)).

4 847 F.2d 1052 (3d Cir. 1988).
5 Id. at 1062.
ETC, the development of the act of state doctrine, and its various interpretations by the courts. This Note stresses the need for a consistent and clear policy concerning the use of the act of state doctrine. In response to this need, this Note proposes that the Supreme Court reconsider and redefine the doctrine and adopt a modified Bernstein exception to the doctrine. Finally, should the Court fail to provide rational, clarified direction on this issue, this Note concludes that the doctrine should be abolished in favor of legislative reform.

II. Background of Environmental Tectonics Corp. v. W.S. Kirkpatrick, Inc.

The controversy in ETC involved two U.S. corporations, Environmental Tectonics Corporation and W.S. Kirkpatrick, Inc., who were competing for a military contract to build and equip an aeromedical facility at Kaduna Air Force Base in Kaduna, Nigeria. That contract was awarded to Kirkpatrick by the Ministry of Defense of the Nigerian Government.

Approximately two years later, the U.S. Department of Justice initiated a grand jury investigation into the circumstances surrounding the grant of the contract. The investigation showed that Kirkpatrick had hired a Nigerian, Benson Akindele, to act as its local agent in dealing with the Nigerian Government. Akindele had informed Kirkpatrick that it should pay a “sales commission” of twenty percent of the contract price, to be used to pay Nigerian political and military officials. Kirkpatrick agreed, and paid the requested sum to two Panamanian corporations which were controlled by Akindele. These corporations then distributed most of the money to Nigerian officials.

The Justice Department charged W.S. Kirkpatrick, Inc. and its chairman, Harry Carpenter, with violations of the Foreign Corrupt Practices Act (FCPA). Both entered guilty pleas.

Environmental Tectonics Corporation brought suit following the conclusion of the criminal action, alleging that criminal conduct by Kirkpatrick and the other defendants violated federal and state

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6 See infra text accompanying notes 56-64.
8 Id. at 1384.
9 Id.
10 Id.
11 Id.
12 Id.
14 Nine other defendants were named: D.I.C. (Holding) Inc., the parent company of Kirkpatrick and Kirkpatrick International; International Development Corporation, S.A., the parent company of D.I.C. (Holding) Inc.; Harry G. Carpenter, the Chairman of the
antiracketeering statutes\textsuperscript{15} and the Robinson-Patman Act.\textsuperscript{16} The defendants moved for a dismissal, alleging that the action was precluded by the act of state doctrine.\textsuperscript{17} The district court, treating the defendants' motion as one for summary judgment, dismissed the case.\textsuperscript{18}

On appeal, the Third Circuit reversed the district court's dismissal of the case.\textsuperscript{19} While the Third Circuit agreed with the district court on two of its conclusions, it found fault with the district court's result and with most of the court's remaining act of state analysis.\textsuperscript{20} First, the Third Circuit agreed with the district court's determination that the awarding of a military procurement contract can involve sufficient government interest to invoke the act of state doctrine.\textsuperscript{21} The court distinguished this from routine governmental acts which are of less concern to the executive branch in its conduct of foreign policy.\textsuperscript{22} Such "routine" acts include, for example, an award of a patent or the acts of a bankruptcy trustee,\textsuperscript{23} which were characterized by the court as "a near-mechanical exercise of narrowly-defined governmental discretion."\textsuperscript{24} Second, the court agreed with the district court's refusal to apply the "commercial exception" to the act of state doctrine.\textsuperscript{25} Under this exception, if acts of a sovereign state are purely commercial in nature, the court should not invoke the act of state doctrine to bar adjudication of the claim.\textsuperscript{26} The Third Circuit concluded without elaboration that the award of a defense contract is "by its very nature governmental,"\textsuperscript{27} and therefore, not within the


\textsuperscript{17} Environmental Tectonics, 659 F. Supp. at 1384.

\textsuperscript{18} Id.

\textsuperscript{19} ETC, 847 F.2d at 1062.

\textsuperscript{20} Id. at 1058-62.

\textsuperscript{21} Id. at 1058.

\textsuperscript{22} Id. at 1058-59.

\textsuperscript{23} Id. at 1058.

\textsuperscript{24} Id. at 1059.

\textsuperscript{25} Id. The idea of a "commercial exception" to the act of state doctrine was first introduced by a plurality of the Supreme Court in Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682, 695 (1976), but was not endorsed by the majority of the Court. See infra notes 122-28 and accompanying text.

\textsuperscript{26} ETC, 847 F.2d at 1059.

\textsuperscript{27} Id.
The Third Circuit then disagreed with the remainder of the
district court's act of state analysis. In particular, the ETC court criti-
cized the district court's reliance on Clayco Petroleum Corp. v. Occidental
Petroleum Corp., 28 which had interpreted the act of state doctrine ex-
pansively. 29 The Clayco court held that the act of state doctrine fore-
closes inquiry into the motivations of a sovereign's acts because such
inquiry may result in embarrassment to the foreign state or our exec-
tutive branch. 30 In a sharply worded opinion, the Third Circuit as-
serted that such a conclusion is contrary to both legal precedent and
the position taken by the executive branch in a letter from its Legal
Advisor, Abraham Sofaer. 31 Sofaer distinguished between judicial
inquiry into the motivations behind the acts of public officials of for-
eign states as opposed to the validity of such acts. 32 He stated that
the act of state doctrine "only precludes judicial questioning of the
validity or legality of foreign government actions." 33 Sofaer's letter
further declared that "[d]ismissal of a complaint before the devel-
opment of evidence, merely because adjudication raises the bare
possibility of embarrassment, constitutes an unwarranted expansion
of the act of state doctrine and is contrary to the flexibility with which
that doctrine should be applied." 34

The Third Circuit found additional support for its position that
the act of state doctrine should not be invoked so readily to preclude
adjudication in two previous Third Circuit cases: Mannington Mills,
Inc. v. Congoleum Corp. 35 and Williams v. Curtiss-Wright Corp. 36 The
ETC court stressed that the formulation of the act of state doctrine
set forth in Mannington Mills and Curtiss-Wright does not permit a
court to employ the act of state doctrine based merely on speculation
as to the effect certain disclosures might have on the sensibilities of a

28 712 F.2d 404 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984). The plaintiff and
defendant were in competition for an oil concession offered by Umm Al Qaywayn. Id. at
405. Clayco alleged that Occidental was awarded the contract after it bribed the petro-
leum minister and his son. Id. The Ninth Circuit affirmed the district court's dismissal of
Clayco's suit on act of state grounds, stating that it was unwilling to permit judicial inquiry
into the motivation for the sovereign act. Id. at 407.
29 ETC, 847 F.2d at 1059-60.
30 Id. at 1060-61 (citing Clayco, 712 F.2d at 407).
31 Id. at 1060-62. Such a communication is termed a "Bernstein letter." See infra
notes 56-64 and accompanying text. The Third Circuit gave considerable deference to
Sofaer's letter in part because of Sofaer's status as a former federal judge.
32 ETC, 847 F.2d at 1061.
33 Id. (quoting State Department Position Letter from Legal Advisor Abraham Sofaer
(Dec. 10, 1986) [hereinafter Sofaer letter], reprinted in Environmental Tectonics Corp. v.
original).
34 ETC, 847 F.2d at 1061 (quoting Sofaer letter).
35 595 F.2d 1287 (3d Cir. 1979).
36 694 F.2d 300 (3d Cir. 1982).
foreign government. Rather, the defendant must be able to show that adjudicating a plaintiff's claim poses a demonstrable threat to the executive's conduct of foreign relations. The court found that such proof was lacking in this case, and that an inquiry into the issues of the case need not scrutinize the validity or legality of Nigeria's acts. Reversing the district court's grant of summary judgment, the ETC court held that the act of state doctrine did not bar adjudication of this action. Disparities such as these between the district court and the Third Circuit in ETC are often encountered by courts addressing the act of state issue. Such inconsistencies are due to the lack of clear guidance by the Supreme Court. To understand the lower courts' struggle to apply the doctrine in the ETC litigation, it is helpful to review the development of the act of state doctrine in the Supreme Court.

III. Development of the Act of State Doctrine

The Supreme Court set forth what is often referred to as the "traditional formulation," or the "classic American statement," of the act of state doctrine in Underhill v. Hernandez:

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.

In Underhill, the defendant, a Venezuelan military general, had forcibly taken over the government. The plaintiff, a U.S. citizen residing in Venezuela, brought suit in the United States against the general alleging unlawful confinement and assault. The U.S.

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37 ETC, 847 F.2d at 1061.
38 Id.
39 Id.
40 Id. at 1062.
41 See generally Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682 (1976) (district court did not apply the act of state doctrine because it found no act of state. Second Circuit reversed, finding the foreign government's refusal to repay certain funds was an act of state. Supreme Court reversed the Second Circuit, holding that no act of state had been proven); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (district court felt Hickenlooper Amendment overruled Sabbatino and thus the act of state doctrine was not a bar to adjudication. Second Circuit disagreed and found that Citibank's counterclaim was barred from adjudication. The Supreme Court reversed, holding that the act of state doctrine did not bar adjudication).
44 168 U.S. 250 (1897).
45 Id. at 252.
46 Id. at 251.
47 Id.
48 Id.
Supreme Court affirmed the Second Circuit's holding that the acts of the defendant are those of the Venezuelan Government, and thus should not be scrutinized in U.S. courts.\footnote{Id. at 254.}

The Underhill decision did not elaborate on whether the origins of the act of state doctrine were rooted in international law, comity, conflicts of laws, or political expediency. Two subsequent cases dealing with the act of state doctrine indicated that the Court had not yet settled on the underpinnings of the doctrine: Oetjen v. Central Leather Co.,\footnote{246 U.S. 297 (1918). The Oetjen case involved a suit by the assignee of the original owner of some hides against the holder of the hides. Id. at 299. Mexican revolutionary forces, which later succeeded in coming into power, had seized the hides. Id. In dismissing the plaintiff's action for replevin, the Court stated that "to permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." Id. at 304.} and Ricaud v. American Metal Co.\footnote{246 U.S. 304 (1918). The facts of Ricaud were substantially similar to those in Oetjen, except that the original owner of the confiscated goods in Ricaud was a U.S. citizen. Id. at 305.}

Both Oetjen and Ricaud involved the expropriation of goods in Mexico by the Mexican Revolutionary Government. Although these two cases were decided in the same year, the Supreme Court stated differing premises on which the act of state doctrine is based. In Oetjen, the Court applied the act of state doctrine to preclude adjudication of the case, indicating that the doctrine was a principle of "international comity and expediency."\footnote{Oetjen, 246 U.S. at 304.} The Ricaud case, relying on both Underhill and Oetjen, reached the same result, but indicated that the act of state doctrine was a "rule of law."\footnote{Ricaud, 246 U.S. at 310. "The fact that title to the property in controversy may have been in an American citizen . . . does not affect the rule of law that the act within its own boundaries . . . cannot become the subject of re-examination and modification in the courts of another." Id. (relying on Oetjen, 246 U.S. at 304 (emphasis added)).} Reading these cases together, one commentator has concluded that the act of state doctrine was viewed by the Court as a "legal rule based upon the premise that the act of a foreign sovereign, performed within its own territory, could not be reviewed by an American court without imperiling the amicable relations between governments, since the doctrine rested on the highest considerations of international comity and expediency."\footnote{See Delson, supra note 3, at 88.} Nevertheless, these differing bases for the act of state doctrine emerged as the first signs of judicial inconsistency,\footnote{Id. (recognizing the emergence of inconsistencies when referring to the basis for the act of state doctrine).} and foreshadowed the confusion that courts would face in determining the scope of the doctrine.

After World War II, an important caveat to the policy of judicial
abstention in act of state cases emerged: the Bernstein exception.\textsuperscript{56} This “exception” derived from litigation involving Arnold Bernstein, a Jew living in the United States who had formerly lived in Germany.\textsuperscript{57} Bernstein sought to recover property forcibly taken from him by the Nazi Government.\textsuperscript{58} The Second Circuit initially refused to adjudicate on act of state grounds.\textsuperscript{59} Later, the court amended its prior decree after the State Department wrote a letter setting forth the executive’s policy relieving U.S. courts from any restraint upon the exercise of their jurisdiction in hearing Bernstein’s claim.\textsuperscript{60} Such an advisory letter by the State Department in act of state cases is now commonly referred to as a Bernstein letter.\textsuperscript{61} The Bernstein exception precludes application of the act of state doctrine if the State Department issues a letter informing the court that the executive branch deems application of the doctrine unnecessary.\textsuperscript{62} Although proposed in a Supreme Court opinion, the exception has never been accepted by a majority of the Court.\textsuperscript{63} Many lower courts, however, have accorded Bernstein letters great deference, often seeming to follow the recommendations of the State Department automatically.\textsuperscript{64}

IV. Modern Act of State Cases

From 1964 to 1976, three Supreme Court cases emerged which make up the core of the modern act of state doctrine. All three cases deal with the nationalization of U.S. citizens’ assets by Cuba.

The first of these cases is Banco Nacional de Cuba v. Sabbatino.\textsuperscript{65} A commentator has described this decision as “undoubtedly one of the

\textsuperscript{56} See Bernstein v. Van Heygen Freres, S.A., 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947); Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949), amended, 210 F.2d 375 (2d Cir. 1954).
\textsuperscript{57} Id. at 247.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 249.
\textsuperscript{60} Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).
\textsuperscript{61} See Bazyler, supra note 3, at 369.
\textsuperscript{62} Id.
\textsuperscript{63} In First Nat’l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), the Bernstein exception received only three favorable votes. Id. at 767-68. Two other Justices of the majority rejected application of the Bernstein exception and preferred to decide the case on other grounds. Id. at 770-73 (Douglas, J., concurring in result); id. at 773-76 (Powell, J., concurring in judgment). In the dissent, Justice Brennan, joined by Justices Stewart, Marshall and Blackmun, strongly objected to the plurality’s acceptance of the Bernstein exception. Id. at 776-93 (Brennan, J., dissenting). In a case prior to Citibank, the Supreme Court avoided ruling on the legitimacy of the Bernstein exception. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 598, 420 (1964).
\textsuperscript{64} Compare Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 884-85 (2d Cir. 1981) (Bernstein letter indicating no objection by the executive branch to adjudication of the dispute received; act of state defense not recognized to bar adjudication of the claim) with Banco Nacional de Cuba v. Chemical Bank, 658 F.2d 903, 911-12 (2d Cir. 1981) (Bernstein letter not received; act of state defense recognized).
\textsuperscript{65} 376 U.S. 398 (1964).
most important international law cases to be decided by a domestic court [in] this century. 66

The controversy in Sabbatino arose from Cuba's nationalization of U.S. sugar interests as a reprisal against unfavorable U.S. policies directed at the Castro Government. 67 The dispute arose between Banco Nacional, an agency of the Cuban Government, and C.A.V., a U.S.-owned Cuban firm which at one time owned a cargo of sugar. 68 C.A.V. sold that sugar to Farr, Whitlock & Co., a brokerage firm in the United States. 69 Farr Whitlock, with the permission of the Cuban Government, sold the sugar and turned over the proceeds to Sabbatino, a U.S. receiver representing C.A.V.'s interests. 70 Banco Nacional sued to recover the proceeds. 71 Farr Whitlock resisted the claim, arguing that because the expropriation violated international law, Cuba had never acquired valid title to the sugar cargo. 72

The district court agreed with Farr Whitlock's argument, and held that the act of state doctrine did not bar adjudication because the act in question violated international law. 73 The Second Circuit affirmed on different grounds. 74

The Supreme Court granted certiorari in Sabbatino to address two sensitive issues: cases involving certain U.S. foreign relations practices, and the appropriate role of the judiciary when called upon to review such cases. 75 The Court overruled the lower courts' determination that the act of state doctrine would not extend to an act that was in violation of international law. 76

Justice Harlan, writing for the majority, set forth several rationales for judicial abstention. These included the absence of uni-

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68 Id.

69 Id. While the shipment was being loaded, Cuba nationalized the property of C.A.V. and other Cuban corporations in which U.S. citizens held a majority interest. Id. Farr Whitlock then contracted to purchase the sugar from a Cuban government corporation, so that the vessel could leave port. Id.

70 Id. at 376-77. The New York Supreme Court, acting pursuant to state statute, appointed receivers for the New York assets of the foreign corporations whose property was nationalized. Id. at 377. The state court ordered Farr Whitlock to pay the receiver who placed the money in trust. Id.

71 Id.

72 Id. at 379-80.

73 Id.

74 Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962), rev'd, 376 U.S. 398 (1964). Despite agreeing with the result reached by the district court, the Second Circuit left its mark on the growing body of act of state justifications, finding it "one of the conflicts of laws rules applied by American courts . . . ." Id. at 855.


76 Id. at 439.
versally accepted standards of international law regarding expropriations; international political sensitivity in that area; the separation of powers between the political and judicial branches; and concerns that judicial involvement may hinder U.S. international relations activities.

In addition, the Court expressly refuted previous justifications for the doctrine stating, "[w]e 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 principle of international law." Instead, the Court asserted that the act of state doctrine has constitutional underpinnings in that it relates to the fundamental separation of powers between the branches of government, and that the continuing vitality of the doctrine depends on its ability to suitably reflect the separate functions of the judicial and political branches.

There was some division about the act of state analysis within the Court. Justice White argued in a lengthy and persuasive dissent that U.S. courts are obligated to adjudicate cases based on applicable law, of which international law is a part. He also objected to the Court's conclusion that the executive branch should have exclusive jurisdiction over matters of international controversy. Justice White argued that although foreign relations is assuredly within the executive domain, it is not within the executive's exclusive control. Justice White also argued that the validity of a foreign act of state is not inevitably a political question.

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77 Id. at 428-30.
78 Id. at 430.
79 Id. at 427-28.
80 Id. at 431-33. The Court noted that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." Id. at 428. It indicated further, however, that when there are areas of international law that have a greater consensus as to applicable standards, U.S. courts are not "broadly foreclosed" from addressing such issues. Id. at 430 n.34. The act of state doctrine may still be applicable "even if [customary] international law has been violated." Id. at 431. In addition to the concerns over deciding nebulous areas of customary international law, the Court stressed the importance of maintaining the "proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." Id. at 427-28. The Court reasoned that judicial involvement by U.S. courts in such matters would be "likely to give offense" to the other country, id. at 432, or might "provide embarrassment to the Executive Branch." Id. at 433.
81 Id. at 421 (citing Oetjen v. Central Leather Co., 246 U.S. 297 (1918); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Underhill v. Hernandez, 168 U.S. 250 (1897)).
82 Id. at 423.
83 Id. at 427-28.
84 Id. at 450-51 (White, J., dissenting).
85 Id. at 461-62 (White, J., dissenting).
86 Id. (White, J., dissenting).
87 Id. (White, J., dissenting).
The Supreme Court phrased its holding in *Sabbatino* narrowly, stating:

[W]e 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 . . . 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. 88

Despite this limited holding, lower courts have embraced the extensive ruminations of the Supreme Court in *Sabbatino* to justify applying the act of state doctrine to cases that had nothing to do with foreign expropriations.89

The *Sabbatino* case prompted a profusion of commentary,90 and Congress, which sought to neutralize *Sabbatino*, responded by enacting the Hickenlooper Amendment to the Foreign Assistance Act of 1964.91 This amendment removed certain types of actions involving claims of title to property in the United States from the purview of the act of state doctrine,92 but the scope of the statute has been confined to cases involving confiscated property brought into the United States.93 One commentator has noted that while the Hickenlooper Amendment would appear to nullify a great portion of the act of state doctrine, in fact it has had almost no effect.94

The Supreme Court next addressed the act of state doctrine in *First National City Bank v. Banco Nacional de Cuba*,95 commonly referred

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88 *Id.* at 428.

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 . . . a confiscation or other taking . . . by an act of that state in violation of the principles of international law, including the principles of compensation.

92 *Restatement (Third)* supra note 1, ¶ 443 n.2.
94 *See Bazyler, supra* note 3, at 393. Bazyler notes that the amendment was applied successfully only one time, in the remand of the *Sabbatino* litigation. *Id.* He sets forth several reasons for its lack of impact. These include the fact that the amendment has received a narrow interpretation that excludes all contract claims. *Id.* In addition, it is inapplicable to claims made by a foreign state's own nationals. *Id.* Lastly, Bazyler states that courts require the situs of the confiscated property or its proceeds to be in the United States. *Id.*
to as Citibank. This case also involved an expropriation by the Cuban Government. The lower courts in Citibank, as in Sabbatino, disagreed over the appropriate application of the act of state doctrine, and were particularly divided about the effect of the newly-created Hickenlooper Amendment. The district court felt that the amendment had "for all practical purposes" overruled Sabbatino, and therefore would have heard the case. The Second Circuit, however, found that the amendment was not controlling, and that Sabbatino barred adjudication of the Citibank counterclaim. In a five-to-four decision, the Supreme Court reversed the Second Circuit, holding that the act of state doctrine did not bar a decision on the merits. Although five Justices agreed on the result, they could not agree on the reasons behind it.

Justice Rehnquist, writing for the three-justice plurality, found the Bernstein exception dispositive. He viewed the act of state doctrine primarily as a means to avoid embarrassing the executive branch in its conduct of foreign relations and concluded that this required deference to the State Department. In essence, the plurality followed Sabbatino, while voicing the strongest endorsement of the Bernstein exception to date. A majority of the Justices, however, rejected the Bernstein exception.

Justice Powell concurred in the judgment, but did not accept the view that the doctrine requires the judiciary to receive the executive's permission to adjudicate an act of state case. He would have rested the decision on the grounds that there was no conflict in Citibank between the judicial and political branches. Justice Douglas appeared to rely on equitable principles of "fair dealing." In an ardent dissent, Justice Brennan, joined by Justices Blackmun, Stewart, and Marshall, refused to recognize the Bernstein exception, argu-

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96 See Bazyler, supra note 3, at 328.
97 The Hickenlooper Amendment was enacted in 1964, the same year Sabbatino was decided. See supra notes 92-95 and accompanying text.
100 Id. at 394-95.
101 Citibank, 406 U.S. at 769-70.
102 Justice Rehnquist's opinion was joined by Chief Justice Burger and Justice White. Justices Douglas and Powell, concurring in the result, explained their reasoning in two separate opinions.
103 Citibank, 406 U.S. at 767-68. For a discussion of the Bernstein exception, see supra text accompanying notes 56-64.
104 Citibank, 406 U.S. at 765-68.
105 Id. at 776-93 (Brennan, J., joined by Blackmun, Marshall, and Stewart, JJ., dissenting); id. at 770-73 (Douglas, J., concurring); id. at 773-76 (Powell, J., concurring).
106 Id. at 773-76 (Powell, J., concurring).
107 Id. at 776 (Powell, J., concurring).
108 Id. at 770-73 (Douglas, J., concurring).
ing that it would allow politics, not law, to dictate judicial results.\(^{109}\)

The third important modern act of state case is *Alfred Dunhill, Inc. v. Cuba*.\(^ {110}\) Once again, the lower courts could not agree on the application of the act of state doctrine,\(^ {111}\) and the Supreme Court again was unable to gather majority support for a clear guideline on the doctrine.

The *Dunhill* litigation arose out of the Cuban Government's nationalization of five privately owned cigar manufacturers.\(^ {112}\) The Cuban government turned the operation of these companies over to "interventors."\(^ {113}\) Dunhill, a U.S. importer, continued to receive and accept shipments from the cigar manufacturers, and paid the interventors for those transactions.\(^ {114}\) These payments covered shipments of goods sent both pre- and post-intervention.\(^ {115}\) The former owners, now residents of the United States, sued Dunhill for the value of the pre-intervention shipments.\(^ {116}\) The *Dunhill* court had to decide whether the act of state doctrine was implicated by the interventors' refusal to reimburse the importers for sums that the importers had paid to the interventors, but which were owed to the former owners.\(^ {117}\)

The Supreme Court, by a vote of five-to-four, refused to apply the act of state doctrine on the basis that no act of state had been proven. Justice White, writing the plurality opinion of the Court, concluded that the facts did not show the interventors' refusal to indemnify the importers constituted a public act on behalf of a sovereign.\(^ {118}\) The Court reasoned that the interventors' refusal to repay funds to Dunhill did not necessarily constitute anything more than

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\(^{109}\) *Id.* at 790-93 (Brennan, J., dissenting). Justice Brennan also noted that the avoidance of embarrassment to the executive branch depended upon speculation as to a court's holding on the validity of foreign acts. *Id.* at 782-85 (Brennan, J., dissenting).

\(^{110}\) *425 U.S. 682* (1976).

\(^{111}\) The district court refused to apply the act of state doctrine because it found no evidence that the Cuban Government had formally repudiated its obligation to repay the pre-intervention funds. *Menendez v. Faber, Coe & Gregg, Inc.*, 345 F. Supp. 527, 545-46 (S.D.N.Y. 1972), *modified sub nom.*, *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973), *rev'd sub nom.*, *Alfred Dunhill, Inc. v. Cuba*, 425 U.S. 682 (1976). On appeal, the Second Circuit found that although the Cuban Government had made no formal decree, the refusal to make payment was an act of state. *Menendez v. Saks & Co.*, 485 F.2d 1355, 1370-74 (2d Cir. 1973), *rev'd sub nom.*, *Alfred Dunhill, Inc. v. Cuba*, 425 U.S. 682 (1976). Thus, the act of state doctrine barred affirmative recovery by the importers against the interventors. *Id.* at 1373-74.

\(^{112}\) *Dunhill*, 425 U.S. at 685.

\(^{113}\) *Id.* The Court defined "interventors" as "those named to possess and occupy the seized businesses" after their nationalization ("intervention") by Cuba. *Id.* at 682.

\(^{114}\) *Id.* at 686.

\(^{115}\) *Id.*


\(^{117}\) *Dunhill*, 425 U.S. at 686-90.

\(^{118}\) *Id.* at 691-93 (citing The "Gul Djemal," *264 U.S. 90* (1924)).
their initial claim of entitlement to the pre-intervention funds. Because the interventors relied on only commercial, and not sovereign, authority to assert their rights to the property and the Cuban Government had not issued any formal decree or resolution on the matter, the Court held that the interventors could not assert an act of state defense.

Despite holding that no act of state had been proven, the Dunhill Court, in dicta, considered the formation of a commercial exception to the act of state doctrine. Justice White reasoned that the act of state doctrine should not be extended to apply to the "purely commercial" acts of a foreign sovereign, even if an act of state could be shown. Three other Justices also endorsed this proposition.

Four Justices joined in a dissenting opinion which disagreed with the majority's conclusion that the expropriation in this case was not an act of state, and attacked the commercial exception to the act of state doctrine proposed by the plurality. Justice Marshall, writing for the dissent, argued that an act of state need not take any particular form, and that passive conduct, such as that evidenced by the interventors' refusal to return the funds to Dunhill, could be included within its scope. The dissent then leveled a scathing attack on the plurality's recognition of a commercial exception to the act of state doctrine. According to Justice Marshall, "[t]he carving out of broad exceptions to the [act of state] doctrine is fundamentally at odds with the careful case-by-case approach adopted in Sabbatino."

A Bernstein letter setting forth the State Department's views on

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119 Id. at 691.
120 Id. at 693-95.
121 Id. at 695. Justice White stated, "[w]e decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations." Id. at 706. He distinguished between "public and governmental" acts and the "commercial or proprietary" acts of a sovereign state. Id. at 698. Citing several sovereign immunity cases for support of this proposition, Justice White reasoned that because a commercial exception was recognized under sovereign immunity, it should likewise be recognized under the act of state doctrine. Id. at 703-05. He concluded that "the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label 'Act of State' than if it is given the label 'sovereign immunity.'" Id. at 705.
122 Chief Justice Burger and Justices Powell and Rehnquist endorsed the "commercial exception" to the act of state doctrine. Id. at 695-706. Justice Stevens concurred in the result, but refused to join the Court in creating a commercial exception to the doctrine. Id. at 715 (Stevens, J., concurring).
123 Id. at 715-16 (Marshall, J., joined by Brennan, Blackmun, and Stewart, JJ., dissenting).
124 Id. at 728-30 (Marshall, J., dissenting).
125 Id. at 719-20 (Marshall, J., dissenting).
126 Id. at 716 (Marshall, J., dissenting).
127 Id. at 728 (Marshall, J., dissenting). One commentator has noted that Justice Marshall "did not rule out the selective use of the commercial exception in future cases." See Bazler, supra note 3, at 343 n.105 (citing Dunhill, 425 U.S. at 728-29). This conclusion rests on Marshall's statement: "In the final analysis . . . it is unnecessary to consider
application of the act of state doctrine was obtained by the Supreme Court. The letter advocated overruling Sabbatino. The dissent pointed out that the State Department had urged just the opposite position when Sabbatino was before the Court. The Bernstein letter did not seem to carry much weight with any of the Justices in this case. While the Justices retained the doctrine, they found it inapplicable to the facts of Dunhill.

Given such discord within the Supreme Court, it is inevitable that lower federal courts dealing with the doctrine would struggle under the lack of clear and consistent guidance. The difficulties are compounded by the unfortunate fact that the leading act of state cases from the Supreme Court have dealt only with the narrow issue of expropriations by foreign governments. This has left the lower courts in the position of applying an already confusing doctrine to novel fact situations, with only the Sabbatino, Citibank, and Dunhill line of Supreme Court cases for guidance. These lower court cases mirror the discord found in the Supreme Court and further contribute to the doctrine's instability, as is demonstrated by the ETC litigation.

V. Environmental Tectonics Corp. and the Act of State Doctrine

The ETC litigation clearly reflects some of the difficulties plaguing the lower courts in their attempts to apply the act of state doctrine. A comparison of the two cases from other lower federal courts whether the exception would be responsive to the concerns underlying the act of state doctrine in every case to which it might apply."

128 Dunhill, 425 U.S. at 696.
129 Id. at 697-98 n.12. The State Department's Bernstein letter stated: "'[I]t is our view that if the Court should decide to overrule the holding in Sabbatino so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.'" Id. at 710-11 (quoting State Department Position Letter from Legal Advisor Monroe Leigh (Nov. 26, 1975), reprinted in Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682 app. 1 at 706 (1976)).
130 Id. at 725 n.10 (Marshall, J., dissenting).
131 In ignoring the State Department's views on the applicability of the act of state doctrine, Justice Rehnquist departs from his own earlier position in Citibank, where he advocated deference to the executive's recommendations. See First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 769-70 (1972).
133 See supra text accompanying notes 50-53.
which were relied upon by the district court and the Third Circuit illustrates the doctrine’s erratic application.

A. ETC in the District Court

After acknowledging the various historical foundations given for the act of state doctrine, the district court stated that a cornerstone in the doctrine’s application is the “avoidance of ‘passing on the validity’ of acts of foreign governments.” The court, however, reasoned that “if the inquiry 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, inquiry is foreclosed by the act of state doctrine.” This motivation-validity distinction came to form the basis for a hair-splitting debate between the district court and the Third Circuit, and is illustrative of the confusing and cumbersome analysis with which the lower courts apply the act of state doctrine.

The district court followed the analysis of the act of state doctrine used by the Ninth Circuit in Clayco Petroleum Corp. v. Occidental Petroleum Corp. Clayco, an oil company, sued one of its competitors, Occidental, claiming that Occidental had bribed a foreign official in order to obtain an offshore oil concession. The Ninth Circuit applied the act of state doctrine to preclude adjudication, asserting that the acts of the sovereign dealt with “public” rather than private interests. In addition, the Clayco court noted that adjudica-

136 Id. (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)).
137 Id. at 1392-93 (citing Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 407 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984)) (emphasis added).
138 712 F.2d 404 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984). The district court felt that Clayco involved a “strikingly similar factual situation” to the one presented in ETC. Environmental Tectonics, 659 F. Supp. at 1393.
139 Clayco, 712 F.2d at 405 n.1. Clayco claimed that Occidental’s payment to the sultan of Umm Al Qaywayn violated the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1 to -2, 78ff(a), (c) (1988). The FCPA prohibits the payment of bribes by U.S. businesses to officials of foreign governments. 15 U.S.C. § 78dd-1 to -2. The Clayco court held that actions by private parties, however, are not available when a foreign government is involved, despite the fact that the FCPA permits actions by private parties. Clayco, 712 F.2d at 409. As one commentator has noted, under such reasoning, all private lawsuits under the FCPA will be barred since any FCPA action necessarily involves payment to an official of a foreign government. See Bayzler, supra note 3, at 357.
140 Clayco, 712 F.2d at 406. According to the Clayco court, the sovereign’s actions of granting oil concessions, unlike the debt repudiation and nationalization of foreign assets that occurred in Dunhill, could not have been taken by a private citizen. Id. at 408. Thus, the actions are “public” and come within the scope of the act of state doctrine. Id. Such reasoning, however, is subject to criticism because it is unlikely that the activity in Dunhill could have been accomplished by a private citizen. Further, in distinguishing between public and private interests, the Clayco court stated: “This case differs from those relied upon by [plaintiff], in which sovereign activity merely formed the background to the dis-
tion of the case would require an examination into the motives of the foreign sovereign in taking the bribe, which the court was reluctant to do.\textsuperscript{141}

The district court in \textit{ETC} found the facts before it analogous to those of \textit{Clayco}, and thus concluded that the awarding of the military contract by the Nigerian Government in \textit{ETC} was a public, sovereign act.\textsuperscript{142} The district court also embraced the \textit{Clayco} court’s expansive application of the act of state doctrine which would preclude inquiry into the motives of a foreign sovereign.\textsuperscript{143} Although the \textit{Clayco} court’s analysis applies this policy when adjudication would cause “embarrassment” to the executive,\textsuperscript{144} the district court adopted an even broader reading of the doctrine. The district court reasoned that inquiry into the motives of the Nigerian Government would tend to make our foreign policy conduct with them “more difficult,” and indicated that this threshold was sufficient to invoke application of the doctrine.\textsuperscript{145}

If such a standard were routinely used by courts, the practical effect would be to bar the adjudication of any claim when a foreign government’s acts are involved, even if the sovereign is not a party to the dispute. Furthermore, there is no historical judicial support for such an expansive application of the act of state doctrine. \textit{Sabbatino}, as well as other courts, confined application of the doctrine to inquiries into the \textit{validity} of foreign acts of state.\textsuperscript{146}

\textbf{B. \textit{ETC} in the Third Circuit}

The Third Circuit in \textit{ETC} relied primarily on \textit{Williams v. Curtiss-Wright Corp.},\textsuperscript{147} another Third Circuit case, to reverse the district court’s grant of summary judgment.\textsuperscript{148} In \textit{Curtiss-Wright}, the plaintiff Williams alleged that the defendant monopolized the market, and illegally induced foreign governments into refusing to purchase jet engines and parts from the plaintiff.\textsuperscript{149} Curtiss-Wright moved to dismiss Williams’ complaint on act of state grounds, arguing that the

\begin{itemize}
\item 141 \textit{Clayco}, 712 F.2d at 406-07.
\item 143 \textit{Id.} at 1394 (relying on \textit{Clayco}, 712 F.2d at 407).
\item 144 \textit{Clayco}, 712 F.2d at 407.
\item 145 \textit{Environmental Tectonics}, 659 F. Supp. at 1394.
\item 146 \textit{Banco Nacional de Cuba v. Sabbatino}, 376 U.S. 398, 428 (1964); \textit{see also} \textit{Williams v. Curtiss-Wright Corp.}, 694 F.2d 300 (3d Cir. 1982); \textit{Industrial Investment Development Corp. v. Mitsui & Co.}, 594 F.2d 48 (5th Cir. 1979), \textit{cert. denied}, Mitsui & Co. v. \textit{Industrial Investment Development Corp.}, 445 U.S. 903 (1980); \textit{Mannington Mills, Inc. v. Congoleum Corp.}, 595 F.2d 1287 (3d Cir. 1979).
\item 147 694 F.2d 300 (3d Cir. 1982).
\item 148 \textit{ETC}, 847 F.2d at 1062.
\item 149 \textit{Curtiss-Wright}, 694 F.2d at 303.
\end{itemize}
doctrine precluded the examination of foreign governments' motives in refusing to buy engine parts from the plaintiff. The district court denied the motion,\(^{150}\) and the Third Circuit affirmed.\(^{151}\)

The *ETC* court noted that *Curtiss-Wright* had "rejected an approach to the doctrine that would in all circumstances foreclose judicial scrutiny of the motivations behind the military procurement decisions of a foreign government."\(^{152}\) As further support for application of a "validity" rather than a "motivation" standard of inquiry, the *ETC* court cited the letter from the State Department's Legal Advisor, Abraham Sofaer, which stated that the "'doctrine only precludes judicial questioning of the validity or legality of foreign government actions.'"\(^{153}\)

There has been continuing disagreement and confusion in the lower courts over whether to use the motivation or validity standard of inquiry in determining whether the act of state doctrine should be applied to prohibit adjudication of the case.\(^{154}\) One court even stated that inquiry into the motivations behind an act of a foreign government would inevitably involve a determination of the validity of that act.\(^{155}\) The motivation versus validity distinction in the *ETC* litigation may have been a function of how the two courts characterized the conduct being examined in the case. While the district court in *ETC* believed it would be necessary to scrutinize the conduct of Nigeria for resolution of the claims,\(^{156}\) the Third Circuit focused its

\(^{150}\) *Id.* at 301-02.

\(^{151}\) *Id.* at 305.

\(^{152}\) *ETC*, 847 F.2d at 1060. As was noted by one commentator, the use of a motivation inquiry standard for application of the doctrine "precludes adjudication in the United States of most international transaction cases." Bazyler, supra note 3, at 947.

\(^{153}\) *ETC*, 847 F.2d at 1061 (quoting Sofaer letter (emphasis in original)). Support for this view can also be traced to Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401, 431-33 (1968), Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682, 697, 706 (1976), and another Third Circuit case, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3d Cir. 1979).


\(^{155}\) *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 76-78 (2d Cir.), cert. denied, 434 U.S. 984 (1977). The district court in *ETC* also hinted that inquiries into either the motives or the validity of a foreign sovereign's acts lack distinction. After noting that the reasoning underlying the act of state doctrine as set forth in *Sabbatino* was the avoidance of "passing on the validity" of acts of foreign governments, the district court concluded that if the inquiry is one which includes the motivation of a sovereign act, such inquiry is also foreclosed by the act of state doctrine. Environmental Tectonics Corp. v. W.S. Kirpatrick, Inc., 659 F. Supp. 1381, 1392-93 (D.N.J. 1987), rev'd, 847 F.2d 1052 (3d Cir. 1988).

\(^{156}\) *Id.* at 1395. The district court stated that, in addition to proving a bribe was paid to or anticipated by Nigerian officials, "inquiry would have to be had as to the effect of the payment or promise of payment of such a bribe." *Id.* Thus, the court reasoned, inquiry into the motivations of the Nigerian Government was "necessary for resolution of the case." *Id.*
inquiry primarily on the conduct of the defendants.\textsuperscript{157}

Another troublesome aspect of the ETC litigation is the courts' treatment of the Bernstein letter from the State Department's Legal Advisor, Sofaer. The letter stated that it was the position of the State Department that inquiry into the motivations of the Nigerian Government was not precluded by the act of state doctrine in this case.\textsuperscript{158} However, the district court relied on a portion of Sofaer's letter which stressed the Department's concerns over the potential affect certain inquiries and discovery proceedings may have on U.S. foreign relations. The letter urged that "caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings."\textsuperscript{159} The district court concluded that the State Department had failed to give a clear position on the application of the act of state doctrine in this case, and in fact, had improperly delegated part of its job to the courts.\textsuperscript{160} The court stated that "[t]he suggestion of the State Department that this court conduct the litigation with an eye to foreign policy concerns is not appropriate. Such a precedent poses a serious threat to the authority of the executive branch to conduct foreign policy."\textsuperscript{161}

The Third Circuit, on the other hand, saw this expression of concern by the State Department as merely a reminder to courts supervising discovery proceedings to do so with care because the broad discovery authorized under the Federal Rules of Civil Procedure is often criticized by foreign governments.\textsuperscript{162} The Third Circuit focused instead on a part of Sofaer's letter which stated that the act of state doctrine "'only precludes judicial questioning of the validity or legality of foreign government actions.'"\textsuperscript{163} The State Department's Bernstein letter concluded that the act of state doctrine would not bar adjudication of the dispute because the allegations in this case did not involve judicial inquiry into the validity of the Nigerian Government's decision to award the contract.\textsuperscript{164}

The Third Circuit, however, may have necessitated future use of Bernstein letters by any party asserting the act of state defense by re-

\textsuperscript{157} ETC, 847 F.2d at 1061. The Third Circuit noted that, "'[a]ppellant does not seek to have the Air Force contract invalidated, nor does it seek compensation for its alleged losses from the Nigerian government.'" \textit{Id}. Thus, the inquiry is merely into whether 'appellees' alleged bribery of Nigerian officials motivated the award of the contract.' \textit{Id}.

\textsuperscript{158} \textit{Environmental Tectonics}, 659 F. Supp. at 1396-97 (citing Sofaer letter).

\textsuperscript{159} \textit{Id}. at 1397 (quoting Sofaer letter) (emphasis added).

\textsuperscript{160} \textit{Id}

\textsuperscript{161} \textit{Id}. (quoting Sofaer letter).

\textsuperscript{162} ETC, 847 F.2d at 1062 n.11.

\textsuperscript{163} \textit{Id}. at 1061 (quoting Sofaer letter (emphasis in original)). The Third Circuit acknowledged the deference it accorded the State Department's assessments by characterizing the Department's letter as "'[t]he only information before the court authoritatively measuring the impact such a determination might have on the executive's conduct of foreign policy.'" \textit{Id}. (emphasis added).

\textsuperscript{164} \textit{Id}. at 1061-62.
quiring "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."165

The differing interpretations taken by the district court and the Third Circuit towards the State Department's Bernstein letter highlight some of the problems that can arise when there is a lack of clear and consistent guidance for judicial resolution of act of state cases. The Bernstein exception would require that courts give deference to the State Department's position concerning the impact that litigating a case would have upon U.S. foreign policy. While the exception has not been endorsed by a majority of the Supreme Court,166 lower courts have continued to rely on such letters for guidance when a case raises concerns of interference with U.S. foreign policy. The problem with this practice is that nearly all cases involving international transactions have the potential to interfere with the foreign policy interests of the United States.167 While it is the proper practice of the judiciary to leave matters of foreign policy to the executive branch, it would be a serious error to defer automatically to the executive in any case involving international litigants. To promote its role in the international economy, the United States needs a judiciary that can respond to and foster international activities. In addition, reliance on the executive branch to determine when the judiciary should apply the doctrine poses serious threats to the fundamental principle of separation of powers.168

Part of the blame may also rest with the State Department. While input and guidance from the executive branch is valuable in dealing with potentially sensitive foreign policy matters, caution should be taken to ensure that these letters do not merely reflect the political mood of the moment. In addition, if the Department issues advisory letters in an ambiguous manner, which may then generate divergent interpretations by courts, those letters are of little guidance to courts in resolving act of state issues, regardless of the degree of deference accorded to them. The different readings that can be given to these letters, as clearly demonstrated by the ETC litiga-

165 Id. at 1061 (citing Williams v. Curtiss-Wright, 694 F.2d 300 (3d Cir. 1982); Manning Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979)).
167 See supra note 64 and accompanying text.
168 In the context of international law violations, Justice White's dissent recognized the dangers a blanket application of the act of state doctrine might have: "The achievement of a minimum amount of stability and predictability in international commercial transactions is not assured by a rule of nonreviewability which permits any act of a foreign state ... to pass muster in the courts of other states." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 459 (1964) (White, J., dissenting).
169 U.S. Const. art. III, § 2.
tion, serve only to contribute to the tangled web of inconsistencies that characterize the modern act of state doctrine.

Unfortunately, the battle over the applicability of the act of state doctrine seems all too likely to come at the cost of forgetting the litigants. Clearly, if the defendants in *ETC* had bribed officials of a private foreign corporation, the plaintiff could seek redress in U.S. courts. Should the plaintiff be denied access to the courts merely because of the fortuitous circumstance that the defendant had bribed an official of a foreign government?

VI. Alternatives to the Act of State Doctrine

The decision in *ETC* documents much of the uncertainty and inconsistency plaguing courts in their attempts to address the act of state doctrine. It also vividly illustrates the need for a rational and consistent policy concerning the doctrine. One problem accentuated by the *ETC* litigation is whether the motivation or validity inquiry standard should govern application of the doctrine, or if, in fact, there is any distinction between these approaches at all. Another unresolved issue is the role of the *Bernstein* exception in the courts' determinations.

In addition to clarifying the doctrine for future litigants, the Supreme Court should adopt a modified *Bernstein* exception to the doctrine—one that is not really an exception, but a procedure which allows for the executive's input while continuing normal adjudicatory processes. The Court should dispense with the traditional *Bernstein* exception, which directs courts to abstain from adjudicating act of state claims unless the State Department expresses its opinion that litigating the case would not hinder U.S. conduct of foreign relations. Instead, the Court should adopt an approach which provides notice of the action to the State Department. The State Department could then submit an amicus brief detailing the executive's position on the matter. Another alternative is to allow the executive branch to appear before the court and submit proof on the issue. If sensitive matters of foreign policy are implicated by the action, protections can be had by way of closed hearings. This evidence can then be weighed by the court as one of several factors to consider in determining whether or not the act of state doctrine should be applied to bar adjudication of the claim, rather than giving blind deference to the State Department's views.

By adopting this proposed modified *Bernstein* procedure al-

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allowing the executive to submit proof in a specified fashion, courts which seek to evaluate the impact of an act of state adjudication on the conduct of foreign policy can do so within accepted judicial procedures. Thus, the courts continue their roles as adjudicators of difficult issues and the fundamental U.S. principle of separation of powers is preserved.

There are many views on how clarification of the doctrine is best accomplished, but the underlying message is clear—something must be done. In light of the fact that the act of state doctrine is a judicially created rule, the burden of clarification rests with the courts, particularly with the Supreme Court.

The only realistic alternative to judicial clarification of the act of state doctrine by the Supreme Court would be to abolish the doctrine by either judicial or legislative action. This approach has been urged by some commentators. One commentator emphasized that the doctrine should be abolished because it “fosters arbitrary and unpredictable adjudication of international disputes, undermines judicial independence, weakens the intended force of several United States laws, and arrests the development of international law by American courts.” The commentator’s point is well taken. Should the Supreme Court fail to provide a meaningful clarification of the doctrine, its abolition would be better than its continued inconsistent application. The consequence of continuing along the present course will be to hamper the stability and predictability needed for parties who are developing and participating in international transactions.

VII. Conclusion

The United States is part of an ever-expanding global economy that requires some measure of stability to promote its continuance. We must look to the judiciary to provide a framework for legal stability to meet these needs. The State Department in ETC pronounced that “the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards.” Judicial interpretation of the doctrine, however, is the primary culprit in undermining that goal. Courts can no longer afford to disregard their responsibility to develop a clear and consistent policy regarding the use of the act of state doctrine. In July 1989, the Supreme Court granted certiorari in ETC to resolve the act of state issue in that

171 See generally Bazyler, supra note 3; Dellapenna, supra note 3; Mathias, Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform, 12 Law & Pol’y Int’l Bus. 369 (1980).


173 Bazyler, supra note 3, at 384.

174 ETC, 847 F.2d at 1061.
case.\textsuperscript{175} The Supreme Court must use this opportunity to reassess and clarify the doctrine. By enunciating a uniform structure for analysis, the Court can provide a greater measure of certainty to U.S. interests in the expanding global economy.

**Recent Development**

On January 17, 1990, the Supreme Court ruled on the applicability of the act of state doctrine to the *ETC* litigation.\textsuperscript{176} Justice Scalia, writing for a unanimous Court, affirmed the judgment of the Third Circuit, which held that the act of state doctrine did not bar adjudication of the claim.\textsuperscript{177} The Supreme Court reasoned that because the legality of the Nigerian Government contract is not a question the district court "must decide,"\textsuperscript{178} the act of state doctrine is not applicable to bar adjudication.

While the Supreme Court clarified some aspects of the act of state doctrine, its analysis fell far short of the broad range of questions and inconsistencies the doctrine has engendered.\textsuperscript{179} The court construed the scope of the act of state doctrine narrowly. It expressly rejected using various bases previously accepted as policies underlying the doctrine\textsuperscript{180} as the sole determinant of whether or not the doctrine is applicable. Instead, the Court characterized the doctrine as a "rule of decision,"\textsuperscript{181} and in doing so gave some guidance to lower courts. Specifically, the Court provided:

"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.\textsuperscript{182}"

The Court did not discount the importance of considering the policies underlying the act of state doctrine altogether. The policies mentioned by the Court include international comity, respect for the sovereignty of foreign nations, and the avoidance of embarrassment to the executive branch in its conduct of foreign relations.\textsuperscript{183} Ac-


\textsuperscript{178} *W.S. Kirkpatrick, Inc.*, 58 U.S.L.W. at 4141 (emphasis in original).

\textsuperscript{179} See supra notes 42-134 and accompanying text.

\textsuperscript{180} *W.S. Kirkpatrick, Inc.*, 58 U.S.L.W. at 4141. Such policies include "international comity, respect for the sovereignty of foreign nations, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *Id.*

\textsuperscript{181} *Id.*

\textsuperscript{182} *Id.* at 4143.

\textsuperscript{183} *Id.* at 4141.
cording to the Court, these policies still come into play in deciding whether, “despite the doctrine’s technical availability, it should nonetheless not be invoked.”

It appears that the Court has really created a two-step test to be used in determining the applicability of the act of state doctrine. First, because the action of a foreign sovereign occurring within its territory is deemed valid, if the outcome of the case before a U.S. court turns upon the effect of that official act, the act of state doctrine generally will apply to bar adjudication. Second, despite the doctrine’s applicability, if the various policies underlying the doctrine are implicated only slightly, the act of state doctrine may not necessarily be a bar to adjudication. The Court stressed using this balancing test to ensure that the judiciary was not incapacitating itself by applying the act of state doctrine where the acts of a foreign sovereign are not directly involved.

The Court made passing reference both to the proposed commercial exception and Bernstein exception to the doctrine, which were issues argued by the parties in this case. Reflecting a desire to resolve the act of state issue in ETC as narrowly as possible, however, the Court declined to address these exceptions since “the factual predicate for application of the act of state doctrine does not exist.”

Whether the Court’s attempt to clarify the scope of the act of state doctrine was successful remains to be seen. There is still enough latitude for lower courts to become mired in the policy implications of the doctrine, but the Court has provided a fairly clear guideline to overcome at least the initial hurdle of whether or not the act of state doctrine issue is implicated at all.

SANDRA ELIZABETH TREMPER

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184 Id. at 4143.
185 Id.
186 Id.
187 Id.