Grupo Protexa, S.A. v. All American Marine Slip and the Decline of the Act of State Doctrine

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I. Introduction

Every nation has the right to define the laws within its borders.¹

¹ See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (recognizing the di-
verse positions held by imperialistic and communistic countries on the issue of expropria-
tion); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 441
(1987) (foreign compulsion) (explaining that governments have the right to compel foreign
citizens to abide by their laws while in their territory); cf. Jonathan M. Wight, An Evaluation of
the Commercial Activities Exception to the Act of State Doctrine, 19 Dayton L. Rev. 1265, 1280-83
(1994) (explaining that a nation's sovereignty is no longer afforded the absolute deference
enjoyed in the past).
Furthermore, foreign sovereigns are afforded great deference in the interpretation of their laws. In some manner, every public act by a foreign sovereign is an interpretation of its own law. As such, these acts should be presumed valid. When a U.S. court challenges the validity of one of these acts, the foreign sovereign is likely to be offended to some degree, and the relations between the United States and the foreign sovereign are likely to suffer.

To prevent unwarranted interference with foreign policy, U.S. courts have adopted the act of state doctrine. In short, this doctrine precludes inquiry into the validity of a foreign sovereign’s actions if such an inquiry is likely to hinder or embarrass the executive branch’s foreign policy. The act of state doctrine was founded originally upon the principles of comity and international law. However, in 1964, the Supreme Court fundamentally altered the doctrine by shifting its justification to a separation of powers theory. Since that time the doctrine has come under constant attack and as a result, it has become much weaker. The recent case of Grupo Protexa, S.A. v. All American Marine

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2 Spencer W. Waller, A Unified Theory of Transnational Procedure, 26 CORNELL INT’L L.J. 101, 124 (stating that U.S. courts are bound by a foreign sovereign’s interpretation of its own legal pronouncements).

3 See Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir.), cert. denied, 497 U.S. 1058 (1989) (stating that courts must be cautious not to affront a foreign government’s sovereignty).

4 Waller, supra note 2, at 124.

5 Michael J. Bazyler, Abolishing the Act of State Doctrine, 134 U. Pa. L. Rev. 325, 367 (1986); see also Allied Bank Int’l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir.) (explaining that it would be an affront to a foreign sovereign for a U.S. court to find the sovereign’s expropriation invalid), cert. dismissed, 47 U.S. 934 (1985).

6 Allied Bank Int’l, 757 F.2d at 520.

7 Id.


9 Id. at 429.

10 Bazyler, supra note 5, at 397 (arguing that the act of state doctrine should be abandoned and that other more reasoned doctrines should be used in its place); Gregory H. Fox, Reexamining the Act of State Doctrine: An Integrated Conflicts Analysis, 53 HARV. INT’L L.J. 521, 568 (1992) (concluding that the act of state doctrine should be rejected because its current application has lost touch with its roots of comity and international law); see Wight, supra note 1, at 1287 (noting that because substantial codification of international law has occurred in recent years, inquiries into the validity of foreign sovereign acts are less likely to embarrass the executive branch). But see id. at 1302 (even though support for the act of state doctrine has weakened, not all commercial activity of a foreign sovereign should be subject to scrutiny).

11 See Nelson v. Saudi Arabia, 923 F.2d 1528, 1531 (11th Cir. 1991) (noting that the act of state doctrine is no longer widely applied, that the doctrine has earned a “well-deserved rest,” and that the Supreme Court now applies a restrictive attitude toward the doctrine); see infra notes 112-73 and accompanying text (illustrating the Supreme Court’s continuous restrictions and limitations on the doctrine); cf. Bazyler, supra note 5, at 398 (arguing that the doctrine should be abandoned because the courts have severely confused its application); see generally, Bernard Ilkhanoff, Comment, United States v. Noriega: The Act of State Doctrine and the Relationship Between the Judiciary and the Executive, 7 TEMP. INT’L & COMP. L.J. 345 (1993) (suggesting that the courts should create yet another act of state doctrine exception for an express executive request).
Slip (Protexa II)\(^{12}\) illustrates this weakness as well as several underlying practices which have led to the doctrine's decline.

This Note will examine how Protexa II illustrates the current weakness in the act of state doctrine and the effect that this decline has on the resulting judgments. In Part II, the Note will discuss the Third Circuit's disposition of the case.\(^{13}\) Part III discusses the background of the act of state doctrine as it has progressed from the beginning of the century through its fundamental shift in the 1960s and finally to its current treatment during the last decade.\(^{14}\) Part IV will discuss several inconsistent analytical approaches illustrated by the Protexa II opinion, the appropriateness of the resulting judgment, and finally the logic of Protexa II's extension of the doctrine.\(^{15}\) In conclusion, this Note will suggest that the doctrine has been weakened to the point that it no longer serves any significant purpose and that the courts should consider abandoning the doctrine as a prudential rule of decision.\(^{16}\)

II. Statement of the Case

On December 15, 1985, Grupo Protexa's ship, the HUICHOL II, sank forty-five miles east of Mexico during a violent storm in the Bay of Campeche.\(^{17}\) The ship was a diving support vessel performing construction work for the Mexican national oil company, Pemex.\(^{18}\) It sank in roughly 100 feet of water, 1.5 miles from the Pemex oil exploratory zone, and three miles from the nearest oil platform.\(^{19}\) The international community recognizes this area as Mexico's Exclusive Economic Zone (EEZ).\(^{20}\)

Pursuant to a standard clause in a multilayered policy,\(^{21}\) Grupo Protexa was insured for removal costs of the wreck if the removal was "compulsory-by-law."\(^{22}\) Two days after the ship sank, the Port Captain\(^{23}\) for Ciudad del Carmen issued a written order that, according to

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\(^{12}\) 20 F.3d 1224 (3d Cir. 1994) [hereinafter Protexa II].

\(^{13}\) See infra notes 17-55 and accompanying text.

\(^{14}\) See infra notes 55-173 and accompanying text.

\(^{15}\) See infra notes 174-275 and accompanying text.

\(^{16}\) See infra part V.

\(^{17}\) Protexa II, supra note 12, 20 F.3d 1224, 1226 (3d Cir. 1994).


\(^{19}\) Grupo Protexa, 753 F. Supp. at 1218. More than 27 seamen died in the sinking.

\(^{20}\) Protexa I, supra note 18, 954 F.2d at 132.

\(^{21}\) The insurance policy underwriting was split into multiple coverage levels. First, a Mexican insurance company was responsible for 5% of all losses. Next, four primary layer underwriters were responsible for 95% of the first $2.5 million. Then, three excess layer underwriters were responsible for 95% of losses exceeding that $2.5 million per the following percentages: AAMS, 30%; Lloyds/London, 65%; and CIGNA/AFIA, 5%. Id.

\(^{22}\) Id.

\(^{23}\) The Port Captain is the government official with authority to "perform police functions within his jurisdiction pertaining to health, sanitation and customs." Id. at 1240. His jurisdiction is defined by the president, id., and he is responsible for all matters of the Marri-
the English translation, required Grupo Protexa to post a bond "guarantee[ing] the cleaning up of the area and the salvaging of [the] vessel." Grupo Protexa and its insurance broker interpreted the order as requiring immediate removal of the wreck. The broker then contacted the various underwriters to discuss the order and the proposed removal plan to which all but two of the underwriters agreed. The defendant underwriter, All American Marine Slip (AAMS), simply advised Grupo Protexa to take all necessary steps to minimize the loss.

Realizing that the Port Captain's authority might be contested, Grupo Protexa sent an in-house attorney to Carmen to review the order. After determining that the order was in fact valid, the attorney visited the Port Captain in an attempt to obtain a suspension or rescission. The Port Captain informed the attorney that such relief would have to be sought from officials in Mexico City and that he expected the removal efforts to commence without delay. Otherwise, the navy would take over, and Protexa would be punished to the full extent of the law. After the attorney identified five potential consequences for noncompliance, Grupo Protexa decided not to challenge the order and proceeded with the removal. Total costs for the removal exceeded $12 million of which AAMS was responsible for over $2.8 million. On the grounds that the Port Captain's order did not qualify as "compulsory-by-law," AAMS refused to pay.

This appeal was the second time the Third Circuit had heard the time Authority which occur within his jurisdiction. Protexa I, supra note 18, 753 F. Supp. 1217, 1224 (D.N.J. 1990), rev’d, 954 F.2d 130 (3d Cir. 1992). By comparison with U.S. law, the court ruled that the Port Captain’s authority to order the removal of the ship depended on the existence of enabling legislation. Protexa II, supra note 12, 20 F.3d at 1227, 1234 n.26 (observing that the Mexican Constitution prohibits the interference with a citizen's possessions unless a competent authority gives written notice indicating the legal basis and reasons for the proceeding). The essence of the court's disposition was that no enabling legislation provided such authority. See infra note 55 and accompanying text.

24 Protexa II, supra note 12, 20 F.3d at 1227.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id. at 1228.
30 Id.
31 Id. Neither the Port Captain nor the parties elaborated on what charges or penalties might have been pursued. Id. However, Grupo Protexa’s attorney identified five potential consequences of noncompliance, including forfeiture of $50,000 in bonds and indemnity actions for the navy's costs of removing the vessel. Id. at 1228, 1234 n.14. The other consequences identified included: 1) Mexico could remove the ship and then bill Protexa for the costs; 2) catastrophic liability to third parties should damage result from the movement of the wreck; 3) noncompliance sanctions; 4) forfeiture of the vessel and bond; and 5) loss of goodwill with the Mexican government. Id.
32 See supra note 31.
33 Protexa II, supra note 12, 20 F.3d at 1228, 1234 n.14.
34 Id.
35 Id.
case. In *Grupo Protexa, S.A. v. All American Marine Slip*,\(^{36}\) the court rejected the trial judge’s interpretation of insurance law and held that the Port Captain’s order made the removal “compulsory-by-law” if the order was in fact valid under Mexican law.\(^{37}\) The court also held that a mere literal translation of the order was insufficient to determine its meaning.\(^{38}\) In remanding the case, the court directed the trial judge to examine the validity of the order as well as the applicability of the act of state doctrine.\(^{39}\) If the act of state doctrine precluded review of the order’s validity, the order would be presumed valid, and Grupo Protexa would win its suit.

At the second bench trial, the trial judge held that “the act of state doctrine did not bar an inquiry” into the order’s validity.\(^{40}\) The trial judge determined that “the policies underlying the doctrine were not implicated in this case and that for reasons of ‘fair play and fundamental justice,’ ” Grupo Protexa should not be allowed to use the doctrine as a sword.\(^{41}\) The judge then received additional evidence including expert testimony concerning the order’s validity under Mexican and international law.\(^{42}\) He found the order invalid and held in favor of the AAMS.\(^{43}\) Grupo Protexa appealed.

In *Protexa II*, the Third Circuit reaffirmed its earlier interpretation of the insurance law.\(^{44}\) Since no Mexican statute or regulation required the removal, the court held that Grupo Protexa could show the removal was “compulsory-by-law” only if Grupo Protexa showed the Port Captain’s order itself was valid.\(^{45}\) The court then considered whether the act of state doctrine required the court to presume the order’s validity.

After discussing the act of state doctrine’s history, the court identified several of its tenets. First, the doctrine arises only when a court must decide the effect of a foreign sovereign’s actions.\(^{46}\) Next, the doctrine’s application depends on the judicial inquiry’s likely impact

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\(^{36}\) *Id.* note 18, 954 F.2d 130 (3d Cir. 1992).

\(^{37}\) *Id.* at 138.

\(^{38}\) *Id.*

\(^{39}\) *Protexa II, supra* note 12, 20 F.3d 1224, 1230 (3d Cir. 1994).

\(^{40}\) *Id.* at 1225. The second bench trial was unreported.

\(^{41}\) *Id.* at 1230.

\(^{42}\) *Id.* at 1225.

\(^{43}\) *Id.* at 1226.

\(^{44}\) *Id.* at 1231-35 (the court again extensively reexamined the development of the compulsory-by-law standard as applied by the various circuits).

\(^{45}\) *Id.* at 1235. The court did identify an exception under which the order would not necessarily have to be found valid. *Id.* at 1233 n.11. Under an objective balancing test, an invalid government order could still be considered “compulsory-by-law” if the reasonable costs of disobeying the order and the probable tort liability outweighed the removal expenses. *Id.* However, since the removal costs far exceeded the objective expectation of noncompliance liability, the court found that this exception was not applicable. *Id.*

\(^{46}\) *Id.* at 1236 (quoting W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int’l, 493 U.S. 400, 406 (1990)).
Instead of laying down rigid rules of application, the Supreme Court has charged the lower courts with deciding if a particular case creates a conflict between the judicial and executive branches. Finally, the court should refrain from inquiring into the validity of the foreign sovereign act only if the adjudication would embarrass or hinder the executive in the realm of foreign relations.

The court, however, ruled that the "rationale" supporting the doctrine was not present in this case, and thus, concluded that an inquiry into the order's validity was not barred. The court also noted that the litigation was between two private parties, that the dispute primarily concerned the interpretation of a single contract clause, and that Grupo Protexa had failed to offer any evidence suggesting an inquiry would cause diplomatic difficulties. In further support of its conclusion, the court referenced its subsequent inquiry, showing that Mexican policy was not at stake because no Mexican law specifically granted the Port Captain authority to issue the order. On this basis, the court declared that rather than attempting to circumvent Mexican law, it was honoring and applying it.

After an extensive review of Mexican Constitution, three main statutes/conventions, and multiple subordinate provisions, the court determined that the Port Captain did not in fact have the authority to order the ship's removal.

Id. (quoting Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 520-21 (2d Cir.), cert. dismissed, 473 U.S. 934 (1985)).

Id. (quoting Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., Inc., 847 F.2d 1052, 1058 (3d Cir. 1988)).

Id. (quoting Allied Bank Int'l, 757 F.2d at 521).

The court did not specifically define the rationale to which it was referring. However, the implication was that the act of state doctrine was only to be applied on an ad hoc basis for situations which might hinder the executive's foreign relations. See id. at 1236 (defining the doctrine's application).

Id. at 1237-38 (referencing W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990)) (commenting that even though the validity of a sovereign's acts may be questioned, "the policies underlying the act of state doctrine may not justify its application"). The court also stated that the claimant, Grupo Protexa, had the burden of showing the doctrine's applicability—and that the claimant simply failed to meet this burden. Id.

Id. at 1238.

Id.

Id.

Id. at 1239-46. The statutory review was conducted because the Mexican Constitution prohibited interference with a person's possessions: "No one may be bothered in his possessions, except by means of written order issued by a competent authority providing the basis and the reasons of the legal cause for the proceedings." Id. at 1240-41 n.26 (quoting MEX. CONST. art. XVI). In effect, the Port Captain's order could be valid only if it was supported by some form of enabling legislation. Id.

The court first noted that the trial judge had examined the United Nations Convention on the Law of the Sea and ruled that it provided an insufficient basis for the order. Id. at 1241. The Third Circuit, however, did not review this ruling. Id. Next, the court addressed Articles 86 and 9 of Mexican Navigation Law. Id. Article 86 provided that if a ship sinks in a port or in a "general waterway of communication" in a manner which affects navigation, the
III. Background Law

A. The Myriad of Relevant Doctrines

Whenever there is a dispute involving a foreign sovereign, there are several doctrines which may come into play. The first is comity, a judicially created doctrine under which the courts of one sovereign give effect to the laws and actions of a second sovereign. Comity is neither an absolute obligation, nor mere courtesy and good will, but more of an expected degree of respect. In applying this principle, a court may honor the legal pronouncements of a foreign sovereign and if necessary, allow the foreign sovereign to seek redress in its forum. Closely related to the principle of comity are the choice-of-law rules.

Finally, the court examined Articles 262 and 263 of the Mexican Means of Communication Law: 'Id. at 1244. While the court acknowledged that Article 262 authorized the Port Captain to commence an investigation of the sinking, it stated that the Article did not address the question as to whether a government official could order a private citizen to pay for a removal or other such expense. 'Id. Thus, the Article did not provide the required enabling provisions necessary to make the Port Captain's order valid. 'Id. However, the court found that Article 263 did provide the required authority to order a ship's removal, but only if the ship sank within a port or near enough nearby to affect the port. 'Id. Unfortunately, the court found the EEZ to be too far from a port, forty-five miles, to cause an effect. 'Id. Hence, this provision also failed to provide the necessary authority.

56 BLACK'S LAW DICTIONARY 267 (6th ed. 1990); see also Joel R. Paul, Comity in International Law, 32 HARV. INT'L L.J. 1, 3-4 (1991) (stating that even though the exact meaning of comity remains unclear, it explains much of what courts do in international law (e.g., recognizing and enforcing foreign judgments as well as limiting jurisdiction to handle claims)). Comity in the international context, however, should not be confused with comity between sister states which is mandated by the full faith and credit clause of the U.S. Constitution. 'Id. at 3 n.3.

57 Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (explaining the limits of comity before refusing to honor a French executory judgment against a U.S. citizen on the grounds that France did not provide the United States reciprocal treatment); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409 (1964) (quoting Hilton, 159 U.S. at 163-64) (arguing that under comity the privilege to sue in U.S. courts had generally been granted unless the foreign sovereign was at war with the United States).

58 See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 250-51 (1988) (explaining that courts are reluctant to intrude upon another nation's domain, even if the sensibilities of the forum court are offended); see also Paul, supra note 56, at 6 (noting that U.S. courts have justified deference as a sign of respect for foreign sovereigns).

59 BLACK'S LAW DICTIONARY 267 (6th ed. 1990); see also JANIS, supra note 58, at 251 (stating that the decision to grant comity, in concurrent jurisdiction disputes, is left to the ad hoc discretion of the court). Irregularity or the appearance of unfairness in the foreign proceedings are two reasons that may lead a court to deny comity. 'Id. at 260. While not determinative, the foreign sovereign's reciprocity of treatment of U.S. judgments is yet another factor. See Sabbatino, 376 U.S. at 408-11 (granting comity to Cuba despite Cuba's refusal to allow the U.S. citizens to sue within its tribunals); JANIS, supra note 58, at 261.

60 Sabbatino, 376 U.S. at 412.

61 See id. at 438 (rejecting respondent's argument to apply the forum court's law merely because the foreign sovereign was a participant in the dispute). The similarity between the choice-of-law rules and comity is that both may lead the forum court to abandon its own laws for those of the foreign sovereign. See Clyde Crockett, The Relationship Between the Act of State
would generally be judged by the laws of that nation.\textsuperscript{62} Other doctrines also address the fundamental question of the appropriateness of the forum.\textsuperscript{63} Each doctrine, however, caters to a slightly different concern. Any time that the foreign state is the defendant, the Foreign Sovereign Immunity Act becomes applicable.\textsuperscript{64} Under its auspices, suits against foreign sovereigns are denied jurisdiction in U.S. courts except in limited situations,\textsuperscript{65} thereby rendering immunity to the state. Another doctrine, forum non conveniens, is the prudential power of a court to decline to hear cases if justice would be better served by moving the case to another forum.\textsuperscript{66} For example, if access to evidence, availability of witnesses, and general practicality would be better served in an alternate forum, a court has the discretion to dismiss the case to that forum.\textsuperscript{67} The political question doctrine is also applicable to foreign disputes.\textsuperscript{68} A court should decline to hear a case if judicial resolution would infringe upon the respect due to coordinate branches of government or create a potential embarrassment from the "multifarious pronouncements by the various departments."\textsuperscript{69} Finally, the act of state doctrine protects the executive branch's foreign policy by restricting inquiry into the validity of a foreign sovereign's actions.\textsuperscript{70} The act of state doctrine incorporates similar considerations as the political question doctrine\textsuperscript{71} and is sometimes characterized as its foreign counterpart.\textsuperscript{72}

\textsuperscript{62} See Bazyler, \textit{supra} note 5, at 388.
\textsuperscript{63} See generally Waller, \textit{supra} note 2, at 101 (discussing the need to consolidate the various doctrines into one unified theory in order to reduce judicial inefficiency).
\textsuperscript{65} Id. §§ 1604-1607 (1988). For example, foreign sovereigns are not protected from tort suits or suits concerning purely commercial actions. Id. § 1605(a)(2)-(5).
\textsuperscript{66} Bazyler, \textit{supra} note 5, at 385 (arguing that forum non conveniens is particularly applicable to international disputes and that its balancing considerations make it more flexible than the act of state doctrine); BLACK'S LAW DICTIONARY 655 (6th ed. 1990); cf. Waller, \textit{supra} note 2, at 112 (emphasizing that the circumstances must be manifestly unjust to the defendant).
\textsuperscript{67} Bazyler, \textit{supra} note 5 at 385.
\textsuperscript{68} Id. at 389.
\textsuperscript{71} Bazyler, \textit{supra} note 5, at 390. Both the act of state doctrine and the political question doctrine share the following criteria:

1. constitutional commitment of the issue to a coordinate branch;
2. lack of judicial standards for resolving the issue; and
3. potential for embarrassing the executive.

\textit{Id.} The other considerations found in the political question doctrine include:

1. impossibility of deciding the issue without an initial policy determination of a kind which should be made by nonjudicial discretion; or
2. an unusual need for adherence to previously made political decision.

\textit{Id.}

\textsuperscript{72} Fletcher Alford, Note, \textit{When Nations Kill: The Liu Case and the Act of State Doctrine in
B. The Act of State Doctrine

1. Traditional View

In given circumstances, the act of state doctrine directs the court to forego inquiry and presume that the act of a foreign state is valid.\(^7\) While the doctrine has roots in the seventeenth century,\(^7\) its traditional view was espoused in the 1897 Supreme Court case of Underhill v. Hernandez.\(^7\) During the 1892 Venezuelan revolution, the revolutionary military commander Hernandez detained an American to complete an ongoing civil service project.\(^7\) The American citizen, Underhill, later sought damages in a U.S. court suit. By the time the suit was brought, however, Hernandez’s government had been formally recognized by the United States.\(^7\) In dismissing the case, Chief Justice Fuller wrote for a unanimous Court:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.\(^7\)

Following this statement, the Court refused to inquire into the validity of Hernandez’s acts which formed the basis of Underhill’s tort claim.\(^7\) The Court essentially held that because Hernandez’s party succeeded in ousting the former government and because the United States had recognized his party as the legitimate government of Venezuela, Hernandez’s actions were imputable to the state, and therefore, presumed valid and thereby immune from liability.\(^8\) Later, the Court emphasized that Underhill’s act of state doctrine rested “upon the highest considerations of international comity and expediency.”\(^8\)

2. The Turning Point

Underhill prevailed for the next sixty-seven years. In 1964, however, the act of state doctrine suffered a fundamental shift in its foundation. In Banco Nacional de Cuba v. Sabbatino,\(^8\) the Court held that

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\(7\) Alford, supra note 72, at 467 n.9 (referencing Ves P. Nanda & David Pansius, Litigation of International Disputes in U.S. Courts ch. 10, at 7 (1986)).

\(7\) 168 U.S. 250 (1897).

\(7\) Id at 251.

\(7\) Id.

\(7\) Id. at 252.

\(7\) Id. at 254.

80 See id. at 253 (holding “idle” the argument that the revolutionary victors should be treated as a mere mob).

\(81\) See, e.g., Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918).

\(82\) 376 U.S. 398 (1964).
the act of state doctrine was founded on the theory of separation of powers.\textsuperscript{83} The dispute arose out of Cuba's expropriation of C.A.V., a sugar exporting corporation.\textsuperscript{84} Prior to the expropriation, an American company, Farr, Whitlock & Co. (Farr), had contracted for a shipment of sugar.\textsuperscript{85} Unfortunately, Farr did not take delivery before the expropriation, and pursuant to Cuba's expropriation enabling law, Farr had to obtain permission from the Cuban government before the ship could leave Cuban waters.\textsuperscript{86} In order to obtain this consent, Farr entered into another contract with the Cuban government on terms identical to those in the C.A.V. contract.\textsuperscript{87} Farr then accepted shipment of the sugar.\textsuperscript{88} When Cuba demanded payment, Farr refused on the grounds that C.A.V. was entitled to the funds.\textsuperscript{89} Cuba brought suit in the District Court, and under court order, Farr delivered the funds to the receiver, Sabbatino.\textsuperscript{90} The District Court refused to apply the act of state doctrine because Cuba's expropriation violated international law.\textsuperscript{91} The Court of Appeals affirmed the judgment.\textsuperscript{92} The U.S. Supreme Court granted certiorari.\textsuperscript{93}

After determining that Cuba had a right to access U.S. courts and that Cuba had, through its expropriation of C.A.V., gained a property right in the sugar, the U.S. Supreme Court turned to the act of state doctrine.\textsuperscript{94} The Court first ruled that while historic notions of sovereign authority were a factor to be considered, the act of state doctrine was not mandated by international law.\textsuperscript{95} The Court then restricted earlier precedent\textsuperscript{96} by stating that not "every case or controversy which touches foreign relations lies beyond judicial cognizance."\textsuperscript{97} The Court noted that even though the Constitution commits the conduct of foreign relations to the executive branch, the Constitution does not require the act of state doctrine nor does it irrevocably bar the judiciary from reviewing the validity of foreign acts of state.\textsuperscript{98} Instead, the Court said that the act of state doctrine rises out of the basic relation-
ship between the branches and expresses only a strong sense that judicial inquiry in such cases may hinder rather than advance U.S. interests.\textsuperscript{99} Finally, the Court stated that the doctrine's vitality depended upon its capacity to reflect correctly the proper distribution of responsibility between the judiciary and the executive branches.\textsuperscript{100}

The Court then proceeded to define the doctrine's application. As a basic tenet, the Court noted that "the greater the degree of codification or consensus concerning a particular area of law, the more appropriate it is for the judiciary to render decisions" in that area.\textsuperscript{101} After observing that some issues will affect foreign policy more significantly than others, the Court refused to establish any firm rule of application.\textsuperscript{102} Rather, the Court decided only that in the absence of a treaty or other unambiguous agreement concerning the controlling legal principles, the judiciary would not examine foreign sovereign expropriation of property within its own territory.\textsuperscript{103} In light of this ruling, the Court refused to consider Farr's counterclaim against the Cuban government and awarded the disputed funds to Cuba.\textsuperscript{104}

While the Court ruled that the act of state doctrine barred review of the Cuban expropriation, the Court's analysis caused a fundamental shift in the doctrine's application.\textsuperscript{105} No longer would sovereign acts be protected by international law. Review of foreign sovereign activity would depend primarily on the sovereign's current relationship with the U.S. executive.

As part of this fundamental shift, the Court's decision has been interpreted as directing the lower courts to perform case-by-case analyses of a judicial inquiry's impact on the executive's foreign policy.\textsuperscript{106} The significance of this balancing was the standard to be employed. Despite two letters from the State Department indicating that the executive branch had no objection to a judicial inquiry,\textsuperscript{107} the Court re-

\textsuperscript{99} Id. at 423.
\textsuperscript{100} Id. at 428.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 423. Immediately after \textit{Sabbatino}, Congress enacted the Hickenlooper Amendment specifically forbidding the Court, based solely upon the act of state doctrine, to refuse to inquire into the validity of expropriations. See 22 U.S.C. § 2370(e)(2) (1988). However, the courts have interpreted this Amendment narrowly and have essentially rendered it meaningless. Bazyler, supra note 5, at 392-93.
\textsuperscript{104} \textit{Sabbatino}, 376 U.S. at 439. The Court actually left the case open for continued factual disputes but commented that it did not expect any to arise. Id.
\textsuperscript{105} See id. at 421 (holding that the doctrine is not compelled by sovereignty or international law as earlier precedent seemed to imply); see id. at 423 (explaining that not every case involving foreign relations is important enough to lie beyond judicial cognizance); see Bazyler, supra note 5, at 334-35 (commenting that the modern version of the doctrine arose from a trilogy of cases starting with \textit{Sabbatino}).
\textsuperscript{106} Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir.), cert. dismissed, 473 U.S. 934 (1985). The \textit{Sabbatino} Court identified as obvious considerations the degree of codification and consensus on the area of international law and the inquiry's effect on foreign relations. \textit{Sabbatino}, 376 U.S. at 428.
\textsuperscript{107} \textit{Sabbatino}, 376 U.S. at 407.
fused to review the validity of the Cuban expropriation. The Court based this refusal on the following: 1) the executive branch is better equipped to handle mass problems such as country-wide expropriation; 2) piecemeal dispositions could seriously interfere with ongoing negotiations; 3) even after the executive has taken a position on the foreign sovereign’s acts, judicial review unfavorable to the foreign sovereign’s acts might increase the offense to the foreign sovereign—especially if the circumstances changed during the time before the trial; and 4) in any case, conflict between the executive’s position and the judicial determination probably could not be avoided. The Court even stated that interpretation of international law would eventually lead to judicial confusion and that this confusion itself could embarrass the executive. In view of the State Department’s support of the inquiry, the standard employed by the Sabbatino Court was extremely protective.

3. The Resulting Limitations

Despite Sabbatino’s paternalistic perspective, the fundamental shift in the doctrine’s foundation set the stage for the doctrine’s decline, and over the next three decades the doctrine suffered continuous attacks on its applicability. Starting in 1976 with the case of Alfred Dunhill of London, Inc. v. Republic of Cuba, the Court implied that third party actions were not imputable to the sovereign unless the sovereign had specifically issued an order, statute, decree, or resolution authorizing such actions. In 1960, Cuba nationalized several cigar manufacturers and installed “interventors” to take possession and control of the combined business. Some of the former American owners brought suit to collect the accounts payable which had accrued before the date

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108 Id. at 437.
109 Id. at 431-33.
110 Id. at 433 (refusing to address patently clear violations of international law).
111 See id. at 463 (White, J., dissenting) (arguing that refusal to inquire into the expropriation was totally unwarranted).
112 Sabbatino’s effect, however, was not immediate. Even until the early 1970s, lower courts continued to strongly support the doctrine’s applicability. In 1970, one court held that whether an oil minister had acted within his authority was irrelevant. Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298-99 (D. Del. 1970). As seen in Galu, the authority of an official is now critically important. See generally Galu v. Swissair: Swiss Air Transp. Co., Ltd., 734 F. Supp. 129, 133-58 (S.D.N.Y. 1990) (performing an extensive review of the policeman’s authority to forcibly expel the plaintiff from Switzerland). In 1971, a Ninth Circuit district court refused to consider an antitrust claim which would have required a finding that a foreign sovereign had acted fraudulently. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), aff’d, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972). Conversely, the Supreme Court later held that a finding of wrongful conduct was irrelevant and that the act of state doctrine was applicable only if the act’s validity was questioned. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int’l, 493 U.S. 682 (1976).
114 Id. at 695.
115 Id. at 685.
of the nationalization. As an affirmative defense, the Cuban intervenors claimed that their refusal to return the disputed funds was an act of state and therefore unreviewable. This defense failed.

The Court first found that the intervenors had been vested only with the rights of possession and control of the business; they had not been vested with the right to repudiate the debts incurred by the business. Second, the Cuban government had granted the intervenors only commercial power, not governmental power. Finally, the Court stated that an attorney's mere assertion of the sovereign's denial of liability was not evidence of an act of state. By failing to produce a statute, decree, order, or resolution of the Cuban government itself, the intervenors had failed to show that their debt repudiation was imputable to the state. In conclusion, the Court stated that the act of state doctrine did not protect a foreign sovereign's purely commercial obligations. Thus, Alfred Dunhill limited the doctrine in two ways. First, mere sovereign involvement in a transaction does not necessarily mean that a court will consider the transaction to be an act of state. Second, and more significantly, to qualify as a state act the action must be an exertion of governmental power, not just a commercial transaction.

In 1988, the Ninth Circuit attacked the doctrine from the reverse side. In Republic of the Philippines v. Marcos, the Philippine government brought suit against its former president, Ferdinand Marcos. In response to the Philippine government's allegations of racketeering, Marcos claimed his actions were unreviewable pursuant to the act of state doctrine. The court, however, stated that the doctrine's purpose was to protect against friction with the foreign policy of the United States toward existing regimes. Because the legitimate government of the Philippines had ousted Marcos from power, inquiry into Marcos' actions probably would not threaten the executive's foreign policy, and an inquiry into the validity of Marcos' actions was not

\[\text{\textsuperscript{116} Id. at 686.}\]
\[\text{\textsuperscript{117} See id.}\]
\[\text{\textsuperscript{118} Id. at 692-93.}\]
\[\text{\textsuperscript{119} Id. at 693.}\]
\[\text{\textsuperscript{120} Id. at 694-95.}\]
\[\text{\textsuperscript{121} Id. at 695.}\]
\[\text{\textsuperscript{122} Id.}\]
\[\text{\textsuperscript{123} See Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 607-08 (9th Cir. 1976) (holding that court proceedings rarely qualify as state acts), cert. denied, 472 U.S. 1032 (1985).}\]
\[\text{\textsuperscript{124} See Alfred Dunhill of London, Inc., 425 U.S. at 703-05 (stating that "[i]n their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns..." and thereby noting that the adjudication of such disputes is unlikely to touch upon national nerves).}\]
\[\text{\textsuperscript{125} 862 F.2d 1555 (9th Cir. 1988), cert. denied, 490 U.S. 1035 (1989).}\]
\[\text{\textsuperscript{126} Id. at 1360.}\]
\[\text{\textsuperscript{127} See id. (noting that the "balance of considerations" shifted once the disputed sovereign was no longer in power).}\]
barred.\textsuperscript{128}

Two years later, in \textit{Liu v. Republic of China},\textsuperscript{129} the Ninth Circuit held that the doctrine did not protect foreign sovereign acts which were consummated within the United States. The Republic of China's (ROC) Director of the Defense Intelligence Bureau (DIB) had ordered the assassination of Henry Liu.\textsuperscript{130} While the order originated in the Republic of China, the assassination actually occurred in the United States.\textsuperscript{131} Henry Liu's widow brought a civil suit against the Republic of China for wrongful death on the theory of \textit{respondeat superior}.\textsuperscript{132}

To succeed, Liu's widow had to show that ROC's DIB Director, Wong, had acted within his official capacity\textsuperscript{133} and that his actions were not protected by either the Foreign Sovereign Immunities Act (FSIA) nor the act of state doctrine. Because section 1605(a)(5) of the FSIA\textsuperscript{134} granted jurisdiction over cases involving personal injuries caused by tortious acts within the United States, the court ruled the FSIA did not bar the suit against the ROC government.\textsuperscript{135}

The court then addressed the act of state doctrine. The court emphasized that the doctrine's purpose was to provide a flexible method of avoiding embarrassment to the executive branch in the conduct of its foreign affairs.\textsuperscript{136} It then stated that the touchstone of the doctrine was the potential interference with foreign relations.\textsuperscript{137} The court observed that foreign sovereigns are particularly likely to be offended by U.S. judicial instructions on how the sovereign should handle its internal affairs.\textsuperscript{138} Liu's assassination, however, was consummated within the United States.\textsuperscript{139} Thus, the DIB Director's order was not a completely internal affair. Given this fact, the court stated that the ROC could hardly contest U.S. judicial review.\textsuperscript{140} Furthermore, because the

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  \item \textsuperscript{128} \textit{Id.} at 1360-61. The court left the option open, however, for Marcos to produce evidence which would swing the balancing test back in favor of applying the act of state doctrine. \textit{Id.} at 1361.
  \item \textsuperscript{129} 892 F.2d 1419 (9th Cir. 1989), \textit{cert. dismissed}, 497 U.S. 1058 (1990).
  \item \textsuperscript{130} \textit{Id.} at 1422.
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} \textit{Id.} at 1421.
  \item \textsuperscript{133} "An employer is vicariously liable for the torts of employees committed within the scope of their employment." \textit{Id.} at 1426 (citing \textit{Alma W. v. Oakland Unified Sch. Dist.}, 125 Cal. App. 3d 133, 138-39, 176 Cal. Rptr. 287, 289 (1981)).
  \item \textsuperscript{134} 28 U.S.C. § 1605(a)(5) (1988).
  \item \textsuperscript{135} \textit{Liu v. Republic of China}, 892 F.2d 1419, 1425 (9th Cir. 1989), \textit{cert. dismissed}, 497 U.S. 1058 (1990).
  \item \textsuperscript{136} \textit{Id.} at 1432 (quoting Banco Nacional de Cuba \textit{v. Sabbatino}, 376 U.S. 398, 428 (1964)).
  \item \textsuperscript{137} \textit{Id.} (quoting \textit{International Ass'n of Machinist & Aerospace Workers (IAM) v. OPEC}, 649 F.2d 1354, 1360 (9th Cir. 1981)).
  \item \textsuperscript{138} \textit{Id.}
  \item \textsuperscript{139} \textit{Id.} at 1422.
  \item \textsuperscript{140} \textit{Id.} at 1435. The court also observed that international consensus condemned murder. \textit{Id.} (referencing \textit{Organization of American States Convention on Terrorism}, Oct. 8, 1976, \textit{art. 1}, 27 U.S.T. 3949, 3957-58). As noted in \textit{Sabbatino}, the greater the codification or
assassination actually occurred within the United States, barring review of the assassination would cause a far greater embarrassment to the executive than the review itself.\textsuperscript{141} Following these conclusions, the court ruled that the ROC could be held liable for Liu’s wrongful death.\textsuperscript{142}

The 1990 Supreme Court case of \textit{W.S. Kirkpatrick \& Co. v. Environmental Tectonics Corp., International}\textsuperscript{143} handed the doctrine another significant blow. The Court held that despite any resulting embarrassment to the executive, the doctrine cannot be invoked unless the actual \textit{validity} of the foreign act of state had to be questioned.\textsuperscript{144} The plaintiff’s antitrust case alleged that Nigerian government officials had taken bribes when awarding a certain defense contract.\textsuperscript{145} The suit was against Environmental Tectonics and not against the Nigerian government officials, and even though the suit would impute the foreign officials with an illegal motive, the validity of their actions would not be questioned.\textsuperscript{146} Pursuant to the Racketeer Influence and Corrupt Organizations Act,\textsuperscript{147} the plaintiff had only to show that the bribe occurred; illegality under Nigerian law was not required.\textsuperscript{148} The Court considered it irrelevant that the facts supporting the claim would also establish the contract’s illegality under Nigerian law.\textsuperscript{149}

The defendants argued that comity, respect for the foreign sovereign, and avoidance of embarrassment to the executive warranted the doctrine’s application.\textsuperscript{150} They asserted that a determination that the officials had accepted the bribe would impugn or question the nobility of Nigeria’s motivations and thus cause interference in the conduct of the executive’s foreign policy.\textsuperscript{151} The Court recognized the similarity

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consensus on an issue, the lesser the demand for the act of state doctrine’s protection. \\

The Republic of China (ROC) also argued that an earlier ROC tribunal finding qualified as an act of state and thus, was unreviewable. \textit{Liu}, 892 F.2d at 1433. The ROC tribunal had found that Wong, ROC Director of the Defense Intelligence Bureau, acted solely in his personal capacity when he ordered the assassination. \textit{Id.} at 1429. The court rejected this argument and held that foreign trials do not constitute a protected act of state since such trials are not the normal “way in which the state exercises its jurisdiction to give effect to its public interests.” \textit{Id.} at 1433 (referencing Timberlane Lumber Co. v. Bank of Am., N.T. \& S.A., 549 F.2d 597, 607-08 (9th Cir. 1976), \textit{cert. denied}, 472 U.S. 1032 (1985)).

\textsuperscript{141} \textit{Liu}, 892 F.2d at 1433.
\textsuperscript{142} \textit{Id.} at 1434.
\textsuperscript{144} \textit{Id.} at 409-10.
\textsuperscript{145} \textit{Id.} at 401-02.
\textsuperscript{146} \textit{Id.} at 401.
\textsuperscript{148} \textit{Id.} at 406.
\textsuperscript{149} \textit{Id.} at 408.
\textsuperscript{150} \textit{Id.}
between this argument and that of the *Sabbatino* balancing approach. The Court, however, drew a sharp distinction between using balancing to dismiss the doctrine and using balancing to invoke the doctrine. After reemphasizing its obligation to decide properly presented cases, the Court refused to apply the doctrine merely because an inquiry might embarrass the foreign government. In conclusion, the Court held that the act of state doctrine only requires that in the process of deciding a case, the actions of a foreign sovereign taken within its own jurisdiction shall be deemed valid. If the validity of an action is not questioned, the doctrine does not bar review.

Immediately following *Environmental Tectonics*, the doctrine experienced yet another decline in the Second Circuit case of *Galu v. Swissair: Swiss Air Transport Co., Ltd.*, which concerned a Swiss alien expulsion dispute. Galu had been previously criminally charged with harassment, but then released with the understanding that she was to leave Switzerland. Two days later, however, she returned to Switzerland and obtained employment with the United Nations. Subsequently, the Geneva Department of Justice arrested her, ordered her expulsion, and forcibly placed her upon a Swiss Air plane destined for New York. Galu brought a civil suit against the airline for transporting her against her will. Because Swiss Air acted upon the police’s direction, its liability turned on whether the police department’s actions qualified as acts of state.

After directing the trial court to reexamine whether Galu’s forced expulsion by Swiss police officers could be imputed to Switzerland, the Second Circuit Court of Appeals affirmed an approach which essentially nullified the doctrine’s usefulness. In the earlier appeal, the court had said that the issue was not whether the police officers may have slightly exceeded their authority. Rather, the issue was whether the police actions constituted an exercise of sovereign authority or merely an ad hoc decision wholly unratified by the government. On remand, however, the trial court examined the police’s

152 Id. at 409.
153 Id.
154 Id.
155 Id.
156 Id. at 409-10.
157 734 F. Supp. 129 (S.D.N.Y.), aff’d, 923 F.2d 842 (2d Cir. 1990).
158 Id. at 130.
159 Id.
160 Id.
161 Id. at 129.
162 Id. at 133-34.
165 *Galu I*, supra note 163, 873 F.2d at 654.
166 Id. (referencing *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980)). But see
actions much more closely than was necessary to dispel the acts as "ad hoc." The Court of Appeals affirmed.

The trial court first asked whether the police officers' immediate enforcement of the expulsion order could render their actions wholly unratted. After closely examining Swiss law, receiving expert witnesses, and noting a Swiss tribunal's holding that Galu's immediate expulsion was lawful, the district court held that in regard to the timing, the police actions were conclusively legal. Upon similar evidence, the court held that the police's use of physical force was also legal. In particular, the court noted that under Swiss law, police act independently only when they "act pursuant to an order which appears on its face to be null and void." Finally, the court rejected the plaintiff's assertions that the police actions were ad hoc because she had been denied her choice in destination. In doing so, the court distinguished Swiss precedent and performed a balancing test, weighing Swiss public interests against Galu's private rights.

The significance of this analysis was that the examination is much more extensive than required to show the police's actions were imputable to the state. This level of examination essentially showed the police actions were in fact valid—the very inquiry precluded by the doctrine. Thus, in answering the preliminary question as to whether the actions qualified as an act of state, the court essentially circumvented the act of state doctrine. In essence, the court had conducted the precluded inquiry in order to justify why inquiry itself could be performed.

IV. Significance of the Case

On its face, Protexa II simply implies that "compulsory-by-law" insurance arguments will be measured by the same standard regardless of whether the contested order was given by a foreign official or by a U.S. official. Absent overriding concerns, the act of state doctrine will not bar inquiry into the validity of foreign official's acts, orders, or de-
crees.\textsuperscript{176} Thus, to assure coverage, an insured party must contest foreign orders to the same degree that they would contest a U.S. order. Despite the equity of this logic, \textit{Protexa II} furthers the demise of the act of state doctrine.

\textit{Protexa II} demonstrates several inconsistent analytical approaches currently used in the application of the doctrine. Several examples of this inconsistent analysis include bootstrapping the balancing tests, performing an overly specific inquiry into an official's particular powers,\textsuperscript{177} employing a realistic versus a protective balancing standard,\textsuperscript{178} and distinguishing between sword and shield applications of the doctrine.\textsuperscript{179} These approaches are inconsistent in that they conflict with the doctrine's purposes and prohibit it from accomplishing its stated goals. Despite these conflicts, however, the current treatment of the doctrine leads to appropriate results. Hence, there has been little pressure to correct these errors, even though the doctrine's strength has been severely weakened. By following this trend, \textit{Protexa II} adds even more weight in favor of abandoning the doctrine in toto.

\section{Inconsistencies of Purpose and Application}

\subsection{Purposes and Caveats of the Act of State Doctrine}

The \textit{Protexa II} court refused to apply the doctrine's inquiry preclusion because it found that the rationales supporting the doctrine were absent in the \textit{Protexa II} facts.\textsuperscript{180} The doctrine's modern stated purpose is to protect the executive branch from embarrassment in the execu-

\textsuperscript{176} See \textit{Protexa II}, \textit{supra} note 12, 20 F.3d 1224, 1239 (3d Cir. 1994) (discouraging plaintiffs from seeking to establish rights under invalid government orders and recognizing that application of the doctrine would disturb the underlying legal insurance regime).

\textsuperscript{177} See generally \textit{Galu v. Swissair: Swiss Air Transp. Co., Ltd.}, 734 F. Supp. 129 (S.D.N.Y.), aff'd, 923 F.2d 842 (2d Cir. 1990) (carefully scrutinizing Swiss law to determine whether police had the authority to physically and immediately expel an alien charged with harassment); \textit{see infra} notes 208-19 and accompanying text.

\textsuperscript{178} \textit{E.g.}, \textit{Republic of the Philippines v. Marcos}, 862 F.2d 1355, 1360 (9th Cir. 1988) (explaining that the balance of considerations was shifted where the actions questioned are those of a former dictator ousted by the current and formally recognized government), \textit{cert. denied}, 490 U.S. 1035 (1990); \textit{see also}, \textit{General Elec. Capital Corp. v. Grossman}, 991 F.2d 1376, 1382 (1993) (stating that the status of the parties at the time of suit was not the pertinent question as to whether the act of state doctrine applied); \textit{see generally}, \textit{Liu v. Republic of China}, 892 F.2d 1419, 1432-34 (9th Cir. 1989) (explaining that the act of state doctrine should not be applied because the foreign sovereign could hardly be affronted by a U.S. inquiry into the validity of the assassination order resulting in a murder within the United States).

\textsuperscript{179} The \textit{Protexa II} opinion implies that Grupo Protexa was the first to assert the act of state doctrine as a sword. \textit{See Protexa II}, \textit{supra} note 12, 20 F.3d at 1230 (noting the trial court's reluctance to allow the act of state doctrine to be used as a sword while not citing any other relevant prior case history). However, a Ninth Circuit district court also made this distinction in 1979. \textit{Than v. Blumenthal}, 469 F. Supp. 1202, 1210 (N.D. Cal. 1979) (refusing to allow the plaintiff to use the doctrine as a sword to force distribution of disputed U.S. assets in a foreign sovereign's bank), \textit{modified}, 658 F.2d 1296 (9th Cir. 1981), \textit{cert. denied}, 459 U.S. 1069 (1982).

\textsuperscript{180} \textit{Protexa II}, \textit{supra} note 12, 20 F.3d at 1236-37.
tion of its foreign policy. It is neither based upon international law nor mandated by the Constitution, and it focuses on protecting the U.S. executive branch rather than the image and integrity of foreign governments. By restricting judicial inquiry into the validity of foreign government actions occurring on their own soil, the doctrine simply allows prudential abstention on foreign issues that would be more efficiently handled by the executive branch.

Every case, however, is not important enough to merit the doctrine's application. In fact, courts must be mindful of their obligation to hear properly presented cases. As a methodological approach, a court will first ask if an issue requires questioning the validity of a state's actions. Second, the court will ask if the action falls into one of several exceptions. Finally, if the doctrine is applicable, the court will conduct a balancing test to determine whether judicial inquiry may substantially embarrass the executive branch. A common issue raised by the first question is whether the actions of a particular official qualify as a state action. As a general rule, an individual official's actions will be imputed to the foreign state if that official had the authority to act for and bind the foreign state. The asserting party, however, has the burden of proving both that a particular act qualifies as an act of state and that an inquiry could hinder or embarrass the executive branch's execution of foreign policy.

2. Discrepancies Between Purpose and Application
   a. Bootstrapping the Balancing Test

   The primary inconsistency demonstrated by Protexa II was the court's method of applying the balancing test. The court concluded

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184 Id. at 409-10.
185 Id.
186 See id. at 425.
187 Environmental Tectonics, 493 U.S. at 409.
188 See id.
189 No specific level of embarrassment has been identified. However, the threat of embarrassment must be more than speculative. Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., Inc., 847 F.2d 1052, 1061 (3d Cir. 1988), rev'd on other grounds, 493 U.S. 400 (1990).
191 See id. at 691.
192 See Protexa II, supra note 12, 20 F.3d 1224, 1238 (3d Cir. 1994) (stating that the plaintiff failed to show any diplomatic difficulties would arise from the inquiry).
193 Id. Technically, the court failed to follow the strict analytical approach established under Environmental Tectonics. See W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990) (refusing to perform a balancing test unless the validity, as opposed to motivation, of a sovereign action was questioned). Rather, the court jumped immediately to the third question as to whether judicial inquiry could hinder or embarrass the executive branch's foreign policy. See Protexa II, supra note 12, 20 F.3d at 1237 n.18.
that an inquiry into the order's validity would not hinder Mexican-U.S. relations.\textsuperscript{194} However, the court buttressed this conclusion with its later analysis of the Port Captain's authority.\textsuperscript{195} This subsequent analysis showed that the Mexican legislature had not authorized the Port Captain to make such an order.\textsuperscript{196} On this basis, the court claimed to honor and apply Mexican law.\textsuperscript{197} To what degree the court used this subsequent analysis to support its conclusion is unknown. However, at least to a certain extent, the court used the very inquiry precluded by the doctrine (i.e., examination of the legal validity of the Port Captain's order) to justify why the inquiry itself could be made.

This bootstrapping method of analysis circumvents the doctrine's purpose. When applicable, the doctrine bars any judicial inquiry, not just those judicial decisions which fail to honor and apply foreign law.\textsuperscript{198} Protection of the executive's foreign policy is the doctrine's accepted modern basis.\textsuperscript{199} However, underlying this basis is a theory similar to comity,\textsuperscript{200} which encourages courts to recognize the actions and decisions of foreign sovereigns.\textsuperscript{201} Rather than inquire into the validity of a foreign sovereign act, a court should treat a foreign sovereign act to be a determination that the act is in fact valid.\textsuperscript{202} By not assuming the act's validity, the court denies the foreign sovereign "comity" regardless of whether the court agrees or disagrees with the foreign sovereign's actions.

The problem with this denial is that a finding by a U.S. court concerning the validity of a foreign sovereign's act is merely a nonauthoritative finding.\textsuperscript{203} That finding carries little weight in the foreign nation itself, and it is certainly not binding upon that nation.

\textsuperscript{194} Protexa II, supra note 12, 20 F.3d at 1238.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990) (holding that when deciding a case, the acts of foreign sovereigns taken within their jurisdictions shall be deemed valid).
\textsuperscript{200} Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 458-59 (1964) (White, J., dissenting) (explaining why the act of state doctrine should not be applied to clear violations of international law even though principles of comity underlying the doctrine warrant enforcement of a foreign sovereign act).
\textsuperscript{201} In a strict sense, comity is the reciprocity of recognition. BLACK'S LAW DICTIONARY 267 (6th ed. 1990). Under comity, a court will give a foreign sovereign access to its forum, Sabbatino, 376 U.S. at 409, and recognize and enforce the foreign sovereign's acts. Id. at 458 (White, J., dissenting). However, comity does not necessarily require that a foreign sovereign's actions be deemed valid. Id. at 458-59 (White, J., dissenting).
\textsuperscript{202} Environmental Tectonics, 493 U.S. at 409.
\textsuperscript{203} Allied Bank Int'l v. Banco Credito Agricola De Cartago, 757 F.2d 516, 521 (2d Cir.) (noting that the foreign sovereign's courts would surely disregard any U.S. court decision which declared the foreign sovereign acts invalid), cert. dismissed, 473 U.S. 994 (1985).
Absent crimes against humanity, a foreign nation is free to define what is and is not the law within its borders. Thus, denying this “comity” to the foreign sovereign will lead to one of two results. First, if the court finds that the action was valid, the court has done nothing more than patronize the foreign sovereign. Its stamp of approval is similar to a parent patting his child on the back and telling him that he has done well. By passing judgment on the foreign sovereign’s act, the United States is saying that it has the power to sanction the act and that the foreign sovereign must in some way seek U.S. approval of its governmental operations. Despite its current world status, the United States is not a parent; all sovereigns are equals. Thus, a foreign sovereign cannot but help being offended by the suggestion that they are in someway subordinate to the United States.

Second, if the court finds that the act was invalid, the court essentially has rejected the foreign sovereign’s interpretation of its own laws. While courts are adept at interpreting the law, the foreign sovereign will usually have participated in creating the laws for its nation. Further, the foreign sovereign will generally have substantial influence in further refining the laws for its nation. In balance, the foreign sovereign’s interpretation of its own laws should be afforded more weight than the interpretation by a U.S. court. Thus, a U.S. court’s finding of invalidity is nothing more than a lower authority repudiating the decisions of a higher authority.

While the evils of such inquiries can be justified, the courts should recognize their true position within the world order, and the courts should be careful how they support these justifications. After a court concludes that the balancing test allows judicial inquiry, common sense dictates that a court should reaffirm its conclusion by examining the foreign law itself. However, the doctrine precludes such examination unless the balancing test shows no likelihood of hindrance or embarrassment to the executive’s foreign policy. Thus, bootstrapping the balancing test is a fundamentally incorrect method of applying the act of state doctrine. As this practice continues, the doctrine becomes weaker in its protection of actions by foreign sovereigns.

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204 See Sabbatino, 376 U.S. at 430 (noting that laws formulated under imperialistic doctrine may not be suitable for emerging states and that international laws may not bind states which have not consented to them).

205 See infra part IV.B.

206 Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989) (advising caution when instructing foreign sovereigns how they must manage their resources), cert. dismissed, 497 U.S. 1058 (1990).

207 See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int’l, 493 U.S. 400, 409-10 (1990) (holding that the balancing test is relevant only if the validity of a state act is questioned).
b. Circumvention of the Doctrine by Inquiry into the Official’s Authority

A common discrepancy similar to that of bootstrapping is the overly-specific inquiry into the foreign official’s authority.208 The first step of applying the act of state doctrine is to determine whether an issue requires inquiry into the validity of a state act.209 The actions of any particular official will not be automatically imputed to the foreign sovereign.210 If the act cannot be imputed, then the doctrine simply does not apply.211 Obviously, some form of inquiry into the official’s authority has to be conducted.

The problem with this inquiry is the degree to which it is currently conducted. For example, the Second Circuit has asked whether the particular act was an exercise of sovereign authority or merely a wholly ad hoc decision by that particular official; legality of the act is irrelevant.212 Unfortunately, its lower courts have ignored the “wholly ad hoc” standard, and the apparent trend supports a close examination of the official’s precise authority to perform the disputed act.213 If the official is not authorized, then no act of state exists, and the doctrine does not bar the inquiry into the act’s validity.214 Ironically, because the action was not authorized, the validity question has already been answered. Similarly, if the official was authorized, the only grounds for finding the act invalid will be found in either the international law or the foreign nation’s own constitutional law. In effect, a finding that

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208 The Protexa II court actually avoided this discrepancy by assuming that the Port Captain’s order qualified as an act of state. Protexa II, supra note 12, 20 F.3d 1224, 1237 (3d Cir. 1994) (refusing to decide on the defendant’s assertion that the Port Captain’s order was not an act of state). However, this Note discusses this discrepancy because of its similarity to the bootstrapping problem and the recent support for this error. See, e.g., Galu v. Swissair: Swiss Air Transp. Co., 734 F. Supp. 129, 134 (S.D.N.Y.) (extensively investigating authority of police officers), aff’d, 923 F.2d 842 (2d Cir. 1990). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. (i) (1987). Under the Restatement:
[a]n action or declaration by an official may qualify as an act of state, but only upon a showing (ordinarily by the party raising the issue) that the official had authority to act for and bind the state... The act of state doctrine does not preclude an initial inquiry as to whether a challenged act is in fact an act of state...

Id.

209 Environmental Tectonics, 493 U.S. at 409-10 (holding the doctrine inapplicable if the validity of the act is not at issue).

210 Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 691-93 (1976); see also supra note 208 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. (i) (1987)).

211 See generally Galu I, supra note 163, 873 F.2d 650 (2d Cir. 1989) (questioning whether policemen’s actions qualified as a state act).

212 Id. at 654. See also supra note 208 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. (i) (1987)).


214 See supra note 208 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. (i) (1987)).
the official was authorized will often necessitate a finding that the action was valid. Again, the precluded validity question has already been answered by a so-called preliminary applicability question.

A modern hypothetical of this discrepancy can be drawn from the Protexa II facts. Whether the act of state doctrine applied to the Port Captain’s order would depend on the Port Captain’s authority to issue such an order. The Port Captain’s jurisdiction existed by virtue of the Mexican presidential decree. However, under the Mexican Constitution, no person may be burdened by the government except by written order issued by a competent authority. By analogy to U.S. law, the court assumes this constitutional provision implies that the Port Captain was unauthorized to make such an order unless a specific statute granted him the authority to make the order. After examining three primary statutes and four subordinate statutes, the court fails to find any grant of authority. The court then concludes that the Port Captain’s act cannot be imputed; therefore, the act of state doctrine is inapplicable. Hence, the inquiry is not prohibited.

However, if the Port Captain typically makes such orders, the Mexican government’s acquiescence should be taken as its interpretation that the Port Captain did in fact have the authority to make the order. By finding otherwise, the U.S. court has again denied “comity” to the foreign sovereign’s interpretation of its own nation’s laws.

One solution to this dilemma is to allow a preliminary inquiry, but only on a limited “quick look” level. As a preliminary question, the court could be restricted to the following questions: 1) does the official normally exercise this general type of power; 2) does the foreign sovereign law clearly and unambiguously proscribe such actions; and 3) can the action be characterized as one for the public’s interests. By asking these questions, the court would cull any disputes which clearly were not imputable to the sovereign while at the same time affording “comity” to actions to which the foreign sovereign has apparently acquiesced.

c. Realistic View of the Risks to the Executive’s Foreign Policy

A third conflict between the doctrine’s purpose and application concerns the perspective used by the courts to perform the balancing test. Theoretically, the executive branch is better able to ascertain and handle foreign policy problems. To maximize the doctrine’s effect,
a court should surrender to the executive branch any issue which could potentially affect foreign policy. In Protexa II, judicial inquiry into the Port Captain’s authority could have been inferred as an attempt by the United States to limit Mexico’s Exclusive Economic Zone (EEZ). Because such a repudiation could affect ongoing negotiations in treaties and economic agreements, the court arguably should have presumed the Port Captain’s actions valid in order to maximize the doctrine’s effect.

In fact, this paternalistic standard was used in the landmark case Banco Nacional De Cuba v. Sabbatino. The Sabbatino Court refused to pass on the validity of Cuban expropriations even after the State Department had specifically made a statement that it did not want to comment. The Court reasoned that foreign nations may resent other sovereign’s courts passing judgment on the foreign nation’s actions. The Court also noted that political reasons may prohibit the executive branch from speaking and that conflicts between judicial pronouncements and executive policy could not be avoided. The Court went as far as to say that the drawing of any lines of impermissible international law violations would cause areas of judicial uncertainty and that this uncertainty itself might embarrass the executive. On these grounds, the Court refused to inquire into the validity of the Cuban actions.

Obviously, this perspective is no longer used, and Protexa II only follows a well-established trend. Immediately after the Sabbatino decision, Congress enacted the Hickenlooper Amendment which forbids the courts from refusing to examine the validity of expropriations on the basis of the act of state doctrine unless so directed by the President. The courts claim to read this Amendment narrowly. However, the cases since Sabbatino have employed a much more realistic interpretation of the risks to the executive’s foreign policy.

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221 See Republic of the Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988) (stating the maximum effect of the act of state doctrine was to bar review of any issue which might offend a foreign government), cert. denied, 490 U.S. 1035 (1989).
222 Contra Protexa II, supra note 12, 20 F.3d 1224, 1238 (3d Cir. 1994) (denying that the issues of Mexican policy were at stake).
224 Id. at 432.
225 Id.
226 Id.
227 Id. at 432-33.
228 Id. at 437.
231 Id. at 112.
232 See Liu v. Republic of China, 892 F.2d 1419, 1434 (9th Cir. 1989) (holding that the act of state doctrine may render a foreign government liable for a murder within the United States), cert. dismissed, 497 U.S. 1058 (1990); Republic of the Philippines v. Marcos, 862 F.2d 1355, 1360-61 (9th Cir. 1988) (implying that no risk to foreign policy exists by reviewing the
This realistic perspective is appropriate. The courts have an obligation to hear cases which are properly presented, and the act of state doctrine is only a prudential concern. It is not mandated by the Constitution, nor international law, and a court should not abandon its obligation merely on a speculation of harm to the conducting of foreign relations by the executive branch.

However, use of this realistic perspective weakens the act of state doctrine. The doctrine essentially shifts the responsibility to the executive branch for managing foreign disputes. Because the executive branch is better equipped to influence the conduct of foreign sovereigns, it should be the one deciding whether an inquiry into the validity of the action would be harmful. Presumably, a realistic perspective yields fewer cases than a paternalistic standard. Thus, a realistic standard reduces the executive branch's control over cases affecting foreign policy.

Ironically, the Supreme Court has not formally recognized one of the doctrine's well-known exceptions that allows review even if the Court would have otherwise assumed the validity of a foreign sovereign's act. This exception is named after the lower court case, Bernstein v. Van Heyghen Freres, S.A., in which the court reversed itself and

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actions of a deposed dictator), cert. denied, 490 U.S. 1035 (1989); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 608 (9th Cir. 1976) (holding that a judicial decision normally would not qualify as an act of state because the judicial decision only involved the dispute resolution between two private parties), cert. denied, 472 U.S. 1032 (1985).


236 Liu, 892 F.2d at 1431.


238 Protexa II, supra note 12, 20 F.3d 1224, 1238 (3d Cir. 1994).

239 But see Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 n.2 (2d Cir.) (stating that invocation of the doctrine is ultimately and always a judicial question), cert. dismissed, 473 U.S. 954 (1985).

240 Sabbatino, 376 U.S. at 419-20. Moreover, the Restatement has commented:

In Sabbatino, the Court indicated that it was not inclined toward having applicability of the act of state doctrine depend on the wishes of the Executive Branch. In First Nat'l City Bank, the State Department's Legal Advisor wrote a "Bernstein letter," and three members of the Court relied upon that letter as a rationale for their decision sustaining a counterclaim for set-off based on expropriation of property in Cuba. The other six Justices, including the two who concurred in the result and four dissenters, rejected the Bernstein exception. In Dunhill, the State Department again wrote a Bernstein letter, but it was not decisive to the outcome.

It seems that if the State Department issues a letter requesting that the courts not review the validity of a particular act, such a letter will be highly persuasive if not binding. If the State Department issues a letter stating that it has no objection on foreign relations grounds to adjudication of the validity of a given act of a foreign state, courts in the United States will make their own determination as to whether to apply the act of state doctrine, taking the view of the Executive Branch into account but not being bound by it.


239 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947).
inquired into the actions of Nazi officials after the State Department issued a letter stating that an inquiry would not affect its foreign policy. Under the *Bernstein* exception, a court will hear a case should the executive branch explicitly state that the inquiry will not affect its foreign policy.\(^{240}\) In *Sabbatino*, this nonrecognition was based on the paternalistic perspective that courts were better informed than the executive branch as to what inquiries would damage U.S. foreign policy.\(^{241}\) In effect, refusal to recognize the *Bernstein* exception implied that the courts should yield more cases to the executive branch’s control.

At a single glance, the realistic perspective seems to conflict with the nonrecognition of the *Bernstein* exception. This conflict can be reconciled by realizing that the courts are simply retaining the power of decision for themselves.\(^{242}\) Not only are the courts reluctant to consider outside influences on their decision to yield, today they are less willing to yield at all. This stronger desire to retain power inherently weakens the act of state doctrine. As a prudential concern, the doctrine now affords less deference to foreign sovereigns.

d. Distinction in Use: Sword Versus Shield

In a closing comment, the *Protexa II* court expressed its reluctance to apply the act of state doctrine in situations where the doctrine was being applied as a sword rather than as a shield.\(^{243}\) Essentially, the court implied that a plaintiff seeking judicial redress should not be able to foreclose review of the central issue merely by his choice of forum.\(^{244}\) As an equitable argument, this reluctance seems to carry significant weight. However, the act of state doctrine is based upon concern for the executive branch’s foreign policy. Equitable arguments generally focus on the individual parties. Thus, the main problem with this argument is its lack of relevance to the purposes behind the doctrine.

This argument also suffers from another deficiency—it does not distinguish between sword and shield uses. Does the court imply that only defendants may raise the doctrine? Or does the court mean that the doctrine should only be used as an affirmative defense to either a claim or counterclaim? In many instances, there is only a blurred dis-

\(^{240}\) *Sabbatino*, 376 U.S. at 419.

\(^{241}\) See *supra* notes 94-111 and accompanying text (discussing the *Sabbatino* Court’s rationale for not reviewing the validity of Cuban expropriations).

\(^{242}\) See First Nat’l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 790-98 (1972) (Brennan, J., dissenting) (commenting that the *Bernstein* exception allowed the political branches to dictate the results in a judicial matter); but see Bazyler, *supra* note 5, at 328 (alleging that under the current act of state doctrine, the courts bow down to every executive whim).

\(^{243}\) *Protexa II*, *supra* note 12, 20 F.3d 1224, 1238 (3d Cir. 1994).

\(^{244}\) *Id.* at 1239. Grupo Protexa could have brought the case in a Mexican court. By bringing the case in the U.S. court, Grupo Protexa sought to employ the act of state doctrine to score an automatic win. *Id.* at 1235.
tinction between an affirmative defense and essential element. In Protexa II, for example, the plaintiff sought reimbursement for the removal costs of a sunken ship. The policy covered costs compelled by law. Was it the plaintiff’s or the defendant’s responsibility to show that an official’s order was valid? As in Protexa II, not every issue is well defined. In these cases, applying a sword/shield distinction might be deemed arbitrary. The sword/shield distinction is, however, workable. The courts can identify what evidence constitutes a prima facie claim and which party has the burden for rebutting given presumptions. But if the courts adopt this distinction, the act of state doctrine will suffer yet another blow to its usefulness.

B. Appropriateness of the Judgment

1. Inequitable Use of the Doctrine as a Sword

Despite the apparent inconsistencies between the purposes and application of the doctrine, Protexa II shows that the doctrine’s current treatment leads to proper judgments. First, simple equity argues against use of the doctrine as a sword. Disregarding the impact on foreign relations, claimants should not be able to seek redress while simultaneously precluding examination of all the relevant facts. This strategy is analogous to a criminal defendant asserting his good character and then objecting when the prosecutor introduces evidence in rebuttal. The inequity of this strategy is even greater where the plaintiff could have brought the suit in the courts of the foreign nation. One must then question whether the plaintiff strategically chose the U.S. courts merely because the plaintiff knew that the disputed government action would be found invalid in the foreign sovereign’s own courts.

The Protexa II court shared this exact suspicion. Protexa was a Mexican corporation. The events transpired in Mexico’s Exclusive Economic Zone. And the Mexican plaintiff resisted the defendant’s attempts to dismiss the case under the doctrine of forum non conveniens. Even though Protexa had legitimate reasons for choosing a

\[\text{id. at 1225.}\]
\[\text{id. at 1226.}\]
\[\text{See id. at 1227-28 (failing to clearly identify who had the burden).}\]
\[\text{id. at 1229 (fearing the onslaught of plaintiffs seeking to establish rights under invalid orders).}\]
\[\text{In a criminal case, the prosecution may not introduce character evidence to show conformity; however, he may use such evidence to rebut the defendant’s evidence of good character after the defendant has put his character in issue. Fed. R. Evid. 404(a).}\]
\[\text{See Protexa II, supra note 12, 20 F.3d at 1239 (noting that Protexa was seeking an outcome determinative advantage from its forum selection).}\]
\[\text{id. at 1226.}\]
\[\text{id.}\]
\[\text{id. at 1235. The doctrine of forum non conveniens allows a case to be dismissed if there is a better forum in which to hear the dispute. Bazyler, supra note 5, at 38. That Protexa fought against this motion is significant because one would assume a plaintiff would}\]
U.S. court. Protexa should not also be given the unfair advantage of precluding review of the very issue upon which the case stood. To have done so would effectively have given Protexa an automatic victory merely by granting Protexa access to the U.S. court.

2. Diminutive Impact on the Foreign Policy

Second, the inquiry will not affect the executive's foreign policy. Inquiry into the validity of the Port Captain's authority causes only a diminutive impact on the Mexican government. The inquiry in no way binds Mexico. If it desires, Mexico remains free to authorize the Port Captain's orders. Nor does the inquiry significantly encourage other shipowners to challenge the Port Captain's authority. Apparently, such challenges were already routine. Further, the challenge was to the authority of a Port Captain. Unlike a challenge to the authority of a military commander, a department of state, or the president himself, this challenge should not severely implicate the dignity of the foreign sovereign to as great of an extent. Lastly, the dispute did not involve the Mexican government, but rather two independent corporations. Thus, the inquiry is only a collateral challenge to the Mexican government. As such, the challenge was more closely akin to a question of foreign law than it was to a direct challenge of the validity of the Port Captain's order. U.S. courts are specifically authorized to examine foreign law and have routinely done so.

In addition, because the inquiry will not have a significant impact on the Mexican government, it will not likely affect U.S. foreign policy. In an extenuated sense, the inquiry will in fact benefit Mexico. If the court had applied the doctrine, and thereby presumed the validity of the order, U.S. insurance companies would have faced increased insurance risks. As a result, the insurance companies would be forced to either increase premiums or decrease coverage of Mexican operations. By performing the inquiry, the court lowered the insurance company's liabilities and fostered more competitive rates for the Mexican policy.

normally prefer to fight a legal battle in its own courts. The obvious inference is that Protexa knew a Mexican court would decide in the defendant's favor.

254 The defendants were U.S. corporations with no assets in Mexico; the policy was issued by agents in the United States; the premiums and adjustments were to be paid in U.S. dollars; and any judgment by a Mexican court would still have to be executed in the United States. Protexa II, supra note 12, 20 F.3d at 1236.

255 See id. at 1238 (stating that the holding placed no limitations on the Mexican government).

256 Protexa's own witness, a noted Mexican lawyer, testified that he had personally challenged twenty-five to thirty removal orders during his career. Id. at 1238 n.19.

257 Cf. Galu I, supra note 162, 873 F.2d 650, 653 (2d Cir. 1989) (stating that there was no doubt that an expulsion order qualified as an act of state and then remanding the case for further examination as to the conduct of the police officers).

258 Fed. R. Civ. P. 44.1.

holders. Lastly, the apparent absence of a U.S. statement of position should be noted. While the Supreme Court has refused to recognize formally the Bernstein exception, the lower courts routinely recognize and consider these statements as evidence of the inquiry’s potential impact.\textsuperscript{260} If the inquiry into the Port Captain’s authority had posed a significant threat to the executive’s foreign policy, one would expect that the plaintiff could have arranged for such a statement to be entered into evidence.

3. Impact on the Parties

Obviously, the court’s refusal to presume the validity of the order destroyed the plaintiff’s outcome-determinative advantage.\textsuperscript{261} Had the court presumed the validity of the Port Captain’s order, no other issues could have been raised, and Protexa would have, for all practical purposes, won the case. However, the inquiry placed the two litigants on a level playing field. Because the policy dictated that coverage would be extended only to removals compelled by law,\textsuperscript{262} justice was served by granting a true inquiry into whether the order actually qualified as legal compulsion.

The implication of the Protexa \textit{II} decision is that policy holders dealing with foreign nations will have to challenge foreign orders to the same extent that they would challenge a U.S. official’s order. Ignorance of the foreign law will not be excused.\textsuperscript{263} Parties dealing with foreign law will be held to the same degree of care as parties dealing with U.S. law. This burden increases the likelihood that policy holders will risk sanctions from the foreign sovereign. However, this burden is a business risk that should be shouldered by the policy holders and not by the insurance companies. If further protection is desired, the policy holder should explicitly purchase it.\textsuperscript{264} This reluctance to presume validity will also increase the risk of a U.S. court incorrectly finding that a foreign official’s orders were invalid. However, as a quasi-factual issue,\textsuperscript{265} the plaintiff only faces the same risk incurred in every factual determination. The small potential for error against policy holders

\textsuperscript{260} See \textit{supra} note 238 for excerpted text from the \textit{Restatement (Third) of Foreign Relations Law of the United States}.

\textsuperscript{261} Protexa \textit{II}, \textit{supra} note 12, 20 F.3d 1224, 1239 (3d Cir. 1994).

\textsuperscript{262} Id. at 1226.

\textsuperscript{263} The district court in Protexa \textit{II} severely critiqued the manner in which Grupo Protexa’s attorney handled the situation. In particular, the court noted the counsel’s reluctance to take on the assignment, his cursory review of the order, his inexperience with the subject matter, and his gross incompetence in translating the order’s Mexican language into English. Grupo Protexa, S.A. v. All Am. Marine Slip, 753 F. Supp. 1217, 1224-25 (D.N.J. 1990), rev’d, 954 F.2d 130 (3rd Cir. 1992).

\textsuperscript{264} See Protexa \textit{II}, \textit{supra} note 12, 20 F.3d at 1239 (explaining that application of the doctrine would expand the insurance coverage beyond what Grupo Protexa had paid for).

\textsuperscript{265} While foreign law is still reviewed on the same basis as U.S. law, the courts are authorized to collect evidence and entertain expert witnesses just as they do in determining questions of fact. \textit{Fed. R. Civ. P.} 44.1.
does not warrant the guaranteed prejudice against insurance companies that would be incurred if the inquiry were denied.

C. Logical Extension of the Current Trend

Protexa II is only a logical extension of the current line of attack on the act of state doctrine. The doctrine was initially based on the theories of international law. But, Sabbatino fundamentally altered the doctrine by switching its basis to the separation of powers theory. Since that time, the courts have continuously limited the doctrine’s applicability and usefulness. Recently, these attacks have included the pronouncements that the judicial decisions do not constitute acts of state; the acts of an individual foreign official are not necessarily imputable to the state; inquiry is precluded only if future foreign policy is endangered; foreign state acts which involve extraterritorial activity “within the borders of the United States” are not eligible for protection; and the doctrine does not protect foreign government actions from review unless the inquiry would question the validity of the action. Protexa II only sets a higher standard for the balancing test and potentially sets a precedent for disallowing plaintiff’s use of the doctrine as a sword.

In consideration of the other recent attacks, these two additional restrictions are not surprising. The higher standard for the balancing test shows only that the courts are willing to endure greater risks of embarrassment to the executive branch. Absent any overriding pitfalls, Protexa II shows that the courts are more than willing to review the actions of low ranking government officials. Likewise, the sword/shield distinction indicates that the courts are becoming intolerant of strategic forum selection aimed at circumventing the truth.

At some point in the future, this line of attack will lead to the doctrine’s inevitable demise. In fact, one could argue that the doctrine already has no useful purpose. Currently, the political question doctrine allows the judiciary to abstain prudentially from deciding issues which could cause undue embarrassment to the executive branch. This test is essentially the same as the balancing test for the

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266 See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416-17 (1964) (stating the effect of the act of state doctrine on international law and policy).
267 Id. at 423.
273 See Baker v. Carr, 369 U.S. 186, 217 (1962) (stating that the political question doc-
act of state doctrine. Using a separate and more narrow doctrine just for foreign sovereign activity is superfluous and a waste of judicial resources.

In addition, other doctrines also provide overlapping protection. The act of state doctrine essentially protects only nonsovereign litigants because sovereign litigants are protected to a great extent by the Foreign Sovereign Immunity Act. Forum non conveniens allows a court to move a suit to a forum which would be more appropriate for resolving the dispute. When available, this option allows the defendant to present the disputed act to the tribunal most adept at deciding the action's validity. Lastly, if the validity of individual officials is no longer to be afforded protection, the only inquiries precluded will be those concerning the activity of state departments and legislative bodies. This effect moves the validity inquiry closer to a pure examination of foreign law as opposed to an inquiry into the validity of a single action.

Protexa II is a logical extension of the current attack on the act of state doctrine. This line of attack has diminished and will continue to diminish the usefulness of the doctrine. In consideration of the other overlapping doctrines which afford similar protection, these continuous limitations may soon leave the act of state doctrine without a reason for existence.

V. Conclusion

Protexa II sets no ground breaking legal precedent. Its significance lies mainly in its illustration of the inconsistencies and declining usefulness of the act of state doctrine. Current application of the doctrine employs analytical steps which conflict with the doctrine's purpose. Methods such as bootstrapping the balancing test and overly-specific inquiries into the authority of individual officials essentially render the doctrine useless. Furthermore, the use of a realistic perspective concerning potential threats to foreign policy and the suggested sword/
shield distinction reduce the number of foreign state acts which will receive the deference and comity afforded by the doctrine.

Despite these discrepancies, the current treatment of the doctrine leads to appropriate judgments. As an equitable argument, plaintiffs should not gain access to U.S. courts and simultaneously be given absolute protection against legitimate affirmative defenses. In regard to the underlying policy, the act of state doctrine seeks to protect the executive branch's execution of its foreign policy. For the great majority of cases, judicial inquiries have little impact on the foreign government and even less impact on the executive branch's policy. Thus, given the court's obligation to hear cases properly presented before it, the courts are correct in restricting the doctrine with tough limitations and standards.

Finally, Protexa II raises the question as to whether the doctrine has any continuing usefulness. The act of state doctrine has been severely limited in the past few years. The courts are showing increasing reluctance to apply it, and its goals are often protected by other overlapping doctrines.

Protexa II illustrates that the act of state doctrine's usefulness has been significantly diminished by the recent judicial restrictions and inconsistent analytical techniques. Fortunately, this treatment has yielded appropriate judgments. Thus, in view of other available protection, the act of state doctrine is quickly losing support for its existence. Soon, the courts should consider abandoning the doctrine once and for all.

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