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Recent Decision

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RECENT DECISION

ACT OF STATE—A BRIBERY EXCEPTION TO THE ACT OF STATE DOCTRINE? ACT OF STATE DOCTRINE BARS JUDICIAL INQUIRY INTO THE VALIDITY OF A FOREIGN SOVEREIGN'S ACTS, BUT NOT INTO THE MOTIVATIONS BEHIND THE ACTS. *W.S. Kirkpatrick, Inc. v. Environmental Tectonics*, 110 S. Ct. 701 (1990).

I. FACTS AND HOLDING

In *W.S. Kirkpatrick, Inc. v. Environmental Tectonics*,[1] the United States Supreme Court addressed whether the act of state doctrine[2] bars a United States court from adjudicating a cause of action that challenges the motivation behind a foreign sovereign's action, but not the validity of the action itself.

Environmental Tectonics, a Pennsylvania corporation, sued W.S. Kirkpatrick, Inc., a New Jersey corporation, and Kirkpatrick's chairman[3] to recover damages for violations of the federal Racketeer Influenced Corrupt Organizations Act (RICO),[4] the New Jersey Racketeering Act,[5] and the Robinson-Patman Act.[6] Environmental Tectonics,

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1. W.S. Kirkpatrick, Inc. v. Environmental Tectonics, 110 S. Ct. 701 (1990).

2. The act of state doctrine precludes courts from adjudicating cases that require an inquiry into the legality of a foreign sovereign's acts performed within the sovereign's territory. Neither the United States Constitution nor international law mandate the doctrine. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-24 (1964). The modern formulation of the doctrine rests on the principle of separation of powers, and aims to avoid judicial action that might interfere with the executive branch's conduct of foreign policy. *Id.* at 423-24. For a discussion of the history of the act of state doctrine, see *infra* part II.

3. Environmental Tectonics also sued several other defendants, including Kirkpatrick's wholly-owned subsidiary, which was formed to carry out the Nigerian contract; a Nigerian national, Benson "Tunde" Akindele, hired as Kirkpatrick's agent; and several of Kirkpatrick's subcontractors. Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1055 (3d Cir. 1988).

4. 18 U.S.C. §§ 1961-1968 (1988).

5. N.J. STAT. ANN. §§ 2C:41-1 to -6.2 (West 1982 & Supp. 1989).

6. 15 U.S.C. § 13(c) (1988).

which failed to win a contract to build and equip an aeromedical center for the Nigerian Air Force, asserted that it was injured because defendants allegedly influenced the award of the contract through the bribery of Nigerian officials.[7]

The complaint alleged that defendants, to secure the bid for the aeromedical center, agreed to pay a sales "commission"[8] totalling twenty percent of the contract price.[9] When Nigeria made payments to Kirkpatrick under the terms of the contract, two Panamanian corporations controlled by defendants' agent channeled the "commission" to Nigerian officials.[10]

The plaintiff, after learning that its bid was substantially lower than the defendants' bid, investigated the Nigerian Government's award of the contract, discovered the sales "commission" arrangement, and notified the United States Department of Justice, which subsequently charged and convicted the defendants of violating the Foreign Corrupt Practices Act.[11] Unsatisfied with the defendants' sentencing in the criminal proceeding, Environmental Tectonics filed this civil action to recover damages resulting from the lost contract.

The defendants moved to dismiss the action on act of state grounds.[12] The United States District Court for the District of New Jersey requested further submissions from the parties and an opinion from the Legal Advisor to the United States Department of State regarding whether the court should apply the act of state doctrine under the circumstances.[13] Despite the opinion from the Legal Advisor that the act of

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7. *Kirkpatrick*, 110 S. Ct. at 703. Nigerian law prohibits both the payment and the acceptance of a bribe by a public official. *Id.*

8. The Court tacitly admitted that this sales "commission" was, in effect, a kickback. *Id.*

9. *Id.*

10. *Id.* Commission payments exceeded $1.7 million. *Environmental Tectonics*, 847 F.2d at 1055. The twenty percent commission was distributed as follows: five percent to the Nigerian Air Force; five percent to a political party; two and one-half percent to Kirkpatrick's Nigerian agent; two and one-half percent to the medical group slated to run the facility; two and one-half percent to the relevant cabinet minister; and two and one-half percent to other key defense personnel. *Id.* at 1055 n.3.

11. Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended in scattered sections of 15 U.S.C.). As part of their plea negotiations on the federal charges, defendants agreed to offers of proof setting forth the bribery scheme in its entirety. Harry Carpenter, the Chairman of the Board and Chief Executive Officer of Kirkpatrick, was sentenced to two hundred hours of community service and fined $10,000. The corporation was fined $75,000, payable over five years. *Environmental Tectonics*, 847 F.2d at 1056.

12. *Environmental Tectonics*, 847 F.2d at 1056.

13. Such opinions are termed "*Bernstein* letters," following the decision of the United States Court of Appeals for the Second Circuit in Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954). In that

state doctrine did not bar adjudication of the dispute if the inquiry focused on the motivation of the Nigerian Government and not on the legality of the award,[14] the district court dismissed the action on act of state grounds.[15] The district court, taking issue with the Legal Advisor's distinction, reasoned that adjudicating the claim would inevitably lead to an examination of the Nigerian Government's motives in awarding Kirkpatrick the contract, and that such an examination would be interpreted as criticism of the Nigerian Government.[16] Because the suit threatened to hinder relations between Nigeria and the United States, the district court concluded that the act of state doctrine precluded judicial inquiry.[17]

On appeal, the United States Court of Appeals for the Third Circuit *reversed* the dismissal.[18] The court agreed with the district court that the award of a military contract is an act influenced by considerations that could trigger the act of state doctrine because national security decisions are considered reasoned expressions of public interest—not routine, ministerial acts.[19] The Third Circuit, however, rejected the rest of the district court's analysis of the act of state issue. The court held that the application of the doctrine requires more than mere conjecture about how foreign governments would interpret the disclosure of certain facts.[20] Prior Third Circuit cases required defendants to prove that the adjudication of a claim posed a demonstrable—rather than a specula-

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case, Arnold Bernstein brought a suit to recover properties expropriated by the German Government during World War II. The Second Circuit dismissed the suit on act of state grounds because hearing the claim required the court to judge the validity of the German Government's acts. Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947). The *Bernstein* court reversed its dismissal after receiving a letter from the United States Department of State Legal Advisor stating that the prosecution of the suit would not interfere with United States foreign policy, which supported the exercise of jurisdiction over claims to recover property expropriated by Nazi officials. *Bernstein*, 210 F.2d at 376. Federal courts may consider *Bernstein* letters, but they are not binding. First Nat'l City Bank (Citibank) v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972).

14. Letter of Abraham D. Sofaer, Legal Advisor, United States Department of State, *reprinted in Environmental Tectonics*, 847 F.2d at 1061-62.

15. Environmental Tectonics v. W.S. Kirkpatrick, Inc., 659 F. Supp. 1381, 1391-98 (D.N.J. 1987).

16. *Id.* at 1392-93.

17. *Id.* ("Therefore, if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States, inquiry is foreclosed by the act of state doctrine.").

18. *Environmental Tectonics*, 847 F.2d at 1062.

19. *Id.* at 1058-59.

20. *Id.* at 1061.

tive—threat to the United States conduct of foreign relations.[21] The court, noting that the United States Department of State did not object to the adjudication of the claim, concluded that adjudication would not hinder United States foreign policy.[22] The court reasoned that adjudicating the plaintiff's complaint required judicial inquiry into the motivation behind Nigeria's acts, but because it was not necessary to rule on the validity of the acts, the application of the act of state doctrine was unwarranted.[23]

On appeal, the United States Supreme Court *affirmed. Held*: The act of state doctrine does not apply when the adjudication of a suit does not require a court to declare invalid the official act of a foreign sovereign.[24]

II. LEGAL BACKGROUND

The act of state doctrine arises as an issue in a lawsuit when the adjudication of a party's claim requires a United States court to judge the validity of acts undertaken by a foreign sovereign within its own territory. Under such circumstances, United States courts are required to refrain from adjudicating that case.[25] Although the concept appears simple, neither courts nor commentators agree on the doctrine's proper scope or basis in law.[26] Over the years, courts and commentators have described the act of state doctrine as a doctrine of conflict of laws,[27] choice of law,[28] judicial abstention,[29] judicial prudence or deference,[30] and sovereign immunity.[31] The modern formulation, based on the doctrine of

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21. *Id.* (citing Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3d Cir. 1982)).

22. *Id.* at 1062.

23. *Id.* at 1061-62.

24. *Kirkpatrick*, 110 S. Ct. at 707.

25. *See infra* note 32 and accompanying text.

26. *See infra* note 63 and accompanying text. One commentator states "this confused and outmoded doctrine frustrates the normal operation of the courts . . . . The courts are mucking up the act of state [doctrine] all the time." *The International Rule of Law Act: Hearing on S. 1434 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judicary*, 97th Cong., 1st Sess. 22-23 (1981) (statement of Prof. Don Wallace, Jr., Director of the International Law Institute, Georgetown University Law Center).

27. *See* Industrial Inv. Dev. Corp. v. Mitsui & Co, 594 F.2d 48, 51 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

28. *See* Alfred Dunhill of London v. Cuba, 425 U.S. 682, 705 n.18 (1976).

29. *See* Hunt v. Mobil Oil, 550 F.2d 68, 74 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

30. *See* International Ass'n of Machinists v. OPEC, 649 F.2d 1353, 1359 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 75, 105 (1964).

31. *See* First Nat'l City Bank (Citibank) v. Banco Nacional de Cuba, 406 U.S. 759,

separation of powers, focuses on preventing the United States adjudication of cases that might interfere with the executive branch's foreign relations responsibilities.[32] This section examines the background of the act of state doctrine and various specific limitations that courts have placed on it.

The doctrine originated in the 1897 case of *Underhill v. Hernandez*,[33] in which a unanimous United States Supreme Court held that United States courts could not adjudicate the validity of acts of a foreign

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762 (1972). For a discussion of the common origin of the act of state doctrine and the doctrine of sovereign immunity, see Note, *Act of State and Sovereign Immunities Doctrines: The Need to Establish Congruity*, 17 U.S.F. L. REV. 91, 93-94 (1982).

32. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423-24 (1964). The judiciary is generally reluctant to interfere in foreign affairs. The United States Constitution limits the role of the judiciary in foreign affairs to cases arising under the Constitution and United States laws, including treaties, to cases affecting ambassadors and public ministers, and to controversies between domestic states and their citizens. U.S. CONST. art. III, § 2, cl. 2. Courts are also careful not to intervene in this area under the political question doctrine applied under the principle of separation of powers. *See* Baker v. Carr, 369 U.S. 186, 211-13 (1962); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918). The political question doctrine arises when courts are confronted with issues deemed inappropriate for judicial review and best resolved through the political process. *Baker*, 369 U.S. at 210-11; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-70 (1803); E. CHEMERINKSY, FEDERAL JURISDICTION § 2.6 (1989). The separation of powers doctrine precludes a branch of government from interfering with the functions of another branch. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 2-1 to 3 (2d ed. 1988). For a discussion of the role of United States courts in foreign affairs, see L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 205-24 (1972).

Although the Supreme Court has broadly interpreted the power of the executive branch to formulate foreign policy, *see, e.g.*, United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-22 (1936) (holding that the executive power in foreign affairs is primary and that the legislative branch's power is secondary), the Constitution enumerates very few executive powers. The executive has the power to make treaties and to appoint ambassadors "with the Advice and Consent of the Senate," U.S. CONST. art. II, § 2, cl. 2, to receive ambassadors, *id.* § 3, and the President, as head of the executive branch, is empowered to serve as the "Commander in Chief of the Army and Navy." *Id.* § 2, cl. 1.

The Constitution specifically enumerates the powers given the legislature over foreign affairs. Congress has the power to control the budget, *id.* art. I, § 8, cl. 1, to regulate foreign commerce, *id.* cl. 3, to define and punish violations of international law, *id.* cl. 10, and to declare war. *Id.* cl. 11. For a discussion of the respective roles of the executive and the legislature in foreign relations, see L. HENKIN, *supra*, at 37-123.

33. 168 U.S. 250 (1897). Underhill, a United States businessman, maintained a waterworks system for the city of Bolivar, Venezuela. When rebel forces under General Hernandez occupied the city, these forces denied Underhill permission to leave. Underhill ultimately returned to the United States where he filed an action against Hernandez for unlawful detention and harassment. *Id.* at 251.

sovereign undertaken within its own territory.[34] The Court explained that the doctrine is not grounded in a rule of law, but arises from principles of sovereign immunity and international comity between states.[35] According to the Court, the act of state doctrine provides a complete defense whenever any judicial examination of the acts of foreign sovereigns is required; parties should pursue challenges to the actions of foreign sovereigns, if at all, through diplomatic channels.[36]

The jurisprudential foundation for the act of state doctrine outlined in *Underhill* and its progeny[37] is the "vested rights" theory of law, under which only the territorial sovereign can create legal rights within its territory.[38] Only the laws that create the rights may determine the nature and scope of the rights—they may not be questioned in other jurisdictions.[39] Courts applying this rationale followed the absolute requirement of judicial abstention for over sixty years.

Eventually, however, United States courts largely rejected the vested rights theory.[40] It is therefore not surprising that when the Supreme

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34. The classic statement of the doctrine is set forth in *Underhill*:

> 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.

Id. at 252. The Court refused to inquire into Hernandez's alleged illegal acts because he committed the acts under the authority of a government that the United States later recognized. *Id.* at 254.

35. *Id.* at 252-53; *see also* Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918) (act of state doctrine based on international comity); Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918) (act of state doctrine preserves amicable relations between states); American Banana Co. v. United Fruit Co., 213 U.S. 347, 352 (1909) (act of state doctrine compelled by principle of sovereign immunity and international comity).

36. Congress ultimately codified the doctrine of sovereign immunity in the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611 (1988). Under the FSIA, the sovereign immunity defense is available only to the government or government official sued. The act of state doctrine, however, arises in suits between private litigants in which the cause of action calls into question the acts of a foreign government. *See* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 331 (1986).

37. *I.e.*, *Ricaud*, 246 U.S. 304; *Oetjen*, 246 U.S. 297.

38. *See* Cuba R.R. v. Crosby, 222 U.S. 473, 478-79 (1912); *American Banana*, 213 U.S. at 356; Chow, *Rethinking the Act of State Doctrine*, 62 WASH. L. REV. 397, 405-11 (1987); Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 CORNELL L. REV. 1, 7 (1973); *see also* 3 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1967-69 (1935).

39. *See Oetjen*, 246 U.S. at 302-04 (1918); *Ricaud*, 246 U.S. at 310 (1918); *American Banana*, 213 U.S. at 359; 3 J. BEALE, *supra note* 38, at 1969.

40. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); Chow, *supra*

Court faced the act of state doctrine again in the 1960s, the Court substantially modified the doctrine's jurisprudential foundation. In *Banco Nacional de Cuba v. Sabbatino*,[41] the Supreme Court substituted a balancing test for the traditional absolute approach.[42] After a review of the act of state doctrine, the *Sabbatino* Court rejected the traditional view that the doctrine emanates from principles of international law or comity.[43] The Court instead declared that the doctrine is grounded in the constitutional principle of separation of powers, which demands a careful distribution of authority between the three branches of the United States Government.[44] The Court was chiefly concerned that the act of state doctrine should "reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[45] The Court noted that the Constitution "does not irrevocably remove" judicial review of foreign acts of state, and then concluded that proper consideration of the doctrine requires that courts examine whether judicial decisions concerning foreign acts of state will hinder United States foreign policy goals or compromise international comity.[46] The Court decided that use of a flexible, case-by-case balancing approach best serves the purposes of the act of state doctrine.[47] Under the *Sabbatino* test, the extent to which an area of international law is codified increases the appropriateness of an assertion of jurisdiction, whereas the extent to which a court's holding in a particular case would affect the sensitive nature of United States foreign relations reduces the propriety of an assertion of jurisdiction.[48] The result in *Sab-*

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note 38, at 412 n.89.

41. 376 U.S. 398 (1964). *Sabbatino* centered on the Castro regime's expropriation of the assets of a United States-owned corporation in violation of international law. The Court refused to examine the validity of the Cuban acts. *Id.* at 428.

42. *Id.* This modern statement of the act of state doctrine rejects the inflexibility of the traditional rule, preferring that courts depend on a "balance of relevant considerations" to determine the propriety of judicial inquiry. *Id.* The Court noted that "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." *Id.*

43. *Id.* at 421.

44. *Id.* at 423.

45. *Id.* at 427-28.

46. *Id.* at 423. One might reasonably ask what place consideration for "international comity" has in separation of powers analysis. Professor Falk argues that this concern is a valid part of judicial decision-making because United States courts, in deciding cases with international ramifications, also affect the development and status of international law. R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 410-24 (1970).

47. 376 U.S. at 428.

48. *Id.* The Court reasoned that it is more appropriate for courts to hear cases when

batino demonstrates that the latter factor is more decisive than the former[49]—an understandable result under separation of powers analysis. The Court, however, failed to specify the weight that a court should assign any particular factor, and over the past quarter century subsequent courts' limited applications of the *Sabbatino* test have shed little light on its proper use.[50] *Sabbatino* represents the last time, prior to the instant case, that a majority of the Supreme Court agreed on the proper application of the act of state doctrine. In the absence of higher guidance, lower federal courts have broad discretion to apply or reject the doctrine, resulting in a number of diverse views about the doctrine's nature and proper application.[51]

Following *Sabbatino*, the United States Congress, concerned that the act of state doctrine would preclude United States citizens from obtaining redress for illegal expropriations of property abroad, passed the Hickenlooper Amendment to the Foreign Assistance Act of 1964.[52] This amendment directs courts to forego application of the act of state doctrine in cases in which expropriation violates international law, except in those cases in which the United States President determines that litigation hinders United States foreign policy.[53]

Various exceptions are available to litigants to relieve the strict application of the act of state doctrine. The Supreme Court, in each of its two cases considering the act of state doctrine since *Sabbatino* and prior to

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a greater degree of codification or consensus exists on particular areas of international law, because they would be applying law, not creating it. *Id.* The Court also considered executive competence to redress grievances. *Id.* The Court suggested that the analysis may change if a "treaty or other unambiguous agreement" exists. *Id.* at 428-31. To date, no such case has been presented. *See infra* note 50.

49. The trial court held that the Cuban expropriation violated international law on three grounds: (1) it was motivated by a retaliatory purpose; (2) the Cuban Government failed to pay adequate compensation for the property; and (3) Cuba discriminated against United States citizens by seizing only the property of United States nationals. 425 U.S. at 406-08. The Supreme Court questioned the extent to which international law regarding expropriation was codified, and concluded that judicial inquiry into the area threatened injury to United States foreign relations and foreign policy objectives. *Id.* at 428-30.

50. The Court has applied the *Sabbatino* analysis only twice since 1964. First Nat'l City Bank (Citibank) v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Alfred Dunhill of London v. Cuba, 425 U.S. 682 (1976). Both cases involved Cuban expropriations of United States property. In neither case did a majority of the Court agree on the proper application of the act of state doctrine. *See infra* notes 54-60 and accompanying text.

51. *See, e.g., infra* note 63. Critics point out that these inconsistent theories lead to arbitrary and unjust results. *See* Bazyler, *supra* note 36, at 344-68.

52. 22 U.S.C. § 2370(e)(2) (1982).

53. *Id.*

the instant case, failed to accept an exception to the doctrine. In *First National City Bank (Citibank) v. Banco Nacional de Cuba*,[54] the Court concluded that, although it is proper for courts to consider executive branch recommendations regarding the application of the act of state doctrine, courts are not bound by such recommendations.[55] Hence, the Court rejected the so-called *Bernstein* exception by holding that courts may use the doctrine to preclude jurisdiction even when the executive branch fails to object to adjudication.[56] This holding reflects the *Citibank* Court's reluctance to allow the executive branch to decide which cases the Court can hear,[57] and supports the finding in *Sabbatino* that courts should decide the doctrine's application as a matter of law.[58] In *Alfred Dunhill of London v. Cuba*,[59] a plurality of the Court suggested that it might recognize an exception to the act of state doctrine for purely commercial activities of foreign sovereigns, because adjudication of claims in-

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54. 406 U.S. 759 (1972). The Cuban Government expropriated Citibank's branches in Cuba. *Id.* at 760. Before the seizures, Citibank loaned $15 million to the predecessor of Banco Nacional. *Id.* In retaliation for the seizures, Citibank sold the collateral pledged to secure the loan, realizing a profit of nearly $2 million over and above the principal and unpaid interest due. *Id.* at 760-61. When Banco Nacional brought suit to recover the excess proceeds, Citibank claimed the excess proceeds as damages for the confiscation of its Cuban branches. *Id.* at 761. The Supreme Court found the case adjudicable. *Id.* at 768.

55. Justice Rehnquist, announcing the opinion of the Court, stated that the federal courts should defer to the judgment of the State Department when the act of state doctrine is involved; only two justices joined his opinion. *Id.* at 768. Justices Douglas and Powell, in separate concurrences, rejected this view, as did dissenters Brennan, Marshall, Stewart, and Blackmun. *Id.* at 770-73 (Douglas, J., concurring), *id.* at 773 (Powell, J., concurring), *id.* at 776-77 (Brennan, J., dissenting). The *Bernstein* exception therefore attracted the support of only three justices; accordingly, courts have subsequently limited *Bernstein* to its facts. *See supra* note 13 (discussing *Bernstein* letters and the *Bernstein* holding). Courts still welcome executive branch recommendations regarding the application of the act of state doctrine in individual cases, but only insofar as these recommendations assist the court in determining the foreign policy considerations weighed in the *Sabbatino* balancing test. *See, e.g.*, Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1062 (3d Cir. 1988).

56. *Citibank*, 406 U.S. at 772-73 (Douglas, J., concurring); *id.* at 773 (Powell, J., concurring); *id.* at 776-77 (Brennan, J., dissenting); *see supra* note 13.

57. Justice Douglas in particular was concerned that the position favored by Justice Rehnquist would leave the Court dependent on executive determinations of its jurisdiction, abdicating judicial responsibility and creating the potential for the abuse of executive powers. *Citibank*, 406 U.S. at 773 (Douglas, J., concurring). In contrast, commentators note that the executive generally has left to the judiciary the decision to use the act of state doctrine. *See, e.g.*, L. HENKIN, *supra* note 32, at 62-64.

58. *See supra* notes 41-51 and accompanying text.

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

volving such activities would not result in judicial intervention into foreign policy matters.[60] Although a majority of the Court has not supported the establishment of a commercial exception, several lower courts recognize its existence.[61] Congress endorsed the same basic principle in the Foreign Sovereign Immunities Act.[62]

Since *Sabbatino*, the act of state doctrine has undergone little modification in either theory or application, and no proposed exception has gained the support of a majority of the Court. Some lower courts, however, have gone beyond the guidelines laid down in *Sabbatino*, *Citibank*, and *Dunhill* to explore a "corruption exception" to the doctrine.[63] Courts will apply this exception to situations in which litigants wish to use the act of state doctrine primarily as a shield to conceal their illegal acts, thereby abusing the doctrine and thwarting United States policy

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60. *Id.* at 703-06. A plurality of four Justices, the State Department, and the Justice Department endorsed this exception. *Id.* at 695-706. The other five Justices neither accepted nor rejected the exception.

61. *See, e.g.*, Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1048 n.25 (9th Cir. 1983) (purely commercial activity usually will not trigger the act of state doctrine); Dominicus Americana Bohio v. Gulf & Western Indus., 473 F. Supp. 680, 689-90 (S.D.N.Y. 1979) (alluding to existence of a commercial exception).

62. 28 U.S.C § 1605(a)(2) (1982) (subjecting foreign sovereigns to the possibility of suit if there is a purely commercial activity affecting United States commerce).

63. *See, e.g.*, Williams v. Curtiss-Wright, 694 F.2d 300, 304 (3rd Cir. 1982) (act of state doctrine should not be applied to thwart legitimate United States regulatory goals in the absence of a showing that the adjudication would hinder international relations); Mannington Mills v. Congoleum Corp., 595 F.2d 1287, 1293 (3rd Cir. 1979) (court unwilling to allow litigants to shield themselves from liability for illegal conduct abroad by invoking the act of state doctrine as a defense); Sage Int'l v. Cadillac Gage Co., 534 F. Supp. 896, 910 (E.D. Mich 1981) (act of state doctrine does not preclude antitrust litigation if plaintiff alleges corruption by a foreign sovereign); *Dominicus Americana Bohio*, 473 F. Supp. at 690 (act of state doctrine not applied after general allegations of corruption). *But see* Clayco Petroleum v. Occidental Petroleum, 712 F.2d 404, 407-09 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (declining to address the issue of a corruption exception to the act of state doctrine in the absence of the presence of a foreign sovereign defendant); Hunt v. Mobil Oil, 550 F.2d 68, 79 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (declining to address the issue of whether a corruption exception to the act of state doctrine exists, because plaintiff did not allege corruption on the part of the foreign government).

Several commentators support the establishment of a corruption exception. *See, e.g.*, Comment, *International Commercial Bribery and the Act of State Doctrine*, 67 WASH. U.L.Q. 601 (1989); Comment, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U.L. REV. 203 (1984) [hereinafter AM. U.L. REV. Comment]; Casenote, *The Act of State Doctrine: A Shield for Bribery and Corruption*, 16 U. MIAMI INTER-AM. L. REV. 167 (1984).

objectives.[64] Congress expressed an interest in countering such activities by enacting the Foreign Corrupt Practices Act (FCPA),[65] but in its deliberations on the FCPA, Congress failed to address the relationship between the FCPA and the act of state doctrine. This omission is critical, because effective enforcement of the FCPA requires the examination of foreign involvement in an alleged bribe, involvement that could trigger the act of state doctrine. Congress appears to have left to the courts the determination of the nature of the relationship between the FCPA and the act of state doctrine.

The first case to consider a corruption exception was *Hunt v. Mobil Oil*,[66] in which the United States Court of Appeals for the Second Circuit adopted an expansive interpretation of the act of state doctrine and dismissed the plaintiff's claim.[67] The court expanded the doctrine to preclude inquiry into the motivations behind a sovereign's conduct, in addition to the traditional preclusion from inquiry into the validity of a foreign sovereign's acts.[68] The court concluded that the case did not provide an appropriate opportunity to discuss the existence of a corruption exception because the plaintiff Hunt did not allege that the foreign government acted corruptly.[69] The court failed to address the question of whether it would recognize such an exception if the plaintiff alleged that

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64. Environmental Tectonics v. W.S. Kirkpatrick, Inc., 659 F. Supp. 1381, 1392-93 (D.N.J. 1987).

65. The FCPA prohibits domestic businesses from making payments to a foreign official to obtain or retain business. 15 U.S.C. § 78dd-2(a) (1988). Congress sought to address several problems by enacting the FCPA. First, the United States was frequently blamed for the actions of its corporations abroad, and the disclosure of corrupt payments embarrassed foreign governments and strained United States relations with those governments. Second, these activities spread corruption in foreign governments. Finally, Congress feared that corrupt acts tarnish the reputations of United States business representatives abroad. Congress sought to provide an incentive for honest behavior. *See* Note, *Corruption and the Foreign Corrupt Practices Act of 1977*, 13 MICH. J.L. REFORM 158, 162-63 (1979); H.R. REP. No. 640, 95th Cong., 1st Sess. 4-5 (1977).

66. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). Hunt sued other oil producers operating in Libya for violations of United States antitrust laws, *id.* at 70, alleging that the actions of the other producers caused the Libyan Government to nationalize its assets. *Id.* at 71-72. Hunt did not allege that the actions of the Libyan Government were illegal. *Id.* at 75. The court considered Libya an innocent victim of the defendants' conspiracy, not a co-conspirator. *Id.* at 79. Generally, the act of state doctrine protects nationalization of a foreign company's assets, since the debate over private versus public ownership of resources is a political or ideological issue not suitable for adjudication. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 429-30 (1964).

67. *Hunt*, 550 F.2d at 79.

68. *Id.* at 77.

69. *Id.* at 79.

both the defendant and the foreign sovereign acted corruptly. It is unlikely that under those facts a court applying the Second Circuit's expansive interpretation of the act of state doctrine would find a corruption exception; any allegation of foreign sovereign corruption necessarily involves an examination of the validity of the foreign sovereign's acts, thereby invoking the act of state doctrine.[70]

Some courts follow the Second Circuit and will not address the possible existence of a corruption exception to the act of state doctrine unless the plaintiff alleges corruption by both the sovereign and the defendant.[71] In these cases, however, the courts did not further explore the exception because plaintiffs did not allege sovereign corruption. Even if such corruption were alleged, courts following the *Sabbatino* guidelines understandably would hesitate to examine the conduct of the foreign sovereign because of the ramifications of such suits on United States foreign policy. Uncertainty about the effect of litigation on foreign policy led at least one court to establish a very low threshold for invoking the act of state doctrine.[72]

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70. Both courts and commentators criticize the expansive application of the act of state doctrine in *Hunt*. *See, e.g.*, Industrial Inv. Dev. v. Mitsui & Co., 594 F.2d 48, 55 (5th Cir. 1979) (rejecting the preclusion of an inquiry into a foreign sovereign's motivation as uselessly thwarting United States regulatory goals, provided no United States foreign policy interest is threatened); Note, *The Act of State Doctrine: Antitrust Conspiracies to Induce Foreign Sovereign Acts*, 10 N.Y.U.J. INT'L L. & POL. 495, 519-34 (1978) (suggesting a flexible balancing approach to act of state situations).

71. *See* Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc., 686 F.2d 322, 326 (5th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983) (court would not consider a corruption exception to the act of state doctrine absent an allegation of foreign sovereign corruption); Sage Int'l v. Cadillac Gage Co., 534 F. Supp. 896, 910 (E.D. Mich. 1981) (if the plaintiff alleges corruption by foreign sovereign, the act of state doctrine does not preclude antitrust litigation). The statement of the *Sage* court is, however, a dictum.

Courts require allegations of sovereign corruption mostly for policy reasons. Such allegations limit the scope of the court's inquiry into the sovereign's conduct and indicate to the court that, because corruption is generally illegal worldwide, the sovereign may not have been acting in its sovereign capacity. *See* AM. U.L. REV. Comment, *supra* note 63, at 234-35.

72. *See* Clayco Petroleum v. Occidental Petroleum, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). The United States Court of Appeals for the Ninth Circuit affirmed the lower court's act of state dismissal of an action alleging defendant's bribery of a foreign official to gain a valuable oil concession. The court noted that a corruption exception to the act of state doctrine is available in United States government enforcement actions under the Foreign Corrupt Practices Act. *Id.* at 409. The court refused, however, to recognize the exception in a suit between private parties. *Id.* The court followed *Hunt* in refusing to examine the motivation behind a foreign sovereign's acts. *Id.* at 407. The court noted that investigating the bribery charge involved impugning the character of the foreign official, a result that could embarrass the United

In contrast, the United States Court of Appeals for the Third Circuit established over the past decade an approach to act of state questions that fits within the standards outlined in *Sabbatino* without deferring to the concerns of foreign sovereigns engaged in questionable activities. The Third Circuit's guiding principle, expressed in *Mannington Mills v. Congoleum Corp.*,[73] demands that the act of state doctrine "is not lightly to be imposed."[74] The Third Circuit requires defendants seeking judicial applications of the act of state doctrine to demonstrate that litigation demonstrably would hinder the conduct of United States foreign policy.[75] Moreover, the court permits inquiry into the motivations behind a foreign sovereign's actions,[76] narrowing the scope of the act of state doctrine to those instances in which (1) the court must rule on the validity of the foreign sovereign's actions; and (2) the court's inquiry would threaten the political branches' conduct of foreign policy.[77] This formulation

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States Government in its conduct of foreign policy and justify the use of the act of state doctrine to dismiss the action. *Id.* at 407. This "embarrassment" standard would effectively stop all attempts to investigate the misconduct of United States corporations abroad, provided that a prominent foreign official was involved in the illegality. *See* Casenote, *supra* note 63.

73. 595 F.2d 1287 (3rd Cir. 1979). In *Mannington Mills*, the United States Court of Appeals for the Third Circuit held that the act of state doctrine did not bar the adjudication of plaintiff's claims that defendant fraudulently obtained foreign patents that served to restrict plaintiff's trade. The court focused on the nature of the disputed conduct and concluded that the granting of a patent is a routine act that does not raise serious foreign policy concerns; therefore, there was no call for application of the act of state doctrine. *Id.* at 1293-94. Implicit in the opinion was an unwillingness to allow defendants to shield themselves from liability for their illegal acts by invoking the act of state doctrine as a defense in United States courts. *Id.* at 1294.

74. *Id.* at 1293.

75. *See* Williams v. Curtiss-Wright Corp., 694 F.2d 300, 304-05 (3d Cir. 1982); *Mannington Mills*, 595 F.2d at 1293-94. In *Curtiss-Wright*, plaintiff charged that Curtiss-Wright monopolized the market for jet aircraft parts. 694 F.2d at 301-02. Curtiss-Wright moved to dismiss the complaint on act of state grounds, asserting that the doctrine forbids courts from examining the motives behind foreign government's actions. *Id.* at 301. The United States Court of Appeals for the Third Circuit rejected the argument, reasoning that the act of state doctrine forbids courts from judging the validity of a foreign government's decisions—not the motivations behind them, provided that the inquiry into the motivations does not hinder the United States conduct of foreign relations. *Id.* at 303-05.

76. *Curtiss-Wright*, 694 F.2d at 303-05.

77. *Id.*; *cf.* Hunt v. Mobil Oil, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *see supra* notes 66-69 and accompanying text (discussing *Hunt*). The Third Circuit distinguished *Hunt* as an expropriation case, an area in which claims are traditionally barred by the act of state doctrine. *Curtiss-Wright*, 694 F.2d at 304; *see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 429-30 (1964). The court also noted

grants plaintiffs extensive latitude to pursue defendants engaged in corrupt practices abroad.

The instant case marks the first instance the United States Supreme Court considered the question whether the act of state doctrine permits inquiry into the motivation behind the act of a foreign sovereign.

III. THE INSTANT DECISION

In the instant case, the United States Supreme Court[78] first reviewed the evolution of the jurisprudential foundation of the act of state doctrine.[79] The Court noted that although the doctrine was originally grounded in international law, courts now consider it a consequence of the principle of separation of powers.[80] Although the Court also noted the various exceptions to the doctrine, but the Court did not pursue them because in the instant case the factual premise for the application of the doctrine did not exist.[81]

The Court reviewed the cases in which courts properly applied the act of state doctrine and observed that in each instance the relief sought or the defense interposed would require a United States court to declare invalid the official act of a foreign sovereign performed within its own territory.[82] The Court contrasted those situations with the instant case, concluding that neither the claim nor any asserted defense required a United States court to rule on the validity of Nigeria's contract with the defendant.[83]

The Court then turned to the arguments that Kirkpatrick advanced in

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criticism of *Hunt*'s broad holding. *Curtiss-Wright*, 694 F.2d at 304 n.5.

78. Justice Scalia delivered the opinion for a unanimous Court. W.S. Kirkpatrick, Inc. v. Environmental Tectonics, 110 S. Ct. 701 (1990).

79. *Id.* at 704.

80. *Id.* (citing Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)); *see supra* notes 32-50 and accompanying text.

81. *Kirkpatrick*, 110 S. Ct. at 705.

82. *Id.* The Court in Underhill v. Hernandez, 168 U.S. 250 (1897), found that to hold defendant liable for his alleged tortious acts would have required the Court to deny legal effect to the acts of an official representing a government that the United States later recognized. In Oetjen v. Central Leather Co., 246 U.S. 297 (1918), and Ricaud v. American Metal Co., 246 U.S. 304 (1918), the Court held that to deny title to the party who claimed the disputed property through purchase from Mexico would have required the Court to invalidate Mexico's seizure of the property, which occurred within Mexican territory. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the Court stated that upholding the defendant's claim would have required invalidation of Cuba's expropriation of goods located in Cuba.

83. *Kirkpatrick*, 110 S. Ct. at 705.

favor of applying the act of state doctrine. To establish its case, plaintiff had to prove that Kirkpatrick made, and that Nigerian officials received, payments in violation of United States law.[84] Kirkpatrick contended that the act of state doctrine should apply because these payments violated Nigerian law and could raise questions about the validity of the Nigerian contract.[85] Kirkpatrick first argued that the doctrine barred any factual findings that would cast doubt upon the validity of a foreign sovereign's acts,[86] an argument based on Justice Holmes' opinion for the Court in *American Banana Co. v. United Fruit Co.*[87]

The Court disagreed, finding that the act of state doctrine is not a doctrine of abstention but a rule of decision in which the acts of foreign sovereigns performed within their own borders are deemed valid.[88] The Court declared that the doctrine is triggered only when the outcome of a case turns on the effect of a foreign sovereign's official acts.[89] In the instant case, the challenged acts were those of Kirkpatrick—not the acts of Nigeria. Regardless of what the Court's finding may suggest about the validity of the Nigerian contract, its legality was not an issue that the Court needed to decide, and application of the act of state doctrine was therefore not required.[90] The Court distinguished *American Banana*, noting that the issue in that case concerned the extent to which a court should give extraterritorial effect to United States antitrust laws—it was not really an act of state case. Even if *American Banana* were an act of state case, reliance on its holding or dicta formed a poor basis for defendant's argument because subsequent cases substantially overruled *American Banana*.[91]

Still urging the Court to apply the act of state doctrine, Kirkpatrick argued alternatively that the instant case implicated the policies underlying the doctrine because of the potential for embarrassment to both Nigeria and United States foreign policy,[92] an argument the United States

84. *Id.*

85. *Id.*

86. *Id.*

87. 213 U.S. 347 (1909) ("[A] seizure by a state is not a thing that can be complained of elsewhere in the courts.").

88. *Kirkpatrick*, 110 S. Ct. at 705. ("The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.").

89. *Id.*

90. *Id.*

91. *Id.* at 705-06; *see supra* note 39 and accompanying text.

92. *Id.* at 706.

District Court for the District of New Jersey found persuasive.[93] The United States, as amicus curiae, agreed with this basic approach, but not with the result favored by Kirkpatrick, arguing that a flexible formula for resolving act of state cases was preferable to any rigid rule.[94] The United States desired resolution of the case on the narrow ground that the letter from the Legal Advisor to the United States Department of State,[95] advising against the application of the act of state doctrine, was a sufficient reason not to apply the doctrine.[96]

The Court rejected this analysis. It noted that under the *Sabbatino* balancing test, the policies underlying the act of state doctrine might require that the Court not apply the doctrine even in cases in which the validity of a foreign sovereign's act within its own territory is at issue.[97] The Court refused, however, to expand the doctrine to include the opposite situation, observing that "those underlying policies are not a doctrine unto themselves, justifying expansion of the act of state doctrine . . . into new and uncharted fields."[98] Concluding that United States courts possess the power to hear cases properly presented, the Court ruled that the act of state doctrine does not provide an exception for cases that might embarrass a foreign government; the doctrine provides only a rule of decision that the acts of a foreign sovereign taken within its own jurisdiction are valid.[99] Because Environmental Tectonics did not challenge the validity of the Nigerian Government's acts, the act of state doctrine is not applicable in this case.[100] The Supreme Court affirmed the decision of the United States Court of Appeals for the Third Circuit and remanded the case for trial.[101]

IV. COMMENT

The Supreme Court's decision in *Kirkpatrick* both clears and muddies the act of state doctrine waters. On a positive note, the Court, while continuing the tradition of not explicitly granting exceptions to the act of state doctrine,[102] creates a de facto corruption exception. The exception

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93. *See supra* notes 15-17.

94. *Kirkpatrick*, 110 S. Ct. at 706.

95. *See* Letter of Abraham D. Sofaer, *supra* note 14.

96. *Kirkpatrick*, 110 S. Ct. at 706. This argument is similar to the one made for the *Bernstein* exception in *Citibank*. *See supra* notes 54-56 and accompanying text.

97. *Kirkpatrick*, 110 S. Ct. at 706.

98. *Id.* at 706-07.

99. *Id.*

100. *Id.* at 707.

101. *Id.*

102. *See supra* notes 54-60 and accompanying text (discussing *Citibank* and

is presumably limited by the *Sabbatino* "balancing of considerations" test—United States courts will still apply the doctrine in cases in which the validity of the foreign sovereign's acts is challenged and the political branches' conduct of foreign policy is threatened.[103] The Court's willingness to examine the motivation behind a foreign sovereign's acts, however, provides a wide opening for attacking the corrupt business practices of United States corporations abroad.

By directing courts to focus on the narrow question of whether the validity of a sovereign act is at issue, the Court clears some of the confusion that has arisen over the scope of the doctrine. It is no longer sufficient for courts to cite the mere possibility of embarrassment to foreign governments as a rationale for applying this doctrine when those governments' acts are not at issue. This opinion overrules *Hunt* and *Clayco* and their progeny.[104] In reminding courts that they possess "the power, and ordinarily the obligation, to decide cases and controversies properly presented to them,"[105] the Court further directs United States courts to hear cases, and not to rely on doctrines such as act of state to refrain from deciding difficult international cases.[106]

The Supreme Court's decision also advances several United States policy goals. By precluding inquiry into the validity of a foreign state's acts but not into the motivation behind its acts, the Court limits the act of state doctrine to its proper scope which will better serve the ends of United States justice; the United States is concerned with the illegal activities of United States corporations abroad, not the illegal activities of foreign governments. The approach the Supreme Court espoused therefore both serves the policy goals behind laws such as the Foreign Corrupt Practices Act and the antitrust regulations at no expense to United States foreign relations and moreover assists those seeking private enforcement of the United States laws.[107]

Dunhill).

103. *Kirkpatrick*, 110 S. Ct. at 706. The Court left open the possibility that a court may not apply the act of state doctrine even if the validity of a foreign sovereign's act is challenged because of the policies underlying the doctrine. *Id.*

104. *See supra* notes 66-72 and accompanying text for a discussion of these cases.

105. *Kirkpatrick*, 110 S. Ct. at 707.

106. Critics of the act of state doctrine charge that it provides a convenient excuse for avoiding difficult international transaction cases. *See* Bazyler, *supra* note 36, at 328.

107. Commentators criticize the "strict" interpretation of the act of state doctrine favored by the United States Court of Appeals for the Second Circuit in *Hunt* and by the Ninth Circuit in *Clayco* as discouraging the effective enforcement of United States regulatory policies. *See, e.g., id.* at 347, 357 n. 190, 376-81.

Congress could protect the corruption exception to the act of state doctrine by enacting

What is worrisome about the decision in *Kirkpatrick* is the Court's reliance on cases from the "vested rights" era of the act of state doctrine's jurisprudential development.[108] These cases do provide needed precedent to decide the instant case: the act of state doctrine is implicated only when the validity of the acts of a foreign sovereign is at issue. Since *Sabbatino*, however, the doctrine is thought to be grounded in the constitutional doctrine of separation of powers.[109] To the extent that the Court relies on outmoded vested rights notions of territorial sovereignty, the Court further muddies the already confusing legal basis for the act of state doctrine and provides opportunities for lower courts to do the same. Future courts should therefore read the decision in *Kirkpatrick* narrowly—the act of state doctrine is inapplicable when foreign sovereign acts are not at issue—and view the discussion of the legal foundation of the doctrine as an obiter dictum.

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legislation similar to the Hickenlooper Amendment, 22 U.S.C. § 2370(a)(2) (1982). In passing the Foreign Corrupt Practices Act, Congress has already made clear its desire that United States corporations not engage in corrupt activities abroad. *See generally* H.R. REP. NO. 640, 95th CONG., 1st Sess. (1977); S. REP. NO. 1031, 94th Cong., 2d Sess. (1976). Legislation directing the courts to forego the application of the act of state doctrine in cases in which corporations engage in illegal acts abroad would provide a clear message to United States courts and businesses about the priorities of United States policy. An exception similar to that in the Hicklenlooper Amendment could preclude review when the executive branch determines that adjudication would hinder foreign relations.

108. *See supra* notes 37-39 and accompanying text.

109. *See supra* note 44 and accompanying text.