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Environmental Tectonics v. W.S. Kirkpatrick and the Act of State Doctrine: An Elusive Standard

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ENVIRONMENTAL TECTONICS V. W.S. KIRKPATRICK AND THE ACT OF STATE DOCTRINE: AN ELUSIVE STANDARD

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INTRODUCTION

The judiciary created the act of state doctrine to permit courts to refrain from questioning or making judgments upon the acts of a foreign sovereign.[1] This doctrine concerns the jurisdiction of United States courts over the actions of a foreign state within its own territory.[2] The act of state doctrine is neither required by nor considered a source of international law, rather it plays an important role in United States domestic law.[3] This role, rooted in the separation of powers theory, provides a basis for interaction between the executive, legislative, and judicial branches in the sensitive realm of foreign relations.[4]

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1. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-29 (1964) (defining the purpose of the act of state doctrine as requiring a balance between the judicial and executive branches of the government in making decisions on hearing cases which may have an effect on foreign affairs); Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (defining the act of state doctrine as not allowing the judicial system of one country to sit in judgment of the actions of another government, especially when the action is made within its own territory); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 comment a (1986) [hereinafter RESTATEMENT FOREIGN RELATIONS] (relating the origins of the act of state doctrine as being derived from both *Underhill* and *Sabbatino* and describing the basis of it as a theory of judicial restraint).

2. *See* RESTATEMENT FOREIGN RELATIONS, *supra* note 1, at § 443 comment a (citing *Sabbatino* and stating that the judicial branch should refrain from examining acts of foreign governments within their own territory).

3. *See* Note, *Commercial Activity as Applied to the Foreign Sovereign Immunities Act and the Act of State Doctrine, Braka v. Bancomer, S.A.*, 17 VAND. J. TRANSNAT'L L. 1015, 1021-22 (1984) (giving a broad overview and history of the act of state doctrine).

4. Int'l Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *see* Buckley v. Valeo, 424 U.S. 1, 120 (1975) (discussing the separation of powers theory); *Sabbatino*, 376 U.S. at 421 (noting that the underlying policy of the act of state doctrine is the separation of powers theory); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-2 to 2-4 (1978) (defining the theory of separation of powers as allowing each branch of government to perform its constitutionally stated functions, thus preserving the independence and integrity of each branch).

Various other theories are advanced as justifications for the act of state doctrine. *See* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 327-28 & nn.3-9 (citing several cases and commentaries advancing judicial prudence, deference,

Initially a flexible concept,[5] the act of state doctrine gradually evolved into one of the most criticized, misunderstood, and inconsistently applied doctrines in United States jurisprudence.[6] As a result of such judicial confusion and uncertainty over this elusive standard, courts have applied the act of state doctrine in a wide variety of cases involving foreign sovereign actions.[7] For example, the Supreme Court has traditionally limited the act of state doctrine to cases involving foreign expropriations.[8] In recent years, however, courts have expanded its use to situations other than expropriation cases.[9] The result is inconsistent decisions in factually similar cases;[10] some courts use the act of state doctrine as a complete bar to adjudication,[11] while other courts create numerous exceptions to avoid it.[12]

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restraint, abstention, issue preclusion, conflict of laws, and choice of law); Chow, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, 62 WASH. L. REV. 397, 400 & nn. 8-10 (citing cases and commentaries basing the act of state doctrine on theories of choice of law, judicial deference, separation of powers, and political question).

5. *Sabbatino*, 376 U.S. at 428.

6. *See* Bazyler, *supra* note 4, at 365-69 (demonstrating confusion and misconception about the act of state doctrine); Chow, *supra* note 4, at 398-99 (citing several examples of confusion and criticism of the act of state doctrine); Kirgis, *Editorial Comments*, 82 AM. J. INT'L L. 58, 58 (1988) (arguing that even twenty years after the *Sabbatino* decision, United States courts still misunderstand the effect of applying the act of state doctrine).

7. *See* Bazyler, *supra* note 4, at 328-29 (discussing expansion of the application of the act of state doctrine); *see also* Knight, *International Debt and the Act of State Doctrine: Judicial Abstention Reconsidered*, 13 N.C.J. INT'L L. & COM. REG. 35, 37 (1988) (suggesting a new standard for review of international debt repayment disputes that are not traditional act of state expropriation cases).

8. *See* Banco Nacioan de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (recognizing the act of state doctrine in a Cuban expropriation case).

9. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (applying the act of state doctrine for the first time in a suit for damages resulting from a foreign sovereign's assault and detention); Bazyler, *supra* note 4, at 344-73 (defining nonexpropriation cases and the use of the act of state doctrine); Knight, *supra* note 7, at 37-38 (outlining the implementation of the act of state doctrine in nonexpropriation cases); Comment, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U.L. REV. 203, 211-13 (1984) [hereinafter Comment, *Foreign Corrupt Practices*] (discussing the use of the act of state doctrine in nonexpropriation cases).

10. *See infra* notes 83-121 and accompanying text (comparing circuit court treatment and inconsistent application of the act of state doctrine).

11. *See, e.g.*, Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (barring adjudication through the use of the act of state doctrine in a foreign bribery case); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (using the act of state doctrine as a bar to adjudication in an antitrust case); *see also* Bazyler, *supra* note 4, at 328 (noting that the courts invoke the act of state doctrine to avoid deciding complicated international transaction cases).

12. *See, e.g.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (creating the commercial activity exception to the act of state doctrine); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (discussing the

The varied application of the act of state doctrine reveals the need for the creation of a uniform standard. The United States Court of Appeals for the Third Circuit in *Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co.*[13] attempts to create such a standard. In *Environmental Tectonics*, the court declined to invoke the act of state doctrine because no proof existed that adjudication of the issue would involve more than a simple inquiry into the motivations behind a foreign sovereign's action.[14] The court held that judges should not invoke the act of state doctrine based on mere speculation of judicial interference in foreign affairs,[15] particularly in private suits concerning violations of federal regulatory laws.[16]

This Casenote analyzes the decision of the Third Circuit in *Environmental Tectonics* and suggests that it creates a proper and workable standard. Part I describes the history and origin of the act of state doctrine, with an emphasis on Supreme Court decisions, judicial exceptions to the doctrine, and recent lower federal courts' treatment. Part II discusses *Environmental Tectonics* with an in-depth analysis of the facts, procedural history, and the Third Circuit decision. Part III examines the author's analysis of the decision and explores the implications of *Environmental Tectonics* in future act of state doctrine cases. Finally, the note concludes that the Third Circuit in *Environmental Tectonics*, has set forth a clear standard which should allow courts to make a reasoned and fair decision upon whether to invoke the act of state doctrine in other than expropriation cases.

I. THE ACT OF STATE DOCTRINE: HISTORY AND ORIGIN

A. SUPREME COURT TREATMENT

During the past century, the United States Supreme Court and other federal courts, have attempted to articulate a clear and precise definition for the act of state doctrine. The courts, however, have not been

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Cuban government expropriation of United States branch banks); Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (creating the Bernstein exception to the act of state doctrine); *see also* Knight, *supra* note 7, at 37 (arguing that some courts employ the act of state doctrine as a bar to review and others do not).

13. 847 F.2d 1052 (3d Cir. 1988).

14. *Id.* at 1061.

15. *Id.* The court found that there must be more than mere speculation of judicial interference; there must be demonstrable proof. *Id.*

16. *Id.*

successful.[17] Examination of the Supreme Court's treatment of the act of state doctrine supports this conclusion.

The Supreme Court first articulated the act of state doctrine in *Underhill v. Hernandez*.[18] In *Underhill*,[19] Chief Justice Fuller espoused what is considered the "classic American statement"[20] regarding the act of state doctrine:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[21]

Courts widely accept this broad statement and quote it in nearly every case following *Underhill* as the underlying principle of the act of state doctrine.[22]

In the years following *Underhill* the act of state doctrine developed slowly because the courts tended to consider it judicially restrictive.[23] The Supreme Court only employed the act of state doctrine in a limited

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17. Bazyler, *supra* note 4, at 330-62.

18. Underhill v. Hernandez, 168 U.S. 250, 252 (1897). The Court, however, stated that the doctrine has roots dating back to the late seventeenth and early eighteenth centuries. *Id.*; *see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (citing a seventeenth century English as an original source of the act of state doctrine along with several late eighteenth and early nineteenth century United States cases) (citing *Blad v. Bamfield*, 36 Eng. Rep. 992 (Ch. 1674); *see also*, Bazyler, *supra* note 4, at 330-32 (discussing the history and origins of the act of state doctrine); Chow, *supra* note 4, at 404 & nn.35-36 (discussing original sources of the act of state doctrine); Knight, *supra* note 7, at 39 (discussing early act of state doctrine cases).

19. *Underhill*, 168 U.S. at 252. Underhill, a United States citizen, sought damages for assault and detention when revolutionary forces took over the Venezuelan government in the 1892 revolution. *Id.* at 251. Underhill claimed that General Hernandez, the revolution's military commander, did not permit him to leave Venezuela, and upon his return to the United States Underhill initiated suit against Hernandez. *Id.* The Supreme Court held that Hernandez acted within the scope of his sovereign capacity and barred adjudication of the claim. *Id.* at 254.

20. *See Sabbatino*, 376 U.S. at 416 (creating the "classic American statement" of the act of state doctrine).

21. *Underhill*, 168 U.S. at 252.

22. *See infra* notes 18-113 and accompanying text (discussing various cases involving the act of state doctrine); Bazyler, *supra* note 4, at 332 (noting that the "Classic American Statement" is repeated in many act of state doctrine cases); Chow, *supra* note 4, at 405 (quoting the "Classic American Statement" of the act of state doctrine).

23. RESTATEMENT FOREIGN RELATIONS, *supra* note 1, at § 443 comment a. Courts apply the act of state doctrine based on several different theories. Note, *Republic of Philippines v. Marcos: The Ninth Circuit Allows a Former Ruler to Invoke the Act of State Doctrine Against a Resisting Sovereign*, 38 AM. U.L. REV. 225, 231 (1988) [hereinafter Note, *Republic of Philippines v. Marcos*]. These theories include the conflict of laws theory, the theory of judicial deference to the executive branch, and the theory of international comity. *Id.* at 231-34 & nn.30-51.

number of cases.[24] For example, in *American Banana Co. v. United Fruit Co.*[25] the Court chose not to apply United States antitrust laws extraterritorially.[26] The Court held that because the antitrust action in question was lawful in Costa Rica, the United States courts should refrain from deciding the case out of concern of interfering with the executive branch's foreign relations powers.[27]

This desire to avoid judicial intrusion was particularly acute for acts committed within a foreign state's own territory,[28] as in *Oetjen v. Central Leather Co.*[29] and *Ricaud v. American Metal Co.*[30] In both cases the Court again refrained from making decisions on act of state grounds. Instead, the Court reaffirmed *Underhill*, failed to articulate a clear definition, and declined to demonstrate the scope of the act of state doctrine.[31] The Supreme Court employed the same technical expressions to articulate various reasons for abstention, causing confusion and uncertainty over the definition of the doctrine.[32]

Following the decisions in *Oetjen* and *Ricaud* in 1918, the Supreme Court did not actively utilize the act of state doctrine for nearly fifty years.[33] The Court did not revive the act of state doctrine until 1964, in

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24. *See, e.g.*, Ricaud v. American Metal Co., 246 U.S. 304 (1918) (invoking the act of state doctrine in conjunction with the decision in *Oetjen v. Central Leather Co.*); Oetjen v. Central Leather Co., 246 U.S. 297 (1918) (barring adjudication because of the act of state doctrine, the theories of international comity, and choice of law); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (invoking the act of state doctrine as a bar to adjudication based upon a theory that the law of a country determines whether an act within that country is lawful).

25. American Banana Co. v. United States, 213 U.S. 347 (1909).

26. *Id.* at 359.

27. *Id.*

28. *Oetjen*, 246 U.S. at 303; *Ricaud*, 246 U.S. at 309.

29. *Oetjen*, 246 U.S. at 297. This case applies the act of state doctrine in a dispute over the ownership of seized goods in possession of the revolutionary Mexican government. *Id.* at 303.

30. *Ricaud*, 246 U.S. at 304. The court determined that the courts of one country will not judge another country's actions committed within its own territory. *Id.* at 309.

31. *See id.* at 309 (demonstrating that the Court employed the act of state doctrine in order to avoid an international dispute between the United States and the new Mexican government); *Oetjen*, 246 U.S. at 303 (revealing a similar purpose).

32. *See* Bazyler, *supra* note 4, at 334 (stating that the Supreme Court has used the act of state doctrine to abstain from hearing cases to provide personal immunity to foreign government officials, preserve territorial choice of law, and avoid international conflict); *see also*, Note, *Republic of Philippines v. Marcos*, *supra* note 23, at 231-34 (outlining various theories and rationales underlying the act of state doctrine).

33. *See* Bazyler, *supra* note 4, at 334 & n.48 (discussing that during the period from 1918 to 1964, the doctrine of foreign sovereign immunity emerged as the doctrine of choice to avoid deciding international transaction cases). The Foreign Sovereign Immunities Act (FSIA) differs from the act of state doctrine because its protection is based on the defendant's status as a foreign sovereign, while the act of state doctrine applies based on the governmental character of the action even when no foreign sovereign is a party to the action. The Foreign Sovereign Immunities Act, 28 U.S.C. §§

Banco Nacional de Cuba v. Sabbatino.[34] *Sabbatino* provides the principal contemporary formulation of the act of state doctrine.[35]

In *Sabbatino*, a dispute arose when the Cuban government expropriated the assets and interests of an American corporation.[36] The issue before the Court was whether the act of state doctrine applies when a foreign sovereign state expropriates American assets or interests, and such action does not serve a public purpose, discriminates against United States citizens who own property in Cuba, fails to provide just compensation, and is a blatant violation of international law.[37] The Supreme Court rejected the lower court's decision to ignore the act of state doctrine whenever a foreign state's act violates international law,[38] finding that no need existed for such an "inflexible and all-encompassing rule"[39] because expropriation situations frequently involve violations of international law. Rather, the Court intimated that courts could make independent decisions by balancing all the factors involved.[40]

1602-1611 (1982 & West Supp. 1989); *see also* RESTATEMENT FOREIGN RELATIONS, *supra* note 1, at § 443 reporter's note 11 (noting that the Supreme Court did not decide any important act of state cases between 1918 and 1964); *see, e.g.*, United States v. Belmont, 301 U.S. 324, 327-28 (1937) (precluding a decision on Soviet expropriation on the basis of the *Underhill* decision and the belief that United States courts should refrain from making decions in cases that may have an impact on foreign relations); Shapleigh v. Mier, 299 U.S. 468, 471 (1937) (precluding a decision on Mexican expropriation on the basis of the *Underhill* decision and also relying on the *Oetjen* and *Ricaud* decisions).

34. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

35. RESTATEMENT FOREIGN RELATIONS, *supra* note 1, at § 443 comment b (1986).

36. *Sabbatino*, 376 U.S. at 401-06. The Cuban government expropriated the assets and interests of an American-owned Cuban sugar company (CAV) in response to a congressional enactment that reduced the Cuban sugar quota. *Id.* at 401. The United States commodity-broker, Farr Witlock, had a sales agreement to purchase sugar from CAV where Farr would pay for the sugar upon arrival. *Id.* Upon delivery, Farr took possession of the sugar but refused to pay the Cuban National Bank, claiming it had an agreement with CAV. *Id.* at 405-06. Banco Nacional de Cuba received an order from the New York Supreme Court appointing Sabbatino as a temporary receiver and transferring all funds to him. *Id.* at 406. Banco Nacional then filed suit in Federal District Court for the Southern District of New York to recover the money. *Id.*

37. *Id.* at 406-08.

38. *Id.* at 427-28.

39. *Id.* at 428. Chief Justice Harlan stated:

> [T]hat the Judicial Branch will not examine the validity of a taking of property within is own territory by a foreign sovereign government, extant and recognized by this country at the time of the suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Id.

40. *Id.* In balancing the interests of the parties, the executive and the judicial branches, the Court discussed a number of factors to determine whether judicial review of an act of a foreign sovereign is proper. *Id.* at 423-24; *see also infra* notes 45-46 and

To arrive at this balancing test, the Court first discussed the "constitutional underpinnings" of the act of state doctrine,[41] which essentially comprise the same elements as the separation of powers theory.[42] The Court stated that judicial decisions regarding foreign sovereign acts should not interfere with executive branch foreign affairs powers.[43] The Court, however, decided against a theory of strict judicial abstention, finding it unnecessary to invoke the act of state doctrine simply to protect against judicial interference in executive affairs.[44] Instead, the Court articulated a case-by-case balancing test that weighs the degree of codification in the area of international law[45] against the possible repercussions on United States foreign relations with the foreign sovereign involved in the dispute.[46] Applying this test to the facts in *Sabbatino*, the Supreme Court concluded that the act of state doctrine served as a bar to adjudication.[47]

Although the *Sabbatino* holding appears narrow and limited to expropriations cases, many lower courts have interpreted the language expansively.[48] In the years following the *Sabbatino* decision, the Supreme

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accompanying text (outlining factors involved in the balancing test).

41. *Sabbatino*, 376 U.S. at 423-25. The Court emphasized that in a separation of powers system, the relationship between the executive, legislative, and judicial branches practically requires the existence of the act of state doctrine. *Id.*

42. *Id.*

43. *Id.; see* Baker v. Carr, 369 U.S. 186, 211-13 (1962) (recognizing that courts should refrain from interfering in questions of foreign relations); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (stating that the United States Constitution commits foreign policy issues to the executive and legislative branches); Int'l Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981) (stating that in the area of foreign affairs the United States government should present a unified front); *see also* Note, *Republic of Phillipines v. Marcos*, *supra*, note 23, at 225 n.2 (advancing the theory that United States courts should not interfere with executive branch unity in areas of foreign policy and citing with approval Moore, *Federalism and Foreign Nations*, 1965 DUKE L.J. 248, 273-74 for the proposition that the power of a single voice in executive branch foreign affairs is important).

The doctrine of separation of powers is inherent throughout the Constitution, which specifies the role of each branch of the government. U.S. CONST. arts. I-III. The judicial branch may hear cases that arise under the United States Constitution, United States laws and treaties, and controversies that arise between states, citizens, and foreign nations. U.S. CONST. art. III, § 2.

44. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (stating that the need for political branch exclusivity may vary with the degree of an issue's sensitivity).

45. *See id.* (holding that application of a sound principle of international law is more reasonable and more firmly within the scope of judicial duties).

46. *See id.* (deciding on less important foreign relation issues may be within the scope of the judiciary's duties). Courts have narrowed the focus of the *Sabbatino* test, concentrating mainly on the act's legality, the foreign sovereign's political status, and the implications that adjudication would have upon United States foreign affairs. *Id.*

47. *Id.*

48. *See* Note, *Republic of Philippines v. Marcos*, *supra* note 23, at 233-34 & n.48

Court has rendered only two important act of state decisions.[49] In *First National City Bank v. Banco Nacional de Cuba*,[50] a case dealing with the Cuban expropriation of the assets and the interests of Citibank's Cuban branch office, the Court held that the act of state doctrine did not preclude a decision on the merits.[51] Similarly, in *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[52] the Supreme Court held that the act of state doctrine did not protect the Cuban expropriation of five cigar manufacturing companies because the sovereign act was purely commercial in nature.[53] Thus, instead of strictly following the *Sabbatino* standard, the Court began to create exceptions to the act of state doctrine,[54] establishing a precedent for wider and further reaching

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(citing Note, *Alien Tort Claims Act*, 27 VA. J. INT'L L. 433, 438-39 (1987) for the proposition that the application of the act of state doctrine is unclear in certain factual circumstances and also citing Note, *Rehabilitation and Exoneration of the Act of State Doctrine*, 12 N.Y.U.J. INT'L L. & POL. 599, 611 (1980) for the proposition that the *Sabbatino* "three factor" balancing test is of limited practical use). Several lower courts have attempted to employ the *Sabbatino* test in other than expropriation cases. *See, e.g.*, Republic of Phillipines v. Marcos, 818 F.2d 1473 (9th Cir.), *reh'g granted*, 832 F.2d 1110 (9th Cir. 1987) (involving the refusal to freeze assets of the former Phillipine President at the request of the Phillipine government); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (relating to bribery of a foreign sovereign official); Int'l Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1360 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (dealing with an extraterritorial antitrust case); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1296 (3d Cir. 1979) (involving both an antitrust and conspiracy action); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 610-11 (9th Cir. 1976), *cert. denied*, 472 U.S. 1032 (1985) (discussing conspiracy in the context of the act of state doctrine).

49. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

50. *First Nat'l City Bank*, 406 U.S. at 759.

51. *Id.* at 768-70; *see also infra* notes 65-70 and accompanying text (discussing the counterclaim exception to the act of state doctrine).

52. *Dunhill*, 425 U.S. at 682.

53. *Id.* at 695; *see also infra* notes 71-77 and accompanying text (discussing the commercial activity exception to the act of state doctrine).

54. *See supra* note 48 and accompanying text (discussing cases in which lower federal courts have not employed the *Sabbatino* guidelines). The judiciary was not the only branch disenchanted with the *Sabbatino* standard. R. FALK, THE AFTERMATH OF *Sabbatino* 35-52 (1965) (discussing congressional dislike of the *Sabbatino* decision). Congress was unhappy with the *Sabbatino* decision because Fidel Castro and the revolutionary government took advantage of American citizens. Note, *Republic of Philippines v. Marcos*, *supra* note 23, at 234 & n.51 (asserting congressional disappointment with the *Sabbatino* decision and citing with approval R. FALK, *supra* for the same proposition).

Thus, in late 1964, Congress enacted the Hickenlooper Amendment. Hickenlooper Amendment to the Foreign Assistance Act. Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (1982)). Congress designed the amendment to require a court to apply standards and principles of international law when deciding on the merits of foreign sovereign expropriation cases, such as *Sabbatino*, unless, for foreign policy reasons, the executive branch intervenes. Knight, *supra*

interpretation.[55]

B. Exceptions to the Act of State Doctrine

Even prior to the Supreme Court's departure from its holding in *Sabbatino*, the lower federal courts and Congress started to create exceptions to the act of state doctrine. This section will highlight the exceptions that the Third Circuit considered in *Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co.*[56]

1. The Bernstein Exception

In *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*,[57] the Court of Appeals for the Second Circuit created

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note 7, at 44; Note, *Foreign Corrupt Practices*, *supra* note 9, at 210 & n.48; *see* 110 CONG. REC. 19,555, 19,557-60 (1964) (remarks of Sen. Hickenlooper) (commenting on the Congressional desire to overturn the *Sabbatino* decision through an amendment to the Foreign Assistance Act); *see also* S. REP. NO. 1188, 88th Cong., 2d Sess. 24, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 3829, 3852 (discussing the drafter's intention of the amendment to reverse, in part, the presumption of interference in executive branch foreign relations created under *Sabbatino* in expropriation cases). The amendment seems to give deference to the executive branch with respect to judicially created law and further complicates the separation of powers problems discussed in *Sabbatino*; Knight, *supra* note 7, at 44 (evaluating and providing an excellent analysis of the Hickenlooper Amendment). The admendment allows the executive branch to intervene in any case before a court that it feels the court should not decide on act of state grounds. *Id.*

The Hickenlooper Amendment to the Foreign Assistance Act, 22 U.S.C. § 2370(e)(2) (1982) states:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of state in violation of the principles of international law, including principles of compensation and other standards set out in this subsection: *Provided*, this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law . . . or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Id.

55. *See* J. SWEENEY, C. OLIVER & N. LEECH, THE INTERNATIONAL LEGAL SYSTEM 402 (3d ed. 1988) [hereinafter SWEENEY] (stating that various Supreme Court Justices in writing minority opinions have made efforts to limit the scope of act of state); Bazyler, *supra* note 4, at 338-44 (reviewing conflicting theories regarding the exceptions to the act of state doctrine); Chow, *supra* note 4, at 421 (discussing various exceptions to the act of state doctrine); Knight, *supra* note 7, at 44-52 (discussing the exceptions to the act of state doctrine).

56. 847 F.2d 1052 (3d Cir. 1988).

57. 210 F.2d 375 (2d Cir. 1954). The original case involved a multitude of claims

the Bernstein exception.[58] The court allowed the executive branch to submit opinions to the judiciary concerning its foreign affairs policy.[59] Under the Bernstein exception, United States courts should only apply the act of state doctrine when the State Department has announced that adjudication of a foreign sovereign's act will in any way interfere with executive branch foreign affairs.[60]

The Supreme Court has never expressly acceded to the Bernstein exception. In *Sabbatino*, the Court explicitly stated that the act of state doctrine should not exclusively depend on either the judicial or executive branch.[61] The Court in *First National City Bank* declined to rely on a Bernstein letter from the State Department and allowed adjudication on the merits of a Cuban expropriation.[62] Similarly, in *Dunhill*, when the State Department again offered its opinion in a Bernstein letter, the Court instead recognized the commercial activity exception as binding.[63] Thus, while refusing to expressly endorse the Bernstein exception, the Court has attempted to determine when to employ the act of state doctrine with the assistance of the State Department's interpretation of the executive branch opinion.[64]

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that Arnold Bernstein, a German Jew, brought against the Nazi government of Germany for property takings during World War II. Berstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71, 72 (2d Cir. 1949). On appeal, the Second Circuit directed a decision upon the merits of the case after receiving a letter from the State Department stating that United States courts should decide upon cases questioning the validity of acts of the Nazi government of Germany. *Bernstein*, 210 F.2d at 376.

58. *See* RESTATEMENT FOREIGN RELATIONS, *supra* note 1, at § 443 reporters note 8 (relating the history of the Bernstein exception).

59. *Bernstein*, 210 F.2d at 380.

60. *See id.* (quoting the Bernstein letter that specifically expressed the executive branch's opinion on the need to adjudicate cases involving Nazi confiscations).

61. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 420, 436 (1964) (stating that the Court would not rule on the validity of *Bernstein*). *See* RESTATEMENT FOREIGN RELATIONS, *supra* note 1, at § 443 note 8 (discussing Supreme Court treatment of the Bernstein exception).

62. *First Nat'l City Bank*, 406 U.S. at 776-77 (1964). Three Justices preferred the Bernstein exception, while six did not. *Id.* Chief Justice Burger and Justices White and Rehnquist agreed that courts should defer to executive approval whenever questioning the act of state doctrine. *Id.* Justices Brennan, Stewart, Marshall, and Blackmun, refused to accept the exception. *Id.* In his dissent, Justice Brennan noted that the executive branch is often without sufficient facts and information to even make an educated guess on the adjudication's impact on foreign affairs. *Id.* at 790-93.

63. *See* Alfred Dunhill of London Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976) (rejecting the Bernstein exception and promulgating the commercial activity exception to the act of state doctrine).

64. *See* RESTATEMENT FOREIGN RELATIONS, *supra* note 1, at § 443 reporter's note 8 (discussing the Bernstein exception to the act of state doctrine); Bazyler, *supra* note 4, at 368-70 (stating that the Supreme Court has never adopted the Bernstein exception and arguing that the State Department is reluctant to issue such letters because of the Court's failure to rely upon them). The State Department receives only two or

2. The Counterclaim Exception

In *Sabbatino*, the Supreme Court created the possibility of a counterclaim exception to the act of state doctrine.[65] It was not until *First National City Bank v. Banco Nacional De Cuba*, however, that the Court officially recognized the exception.[66] The Court held that if a foreign state filed a counterclaim in response to a suit brought in a United States court, the foreign state had waived its right to use the act of state as a defense to the original claim.[67]

The counterclaim exception originated as a result of the Court's fractured opinion.[68] Because the Court could not reach a plurality, its desire to avoid the act of state bar to adjudication and decide the merits of the case resulted in a new exception.[69] The Supreme Court's multifaceted opinion and its hesitance to expressly articulate the exception in its *First National City Bank* opinion, however, has caused the lower courts to promulgate conflicting interpretations and applications.[70]

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three requests for such letters annually and prior to 1986, has issued only seven such letters. *Id.* at 370 n.274.

65. *Sabbatino*, 376 U.S. at 439. Justice Harlan stated in dictum that "[s]ince the act of state doctrine proscribes a challenge to the validity of the Cuban expropriation decree in this case, any counterclaim based on asserted invalidity must fail." *Id.*

66. *First Nat'l City Bank*, 406 U.S. at 768-70.

67. *Id.* After the Cuban Revolution, the Castro government nationalized all the banks in Cuba, including Citibank branches. *Id.* Citibank, having accepted collateral from the predecessor to Banco Nacional to guarantee a loan to the previous government, sold the collateral and kept the excess money as payment toward the loan. *Id.* at 760. Banco Nacional sued Citibank to recover the excess money; Citibank counterclaimed and requested that the Court consider the excess money as damages for the expropriation of its branch banks in Cuba. *Id.* at 760-61. The Court held that Banco Nacional could not use the act of state doctrine as a defense to Citibank's counterclaim because they had waived immunity by bringing the original suit. *Id.* at 759-61, 766-73.

68. *Id.* at 764-70. Justice Rehnquist wrote the opinion, with Justices Douglas and Powell each writing a separate concurrence. *Id.* Justice Rehnquist based his opinion on the flexibility of the act of state doctrine derived from *Sabbatino* and found that the State Department's Bernstein letter was persuasive. *Id.* Justice Douglas based his concurring opinion on an analogy to the theory of Foreign Sovereign Immunity Act's counterclaim exemption. *Id.* at 772-73. Justice Powell concurred on the theory that unless actual proof of interference with executive branch foreign policy existed, the courts should decide upon such cases. *Id.* at 775; *see* Bazyler, *supra* note 4, at 338-41 (analyzing the *First Nat'l City Bank* decision); Knight, *supra* note 7, at 45-46 (discussing the *First Nat'l City Bank* decision and the individual opinions of the Supreme Court Justices).

69. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 759-75 (1964) (confining the courts to adjudication of the case before them and leaving to the executive branch the conduct of foreign relations).

70. *See* Bazyler, *supra* note 4, at 341 (arguing that the *First Nat'l City Bank* decision fostered confusion in the federal courts); Knight, *supra* note 7, at 47 n.56 (pointing out that in 1981, six Second Circuit cases involving similar Cuban expropriations and the counterclaim exception resulted in erratic and dissimilar holdings).

3. The Commercial Activity Exception

The Supreme Court developed the commercial activity exception to the act of state doctrine in *Alfred Dunhill of London, Inc. v. Republic of Cuba*.[71] The Court held that if a foreign sovereign state engages in any activity that is completely commercial in nature,[72] the act of state doctrine will not apply so that the court can decide the case on the merits.[73] The Court derived this exception from the theory of the commercial exception for foreign sovereign immunity.[74] The commercial activity exception narrows the scope of the doctrine and creates further uncertainty and misunderstanding in its application.[75] The Supreme Court only exacerbated the confusion by leaving the interpretation of a "pure commercial activity" to the lower courts.[76] Thus, although the courts widely use the exception, it does not rest on a completely solid foundation.[77]

4. Analysis of The Exceptions

These exceptions illustrate the difficulties that the courts have experienced in applying and interpreting the act of state doctrine because no

71. 425 U.S. 682 (1976). The Cuban government expropriated the assets and interests of five cigar companies and appointed "interventors" to run the companies. *Id.* at 685. The original owners of the companies (Cubans now in the United States) brought suit against importers of the cigars, including the Alfred Dunhill of London Corporation. *Id.* Dunhill then brought suit against the interventors for reimbursement of the amount that the company owed to the original owners but mistakenly paid to the interventors. *Id.* The Court held that the interventors failed to prove that their actions fell within the act of state doctrine. *Id.* at 694.

72. *Id.* at 696. When a nation enters the marketplace seeking customers, it divests itself of its sovereign qualities. *Id.* (citing *Ohio v. Helvering*, 292 U.S. 360, 369 (1934)).

73. *Id.* The Supreme Court decided to ignore the Bernstein exception, another possible device for avoiding the act of state bar to adjudication, and instead chose to create a new exception to the doctrine. *Id.* at 698. In fact, in its Bernstein letter, the State Department urged the Court to overrule *Sabbatino* and abolish the act of state doctrine altogether. *Id.* at 685-86.

74. *See* Knight, *supra* note 7, at 47-50 (equating the commercial activity exception to the act of state doctrine with the commercial activity exemption under the Foreign Sovereign Immunities Act and discussing the improper application of the exception with respect to the act of state doctrine cases).

75. *See* Bazyler, *supra* note 4, at 370 nn.280-82 (discussing the general disagreement, even within the Supreme Court, over the commercial exception to the act of state doctrine); Chow, *supra* note 4, at 420 n.150 (discussing the effect that conflicting interpretations of the commercial activity exception have had upon decisions in lower federal courts).

76. *See* Bazyler, *supra* note 4, at 370-71 (addressing the differing decisions of the federal circuits).

77. *Id.* at 370.

strictly defined parameters of either it or its exceptions exist.[78] Consequently, enormous confusion and inconsistency prevails in federal circuit court decisions. The Supreme Court's reluctance to hear, and, thus, clarify the limits of the act of state cases since *Dunhill* confirms this conclusion.[79]

C. Recent Federal Circuit Court Treatment

Over the past decade, the federal circuit courts have adjudicated a large number of act of state cases.[80] These courts have relied upon the leading Supreme Court cases and exceptions to the act of state doctrine in promulgating their decisions.[81] Although the Supreme Court traditionally has dealt with the act of state doctrine in the context of foreign expropriations,[82] the federal circuit court decisions have expanded the application of the act of state doctrine.[83] The United States Court of Appeals for the Third and Ninth Circuits have rendered influential act of state doctrine decisions, several of which are highlighted by the Third Circuit in *Environmental Tectonics*. This section will discuss the leading federal circuit court cases relied on in *Environmental Tectonics*, with an emphasis on Third Circuit and Ninth Circuit act of state doctrine case law because decisions in these circuits directly conflict.

1. Ninth Circuit Decisions

Timberlane Lumber Co. v. Bank of America Nat'l Trust and Savings Ass'n[84] is the Ninth Circuit's first interpretation of the modern act

78. *See* Bazyler, *supra* note 4, at 374-75 (concluding that the numerous exceptions to the act of state doctrine foster not only confusion, but disagreement among courts); Knight, *supra* note 7, at 52 (citing the confusion the act of state doctrine and its exceptions create).

79. *See* Chow, *supra* note 4, at 420-21 (noting the lack of Supreme Court decisions on this issue).

80. Sweeney, *supra* note 55, at 402, 408. Over the last thirteen years the Supreme Court has not made any significant act of state decisions and, therefore, has not reviewed the decisions of the lower circuit courts. *Id.*

81. *See supra* notes 56-79 and accompanying text (discussing leading Supreme Court cases and treatment of the exceptions to the act of state doctrine).

82. *See* Bazyler, *supra* note 4, at 344-49 (citing chronologically: *Oetjen*; *Ricaud*; *Sabbatino*; *Citibank*; and *Dunhill* as the leading Supreme Court cases dealing with the act of state doctrine in the context of foreign expropriations).

83. *See supra* note 48 (illustrating how the federal circuit courts may invoke the act of state doctrine in any claim involving events outside the United States).

84. 549 F.2d 597 (9th Cir. 1976), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert denied*, 472 U.S. 1032 (1985). Timberlane accused the Bank of America of conspiring with the Honduran government to destroy Timberlane's business opportunities in Honduras. *Id.* at 1068. The Bank of America attempted to invoke the act of state doctrine as a defense, intending to bar the court from hearing the case. *Id.*

of state doctrine.[85] The court adopted a flexible position in examining the question of whether the actions of the Bank of America in conspiring with the Honduran government to cripple Timberlane's business interests in Honduras, was an act of state and, thus, barred by the doctrine.[86] In formulating its opinion, the court discussed several important factors.[87] The court found that the act of state doctrine did not apply because the transaction was essentially one between private parties that specifically implicated only the Bank of America rather than either the Honduran government or any Honduran officials.[88] The court, then, decided that because its involvement would not interfere with or threaten the executive's foreign relations powers,[89] and because of the importance of extraterritorial enforcement of United States laws, it could adjudicate on the merits.[90]

In 1981, however, the Ninth Circuit, in *International Ass'n of Machinists v. OPEC*[91] set forth a more detailed and rigid standard for the act of state doctrine.[92] In deciding whether petroleum price setting agreements were a violation of United States antitrust laws, the court expanded the scope of the act of state doctrine.[93] The *OPEC* court affirmed the district court's dismissal,[94] but instead of basing its decision on a theory of sovereign immunity, the court applied the act of state doctrine and set forth a number of factors.[95] The Ninth Circuit's adoption of a broad interpretation of the act of state doctrine created a

85. *See* Bazyler, *supra* note 4, at 348-49 (noting that *Timberlane* is the leading Ninth Circuit case in this area).

86. *Timberlane*, 549 F.2d at 601; *see* Bazyler, *supra* note 4, at 349 (defining the Ninth Circuit's *Timberlane* decision as a flexible interpretation of the act of state doctrine).

87. *Id.* at 615. The Ninth Circuit considered the effect on United States foreign commerce activities, the magnitude of the violation, and international comity and fairness. *Id.*

88. *Id.* at 608.

89. *Id.* Although the Bank of America was inextricably involved with the Honduran government, a court could not characterize this involvement as the act of a foreign sovereign. *Id.*

90. *Id.*

91. 649 F.2d 1354 (9th Cir. 1981).

92. *Id.* at 1358-61.

93. *Id.*

94. *Id.* at 1362.

95. *Id.* at 1358-62. These factors include: whether a potential for judicial interference in executive foreign policy decisions exists; whether the act is a violation of international law, or at least of the law of the countries involved; whether public interest in the act exists, and whether the suit involves a sovereign's inherent right to protect its people; *see* Bazyler, *supra* note 4, at 353-55 (analyzing the relevant factors and the effect of the *OPEC* decision); Chow, *supra* note 4, at 422-23 (analyzing and explaining the *OPEC* decision and arguing that on the basis of the *OPEC* decision United States courts could not hear any cases involving possible actions of foreign sovereigns).

standard that would possibly allow a foreign sovereign immunity in almost any situation and preclude United States courts from hearing almost any international dispute.[96]

Therefore, when faced with *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*,[97] the Ninth Circuit refrained from deciding upon the merits of the case even though the facts did not meet the threshold requirements necessary to invoke the act of state doctrine as set forth in *OPEC*.[98] The court held that a government is acting in its sovereign capacity, as well as in the best interest of its people, when it awards an oil concession; thus, the court invoked the act of state doctrine.[99] The court refused to accept the commercial exception because it recognized that previous decisions within the circuit disagreed with the exception.[100] The court, therefore, held that the existence of a commercial activity does not automatically create an exception to the act of state doctrine.[101] The court based this broad interpretation of the act of state doctrine on a theory of judicial restraint.[102]

2. *Third Circuit Case Law*

The leading Third Circuit case is *Mannington Mills, Inc. v. Congoleum Corp.*.[103] Refusing to apply the act of state doctrine in an anti-

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96. *See* Bazyler, *supra* note 4, at 354-55 (analyzing the *OPEC* case with respect to the interaction of the Foreign Sovereign Immunities Act and the act of state doctrine).

97. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). In a dispute between two United States corporations, Clayco Petroleum Corporation (Clayco) alleged that Occidental Petroleum Corporation (Occidental) obtained a valuable oil concession from the Arab Sovereignty, Umm Al Qaywayn, through the bribery of government officials. *Id.* at 405. When the SEC determined that improprieties occurred in an action for violation of the disclosure provisions of the Securities and Exchange Act, Clayco brought suit under both the Sherman and Robinson-Patman Acts. *Id.* at 406. Occidental argued that the act of state doctrine precluded the court from hearing the case. *Id.*; *see also infra* notes 143-48 and accompanying text (analyzing *Environmental Tectonics* in light of the *Clayco* decision).

98. *Clayco*, 712 F.2d at 406-07. The Ninth Circuit did not directly address all the factors set forth in the *OPEC* case. *Id.* Instead the court weighed certain factors, such as a sovereign's inherent right to protect its people and public interest in an action, more heavily than others. *Id.* The court was especially hesitant to decide the case because in doing so, the court felt that it would have to examine the motivation behind the governmental acceptance of a bribe. *Id.*

99. *Id.* at 408.

100. *See id.* (citing *OPEC*, 649 F.2d at 1360 as holding that commercialism does not automatically create an exception to the act of state doctrine).

101. *Id.* at 406-08.

102. *See supra* notes 97-98 and accompanying text (explaining the Ninth Circuit interpretation of the act of state doctrine in *Clayco*).

103. 595 F.2d 1287 (3d Cir. 1979). In a dispute between two United States corpo-

trust case involving the fraudulent acquisition of foreign patents, the court relied upon the flexible approach espoused in the Ninth Circuit's *Timberlane* decision.[104] The court held that a foreign sovereign's issuance of patents was not equivalent to the act of state definition that has evolved since *Sabbatino*.[105] The court, therefore, outlined a series of ten factors to consider when deciding whether to apply the act of state doctrine.[106] Although *Mannington Mills* signifies a return to a more flexible approach,[107] the Third Circuit, by incorporating several distinct factors into its analysis, still failed to elucidate a clear standard to alleviate the confusion and uncertainty associated with the doctrine.

In the more recent Third Circuit case, *Williams v. Curtiss-Wright*,[108] the court again refused to employ the act of state doctrine in an antitrust action that involved the monopolization of the international market for jet engines.[109] In affirming the district court decision, the court rejected an approach that would preclude adjudication in all cases that involve judicial scrutiny of the motivations behind a foreign government's military procurement decisions.[110] The court noted that

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rations that manufactured floor covering, Mannington Mills claimed that Congoleum fraudulently acquired rights to foreign patents in violation of United States antitrust laws. *Id.* at 1290. Congoleum raised an act of state defense, arguing that a court could consider the granting of patents the act of a foreign sovereign. *Id.*

104. *Id.* at 1292-94; *see* Bazyler, *supra* note 4, at 358 (arguing that the Third Circuit followed the Ninth Circuit's *Timberlane* decision).

105. *Id.* at 1293-94.

106. *Id.* at 1297-98. Building on the factors outlined in *Timberlane*, the Third Circuit developed the following factors:

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

Id.

107. Bazyler, *supra* note 4, at 358.

108. 694 F.2d 300 (3d Cir. 1982). Williams alleged that Curtiss-Wright monopolized the international market for certain jet engines. *Id.* at 304. Williams claimed violations of United States antitrust laws and common law tort. *Id.* at 301-02. Curtiss-Wright moved to dismiss on act of state grounds, arguing that adjudication would require an examination of a foreign government's motives in buying jet engines only from Curtiss-Wright. *Id.*

109. *Id.* The Third Circuit denied Curtiss-Wright's motion to dismiss and refused to employ the act of state doctrine. *Id.*

110. *Id.*; *see also Environmental Tectonics*, 847 F.2d at 1060 (analyzing and discussing Judge Weis' Third Circuit decision in *Curtiss-Wright*).

private litigants are not necessarily immune from antitrust and other civil suits simply because some part of an illegal scheme happens to involve the acts of a foreign government.[111] The court stressed that the act of state doctrine should not hinder legitimate regulatory goals without a strong showing that adjudication would impact executive branch involvement in foreign affairs.[112]

The definition of the act of state doctrine formulated in both *Mannington Mills* and *Curtiss-Wright* requires more than mere conjecture that adjudication may have an adverse effect on the executive branch foreign relations power.[113] The Third Circuit has thus attempted to create a standard applicable in other than expropriation cases, such as in *Environmental Tectonics.*

II. *ENVIRONMENTAL TECTONICS CORP. INT'L V. W.S. KIRKPATRICK & CO., INC.*

A. FACTS AND PROCEDURAL HISTORY

In *Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., Inc.*,[114] the cause of action arose when the Minister of Defense for the Federal Republic of Nigeria awarded a defense related contract.[115] Environmental Tectonics Corp. (ETC), a Pennsylvania corporation, brought suit against W.S. Kirkpatrick & Co. (Kirkpatrick),[116] a New Jersey corporation, for violations of the state racketeering laws,[117] the

111. *See Curtiss-Wright*, 694 F.2d at 304 (citing *Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)); *Environmental Tectonics*, 847 F.2d at 1060 (citing *Continental Ore* and discussing the *Curtiss-Wright* decision).

112. *Curtiss-Wright*, 694 F.2d at 304.

113. *Id.*; Mannington Mills v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979).

114. 847 F.2d 1052 (3d Cir. 1988).

115. Brief for Appellant at 3, Environmental Tectonics Corp. Int'l. v. W.S. Kirkpatrick & Co., 847 F.2d 1052 (3d Cir. 1988) (No. 87-5328) [hereinafter Brief for Appellant]. The Minister of Defense awarded the contract for the design and construction of an aeromedical facility at the Kaduna Air Force Base in Nigeria to Kirkpatrick's international subsidiary. *Id.*

116. Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., 659 F. Supp. 1381 (D.N.J. 1987). The ETC brought suits against Kirkpatrick's holding company, its international subsidiary, corporate officers, and corporate subcontractors. Brief for Appellant, *supra* note 115, at 5.

117. New Jersey Anti-Racketeering Act, N.J. STAT. ANN. § 2C:41-2 (West 1982). The statute provides:

> A. It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which he has participated as a principal within the meaning of N.J.S. 2C:2-6 to use or invest, directly and indirectly, any part of the income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in or the activities of which affect trade or

federal Racketeer Influenced and Corrupt Organizations Act (RICO),[118] and the Robinson-Patman Act.[119] ETC claimed that Kirkpatrick and other defendants participated in a scheme to bribe Nigerian government officials, which eventually led to the award of the contract to Kirkpatrick.[120]

ETC and Kirkpatrick[121] both sell and distribute aircraft parts and aero-medical equipment to foreign airforce groups and foreign and domestic airlines.[122] In 1980, Kirkpatrick learned of a potential Nigerian aero-medical supply contract.[123] Harry Carpenter, Kirkpatrick's Chief Executive Officer, subsequently employed Benson Akindele, a Nigerian national, to help acquire the contract.[124] Akindele informed Carpenter that Kirkpatrick may be required to pay up to a twenty percent "com-

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commerce.

Id.

118. Racketeer Influenced and Corrupt Organizations Act, 84 Stat. 941, 18 U.S.C. §§ 1961-68 (1982 & West Supp. 1989). Section 1961 defines the activities that are considered criminal violations of the RICO statute, including arson, bribery and mail, wire, and securities fraud. 18 U.S.C. §§ 1961-62 (1982 & West Supp. 1989).

The statute, section 1962(b) to (d) also provides:

> (b) It shall be unlawful for any person through a pattern of racketeering or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of debt. (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Id.

119. Robinson-Patman Act, 15 U.S.C. § 13(c) (1982). This section makes it unlawful for any person engaged in commerce to pay, grant, receive, or accept payment of commissions or other compensation that is not rendered in connection with the sale or purchase of goods or services. *Id.*

120. Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., 847 F.2d 1052, 1054 (3d Cir. 1988); Brief for Appellant, *supra* note 115, at 5-7. Kirkpatrick and its chairman, Harry Carpenter, were each convicted of violating the Foreign Corrupt Practices Act. Kirkpatrick was fined $75,000 and Carpenter was fined $10,000 and ordered to perform 200 hours of community service. *Id.* at 13; *see also* Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (1982 & West Supp. 1989) (outlining provisions of the Foreign Corrupt Practices Act under which Kirkpatrick and Carpenter were convicted).

121. Brief for Appellant, *supra* note 115, at 5.

122. *Environmental Tectonics*, 847 F.2d at 1054-55; Brief for Appellant, *supra* note 115, at 6-7.

123. Brief for Appellant, *supra* note 115, at 6-7.

124. *Id.* At this time, Kirkpatrick lacked the ability to complete the entire contract on its own. *Id.* Kirkpatrick began negotiations with subcontractors to prepare for the acquisition of the contract. *Id.* In addition to the subcontractors, Carpenter hired Akindele to pose as a local agent to acquire the contract. *Id.*

mission" to guarantee the award.[125] Kirkpatrick then entered into a written agreement with Akindele that outlined the commission payment schedule based on the previously negotiated Nigerian contract prices.[126]

Throughout 1981, ETC prepared a bid for the Nigerian contract, continuously submitting pricing data to the Nigerian government and meeting directly with Nigerian government officials to negotiate details of the contract.[127] ETC submitted its final bid for the project in February 1982.[128] Despite ETC's efforts, on March 19, 1982, the Nigerian Ministry of Defense awarded the contract to Kirkpatrick.[129] In 1983, after discovering that its bid for the Nigerian contract was significantly lower than Kirkpatrick's, ETC investigated the award and subsequently filed suit.[130]

Kirkpatrick raised the act of state doctrine as a defense and moved for dismissal of the case.[131] In 1987, the United States District Court

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125. Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., 847 F.2d 1052, 1055 (3d Cir. 1988); Brief for Appellant, *supra* note 115, at 7-10. During meetings with Kirkpatrick and the subcontractors, Akindele reviewed the requirement of a 20% commission. *Id.* He stated that European competitors customarily made such commission payments and often outbid the United States competitors. *Id.* Akindele allegedly broke down the commission payments as follows: 2.5% for Akindele, 5% for the Nigerian Air Force, 2.5% for the medical group, 5% for a political party, 2.5% for a cabinet minister, plus 2.5% for other key defense personnel. *Id.* at 10 n.3.

126. *Id.* at 7-10. Kirkpatrick agreed to pay the commissions to two separate Panamanian corporations that Akindele created and controlled. *Id.* Akindele then was responsible for distributing the monies to the appropriate people based on the settled contract price. *Id.*

127. *Environmental Tectonics*, 847 F.2d at 1055-56; Brief for Appellant, *supra* note 115, at 9-11.

128. Brief for Appellant, *supra* note 115, at 9-11.

129. *Id.* The Nigerian government awarded the contract for aero-medical equipment and construction of an aeromedical facility to Kirkpatrick's DISC corporation for a total price of $10,800,000.00, including the 20% commission. *Id.*

130. *Id.* The investigation revealed that in September 1982, after Nigeria's initial payment, Kirkpatrick made payments of $117,929.34 and $193,657.70 to Akindele through the two Panamanian corporations and that Akindele subsequently disbursed the monies according to the payment schedule. *Id.* As the Nigerian government made progress payments to Kirkpatrick in December 1982, February 1983, and August 1983, Kirkpatrick similarly paid $1,764,019.58 (20% of the contract price) to Akindele and Nigerian government officials through the Panamanian corporations. *Id.*; *see* note 120 (detailing how the United States Department of Justice subsequently became involved in the investigation and Kirkpatrick and Carpenter later pled guilty to violations of the Foreign Corrupt Practices Act).

131. Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., 659 F. Supp. 1381, 1391-92 (D.N.J. 1987). Kirkpatrick argued that in order to prove violations of RICO and the Robinson-Patman Act, ETC must first establish that the Nigerian government officials knowingly accepted bribes. *Id.* Kirkpatrick argued that the court must make a determination about the validity of the acts of Nigeria as a foreign sovereign. *Id.*

for the District of New Jersey dismissed ETC's original suit on these grounds.[132] In reaching its conclusion, the district court relied heavily on the Bernstein letter[133] and the Ninth Circuit's holding in the *Clayco* case.[134] ETC appealed the case to the United States Court of Appeals for the Third Circuit.[135]

B. THE THIRD CIRCUIT DECISION

On appeal, ETC claimed that the lower court erred in dismissing the case because the act of state doctrine did not apply.[136] ETC asserted that bribery of a few government officials to attain a foreign military contract is not an act of state.[137] ETC also asserted that the award of a military procurement contract is commercial in nature, does not require a determination of the motives of a sovereign state, and, thus, would not interfere with the executive's role in foreign relations.[138]

Despite ETC's argument, the Third Circuit agreed with the lower court that the award of a foreign military procurement contract might constitute a sufficient expression of an act of state[139] and that the commercial exception only applies when an action is purely commercial in nature.[140] The court, however, did not find enough evidence to other-

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132. *Environmental Tectonics*, 659 F. Supp. at 1391-92. The court also held that ETC had standing to allege that Kirkpatrick engaged in bribery, mail, and wire fraud in violation of RICO. *Id.* at 1389-91. The district court dismissed the allegations because ETC did not demonstrate a pattern of racketeering. *Id.* at 1389. The court also ruled that ETC's amended complaint stated a sufficient claim against Kirkpatrick's holding company, but that Carpenter could invoke his fifth amendment rights not to answer certain deposition questions. *Id.* at 1398-1402.

133. *Id.* at 1396-98. Judge Lechner requested an opinion on the issue from the State Department and received an official answer in the form of a Bernstein letter from Federal Judge Abraham D. Sofaer, Legal Advisor to the United States State Department. *Id.* at 1042.

134. *Id.* at 1392-96; *see supra* notes 97-101 and accompanying text (detailing the *Clayco* case where the act of state doctrine barred adjudication in an international transaction involving bribery and the Foreign Corrupt Practices Act).

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

136. *Id.*; Brief for Appellant, *supra* note 115, at 15.

137. *Environmental Tectonics*, 847 F.2d at 1058; Brief for Appellant, *supra* note 115, at 22.

138. *Environmental Tectonics*, 847 F.2d at 1057.

139. *Id.* at 1058-59. The court also distinguished between governmental actions having little impact upon foreign policy and military procurement contracts that generally involve judicial entanglement with executive branch foreign affairs. *Id.*

140. *Id.* at 1059. The court characterized a sovereign's purely commercial activity not by the purpose of the act, but by its nature. *Id.* In order to be purely commercial, the activity must result in individual profit. *Id.* The court distinguished a military procurement contract, which is generally governmental in nature, from an ordinary contract, that is generally commercial in nature. *Id.*

wise substantiate the lower court findings.[141] Ultimately, the court declined to invoke the act of state doctrine.[142]

In addition, the Third Circuit rejected the lower court's reliance on the Ninth Circuit's *Clayco* decision.[143] The lower court attempted to equate *Environmental Tectonics* with *Clayco*,[144] but the Third Circuit court found inconsistencies within the *Clayco* holding.[145] Although the Ninth Circuit claimed to espouse a flexible approach to the application of the act of state doctrine, the Third Circuit characterized it as an expansive application[146] and not in accordance with prior Third Circuit decisions.[147] The Ninth Circuit refused to inquire into a foreign sovereign's motivations on the theory that such an inquiry would impinge upon executive branch foreign relations power.[148] Instead, the Third Circuit court applied the standard it first articulated in *Mannington Mills*[149] and later affirmed in *Curtiss-Wright*.[150]

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141. *Id.* The court disagreed with the lower court's theory that the act of state doctrine barred ETC's claims if the judicial determination requires an inquiry into a sovereign's motivations that could embarrass the sovereign or interfere in the conduct of United States foreign policy. *Id.* (*citing Environmental Tectronics*, 659 F. Supp. at 1392-93 (D.N.J. 1987)).

142. *Id.* at 1062.

143. *See supra* notes 88-106 and accompanying text (discussing *Clayco* and other Ninth Circuit decisions on the act of state doctrine).

144. Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., 847 F.2d 1052, 1059 (3d Cir. 1988).

145. *Id.* at 1059-60.

146. *See id.* at 1060 (defining an expansive interpretation as allowing a court to invoke the act of state doctrine in any case where it is only necessary to look at the motivation behind a foreign sovereign's action).

147. *Id.* at 1060. The court also notes that the Second Circuit adopted the *Clayco* approach to the act of state doctrine in *Hunt v. Mobil Oil Corp.* (citing *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977)). *Id.* at 1060 n.9. The court noted, however, that several circuits and commentators have criticized the analysis because it prevents the extraterritorial enforcement of United States regulatory policies. *Id.*

148. *Id.* at 1060.

149. Mannington Mills v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979). In *Mannington Mills*, the Third Circuit focused not only on the character of foreign sovereign conduct, but also on the problem of allowing United States corporations to hide their illegal and improper actions behind the act of state doctrine defense. *Id.* at 1293-94; Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., 847 F. 2d 1052, 1060 (3d Cir. 1988) (discussing the nature of a foreign sovereign's conduct necessary to constitute an act of state (quoting *Mannington Mills*, 595 F.2d at 1292-94)).

150. Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3d Cir. 1982). The Third Circuit held that a private party does not enjoy the same immunity from liability given to a foreign sovereign if a private party participates in illegal activity that involves a foreign government or its official actions. *Id.* at 304 (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)); *Environmental Tectonics*, 847 F.2d at 1060 (citing the same case and articulating the same proposition). The court also emphasized the need to guarantee that the act of state doctrine does not obstruct the enforcement of United States regulatory and trade laws when adjudication would not interfere with executive branch foreign relation goals. *Curtiss-Wright*, 694 F.2d at

In *Environmental Tectonics*, the Third Circuit rejected a speculative standard of proof, stating that a court should not invoke the act of state doctrine without demonstrable proof that adjudication of a claim will interfere with executive branch political and foreign relations powers.[151] The Third Circuit dismissed the lower court's speculative standard because it relied on nothing more than a broad theory that inquiry into the Nigerian government officials' motivations may possibly have an effect on United States relations with Nigeria.[152] In fact, the only authoritative source of proof available to determine the impact on foreign relations was the Bernstein letter that the lower court received from the State Department.[153]

In its analysis of the Bernstein letter,[154] the Third Circuit relied heavily on the State Department's assessment of whether adjudication would prejudice executive branch foreign relations.[155] The court emphasized the State Department's distinction between a judicial inquiry into the motivation of a foreign sovereign act and questioning the validity or legality of foreign sovereign actions.[156] The court agreed with the State Department's view that the act of state doctrine is too expansive when it simply bars adjudication whenever an examination of a foreign sovereign's motivations is necessary and such adjudication poses only a slight threat of interference with executive branch foreign relations powers.[157]

The Third Circuit also based its decision in *Environmental Tectonics* on its most recent decision in *Curtiss-Wright*,[158] which employed a similar theory. The court found that both cases would involve little more than an examination of the motives of a foreign sovereign's actions,

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304; *Environmental Tectonics*, 847 F.2d at 1060; *see also supra* notes 108-12 and accompanying text (discussing Curtiss-Wright's attempt to use act of state doctrine in an antitrust case as a defense).

151. *Environmental Tectonics*, 847 F.2d at 1061.

152. *Id.*

153. *Id.*

154. *See* Letter from Abraham D. Sofaer, Legal Advisor to the United States Department of State, to Judge Lechner, United States District Court for the District of New Jersey (Dec. 10, 1986) *cited in Environmental Tectonics Corp.*, 847 F.2d at 1068-69 (App.) (3d Cir. 1988) (discussing the State Department's official pronouncement in a Bernstein letter that Judge Lechner requested for the Environmental Tectonics litigation).

155. Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., 847 F.2d 1052, 1062 (3d Cir. 1988).

156. *See id.* at 1062 (citing the Bernstein letter from Abraham D. Sofaer to Judge Lechner (Dec. 10, 1986)).

157. *Id.*; *see supra* notes 97-101 and accompanying text (discussing the *Clayco* case).

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

rather than a determination of the validity or legality of those actions.[159] Neither defendant proved beyond mere speculation that adjudication of such claims would result in great interference with the foreign affairs power of the executive branch. [160] Therefore, the court did not invoke the act of state doctrine and remanded the case for a decision on its merits.[161]

III. ANALYSIS

A. THE ACT OF STATE DOCTRINE'S ROLE IN OTHER THAN EXPROPRIATION CASES—A DIFFERENT STANDARD

In *Environmental Tectonics*, the Third Circuit considered the issues of Kirkpatrick's bribery of Nigerian government officials to secure a military procurement contract and Kirkpatrick's subsequent attempt at a defensive application of the act of state doctrine.[162] The Supreme Court, however, has traditionally focused on the act of state doctrine in expropriation cases.[163] In addition, until recently, the Supreme Court has failed to grant certiorari or decide any act of state cases.[164]

The act of state doctrine is a guide for lower courts decisions involving the definite acts of foreign sovereigns, such as expropriation.[165] In recent years, however, lower court cases have focused more on the doctrine as a defense against loss or damage to imperceptible, yet valuable rights, with the ultimate cause not necessarily the act of a foreign sovereign.[166] *Environmental Tectonics* falls into this latter category, mak-

159. *Id.* The Third Circuit's precedent and current analysis tend to affirm the State Department's motivation-validity distinction. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1054-55; *see supra* notes 114-35 and accompanying text (discussing the factual background of *Environmental Tectonics*).

163. *See supra* notes 17-79 and accompanying text (outlining the history of the Supreme Court treatment of the act of state doctrine).

164. *Id.*; *see supra* note 52 (indicating that in 1976 Supreme Court decided its last major act of state case, *Alfred Dunhill of London v. Republic of Cuba*).

165. *See supra* notes 17-79 and accompanying text (discussing Supreme Court treatment of the act of state doctrine).

166. Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., 847 F.2d 1052, 1058 (3d Cir. 1988). The Supreme Court has avoided developing rigid rules to govern the doctrine's application, but has left the lower courts to decide when a particular case would cause a conflict between the judicial and executive branches. *Id.* This allows the lower courts to balance the need to avoid such a conflict against an individual's right to a day in court. *Id.* The Supreme Court has left unresolved act of state determinations on such governmental acts as court decisions, powers over licenses, patents, construction awards or other types of procurement contracts that could involve bribery or other anticompetitive actions. *Id.*; *see also* RESTATEMENT FOREIGN RELATIONS LAW *supra* note 1, at § 443 note 7 (discussing the act of state doctrine in antitrust and other nonexpropriation cases).

ing the Third Circuit decision not only difficult, but crucial because it attempts to create a standard for implementation of the act of state doctrine in other than the traditional expropriation cases.

In suits involving the defensive use of the act of state doctrine against claims of bribery and other regulatory laws, it is often difficult to determine whether or not foreign sovereign involvement is actually sovereign in nature.[167] Even the term act of state only adds confusion to this determination.[168] When considering this ambiguity, some courts invoke the act of state doctrine only when involvement is clearly substantial,[169] while other courts, unable to determine what is a substantial degree of involvement, invoke the act of state doctrine to avoid having to make difficult decisions.[170]

One factor most courts consider in rendering a decision is the possibility of interfering with executive branch foreign policy.[171] In antitrust or bribery situations, however, the dispute is usually between private parties with only limited foreign sovereign involvement, and, thus, the court's decision usually has only a slight impact upon foreign relations.[172] The ultimate question is whether the possibility of a slight impact on foreign relations should be the determinative factor in the decision to hear such a case on its merits.

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167. *Compare* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293-95 (3d Cir. 1979) (holding a foreign sovereign patent issuance is not an act of state) *with* Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 407 (9th Cir. 1983) (holding that a foreign sovereign decision over exploitation and control of natural resources is an act of state).

168. *See* Bazyler, *supra* note 4, at 365-66 n.250 (arguing that a court may consider virtually any governmental action an act of state). Nearly all international transaction involves some degree of foreign government involvement because the governments frequently own a large majority of the business and economic enterprises. *Id.*

169. *See Mannington Mills*, 595 F.2d at 1293-94 (analyzing the nature of conduct and the effect on the parties); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 608-09 (9th Cir. 1976) (distinguishing public acts of a foreign sovereign protected under the act of state from private acts of foreign sovereign that are not protected).

170. *See Clayco*, 712 F.2d at 407 (determining that the exploitation of control over natural resources is an act of state); Hunt v. Mobil Oil Corp., 550 F.2d 78-79 (2d Cir.) (stating that the act of state doctrine bars examining the motives of a Libyan government expropriation of a Hunt concession).

171. *See* Bazyler, *supra* note 4, at 367 (stating that the problem with focusing on interference with executive branch foreign policy decisions is that every court decision involving an international transaction could potentially interfere in foreign relations or embarrass the executive branch (citing *OPEC*, 649 F.2d 1354 (9th Cir. 1981)).

172. *See* Comment, *Foreign Corrupt Practices*, *supra* note 9, at 210-11 (explaining the difficulty in ascertaining whether an alleged antitrust violation is an act of state).

B. The Third Circuit Correctly Relied Upon The Precedent Set in *Mannington Mills* and *Curtiss-Wright*

In *Mannington Mills*, the Third Circuit stated that a court should not lightly impose the act of state doctrine.[173] In *Environmental Tectonics*, the court reasoned that the formulation of the act of state doctrine that it created implicitly in *Mannington Mills* and explicitly in *Curtiss-Wright* would not allow a court to invoke the act of state doctrine simply because "mere conjecture" exists about the possible adverse effects upon the sensibilities of foreign governments.[174] This is the proper approach because it considers the impact that adjudication will have upon foreign affairs, and does not permit dismissal simply based on a slight possibility of conflict.[175] The court places the burden upon the defendant to show that adjudication of the claim poses a "demonstrable, not speculative threat" to United States foreign relations, thereby, articulating an appropriate standard of review.[176]

In applying this standard to the facts in *Environmental Tectonics*, the court found the only evidence that ETC's suit may affect relations between the United States and Nigeria was the Bernstein letter from the State Department.[177] The court determined that the Department of State, as a voice of the executive branch, did not believe that inquiry into the motivations behind the Nigerian government's award of the contract was an inquiry into the legality or validity of an action.[178] There was only the possibility of inquiry into the legality of the action of a foreign sovereign, and this speculation would not compromise United States foreign relations with Nigeria.[179]

The court's interpretation of the Bernstein letter in this case is interesting. Previous discussions of the Bernstein letter exception[180] reveal that the Third Circuit could have chosen to rely more heavily on the letter to create an exception to the use of the act of state doctrine and,

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173. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979).

174. *See* Bazyler, *supra* note 4, at 365-67 (stating that there is a possibility of foreign governmental involvement in almost every international transaction).

175. Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., 847 F.2d 1052, 1061 (3d Cir. 1988). The court found that the defendant failed to demonstrate that the litigation would result in the type of institutional conflict that would invoke the doctrine. *Id.*

176. *Id.* The court placed the burden on the defendant to prove that the act of state doctrine should bar adjudication because of a genuine threat to foreign relations. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *See supra* notes 57-64 and accompanying text (discussing the Bernstein letter exception to act of state doctrine).

consequently, could have decided the case on the merits.[181] The court, however, chose to use the contents of the letter as evidence that not more than mere speculation of judicial interference in foreign relations existed, and, thus, a judicial inquiry into the motivation of a foreign sovereign action did not meet the traditional standard for invoking the act of state doctrine.[182] This decision effectively refutes the standard established in *Clayco*.[183]

The Third Circuit properly distinguished and discredited the standard that the Ninth Circuit expressed in *Clayco*[184] that the act of state doctrine bars adjudication if a claim requires a judicial inquiry into the motivation of a sovereign act.[185] The Ninth Circuit's expansive application of the act of state doctrine essentially makes it so inflexible that almost any inquiry would either cause embarrassment to the executive branch or result in interference with United States foreign policy.[186] Although the facts in *Environmental Tectonics* and *Clayco* are very similar,[187] the decisions are contradictory.

In *Clayco*, the Ninth Circuit appears particularly concerned with preventing interference with executive branch foreign relations powers and general executive embarrasssment.[188] The court, however, articulates a standard, that effectively creates a shield for United States corporations involved in illegal conduct abroad.[189] The *Clayco* decision does little more than dilute the enforcement capability of United States regulatory laws.[190]

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181. *Id.* The Supreme Court has never expressly accepted the Bernstein letter exception and, thus, courts consider a letter highly persuasive but not dispositive. *Id.*

182. Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., 847 F.2d 1052, 1058-61 (3d Cir. 1988).

183. *Id.* at 1061. The court relies on language in the letter from an amicus brief of the United States. *Id.* It states as follows:

> [T]hat doctrine only precludes judicial questioning of the *validity* or *legality* of foreign governments actions. . . . Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. (emphasis added)

Id.

184. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983).

185. *Id.*

186. *See* Bazyler, *supra* note 4, at 361-67 (discussing the inflexibility of the doctrine).

187. *See supra* notes 97-102 & 114-35 and accompanying text (stating facts in *Clayco* and *Environmental Tectonics*).

188. *Clayco*, 712 F.2d at 407.

189. Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., 847 F.2d 1052, 1059-60 (3d Cir. 1988).

190. *Id.* at 1061-62.

Conversely, the Third Circuit in *Environmental Tectonics* is primarily concerned with preventing United States corporations involved in illegal activities abroad from hiding behind the shield of the act of state doctrine.[191] The court alleviates that concern by placing the burden of proof on the moving party to show that the adjudication of the claim would somehow hinder United States foreign relations.[192] The court articulates a workable standard that aids in preserving legitimate federal regulatory goals.[193] The standard allows for a measurable degree of judicial involvement and places a positive burden on the defendant. The *Environmental Tectonics* decision illuminates the scope of the act of state doctrine in cases involving extraterritorial violation of federal regulatory laws by providing shape and form to a doctrine that is overbroad and expansive.

CONCLUSION

The act of state doctrine began as a doctrine of judicial restraint grounded in the separation of powers theory, but since has evolved, in some courts, into a complete bar to adjudication. In cases that involve foreign expropriation such a theory of restraint may be appropriate, but in international transaction cases that violate federal regulatory laws with only minimal foreign sovereign involvement, it is inapplicable. In cases involving claims between private parties where the alleged wrongdoer employs the act of state doctrine as a defense, the doctrine should not automatically bar adjudication.

In *Environmental Tectonics*, the Third Circuit correctly placed the burden upon the defendant to prove that adjudication of the claim poses a "demonstrable, not speculative threat" to United States foreign relations.[194] Though the court does not draw a bright line, it creates a standard that should help other courts to determine when to invoke the act of state doctrine in difficult cases. In applying this standard, courts can reach a fair and just determination and clearly demonstrate how they reached that decision.

POSTSCRIPT

On October 31, 1988, the Supreme Court requested the Solicitor General to file a brief expressing the view of the United States govern-

191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 1061.

ment on the act of state doctrine in *Environmental Tectonics*.[195] After receipt and review of this brief, the Supreme Court granted certiorari in *Environmental Tectonics*.[196] Only one question now remains unresolved: whether the Supreme Court feels ready to affirm the Third Circuit decision and articulate a clear standard for implementation of the act of state doctrine in other than foreign expropriation cases.[197]

195. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l, 109 S.Ct. 301, 57 U.S.L.W. 3312 (Oct. 31, 1988).

196. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l, 109 S.Ct. 3213, 57 U.S.L.W. 3841 (June 26, 1989). Review is limited to the act of state doctrine issue. *Id.*

As of this date, petitioner, Kirkpatrick, amicus, Solicitor General, and amicus, Republic of China have filed briefs in the case which is scheduled for hearing during the October 1989 term.

197. *See supra* notes 136-61 and accompanying text (revealing the Third Circuit standard that in private causes of action for violations of federal regulatory laws, the act of state doctrine cannot be invoked without demonstrable proof that an inquiry into the motivations of a foreign sovereign will threaten executive branch foreign relations powers).