The Act of State Doctrine and the Demise of International Comity

I. INTRODUCTION

The act of state doctrine was once referred to as an airy castle.[1] If so, it is a stronghold which has endured many changes in occupancy. The courts' interpretations of the doctrine's effect and underlying reasons have evolved considerably from its introduction into American jurisprudence nearly a century ago.[2] A recent Supreme Court case,[3] however, may have created a crack in the foundation of the structure that will eventually lead to its demise.

It is the purpose of this note to examine the reasoning the Court used in *W.S. Kirkpatrick & Co., Inc v. Environmental Tectonics Corp., International*[4] to reach its unanimous decision that the act of state doctrine only applies to foreclose United States courts from adjudicating otherwise valid claims when the validity of a foreign act of state must be examined. The decision will be compared with prior cases in which the same or substantially similar issues were addressed. Finally, the effect this case is likely to have on the reach of the act of state doctrine will be discussed.

II. THE ACT OF STATE DOCTRINE

The act of state doctrine requires the courts of the United States to refrain from judging the validity of sovereign acts of a foreign State which have effect within that country's borders by refusing to adjudicate cases where such sovereign acts must be examined.[5] This judicially created doctrine first appeared in United States law in its modern form in *Underhill v. Hernandez*.[6] In *Underhill*, the plaintiff, a United States citizen, was living and working in Venezuela when the Venezuelan Revolution began. He was detained for some time by the revolutionary government before being allowed to return to the United States. He then filed suit, seeking damages for the detention.[7]

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1. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1113 (5th Cir. 1985).
2. Underhill v. Hernandez, 168 U.S. 250 (1897).
3. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 110 S. Ct. 701 (1990).
4. *Id.*
5. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1986).
6. *Underhill*, 168 U.S. 250.
7. *Id.* at 251.

Writing for the majority, Chief Justice Fuller stated, "[e]very 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 another done within its own territory."[8] The Court referred the aggrieved party to an alternate solution "through the means open to be availed of by sovereign powers as between themselves,"[9] that is, through mechanisms established by the Executive Branch, and not through the court system.

This first act of state case was grounded in international comity and respect for the sovereign acts of foreign States. The cases that followed reflected these concerns,[10] viewing the doctrine as resting on "the highest considerations of international comity and expediency."[11]

The next milestone in the evolution of the doctrine came in 1964 with *Banco Nacional de Cuba v. Sabbatino* (Sabbatino).[12] *Sabbatino* involved the rights to American owned sugar expropriated by the Cuban government in response to the lowering of the sugar quota by the United States.[13] The Court held that the act of state doctrine applied to bar the Court from adjudicating the case.[14] To do so would require the Court to declare invalid the law of a foreign sovereign State which had effect only within the territorial boundaries of that State, which government was extant and recognized by the United States as valid, there being no controlling treaty or other unambiguous agreement.[15]

To reach its decision, the *Sabbatino* Court applied a balancing test[16] to determine whether the act of state doctrine should apply. The Court weighed foreign policy concerns and potential separation of powers problems "to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[17] The Court refused to lay down "an inflexible and all-encompasing rule" in the case.[18] Instead, after weighing the relevant factors, the Court decided that the act of state doctrine should

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8. *Id.* at 252.
9. *Id.*
10. Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., Ltd., 246 U.S. 304 (1918).
11. *Oetjen*, 246 U.S. at 303-04.
12. 376 U.S. 398 (1964).
13. *Id.* at 401-06.
14. *Id.* at 428.
15. *Id.*
16. *Id.* at 427-28.
17. *Id.*
18. *Id.* at 428.

apply to foreclose judicial determination of the validity of the acts of the Cuban Government.

The *Sabbatino* court also relied on the competency of the judiciary to decide such cases.[19] This was probably due, in large part, to the increased complexity of the world climate. Considerations of international comity subsequently gave way to internal concerns such as separation of powers. Accordingly, the policy behind the act of state doctrine underwent similar changes in emphasis and application.

The Court noted that "[t]he text of the Constitution does not require the [existance of an] act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state."[20] The Court did state, however, that the doctrine has Constitutional underpinnings. "The basic relationship between branches of the government in a system of separation of powers" is a rationale for the doctrine.[21]

Of secondary concern to the *Sabbatino* Court was the "competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[22] The competency issue is related to, yet distinct from, the separation of powers issue. The former is concerned with consistency in the ordering of relations with foreign States, while the latter focuses on the relative quantity and quality of resources available to each branch of the government to make determinations that will ultimately affect those relations.

The doctrine began as a bar to judgment by United States courts when the validity of a foreign sovereign act was at issue, based on notions of international comity. Its current application is grounded in separation of powers, its scope, the subject of dispute.

A. The Foundation for Kirkpartick

A line of cases beginning early in the twentieth century explored an aspect of the act of state doctrine which was not resolved definitively by the Supreme Court until *Kirkpartick* in 1990. At issue in these cases was whether the act of state doctrine barred inquiry into the purpose or motivation of foreign acts of state, rather than the validity of such acts.

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19. *Id.*
20. *Id.* at 423.
21. *Id.*
22. *Id.*

B. The Pre-Sabbatino Cases

The first case to examine this dichotomy was *American Banana Co. v. United Fruit Co.* (*American Banana*).[23] The plaintiff was seeking damages from the defendant, a New Jersey corporation operating outside the United States, for, *inter alia*, allegedly monopolizing the banana trade in the regions of Panama, Columbia and Costa Rica. Plaintiff asserted that it was injured by the acts of the Costa Rican government which allegedly acted at the instigation of the defendant to further its anti-competitive efforts.[24]

The holding of *American Banana* was based on the extraterritorial reach of the United States antitrust laws.[25] The act of state language was purely dicta. The Court had already acted to foreclose judicial inquiry on jurisdictional grounds.[26] The Court employed the classic formulation of the act of state recited in *Underhill*.[27] Though the validity of the Costa Rican government's actions was not at issue, the Court refused to hear the merits of the case because to do so would require the Court to expose the potentially corrupt motive of the government.[28]

That language in *American Banana* was overruled less than twenty years later in *United States v. Sisal Sales Corp.* (*Sisal Sales*).[29] The Court in *Sisal Sales* allowed an action against the defendant for alleged violations of the Sherman Act[30] and the Wilson Tariff Act[31] where the defendant had secured anticompetitive legislation from the Mexican Government to further the defendant's activities.[32]

The Court was again called upon to examine the motive of defendant's activities which included securing the discriminatory legislation. The Court reasoned that the defendant's acts, and not those of the Mexican Government, were being questioned. Viewed in this context, the Court allowed the case to go forward.[33]

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23. 213 U.S. 347 (1909).
24. *Id.* at 353-55.
25. *Id.* at 355.
26. *Id.* at 357.
27. Underhill v. Hernandez, 168 U.S. 250 (1897).
28. 213 U.S. at 353-55. It is unlikely that the case would have been decided differently if the sole issue were the applicability of the act of state doctrine. The possibility of insult to a foreign sovereign, the paramount consideration of the doctrine at that time, would likely have mandated application of the doctrine on the facts of this case.
29. 274 U.S. 268 (1927).
30. Comp. Stat. § 8820 et seq.
31. Comp. Stat. §§ 8831, 8832.
32. *Sisal Sales*, 274 U.S. at 271-74.
33. *Id.* at 276.

The next significant case was *Continental Ore Co. v. Union Carbide and Carbon Corp.* (*Continental Ore*).[34] The Court followed *Sisal Sales* by holding that the reach of United States anti-trust legislation extended extraterritorially.[35] The case also has significance in the context of the act of state doctrine.

The plaintiffs accused defendants of influencing the Canadian Government, through a government agent, "to direct the elimination of Continental from the Canadian market."[36] Defendant contended that the Court's holding in *American Banana* shielded it from liability.[37] The Court refused to follow *American Banana*, citing instead *Sisal Sales*.[38]

The Court found it significant that "[i]n the present case [plaintiffs] do not question the validity of any action taken by the Canadian Government. . . . Nor is there left in the case any question of the liability of the Canadian Government's agent, for [it was not served process]."[39] Instead, the Court held that "[defendants] are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government."[40]

In each of the two cases following *American Banana*, the Court appears to have drawn an artificial distinction between the acts of the defendants and those of the foreign government. This reasoning was substantially discarded with the next series of cases, the probable cause of which was the impact of the *Sabbatino* opinion.[41] The courts began to implement a version of the balancing test outlined in *Sabbatino* to determine if and when the act of state doctrine should apply.[42]

III. USE OF THE BALANCING TEST TO EXAMINE MOTIVE

The balancing test was applied in 1971 in *Occidental Petroleum Corp. v. Buttes Gas and Oil Co.* (*Buttes*).[43] The court cited *American Banana* and

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34. 370 U.S. 690 (1962).
35. *Id.* at 706.
36. *Id.*
37. *Id.* at 704.
38. *Id.*
39. *Id.* at 706.
40. *Id.*
41. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
42. The balancing test introduced in *Sabbatino* weighed foreign policy concerns to determine whether the act of state doctrine should apply when validity of a sovereign act was at issue. The lower courts expanded the test to balance the issues when not only validity but also motive was being questioned.
43. 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972).

held on facts similar to those in *American Banana* that "[t]he act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant."[44] The court cited *Sisal Sales* and *Continental Ore* only to distinguish the reach of antitrust laws from those enunciated in *American Banana*, and not as impacting the reach of the act of state doctrine.[45] The *Buttes* court distinguished both cases on their facts, stating that, "[b]oth the *Sisal Sales* and *Continental Ore* cases steer clear of attaching anti-trust liability to sovereign conduct or its inducement."[46] The cases were allowed to go forward because defendants, in each case "by their own deliberate acts, here and elsewhere, brought about forbidden results within the United States."[47]

The *Buttes* court also made the express distinction between examining the validity and the motive of a sovereign act. The court applied the act of state doctrine and refused to examine the motivation behind the sovereign act, based on potential "diplomatic friction and complication that the act of state doctrine aims to avert."[48] The court thus applied a balancing approach rather than a rigid, formalistic rule.

The court again applied the balancing test in a later case. *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.* (*Timberlane*)[49] was decided five years after *Buttes* and distinguished that case on its facts without specifically rejecting the court's formulation of the act of state doctrine.[50] Timberlane alleged that the defendants conspired with a bank which held a mortgage on Timberlane's property to drive Timberlane out of the Honduran lumber business. Defendants succeeded in obtaining a court order to foreclose on the Timberlane mortgage, despite Timberlane's repeated efforts to clear its title.[51]

First, the *Timberlane* court distinguished between sovereign acts and non-sovereign acts for purposes of the act of state doctrine.[52] An example of the former is laying claim to offshore waters which was the issue in *Buttes*.[53] An example of the latter is the application of neutral Honduran

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44. *Id.* at 110.
45. *Id.* at 109.
46. Id. at 109 n.4.
47. *Id.* at 109.
48. *Id.* at 110.
49. 549 F.2d 597 (9th Cir. 1976).
50. *Id.* at 605.
51. *Id.* at 604.
52. *Id.* at 606-07.
53. 331 F. Supp. 92, 95 (1971).

laws by its courts and their agents. Clearly, if no sovereign act is at issue, the act of state doctrine lacks the elemental predicate for application.[54]

Second, the court applied the foreign policy balancing test and stated, "[Timberlane] does not challenge Honduran policy or sovereignty in any fashion that appears on its face to hold any threat to relations between Honduras and the United States."[55] Finally, the court stated that even if, *arguendo*, the act of state docrtine should apply to bar inquiry into some acts of the defendant due to the involvement of the Honduran government, the plaintiff alleged other agreements and actions by the defendant which were independent of the Honduran government, and were clearly unprotected by the act of state doctrine.[56]

Thus, the *Timberlane* court did not disturb the proposition that courts may not inquire into the validity or motive of foreign sovereign acts when the balance weighs against such inquiry. Instead, it adhered to the balancing test approach, weighing foreign policy concerns against the goals sought by enforcement of the Sherman Act to determine whether the act of state doctrine should apply when either validity or motive is at issue.[57]

In both *Buttes* and *Timberlane,* the courts distinguished between motive and validity. In neither, however, did the courts apply a rigid rule approach. Instead, in each case all of the relevant factors were weighed to determine whether the act of state doctrine should apply despite the fact that motivation behind a sovereign act, and not validity of the act, was at issue.

A. Balancing Test Not Applied

The Second Circuit failed to distinguish between motive and validity for purposes of applying the act of state doctrine in *Hunt v. Mobil Oil Corp.* (*Hunt*).[58] The court failed to apply the balancing test, and instead stated that the act of state doctrine is necessarily applicable when not only validity but also motive is at issue.[59]

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54. *See infra* note 119.

55. *Id.* at 608.

56. *Id.*

57. *Id.* at 607. (The court stated, "we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, repeating the terms of *Sabbatino*, [376 U.S. at 423] 'the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.'")

58. 550 F.2d 68 (2d Cir. 1977).

59. *Id.* at 77.

The facts in *Hunt* required the court to examine the motive of the Libyan Government in nationalizing plaintiff's Libyan crude oil production. The defendants had allegedly combined and conspired to preserve the competitive advantage of Persian Gulf crude oil over Libyan crude oil.[60] In so doing, the plaintiff was requested by the defendants to comply with the terms of an agreement in which Hunt was to refuse to market crude oil according to Libya's demands. As a result of Hunt's refusal, Libya nationalized Hunt's crude oil production. The court was not called upon to invalidate the effect of the expropriation scheme, only to punish defendant Mobil for its anticompetitive activities.[61]

The factual setting in *Hunt* appears to be well suited for the application of the balancing test. The volatile situation between Libya and the United States at that time would have likely demanded application of the act of state doctrine. The court did not take this approach, however. Instead, while reaching the same result, the court formulated a broad rule of law holding that validity and motive of a sovereign act may not be distinguished for purposes of applying the act of state doctrine.[62]

B. The Return to the Balancing Test

Just two years later in *Industrial Investment Development Corp. v. Mitsui Co., Ltd.* (*Mitsui*),[63] the Fifth Circuit departed from the broad holding of *Hunt* which fused validity and motive and placed them under the protective umbrella of the act of state doctrine. The *Mitsui* court determined that the relevant factors (potential friction with the executive branch and the foreign sovereign, and the goals sought to be furthered by the law defendant is trying to avoid) should be weighed to decide whether the act of state doctrine should apply when motive of a foreign act must be examined.[64]

Industrial Development alleged violations of the Sherman Act against Mitsui for its activities alleged to have caused the plaintiff to be denied a timber cutting license.[65] The court cited *Sisal Sales* stating that, in this case, as there, "The instigation of foreign government involvement does not mechanically protect conduct otherwise illegal in this country

60. *Id.* at 70-72.
61. *Id.* at 72.
62. *Id.*
63. 594 F.2d 48 (5th Cir. 1979).
64. *Id.* at 53.
65. *Id.* at 49-50.

from scrutiny by the American courts."[66] The court suggested that the failure of the Indonesian Government to issue a cutting license did not rise to the level of a sovereign act contemplated by the act of state doctrine. Such involvement was not sufficient to allow the defendant to invoke the doctrine.[67]

While this aspect of the court's decision followed the analysis of past cases delineating acts as sovereign and within the scope of the act of state doctrine, or not sovereign and thus outside the fatal reach of the doctrine, this court carried the opinion one step further. It demanded application of the foreign policy balancing test to determine applicability of the act of state doctrine when inquiring into motive. Thus, this court stated its disagreement with *Hunt* that motivation and validity are equally protected by the act of state rubric.[68]

The balancing test was again successfully employed in *Mannington Mills Inc. v. Congoleum Corp.* (*Mannington Mills*).[69] The plaintiffs alleged that defendants had violated section two of the Sherman Act by securing foreign patents through fraudulent means.[70] The court employed the analysis from *Timberlane* to hold that "The granting of patents *per se* . . . is not the kind of governmental action contemplated by the act of state doctrine. . . ."[71] That is, certain acts do not rise to the level of sovereign action.

The so-called commercial act exception[72] was also offered to distinguish between commercial acts, probably not protected by the act of state doctrine, and non-commercial acts, which would be covered unless they are of a non-sovereign nature. Finally, the court applied the now familiar balancing test and concluded that the lack of significant impact on American foreign relations would justify the non-application of the doctrine in this case.[73]

The balancing test was revitalized in *Mitsui* and *Mannington Mills*. In both cases, the courts rejected the broad language in *Hunt*, and

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66. *Id.* at 52.

67. *Id.* at 53.

68. *Id.* at 55.

69. 595 F.2d 1287 (3d Cir. 1979).

70. *Id.* at 1290.

71. *Id.* at 1294. (That is to say that when the actions of foreign States are not the "result of a considered policy determination by a government to give effect of its political and public interests," the act of state doctrine is not applicable.)

72. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (plurality opinion).

73. 595 F.2d at 1294.

determined from the facts of the cases whether the act of state doctrine should apply.

C. *When Validity is in Issue*

International Ass'n of Machinists and Aerospace Workers v. The Organization of Petroleum Exporting Countries (IAM)[74] applied the act of state doctrine to bar plaintiff's suit, but can be clearly distinguished from the preceding cases on its facts. The plaintiffs were seeking injunctive relief and damages against the member nations of OPEC, "alleging that their price-setting activities violated United States anti-trust laws."[75] The court would have been required to declare the effect of the price-setting policies of the OPEC nations invalid for the plaintiffs to prevail, which is clearly impermissible under the act of state doctrine.

IAM does have significance on the issue of motive, however. In dicta, the court restated its commitment to applying the act of state doctrine in cases questioning the motive of a sovereign act when such application is called for by a determination that a failure to do so would result in an affront to a foreign State's sovereignty.[76]

IV. THE BALANCING TEST REVISITED

In the next series of cases, the courts weighed all the relevant factors in each case because motive was again at issue. In *Williams v. Curtiss-Wright Corp. (Curtiss-Wright)*,[77] defendants were accused of coercing foreign governments into purchasing engine parts from the defendant to the exclusion of all other vendors in violation of the Sherman Act.[78] The court held that "[t]he act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations."[79] Again the court allowed for the possibility that the act of state doctrine may or may not apply to inquiries of motivation, and recognized that the crucial determination is the impact on foreign relations.

The court held the act of state doctrine inapplicable in *Northrup Corp. v. McDonnell Douglas Corp. (Northrup)*.[80] The defendant, Northrup,

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74. 649 F.2d 1354 (9th Cir. 1981).
75. *Id.* at 1355.
76. *Id.* at 1360.
77. 694 F.2d 300 (3d Cir. 1982).
78. *Id.* at 301-02.
79. *Id.* at 304.
80. 705 F.2d 1030 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983).

accused McDonnell Douglas of deliberately monopolizing the foreign market for a certain type of aircraft manufactured by both plaintiff and defendant by influencing foreign procurement decisions.[81] On the facts of this case, the court reasoned that neither validity nor motive of the foreign procurement decision need be examined. The court added that "[w]hether Northrup can eventually establish the amount of damages without implicating foreign procurement decisions, and whether that implication is permissible are disputed questions which we need not address at this stage of the proceedings."[82]

Thus the court in *Northrup* did not address the validity-motive distinction in its holding. In dicta, however, it adhered to the balancing approach, weighing the potential impact on United States foreign policy against the goals furthered by the enforcement of anti-trust legislation.

Curtiss-Wright and *Northrup* represent further dedication to the balancing test by the lower courts, even though in both cases, the courts found that the act of state doctrine did not apply.

Balancing Test Ignored

In *Clayco Petroleum Corp. v. Occidental Petroleum Corp. (Clayco)*,[83] the court stated a broad approach to inquiry into motivation. Plaintiff Clayco alleged that the defendant had bribed foreign officials in order to secure a valuable offshore oil concession. The court held that where the very existence of the claim depends upon establishing that the motivation of the sovereign act was bribery, the act of state doctrine bars all inquiry because embarrassment would result from adjudication.[84] The *Clayco* opinion represents an obvious departure from the careful weighing of relevant factors seen in previous cases, and has been criticized for its conclusory treatment of the motive-validity dichotomy.[85]

Thus, most of the cases preceding the Court's 1990 opinion in *Kirkpatrick* have a common thread: in each instance courts have applied a balancing test to determine whether inquiry into the motive of a foreign sovereign act was proper, or whether foreign policy concerns mandated application of the act of state doctrine.[86]

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81. *Id.* at 1036-37.

82. *Id.* at 1048.

83. 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

84. *Id.* at 407.

85. *See, e.g.*, Note, *The Act of State Doctrine: A Shield for Bribery and Corruption*, 16 U. MIAMI INTER-AMERICAN L. REV. 167 (1984).

86. Arguably, in both *Clayco* and *Hunt* the courts failed to apply the balancing

V. FACTS OF KIRKPATRICK

In 1980-81 the Republic of Nigeria began accepting bids for the construction and equipment of an aeromedical center at Kaduna Air Force Base.[87] Harry Carpenter, then Chairman of the Board and Chief Executive Officer of W.S. Kirkpatrick & Co., Inc. (Kirkpatrick), was interested in obtaining the contract. Carpenter set up a deal with Benson "Tunde" Akindele, a Nigerian citizen, in which Akindele would secure the contract for Kirkpatrick in return for a "commission" consisting of 20 percent of the contract price. The "commission" was to be paid to two Panamanian entities controlled by Akindele, who in turn would release the majority of the funds to officials of the Nigerian Government in the form of a bribe. The Nigerian Government awarded the contract to Kirkpatrick which paid the money according to the plan.[88]

Environmental Tectonics Corporation, International (ETC) had entered a lower bid on the Kaduna project but was nonetheless unsuccessful in obtaining the contract. ETC learned of the 20 percent "commission" paid by Kirkpatrick and brought the matter to the attention of the proper United States authorities. Both Carpenter and Kirkpatrick were indicted under provisions of the Foreign Corrupt Practices Act of 1977,[89] to which both pled guilty.[90]

On October 2, 1985 the United States attorney for the District of New Jersey filed an offer of proof in the Carpenter matter which was signed by Carpenter. The offer established the Akindele agreement and payment of the "commission," but did not establish the payment or promise of payment of bribes to Nigerian Government officials.[91]

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test. But while the *Clayco* court spoke in broad language, there is some support for the balancing test approach. The court acknowleged that "judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarass our government in the conduct of foreign policy." 712 F.2d at 407. Instead of balancing, however, the court appears to have concluded that embarrassment would result. Similarly, in *Hunt*, the court used general language to suggest that it would not apply a balancing test. The State Department's involvement in the Libya seizure, however, necessarily indicates that the court was aware of the foreign policy implications. It is thus uncertain whether the court would weigh foreign policy into the balance in another situation. 550 F.2d at 73.

87. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 110 S. Ct. 701, 702-03 (1990).

88. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 659 F. Supp. 1381, 1386-87 (D.N.J. 1987).

89. 15 U.S.C. § 78dd-1 et seq. (Supp. V 1981) [hereinafter FCPA].

90. *Kirkpatrick*, 659 F. Supp. at 1386.

91. *Id.* at 1386-87.

ETC then filed the present civil action alleging violations of the Robinson-Patman Act,[92] RICO,[93] and the New Jersey Anti-Racketeering Act.[94]

VI. HOLDINGS AND PROCEDURAL HISTORY OF KIRKPATRICK

The United States District Court for the District of New Jersey held that the act of state doctrine barred the court from adjudicating the claim.[95] The defendants contended, and the court agreed, that in order to prove violations of the Robinson-Patman Act,[96] RICO,[97] or the New Jersey Anti-Racketeering Statute,[98] plaintiffs would have to "establish [that] officials of the Government of Nigeria were paid, or knew they would be paid bribes for awarding the Nigerian contract to Kirkpatrick, and that but for the payment of the bribes or promise of payment, ETC would have been awarded the Nigerian contract."[99] Such examination, it was decided, would either require inquiry into a foreign act of state or impede the Executive Branch in the conduct of foreign affairs, either of which is barred by the act of state doctrine.[100]

The Court of Appeals reversed, holding that the act of state doctrine did not bar plaintiff's suit. The court balanced the relevant considerations, and found that the reasons for applying the doctrine were outweighed by those opposed to it.[101]

The Supreme Court affirmed, but refused to balance the factors involved.[102] Instead, the court held that when validity is not at issue, the Court will not apply the act of state doctrine.[103]

A. The District Court's Reasoning in Kirkpatrick

After discussing the evolution of the act of state doctrine and its policy rationales, the district court in *Environmental Tectonics Corp. (ETC),*

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92. 15 U.S.C. § 13(c) (1988).
93. 18 U.S.C. §§ 1962-1968 (1988).
94. 2C N.J.C.S. §§ 41-1 et seq. (1991).
95. *Kirkpatrick*, 659 F. Supp. at 1381.
96. *See supra* note 92.
97. *See supra* note 93.
98. *See supra* note 94.
99. *Kirkpatrick*, 659 F. Supp. at 1391-92.
100. *Id.* at 1398.
101. Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., Inc., 847 F.2d 1052 (3d Cir. 1988).
102. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 110 S. Ct. 701, 705 (1990).
103. *Id.*

International v. W.S. Kirkpatrick & Co., Inc. (*Kirkpatrick*),[104] indicated its intent to follow the balancing test approach by stating,

> [t]he act of state doctrine should not be imposed without due consideration. In determining whether it is applicable, a court must analyze the precise nature of the conduct at issue, the effect upon the parties, and the effect upon the internal affairs of the foreign sovereign and the foreign policy of this country.[105]

Ultimately, however, the court relied on the broad language of *Clayco*.[106] The facts in *Clayco* were similar to those in *Kirkpatrick*, and the *Kirkpatrick* court embraced the conclusory application of the rule to bar inquiry into the motivation of the acts in question.

ETC asserted that the *Bernstein* exception[107] should operate to exclude act of state application. The exception requires the courts to apply the act of state doctrine unless the Executive Branch issues a letter to the court indicating that the foreign policy interests of the United States would not be served by its application.[108] The court reviewed the contents of the letter from the State Department which provided the opinion of the legal advisor as to whether adjudication of the case would interfere with any Executive Branch function. While the court noted that the letter expressly stated that the act of state doctrine should not bar the case from going forward, it nonetheless refused to allow adjudication. Using a rigid separation of powers analysis, the court stated, "The suggestion of the State Department that this court conduct the litigation with an eye to foreign policy concerns is not appropriate. Such a precedent poses a serious threat to the authority of the Executive Branch to conduct foreign policy."[109]

B. Kirkpatrick on Appeal

The Court of Appeals reversed, stating, "The formulation of the act of state doctrine outlined in *Mannington Mills* and *Curtiss-Wright* does

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104. 659 F. Supp. 1381 (D.N.J. 1987).

105. *Id.* at 1393 (citing RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 comment d).

106. *Id.* at 1393-94.

107. The *Bernstein* case from which the exception was derived is Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949). In the case, the plaintiff, a German national, brought suit to recover property confiscated by the Nazi Government. The court initially dismissed the case on act of state grounds, but reversed itself after receiving a letter from the State Department permitting the case to go forward. 210 F.2d 375 (2d Cir. 1954).

108. In First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), a plurality of the Supreme Court adopted the *Bernstein* exception.

109. 659 F. Supp., 1381, 1397 (1987).

not allow a court to invoke the doctrine on the basis of mere conjecture about the effect that the disclosure of certain facts might have on the sensibilities of foreign governments."[110] The district court's dismissal for act of state reasons was based on such speculation.[111]

The court emphasized the need to weigh all factors to determine the applicability of the act of state doctrine. It considered the letter from the legal advisor to the State Department, and held the act of state doctrine inapplicable on the facts of the case.[112]

The Supreme Court affirmed the Third Circuit in result.[113]

VII. SUPREME COURT'S ANALYSIS OF KIRKPATRICK

Justice Scalia delivered the opinion for a unanimous Court in what is likely to be a landmark act of state doctrine case. After discussing the doctrine's policy and the various exceptions which have been proposed,[114] the Court issued its opinion.

The Court's Opinion

The parties in the case "argued at length about the applicability of the possible exceptions [to the act of state doctrine], and more generally, about whether the purpose of the act of state doctrine would be furthered by its application in this case."[115] The Court focused its determination on whether to apply the doctrine, however, on neither an exception nor any policy considerations. Instead, the Court drew a bright line distinction between the validity of a foreign act and the motivation behind the act. In the former, the Court stated, the doctrine is technically available, while in the latter, "the factual predicate for application of the act of state doctrine does not exist."[116]

The Court next included a brief history of some significant act of state cases[117] in an attempt to illustrate that its decisions have consistently adhered to the validity-motive distinction, stating, "In every case in

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110. Environmental Tectonics Corp., Int'l v. W.S. Kirkpatrick & Co., Inc., 847 F.2d 1052, 1061 (3d Cir. 1988).

111. *Id.*

112. *Id.*

113. *Id.* at 1052.

114. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 110 S. Ct. 701, 702-05 (1990).

115. *Id.* at 704.

116. *Id.*

117. *Id.* at 704-05.

which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."[118]

An analysis of Supreme Court cases does tend to support this assertion.[119] The Court appears to have rejected the policy reasons expressed in the lower court opinions which applied the act of state doctrine when motive and not validity was at issue. The most obvious of these cases is *Clayco*,[120] relied on heavily by the district court. In *Clayco*, the court clearly was not required to invalidate or make ineffective the act of the sovereign in granting the offshore oil concession.[121] That court dismissed the action under the act of state doctrine citing embarrassment to the sovereign as the justification for its action.[122]

The Court next examined the arguments made by the defendant asserting applicability of the act of state doctrine. First, Kirkpatrick argued that in order for ETC to prevail, the Court must find that the bribes were made. If made, such bribes would be in violation of and thus invalid under Nigerian law.[123] The Court adhered to its validity-motive distinction stating, "act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon the effect of official action by a foreign sovereign." (emphasis in original)[124] That situation, the Court decided, is not present here.[125]

Defendant Kirkpatrick next cited *American Banana*,[126] where the Court barred an action, using act of state language from *Underhill*,[127] where motive but not validity was at issue.[128] The Court decidedly struck down this argument, using a two point analysis. First, the Court

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118. *Id.* at 704.

119. In all of the Supreme Court cases relied upon by the *Kirkpatrick* Court where the act of state doctrine was applied, the validity of an act was involved. In both *Sisal Sales* and *Continental Ore*, the Court refused to apply the act of state doctrine, and in each of those cases, validity was not being questioned. *Id.* at 705-06.

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

121. *Id.*

122. *Id.* at 407.

123. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 110 S. Ct. 701, 705 (1990).

124. *Id.*

125. *Id.*

126. 213 U.S. 347 (1909).

127. 168 U.S. 250 (1897).

128. 110 S. Ct. at 705.

stated that any act of state language in *American Banana* was dicta, and second, that dicta was overruled by *Sisal Sales*.[129]

Finally, Kirkpatrick fell back on policy considerations. Citing international comity, respect for the sovereignty of foreign nations within their own territory, and the avoidance of embarrassment to the Executive Branch in the conduct of foreign relations, Kirkpatrick argued the applicability of the act of state doctrine.[130] Kirkpatrick received some dubious help on this argument from the United States as *amicus curiae*. The United States argued that the Court "should not . . . 'attach dispositive significance to the fact that this suit involves only the 'motivation' for, rather than the 'validity' of, a foreign sovereign act,'[131] and should eschew 'any rigid formula for the resolution of act of state cases generally.' "[132]

While the United States advocated continued use of the balancing test applied by lower courts, it nonetheless urged non-application of the act of state doctrine in *Kirkpatrick*. The United States argued that the letter from the legal advisor of the State Department to the district court, "gives sufficient indication that, 'in the setting of this case,' the act of state doctrine poses no bar to adjudication."[133]

In response to these arguments, the Court focused on the *Sabbatino* balancing test, which arguably requires the validity of an act to be called into question before the act of state doctrine can be invoked.[134] It did not consider the foreign policy balancing test employed by the lower courts which allows application of the doctrine when motive alone is at issue if the facts of the case permit. The factual setting of *Sabbatino* required that the Court inquire into the validity of the Cuban expropriation.[135] The test used in that case, the Court pointed out, was to determine whether, "despite the doctrine's technical availability, it should nonetheless not be invoked."[136] In this way, the Court precluded usage of the balancing approach for issues of motive because the threshold issue, validity, was not satisfied.

The Court concluded with a broad holding: "The act of state doctrine does not establish an exception for cases and controversies

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129. *Id.* at 706.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401-06 (1964).
136. *Kirkpatrick*, 110 S. Ct. at 706.

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."[137]

VIII. THE EFFECT ON THE ACT OF STATE DOCTRINE

It is likely that some parties and commentators will argue that the act of state doctrine underwent no changes as a result of the *Kirkpatrick* decision. Others will argue that the Court was merely narrowing the expansive application of the doctrine in the circuits, and getting back to its originally intended application. Proponents of a third school of thought will assert that the act of state doctrine has been narrowed considerably as a result of *Kirkpatrick*. Each of these three positions will be examined.

A. The Act of State Doctrine Remains Intact

There are at least two bases for the position that the act of state doctrine has not been changed by the Court's opinion in *Kirkpatrick*. First, if the decision turned on the specific facts of the case, its holding would be so narrow as to only apply to another case with substantially similar facts. There is some support for this in the case, where the United States urged the Court to balance the relevant factors involved. In doing so, the act of state doctrine would not apply in this case, but the holding would be specific to the facts such that the Court would "resolve this case on the narrowest possible ground."[138]

While the Court agreed with the United States in result, it is relatively clear that the holding was not based solely on the unique facts of this case. Throughout its opinion, the Court made a distinction between inquiry into motive as opposed to validity of foreign sovereign acts; accordingly, the holding is stated in broad language. It was intended that the act of state doctrine would not be applied in any case when motive alone is at issue.[139] The *Kirkpatrick* holding will undoubtedly be relied on in future cases to foreclose use of the act of state defense.

The second point that could be made in favor of this position is the Court's statement that,

> [i]n every case in which *we* have held the act of state doctrine applicable, the relief sought or defense interposed would have

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137. *Id.* at 707.
138. *Id.* at 706.
139. *Id.* at 701.

> required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory. (emphasis supplied)[140]

The Court's use of the word "we" in the first part of the quoted sentence creates an ambiguity as to whether the Court is making reference to Supreme Court cases only, or to United States courts in general. It may indicate cases decided by the Supreme Court alone. If that were true, the believability of the argument would be enhanced. A review of Supreme Court cases supports that view because in each case where the act of state doctrine was applied, validity of a foreign sovereign act was at issue.[141]

The latter part of the quoted sentence, which says "would have required *a court* in the United States to declare invalid . . ." (emphasis supplied),[142] reveals the probable meaning to be courts in general, and not the Supreme Court specifically. If this meaning is correct, the statement not only refutes the idea that the act of state doctrine has not been altered by the opinion, but appears to be flatly wrong as well.

It is unlikely that the Court intended for this opinion to have little or no precedential value. Such would be the case if the reach of the act of state doctrine were not altered as a result of this decision. The language reveals some change in the doctrine as a consequence of the *Kirkpatrick* decision.

B. Clarifying the Act of State Doctrine

The second possible interpretation is that the Court granted *certiori* not only to clear up conflicts in the circuits, but also sought to return to the purity of application espoused by the original act of state cases. *Underhill*, *Oetjen*, and *Sabbatino* were principally relied on by the Court for asserting the inflexible distinction between validity and motive.[143] In each of those cases, the validity of a foreign act was at issue. Furthermore, the doctrine did not preclude the high Court from adjudicating *Sisal Sales* or *Continental Ore*, both of which arguably involved the foreign sovereign's motive, but not the validity of the act.

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140. *Id.* at 704.

141. The possible exception to that is *American Banana*, but the act of state language there was dicta, and was later overcome by the Court's holding in *Sisal Sales*.

142. *Kirkpatrick*, 110 S. Ct. at 704.

143. *Id.* at 704-05.

The lower courts were the sole employers of the foreign policy balancing test when motive alone was at issue. This case, then, served only as a reminder to the circuits that the act of state doctrine applies only when validity is at issue.

This argument has more merit, and is more persuasive than the previous one. There is some comfort in the application of the rule in such a fixed manner because it leads to uniformity of application and predictability of result. Such a conclusion about the result of the decision, however, tends to exclude a major tenet of the doctrine—the policy which underlies it.

Where the reasons behind the rule end, there too, ends the rule. It was upon this axiom that the lower courts justified expanding the doctrine beyond its original reach to include motive. If the original policy reason for the doctrine, international comity, continued to be a viable reason for its application, the expanded scope of the doctrine would be justified. If the courts determined that the motive of a foreign sovereign should not be examined in the interests of international comity, then the act of state doctrine should be applied. Similarly, the courts could cite separation of powers concerns to foreclose adjudication of cases involving sensitive political issues.

The high Court in *Kirkpatrick* ignored these arguments, favoring an inflexible rule which precludes application of the act of state doctrine whenever validity is not at issue. This interpretation of the *Sabbatino* balancing test tends to prevent the natural growth of the law. Those who fashioned the Constitution, created a broad, general framework, to withstand changes that would necessarily result from a dynamic society. Similarly, the judiciary, in introducing the act of state doctrine, likely intended it as a broad base on which to build and adapt to the demands of increasingly complex fact situations.

The lower courts built on the framework introduced in *Underhill*, and, guided by policy, created a balancing test to weigh all relevant factors. The Supreme Court's characterization of the *Sabbatino* balancing test and its resultant sharp distinction between validity and motive provide fuel for the second argument. The void created by the Court's refusal to weigh policy into the balance, however, weakens the argument by giving the appearance that policy is no longer an issue when determining whether to apply the act of state doctrine.

C. *The Act of State Doctrine Narrowed*

The third possibility concerning the effect of the *Kirkpatrick* decision, posits that the scope of the doctrine has been considerably narrowed. While the original application of the doctrine was tailored to the fact

situation of *Underhill*, where validity of an act was at issue, the policy reasons put forth in that case and in later cases justify the expansion of the rule to include motive.[144] The lower courts have applied this broader interpretation with some consistency. The Supreme Court in *Kirkpatrick* clearly opposed this reasoning, and stated,

> It is one thing to suggest, as we have, that despite the doctrine's technical availability, it should nonetheless not be invoked; it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine . . . into new and uncharted fields.[145]

Thus, under this approach, the Court would only require a balancing of policy concerns in cases involving a validity issue. It would never weigh policy when only motive is at issue because the threshold test of validity is not met.

The third argument is persuasive if the proponent adheres to the belief that the law must change to adjust to a changing society, and that the Court should weigh policy reasons in any case involving motive or validity, and determine on that basis whether the act of state doctrine should apply. Assuming that to be true, the *Kirkpatrick* decision clearly narrowed the scope of the doctrine by eliminating the possibility that the doctrine would be applied when motive alone is at issue.

IX. PROBLEMS RESULTING FROM KIRKPATRICK

The *Kirkpatrick* decision signals the beginning of the end for the act of state doctrine. The doctrine has been narrowed considerably, opening the door for overly zealous commentators to urge its abandonment.[146] The policy reasons for the introduction of the doctrine and those espoused by the courts through the years since that time, however, demand that the doctrine not only remain extant, but that it be resuscitated.

In purporting to adhere to the *Sabbatino* precedent, the *Kirkpatrick* Court did precisely what the *Sabbatino* opinion warned against. The Court laid down a rigid, all-encompassing rule which foreclosed use of

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144. Expansion of the doctrine to include motive is justified only in those cases where the balancing test is applied, that is, where foreign policy, international comity, etc., are weighed and the scale tips in favor of application.

145. *Kirkpatrick*, 110 S. Ct. at 706-07.

146. *See, e.g.*, Hoagland, *The Act of State Doctrine: Abandon It*, 14 DENVER J. INT'L LAW AND POLICY 317 (1986); Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PENN. L. REV. 325 (1986).

the act of state doctrine when the validity of a foreign sovereign act is not at issue. The Court further eliminated the potential for legitimate application of the doctrine based on policy concerns by stating that the policies behind the doctrine are not in themselves a doctrine.[147]

This narrow reading of the act of state doctrine is tantamount to a death knell. The usefulness of the doctrine has now effectively been limited to situations where the courts of the United States are called upon to invalidate foreign acts of state. In those situations, moreover, the court may still employ the *Sabbatino* balancing test and decide not to apply the act of state doctrine even though technically available.[148]

By failing to recognize motive as a means of successfully asserting the act of state doctrine, the Court has closed its eyes to the policy for its existance in many cases. International comity was the original goal of the doctrine, and should be no less so today. By limiting the doctrine as it has, the Court is sending a message to foreign States. It is saying that the United States will not respect the laws, customs and practices of foreign States except to the extent that United States courts would be called upon to repeal the official acts of those States. This statement demonstrates the attitude of the United States in the arena of foreign policy and presents some troubling issues.

A. Diplomacy

One could imagine a situation in which, similar to *Kirkpatrick*, officials of a foreign state accept bribes and grant preferential treatment in awarding government contracts. But suppose that country is one with whom diplomatic relations are already volatile. While punishing a wrongdoer in United States courts, a court could also interrupt the work of the State Department in seeking to secure more favorable relations with that State. If this country were located in the Middle East, for example, the repercussions of this policy could be disasterous. This hypothetical demonstrates the liklihood of violating not only relations abroad but also of constitutionally mandated separation of powers. It would inexorably confuse the functions of the judiciary and the political branches in the area of foreign relations.

B. Democracy

Another problem with the *Kirkpatrick* Court's narrowing of the act of state doctrine is that a single set of standards, based on the collective

147. 110 S. Ct. at 706-07.

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

conscience of a single country, would be applied to the acts of foreign States, regardless of that State's own ideas of acceptable practice. The act of state doctrine as originally applied gave great deference to the varied practices of other countries. Comity was the paramount goal of the doctrine.[149] Over time, however, the courts of the United States have become less and less tolerant of standards of conduct practiced by other countries. This attitude has coincided, not surprisingly, with the emergence of the United States as a superpower among nations, at least in the military arena. The *Kirkpatrick* decision, moreover, came at a time shortly after the Soviet Union proved to be little more than a paper tiger by revealing a crumbling economy and infrastructure.

This attitude currently held by the United States is dangerous. Not only must other States submit to these standards, but ultimately our highly-regarded notions of democracy will be jeopardized. It is not the mark of a democratic nation to promulgate rules and standards of conduct for those who have no voice in or influence over their content. Even the smallest minority group in the United States has voting rights, lobbying rights, and access to other accepted channels through which to effect change in the desired direction (however slowly that change may occur in fact). But to require members of foreign States to adhere to standards which are quite possibly unacceptable to them is unacceptable to our own democratic ideals.

Proposals for change need not be sought beyond the boundaries of our own country. Rather, it need only be recognized that comity is, and must continue to be, the ultimate goal of the doctrine. To allow all of these factors to be considered, and still effetuate the ultimate goal of the system—to resolve conflicts among parties—the Court need only turn to the balancing test successfully employed by several lower courts.[150] It is likely that fair results would be obtained by the consistent use of the balancing approach. The policy considerations on both sides of the equation could be weighed—policy in favor of applying the doctrine such as international comity and respect, separation of powers and ensuring preservation of democratic ideals—against preserving respect for the laws, resolving conflicts and deterring future wrongful conduct by punishing wrongdoers. The facts of each case should determine the applicability of the doctrine.

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149. Underhill v. Hernandez, 168 U.S. 250 (1897).

150. *See, e.g.*, Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3rd Cir. 1982); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied* 409 U.S. 950 (1972).

Instead, the rigidity of the rule espoused in *Kirkpatrick*, combined with a refusal to recognize why the doctrine was introduced, have foreclosed application of the balancing test successfully employed by the lower courts. The act of state doctrine was likely not meant to be a rigid, inflexible rule, mechanically applied the same in each fact situation. Such is the role and the fate of the Foreign Sovereign Immunities Act,[151] which has been labeled "a remarkably obtuse doctrine" and "a statutory labyrinth."[152] The act of state doctrine and the Foreign Sovereign Immunities Act have similar policy reasons, and some commentators have compared the two and suggested exceptions to the act of state doctrine based on those enumerated in the Foreign Sovereign Immunities Act.[153] For the act of state doctrine, however, its utility lies in its flexibility. Once it is limited in the manner done by the *Kirkpatrick* Court, its usefulness is at least diminished, if not eliminated.

The rigidity of the *Kirkpatrick* decision appears to have restricted the doctrine beyond its original scope. The imprudence of the *Kirkpatrick* opinion will be felt in subsequent act of state cases, which will almost certainly be more numerous as a result of this opinion. It seems likely, moreover, that use of the balancing test in the manner suggested, would not lead to an increase in foreign criminal activity among United States citizens.

Applicability of the doctrine would remain dependent upon substantial involvement of a foreign sovereign acting in an official capacity. The immunity or not of the United States citizen acting in concert with the foreign sovereign would likely not influence the conduct of the sovereign since, in any case, such official would be immune from prosecution in the United States courts under the Foreign Sovereign Immunities Act.[154]

X. CONCLUSION

In the *Kirkpatrick* case, the Court restricted the application of the act of state doctrine. The policy reasons for the doctrine, separation

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151. Jurisdictional Immunities of Foreign States, 28 U.S.C. §§ 1602-1611.

152. Callejo v. Bancomer, 764 F.2d 1101, 1107 (1985).

153. *See, e.g.*, Leigh, *Foreign Sovereign Immunities Act—Act of State Doctrine—Treaty Exception*, 82 AM. J. INT'L LAW 585 (1988); Angulo and Wing, *Proposed Amendments to the Foreign Sovereign Immunities Act of 1976 and the Act of State Doctrine*, 14 DENVER J. INT'L LAW AND POLICY 299 (1986); Hannon, *Foreign Sovereign Immunity and the Act of State: The Need for a Commercial Act Exception to the Commercial Act Exception*, 17 U. SAN FRANCISCO L. REV. 763 (1983); Zimmerman, *Applying an amorphous doctrine wisely: the viability of the act of state doctrine after the Foreign Sovereign Immunities Act*, 18 TEXAS INT'L L.J. 547 (1983).

154. *See supra* note 151.

of powers and international comity, appear to have been largely discarded. The Court disguised its decision in the language of precedent, but has probably gone beyond any past cases. The furthering of American objectives may be advanced by the decision, as defendants will most often not be able to use the doctrine to shield themselves from liability; but the price to be paid for the conviction of those few defendants is, *inter alia*, the already dubious reputation of the United States in the eyes of sovereign States whose policies are being examined.

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