

THE ACT OF STATE DOCTRINE IS ALIVE AND WELL: WHY CRITICS OF THE DOCTRINE ARE WRONG

Andrew D. Patterson

ABSTRACT

This article argues that the oft-criticized act of state doctrine is much more useful and beneficial than its numerous critics believe. The act of state doctrine is a judicially created principle of abstention: courts may decline to hear cases that question the validity of a foreign state's sovereign act. The doctrine is accused of being poorly justified and inconsistently applied. Critics also complain that the doctrine is used to deny plaintiffs justice in otherwise worthy human rights, antitrust and commercial litigation. This article debunks both of those claims and provides a framework for understanding act of state decisions that will enable academics and practitioners to more reliably predict how courts will apply the doctrine in the future.

Section I provides a quick explanation of the doctrine and its history. Section II is an extensive analysis of precedent. That analysis reveals that the doctrine is well-justified by courts that are hesitant to hear certain cases and will irrevocably harm relations between the United States and other countries. Section II also disproves the notion that the doctrine is being applied inconsistently. When courts decide whether to apply the doctrine, they respond systematically to the certain factors, such as whether the dispute involves oil reserve management, charges of corruption, or human rights abuses. Even better, courts rarely use the doctrine to deny relief in egregious cases – plaintiffs alleging serious human rights abuses, for example, are almost always allowed to proceed. Section III examines several recent act of state cases and verifies that the model developed in Section II accurately explains how courts apply the doctrine. Section IV examines several reform proposals and finds them unnecessary or counterproductive; instead, the doctrine should be left as it is today.

INTRODUCTION

The act of state doctrine is the principle that “courts should not hear cases that question the validity of a sovereign act of a foreign state committed within its own territory.”¹ The doctrine dictates if American companies may be protected from the fraudulent acts of foreign governments,² if transnational corporations are held to account for enslaving or murdering workers,³ and if tyrants are brought to justice for committing torture and genocide.⁴ The act of state doctrine also impinges on a variety of other legal fields such as libel,⁵ antitrust,⁶ natural resource management,⁷ and international commercial transactions.⁸

The doctrine can bar the adjudication of claims by sympathetic plaintiffs.⁹ As a result, academics often view the doctrine harshly. Courts are accused of applying this doctrine ineptly, frustrating justice and equity in human rights or corruption cases.¹⁰ Other critics complain that the discretionary nature of the doctrine renders it indeterminate and inconsistent.¹¹ Both of those camps conclude that the act of state doctrine is

¹ See *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int’l*, 493 U.S. 400, 405 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

² See *Kirkpatrick*, 493 U.S. at 400; *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002).

³ See *Sarei v. Rio Tinto*, 456 F.3d 1069 (9th Cir. 2006), *withdrawn, hearing en banc granted by Sarei v. Rio Tinto*, 499 F.3d 923 (9th Cir. 2007); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-Civ-rani-8386, 2002 U.S. Dist. LEXIS 3293, at *1 (S.D.N.Y. Feb. 28, 2002).

⁴ See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁵ See *DeRoburt v. Gannett Co.*, 733 F.2d 701 (9th Cir. 1984).

⁶ See *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (9th Cir. 1971).

⁷ See *Montreal Trading, Ltd. v. Amax, Inc.*, 661 F.2d 864 (10th Cir. 1981); *Int’l Ass’n of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981).

⁸ See *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976); *Allied Bank v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985).

⁹ See *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251 (11th Cir. 2006); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977) (barring suit by alleged victim of conspiracy by oil companies and Libyan government).

¹⁰ Margarita S. Clarens, Note, *Deference, Human Rights and the Federal Courts: The Role of the Executive in Alien Tort Statute Litigation*, 17 DUKE J. COMP. & INT’L L. 415, 436-37 (2007); Michael J. O’Donnell, *A Turn For The Worse: Foreign Relations, Corporate Human Rights Abuse, and the Courts*, 24 B.C. THIRD WORLD L.J. 223, 224-25 (2004); Rosica Popova, *Current Public Law and Policy Issue: Sarei v. Rio Tinto and the Exhaustion of Local Remedies Rule in the Context of the Alien Tort Claims Act: Short-Term Justice, But at What Cost?*, 28 HAMLINE J. PUB. L. & POL’Y 517, 554 (2007).

¹¹ See Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325,

hypocritical in that its justifications are shifting, and at times ignored, when courts consider its application.¹² Commentators call for stringent reforms of the doctrine.¹³

I argue that these critiques misunderstand the act of state doctrine. At the most abstract level, the doctrine deserves to exist because it embodies real concerns about America's foreign relations and international comity.¹⁴ Its original animating principles remain vital and have been applied consistently over the past century.¹⁵ Fairly clear evidence to the contrary has been either dismissed or ignored by most commentators.¹⁶ I contend that courts have shown considerable wisdom and consistency in applying the doctrine. Courts have not uniformly structured their act of state analysis; some explicitly adopt a balancing test,¹⁷ while others invoke exceptions to the doctrine.¹⁸ All courts grapple with the same concerns underlying the

330-31 nn.22-25 (1986); Daniel C.K. Chow, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, 62 WASH. L. REV. 397, 416 (1987) (arguing that doctrine is incoherent unless understood as jurisdiction to prescribe); Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILL. L. REV. 1, 7 (1990) ("doctrine resembles the proverbial elephant described by a committee of the blind."); Gregory H. Fox, *Reexamining the Act of State Doctrine*, 33 HARV. INT'L L.J. 521, 568 (1992) (stating act of state doctrine is "tangled web"); Lynn E. Parseghian, Comment, *Defining the "Public Act" Requirement in the Act of State Doctrine*, 58 U. CHI. L. REV. 1151, 1162 (1991); Patrick W. Pearsall, *Means/Ends Reciprocity in the Act of State Doctrine*, 43 COLUM. J. TRANSNAT'L L. 999, 1010 (2005) (stating that doctrine is "rife with unrestrained discretion and indeterminacy.").

¹² See Pearsall, *supra* note 11, at 1013.

¹³ See Bazyley, *supra* note 11, at 396 (outright abolition of doctrine); Parseghian, *supra* note 11, at 1167 (proposing more restrictive definition of which acts are protected from review under act of state doctrine); Russ Schlossbach, *Arguably Commercial, Ergo Adjudicable? The Validity of a Commercial Activity Exception to the Act of State Doctrine*, 18 B.U. INT'L L.J. 139, 161 (2000) (advocating legislative or judicial clarification of when commercial activities exception applies).

¹⁴ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964).

¹⁵ See *infra* Section II (discussing how application of factors in act of state cases is consistent with principles of act of state doctrine).

¹⁶ See *infra* note 36.

¹⁷ See *Grupo Protexa, S.A. v. All Am. Marine Slip*, 20 F.3d 1224 (3d Cir. 1994); *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986); *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 325-26 (5th Cir. 1982); *Int'l Ass'n of Machinists, Inc. v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981); *Tex. Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981); *Deirmenjjan v. Deutsche Bank, NO. CV 06-00774 MMM (CWx) 2006 U.S. Dist. LEXIS 96772*; *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004); *Sirico v. British Airways PLC*, 2002 U.S. Dist. LEXIS 1551 (E.D.N.Y. 2002); *Risk v. Kingdom of Norway*, 707 F. Supp. 1159 (N.D. Cal. 1989); *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 905 (E.D. Mich. 1981).

¹⁸ See *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990); *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 392 (3d Cir. 2006); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Dom. Rep. v. AES Corp.*, 466 F. Supp. 2d 680 (E.D. Va. 2006); *Paul v.*

doctrine. Courts discuss exceptions to the doctrine, but in practice those exceptions act as factors arguing for or against applying the doctrine. So the exceptions are applied in a way that appears incoherent but is actually sensitive to the particularized facts of a case.¹⁹ Through a clear-eyed and expansive look at the act of state doctrine, observers can better predict how courts will act on their intuitions, and practitioners can better understand what courts are truly concerned about in act of state litigation.

Section I traces the historical development of the doctrine, its rationale and its exceptions. I take issue with the many commentators who claim there has been a decisive shift in the rationale of the act of state doctrine. Courts are conscientious in applying not just the concerns voiced in *Banco Nacional de Cuba v. Sabbatino*,²⁰ but also the concerns of earlier decisions, which are commonly thought to be repudiated.

In Section II, I parse the factors that courts find decisive. Given that act of state cases are closely correlated to facts, case law appears to be an awkward mixture of inconsistently-applied rules and exceptions. However, this is because courts drape their factor-based decisions in the language of rules.²¹ I conclude the discussion of each factor with a brief analysis of how this supports my argument that courts engage in factor balancing and that the justification for the doctrine has remained consistent over the doctrine's lifespan.

In Section III, I discuss two recent cases that show that the fact-intensive approach is still in use today. I conclude that courts actually wield the doctrine with more skill than many believe. In fact, courts have already implicitly adopted many of the suggested reform proposals.²²

Avril, 812 F. Supp. 207 (S.D. Fla. 1992).

¹⁹ See Margaret A. Niles, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors under the Act of State Doctrine*, 35 STAN. L. REV. 327, 341 (1983) (agreeing that courts are more concerned about facts of case than tests imply, but critiques ability of judges to make these decisions: "In order to incorporate those evaluations into their decisions, courts using a formalistic definitional rule may manipulate definitions, and courts attempting to balance may place greater weight on whichever factors will account for the foreign policy assessment.").

²⁰ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

²¹ See *infra* Section IIC (discussing D.C. Circuit's discussion of commercial activity, which highlights linguistic twists and turns courts must go through in act of state cases. Courts make contradictory statements within and between circuits, but reach very similar results in every circuit).

²² See *infra* Section II (discussing numerous exceptions implemented as contributory factors).

I. AN OVERVIEW OF THE DOCTRINE

A. Underhill and early developments.

*Underhill v. Hernandez*²³ was the first American case where the act of state doctrine was used as a means to deny jurisdiction.²⁴ Underhill himself was an American national working in Ciudad Bolivar, Venezuela, when a revolutionary army led by a General Hernandez occupied the city and established a revolutionary government.²⁵ The army harassed and detained Underhill to try to coerce him into operating his machine repair business for the rebel forces, who were later recognized by the United States as the legitimate Venezuelan government.²⁶ Underhill sued. The Supreme Court recognized the army's harassment of Underhill as acts of state immune from review by an American court. In rejecting Underhill's lawsuit, Justice Fuller made the "classic American statement" of the act of state doctrine:²⁷

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.²⁸

Commentators typically characterize *Underhill* as promoting international comity.²⁹ *Underhill* presents this concern as an iron rule precluding judgment in all circumstances. This doctrine is also strongly consistent with the prevailing view of the nineteenth and early twentieth centuries, when individual rights in international disputes were thought to be subordinate to states' rights.³⁰ If a citizen suffered an injury, then the state, not the individual, received standing to press for relief.³¹

²³ *Underhill v. Hernandez*, 168 U.S. 250 (1897).

²⁴ See Bazylar, *supra* note 11, at 330-31 nn.22-25 (examining historical roots of the doctrine).

²⁵ *Underhill*, 168 U.S. at 250-51.

²⁶ *Id.*

²⁷ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964).

²⁸ *Underhill*, 168 U.S. at 252.

²⁹ See Anne Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1948 (1992) (Burley defines comity, quoting *Hilton v. Guyot*, 159 U.S. 113 (1895), as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."); Fox, *supra* note 11, at 524-25.

³⁰ *Underhill*, 168 U.S. at 252.

³¹ *Id.*

This view was borne out in subsequent Supreme Court cases of the period. *Oetjen v. Central Leather Co.*³² upheld seizure of hides by a Mexican revolutionary government, stressing the need to protect comity and “the peace of nations.”³³ *Ricaud v. American Metal Co.*,³⁴ a companion case to *Oetjen*, also addressed the legality of seizures by the Mexican government. *Ricaud* supplemented the justifications in *Underhill* and *Oetjen*, reasoning that “to accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction, rather it is an exercise of it.”³⁵

These early act of state cases are concerned both with foreign relationships and domestic separation of powers.³⁶ Many commentators only see these “internal”³⁷ concerns arise later on in the trajectory of the act of state doctrine.³⁸

B. *The Modern Era: Sabbatino*

The Supreme Court was silent on the act of state doctrine until 1964, when it decided the landmark case of *Banco Nacional De Cuba v. Sabbatino*.³⁹ Communist Cuba’s economic reforms included a wide swath of nationalizations of American companies.⁴⁰ One such company was Farr,

³² *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918).

³³ *Id.* at 300-04.

³⁴ *Id.* at 304.

³⁵ *Id.* at 309.

³⁶ See also Louis Henkin, *The Foreign Affairs Powers of the Courts: Sabbatino*, 64 COLUM. L. REV. 805, 814-15 (1964) (discussing that *Sabbatino*’s separation of powers concerns may differ slightly from those in *Oetjen* to justify a federal common law doctrine post-*Erie*).

³⁷ See Chow, *supra* note 11, at 416 (1987) (characterizing comity rationales as “external” deference, and separation of powers rationales as “internal” deference). I will also use internal and external to describe the different rationales.

³⁸ *Id.* at 475; Fox, *supra* note 11, at 526; Mark Haugen and Jeff Good, *Evolution of the Act of State Doctrine: W.S. Kirkpatrick Co. v. Environmental Tectonics Corp. and Beyond*, 13 U. HAW. L. REV. 687, 692 (1991); Niles, *supra* note 19, at 341-42; Parseghian, *supra* note 11, at 1155 (acknowledging primacy of separation of powers rationale but acknowledging persistence of comity rationale); Russ Schlossbach, *Arguably Commercial, Ergo Adjudicable? The Validity of a Commercial Activity Exception to the Act of State Doctrine*, 18 B.U. INT’L L.J. 139, 147 (“by the early 1970s, the rationale underlying the Act of State Doctrine had undergone a nearly complete transformation.”); see also Robert Delson, *The Act of State Doctrine – Judicial Deference or Abstention?*, 66 AM. J. INT’L L. 82, 83 (1972); Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT’L L. 175, 180 (1967); Popova, *supra* note 10, at 554 (critiquing a case for ignoring separation of powers concerns as “a clear violation of the principles served by the act of state doctrine.”).

³⁹ *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398 (1964).

⁴⁰ See *Sabbatino*, 376 U.S. at 403-04 n.7 (text of a Cuban decree nationalizing all

Whitlock & Co., a commodities trader that imported sugar from an American-owned refinery in Cuba.⁴¹ In retaliation for Congress reducing the import quota of Cuban sugar, Cuba expropriated the sugar as it was being loaded for shipment.⁴² When Farr sold the sugar and then refused to compensate Cuba, Cuba sued to recover the proceeds of the sale.⁴³ The Supreme Court held that the act of state doctrine prevented courts from examining the validity of the nationalization.

1. *Sabbatino's* Justification of the Act of State Doctrine

The court rejected the reasoning in *Underhill* that state sovereignty necessitates the act of state doctrine, though sovereignty “bears on the wisdom of employing [it.]”⁴⁴ The doctrine is also not coupled with the requirements of international law.⁴⁵ The act of state doctrine is not even required “by the text of the Constitution.”⁴⁶ Instead, the doctrine has “constitutional underpinnings.”⁴⁷ The doctrine is implied by the separation of powers.⁴⁸ The primary concern is that the judiciary is ill-equipped to decide cases without monkey-wrenching American foreign policy.⁴⁹ The court went to great lengths to explain why the doctrine’s justification here was different from the thinking in *Underhill*, *Ricaud* and *Oetjen*.⁵⁰ Yet, the *Sabbatino* court agreed with *Underhill's* core justification that relief against a foreign state must be pursued by the plaintiff’s own state.⁵¹

American-owned companies).

⁴¹ *Id.* at 401.

⁴² *Id.* at 403.

⁴³ *Id.* at 406.

⁴⁴ *Id.* at 421.

⁴⁵ *Id.* at 422 (“[N]o claim has ever been raised before an international tribunal that failure to apply the act of state doctrine constitutes a breach of international obligation.”).

⁴⁶ *Sabbatino*, 376 U.S. at 423.

⁴⁷ *Id.*

⁴⁸ *Id.* The court distinguished itself from prior jurisprudence’s concern about international comity. “The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.”

⁴⁹ *Id.*

⁵⁰ *Id.* at 423-24. The court acknowledged *Oetjen's* concern over separation of powers, but dismissed it as an overbroad claim, and that some cases may be adjudicated. Court again goes out of its way to discredit the implication that *Oetjen* constitutionally mandates the act of state doctrine. Rather, its own analysis of “constitutional underpinnings” supports this discretionary doctrine. It actually punts the status of external considerations.

⁵¹ *Id.* at 431 (“Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly.

Sabbatino refined the preexisting reasons for the act of state doctrine. As noted, many critics do not agree with this view. Critics instead believe that the “internal deference” issues posed by the separation of powers concerns supplant the “external deference” concerns of international comity and peace.⁵² This is an unconvincing distinction. The *Sabbatino* court was concerned about internal separation of powers issues, but not out of rigid formality. The reason for concern in *Sabbatino* was that an internal violation of powers could cause problems for American foreign policy and anger other nations needlessly – a concern squarely aligned with the praise for “the peace of nations”⁵³ in *Oetjen*.⁵⁴

Sabbatino changed act of state jurisprudence by imposing a discretionary test applied on a case-by-case basis.⁵⁵ *Underhill* applied the act of state doctrine as an inflexible rule.⁵⁶ While the *Underhill* requirement that there be a sovereign act carried out in the territory of the sovereign remained good law, the court declined to lay down “an inflexible and all-encompassing rule in this case.”⁵⁷ The court proposed three non-exclusive factors that are relevant in deciding whether to apply the doctrine.⁵⁸ The first factor is how agreed-upon the principle is in international law; the

Representing all claimants of this country, it will often be able, either by bilateral or multilateral talks, by submission to the United Nations, or by the employment of economic and political sanctions, to achieve some degree of general redress.”).

⁵² See *supra* note 36.

⁵³ *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918).

⁵⁴ *Sabbatino*'s reformulation allows the courts more flexibility in waiving the act of state doctrine in the future. But when it comes to rationales justifying the doctrine, it is not nearly as path-breaking a decision as commentators suggest. The court actually acknowledged that both considerations are important. “Whatever considerations are thought to predominate” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964). The *Sabbatino* factors are more consistent with a concern about international comity than internal deference. The second factor, *infra* note 59, is concerned about the relationship with the foreign country, as is the third factor, whether the foreign government exists today. In an internal analysis, the continued existence of the foreign government is irrelevant. That it is one of three central factors in deciding these cases suggests that even the *Sabbatino* court was moved by external, not internal deference.

⁵⁵ Some commentators think *Sabbatino* meant the test to apply in crafting categorical exclusions, i.e. for nationalizations. See Jack L. Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461, 476 (1993). However, the third *Sabbatino* factor specifically seems to call for an inquiry into the facts at hand, and courts undertake a case-by-case analysis. See *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 (2d Cir. 1985).

⁵⁶ See Michael D. Ramsey, *Acts of State And Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1, 16 (1998).

⁵⁷ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

⁵⁸ *Id.* at 428.

greater the consensus, the less the justification for applying the doctrine.⁵⁹ The second factor is how politically controversial the dispute is.⁶⁰ The third factor is whether the government that committed the act still exists.⁶¹ In *Sabbatino*, these factors weighed in favor of applying the doctrine.⁶² Commentators have thought that the factors have been applied very narrowly – as in only for expropriation cases.⁶³ This is a misconception, and courts have heeded these factors in a variety of act of state cases.⁶⁴ The *Sabbatino* court's move in changing the philosophy of the justification is overstated, but its role in changing the mechanics of the act of state is equally underestimated.

The *Sabbatino* court shared the concerns expressed by earlier courts, but was less cautious about holding sovereigns to account. Courts had found exceptions to the act of state doctrine before *Sabbatino*.⁶⁵ The equities at stake meant that judges had adopted an intuitive, factor-balancing approach even when the doctrine was described rigidly. These moments were rare, but that they happened at all is strong evidence that the act of state doctrine is more consistent and continuous over time than commentators claim. In

⁵⁹ *Id.* (“It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it.”).

⁶⁰ *Id.* (“It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.”).

⁶¹ *Id.* (“The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered.”). Courts have applied this factor as dispositive.

⁶² There was no clear law to apply as the status of nationalizations in international law was unsettled. The case dealt with a highly controversial political event, straddling ideological divides between two armed camps toting nuclear weapons, covering a highly disputed area of international law, in an area of extreme importance to American foreign policy. The court wanted to make clear that future cases may have a different outcome based on facts, and gave a narrow holding: “The Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of 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.” *See id.*

⁶³ *See* Niles, *supra* note 19, at n.28.

⁶⁴ *See* *Tex. Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) (commercial dispute); *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (torture case); *Risk v. Kingdom of Norway*, 707 F. Supp. 1159 (N.D. Cal. 1989) (custody dispute).

⁶⁵ *See* *Jimenez v. Aristeguieta*, 311 F.2d 547, 557-58 (5th Cir. 1962) (viewing acts of corruption as “far from being an act of state as rape”); *Zwack v. Kraus Bros. & Co.*, 237 F.2d 255 (2d Cir. 1956) (ruling against Hungarian confiscation contrary to *Sabbatino*); *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (waiving doctrine by suggestion of State Department).

this view, *Sabbatino* is a substantial but not radical doctrinal shift.

The move towards freer scrutiny of state actions is best explainable by the drastic changes in international law and foreign affairs that occurred in the decades between *Underhill* and *Sabbatino*. The legal order created after World War II focused on strengthening international legal regimes and accountability. Individual rights gained more stature in the international political order, embodied in the 1948 Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, drafted two years after *Sabbatino*. These developments undermined the philosophy reflected in *Underhill* and *Oetjen* (conversely, these argued that individuals must rely on their patron states to achieve redress against other states). Expanding international trade meant foreign sovereigns would increasingly butt heads over issues that might be properly resolved in legal orders.⁶⁶ Similarly, governments intervened more and more in what were previously private markets. This made governments more likely to be a party to cases not involving issues of core sovereignty such as territory, defense, or diplomatic privileges.⁶⁷ Commercial or other issues that did not trigger the concerns over international peace inherent in high politics are much more suitable to adjudication.⁶⁸ The increasingly tight regulatory, commercial and economic ties between western powers made adjudication of innocuous disputes seem less like a violation of sovereignty.⁶⁹ Western regimes were drawing ever closer in shared democratic values and political interests. This shift, since World War II, has also decoupled *Oetjen*'s linkage between respecting sovereignty and international peace.⁷⁰ Indeed, one influential commentator believes the act of state doctrine is applied systematically to countries outside the international legal order established by western states after the Second World War.⁷¹ This view is consistent with the approach in

⁶⁶ In the antitrust context, for example, courts have "gutted" international comity, a concern for courts in applying the act of state doctrine, as a barrier to enforcement. See Spencer Weber Waller, *Suing OPEC*, 64 U. PITT. L. REV. 105, 134-42 (2002) (discussing numerous cases).

⁶⁷ See Jack L. Goldsmith, *The New Formalism In United States Foreign Relations Law* 70 COLO. L. REV. 1395, 1413 (1999).

⁶⁸ *Id.* at 1412 (differentiating between "high" and "low" politics).

⁶⁹ The proliferation of international organizations, like NATO, the OECD, the nascent treaty organizations that would form the European Union under the 1993 Treaty of Maastricht may be why part of the reason why *Sabbatino* was deferential to international treaties in the act of state context. See *infra* note 87.

⁷⁰ *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 300-04 (1918).

⁷¹ *Burley*, *supra* note 29, at 1910. I do not view this as a complete explanation. For example, courts have shown deference to the acts of Australia. See *Oceanic Exploration Co. v. ConocoPhillips, Inc.*, 2006 U.S. Dist. LEXIS 72231, at *1 (D.D.C. Sept. 21, 2006). Even *Burley* admits that the courts choose to deploy the doctrine in the way that most favors the foreign state. See *Burley*, *supra* note 29, at 1977. The importance of the allied state and the

this article. Courts realize that states that are reticent about supranational or international legal regimes are more likely to be offended by other states adjudicating their behavior. The Cold War and the specter of nuclear war made courts keenly aware of why deference might be extended to countries politically and militarily opposed to the United States.⁷²

2. *W.S. Kirkpatrick & Co., Inc., Et Al. v. Envtl. Tectonics Corp., Int'l*

The next major Supreme Court decision, *Kirkpatrick*,⁷³ moved to restrict the doctrine.⁷⁴ Two American contractors bid for one construction contract for the Nigerian Air Force. The winning company bribed the Nigerian government to secure the contract. The losing contractor sued under RICO. The district court dismissed the lawsuit, relying on lower court precedent that held that the act of state doctrine applied if, “[T]he inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign constitute interference in the conduct of foreign policy of the United States.”⁷⁵ The court, in a 9-0 opinion authored by Justice Scalia, held that the act of state doctrine did not apply. It took a narrower view of when an act’s validity is challenged. In *Kirkpatrick*, the doctrine was only to apply when a plaintiff challenged the legal effect of an act of state. An inquiry into the motivations behind an act of state does not trigger *Sabbatino* factor-balancing.⁷⁶ The court cautioned that the foreign relations test used to decide whether to apply the act of state doctrine, when available, is not “appropriate for the quite opposite purpose of expanding judicial incapacities where such acts are not directly (or even indirectly) involved.”⁷⁷

This court acknowledged both the external and internal justifications for the doctrine without endorsing either.⁷⁸ The actual inquiry, however, was focused on the foreign relations impact.⁷⁹ The separation of powers

issue at hand dictates how courts apply the act of state doctrine.

⁷² See Goldsmith, *supra* note 67, at 1412.

⁷³ *W.S. Kirkpatrick & Co., Inc., v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990).

⁷⁴ Two other Supreme Court cases explore implications of *Sabbatino*, discussed below, but their plurality opinions have had limited impact. See *infra* notes 91-92.

⁷⁵ *Kirkpatrick*, 493 U.S. at 403.

⁷⁶ *Id.* at 408-09 (“When that question is not in the case, neither is the act of state doctrine. That is the situation here. Regardless of what the court’s factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires.”).

⁷⁷ *Id.* at 409.

⁷⁸ *Id.* at 404.

⁷⁹ *Id.* at 409.

rationale received scant attention from the Supreme Court.⁸⁰ The court otherwise declined to wade into the details of the act. It noted the developing body of exceptions to the doctrine, but did not comment on their validity.⁸¹ It also disregarded the State Department's advisory letter to the District Court, which is usually significant in act of state cases.⁸² By focusing on the threshold question, *Kirkpatrick* gave a new tool to courts trying to avoid the act of state doctrine. However, it also discredited a line of cases, discussed in Section II, that were properly decided.⁸³

Courts have still not settled on what it means to question the validity of an act. Some courts take the narrow view of validity from *Kirkpatrick*, but other cases continue to hold that the validity is questioned even if the case doesn't require that the act be nullified.⁸⁴ This question goes to the core of the act of state doctrine, and has not been settled. Cases have been decided that would seemingly contradict the strict exceptions of *Kirkpatrick*, yet have not been heard by the Supreme Court.⁸⁵ Even *Underhill* may not be consistent with this principle. In *Underhill*, the question was not whether the acts were valid sovereign acts, but whether those acts occurred and were also tortious. *Kirkpatrick*'s distinction, that "[t]he issue in this litigation is not whether [the alleged] acts are valid, but whether they occurred," is applicable to many cases where the courts have applied the doctrine.

In light of precedent, though the *Kirkpatrick* court deployed with the rule-based language in the case, it is likely that the court decided on the equities of the case as much as on a rule divorced from the facts of the case. *Kirkpatrick* did not foreclose much act of state litigation, but it did signal to courts that they should apply the doctrine less strictly. Other cases had anticipated *Kirkpatrick*, but the circuits had taken different approaches to the logic in *Kirkpatrick*.⁸⁶

⁸⁰ *Id.* at 405, 409.

⁸¹ *Kirkpatrick*, 493 U.S. at 405.

⁸² *Id.* at 409.

⁸³ See *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir. 1983); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 607 (9th Cir. 1976).

⁸⁴ One case, *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 905 (E.D. Mich. 1981), anticipates that focusing analysis on whether the act's validity is questioned merely changes at what step courts will analyze the factors of the act of state doctrine.

⁸⁵ See *infra* note 274.

⁸⁶ See Waller, *supra* note 66, at 131. Other cases echo the opinion that questioning the motives of the sovereign doesn't implicate the act. See *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 55 (5th Cir. 1979) ("Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action.").

II. THE RELEVANT FACTORS FOR AN ACT OF STATE DECISION

Events since *Sabbatino* have steadily narrowed the application of the doctrine. *Sabbatino* explicitly suggested a treaty exception that lower courts have followed.⁸⁷ Congress attempted to limit the application of the doctrine in *Sabbatino*-like expropriation cases through the second Hickenlooper amendment, but this floundered due to judicial hostility to the attempt.⁸⁸ While a court could exercise discretion to not apply the doctrine via the *Sabbatino* factors,⁸⁹ courts instead often carve out exceptions, asserting that one of the doctrine's predicate elements are not met.⁹⁰

Besides *Kirkpatrick*, two Supreme Court cases have discussed such exceptions: *Alfred Dunhill of London, Inc. v. Cuba*⁹¹ and *Banco Nacional de Cuba v. First Nat'l City Bank*.⁹² The following exceptions to the doctrine have been identified by courts and academics: when the state department says the doctrine should be waived,⁹³ when the sovereign acts

⁸⁷ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (“The Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of 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.”). This has received minimal attention, and seems that it actually is a legitimate exception – a clear case of a sovereign power choosing to waive the application of the doctrine. As such, it does not receive further discussion here. See *Kalamazoo Spice Extraction Co. v. Ethiopia*, 729 F.2d 422, 426 (6th Cir. 1984) (applying treaty exception); see also Lucy Dunn Schwallie, *Acts of Theft and Concealment: Arguments Against the Application of the Act of State Doctrine in Cases of Nazi-looted Art*, 11 UCLA J. INT’L L. & FOREIGN AFF. 281, 291 (discussing treaty exception in detail).

⁸⁸ Helen Kim, *The Errand Boy’s Revenge: Helms-Burton and the Supreme Court’s Response to Congress’ Abrogation of the Act of State Doctrine*, 48 EMORY L.J. 305, 318 (1999) (“Hickenlooper has been construed narrowly, and the reversal of presumption applies only in cases where the property a) is found in the United States and b) is directly related to the confiscation,” even to the exclusion of what was obviously meant to be included in the act by congress, such as litigation over the proceeds from the sale of the expropriated property).

⁸⁹ See *Sabbatino*, 376 U.S. at 428.

⁹⁰ E.g., the act of the sovereign was not a public act, or that the case did not question the validity of a public act. The most technical, and sometimes discretionary cases are debt cases where the situs of the debt is found to be outside the sovereign’s territory, precluding application of the doctrine. For an in-depth discussion of these cases, see Ariel Oscar Diaz, *The Territoriality Inquiry Under The Act of State Doctrine: Continuing the Search for an Appropriate Application of Situs of Debt Rules in International Debt Disputes*, 10 ILSA J. INT’L & COMP. L. 525 (2004).

⁹¹ 425 U.S. 682 (1972); see also discussion *infra* note 98.

⁹² 406 U.S. 759, 772 (1972) (holding that there is counterclaim exception to doctrine).

⁹³ These are known as Bernstein letters. See *infra* Section IIB.

commercially,⁹⁴ and in other situations where the court believes the sovereign act is too unimportant or non-governmental to be protected.⁹⁵ One of the chief criticisms of the doctrine is that courts fail to uniformly understand and apply the exceptions to the act of state doctrine.⁹⁶ Because courts often discuss exceptions as universally-applied rules, commentators expect to find consistent applications of those exceptions.⁹⁷ However, I argue that courts in practice consider the facts that trigger “exceptions” as factors balanced against other considerations. Courts weigh these factors to reach a decision, but they then invoke rule-like exceptions to justify that decision.⁹⁸ The courts may not explain their decision-making process in detail, but this complaint is far removed from the common allegation that the doctrine is being applied inconsistently.

One decision criticizes the reductionist urge to find hard-and-fast rules for the act of state doctrine. Judge Boyle in *Sage International, Ltd. v. Cadillac Gage Co.*,⁹⁹ in a wide-ranging discussion of the doctrine’s history, argued that:

The tendency to attempt resolution of the question by use of reflexive terms such as ‘validity’ or ‘commercial’ is indicative of the understandable urge to reduce complex issues to simple, mechanical formulations. Yet a candid assessment, for instance, of the “validity” approach reveals that, in deciding what label to attach, the decisionmaker has, in fact, given at least tacit consideration to other factors.¹⁰⁰

The discussion of the following exceptions in this article show that courts face great tension in trying to apply rigid exceptions sensibly when cases have wildly divergent fact patterns. The inconsistent body of decisions can only be explained by what Judge Boyle observed in *Sage International* – that courts are tacitly balancing factors, not applying exceptions.

This article will show how each factor relates to the *Sabbatino* factors

⁹⁴ See discussion *infra* Section IIA.

⁹⁵ E.g., torture or corruption. See discussion *infra* Section IIC.

⁹⁶ See *supra* note 11.

⁹⁷ *Id.*; see also Bryan J. Blankfield, Note, *Callejo v. Bancomer, S.A.: The Need for a Commercial Activity Exception to the Act of State Doctrine*, 7 NW J. INT’L L. & BUS. 413, 421-22 (1985).

⁹⁸ The treaty exception, discussed *supra* note 87, might actually be an exception. However, it is firmly in line with a balancing test that takes into account the *Sabbatino* factors – the sovereign has conclusively decided that it does not object to foreign courts adjudicating its dispute, as decisive a factor as the government’s non-existence.

⁹⁹ *Sage Int’l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981).

¹⁰⁰ *Id.* at 905.

and the various rationales for the act of state doctrine. Most often, these factors are an extension of the second *Sabbatino* factor, which is the effect of judgment on foreign relations of the United States. Some courts tried to establish a more inclusive ten-part balancing test sensitive to more factors, but this analysis was incomplete and has been infrequently applied.¹⁰¹ Like the three-part *Sabbatino* test, most of the analysis is concerned about the effect on foreign relations.¹⁰² This analysis will confirm the argument in Section I that the court's approach to the act of state doctrine has been more coherent and continuous than commentators have thought.¹⁰³

A. *The Commercial Activities Exception*

In *Alfred Dunhill of London, Inc. v. Cuba*,¹⁰⁴ a British tobacco company overpaid a Cuban state-owned enterprise for imported cigars.¹⁰⁵ Cuba refused to repay the company, and when challenged in court, claimed that their refusal was an act of state that could not be litigated in foreign courts.¹⁰⁶ The court split three ways. Four Justices held that the act of state doctrine should not apply because the Cuban government had failed to meet the evidentiary burden for establishing the act of state doctrine, since “[n]o statute, decree, order or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in

¹⁰¹ See *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (“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. [the] [a]vailability 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.”).

¹⁰² Factors 1, 2, 7, 8, 9 and 10 are concerned about comity and the effect a judgment would have on the foreign state. The other factors are concerned about justice for the plaintiff, but the effect is to lay out a much simpler balancing test: whether the negative impact on foreign relations is outweighed by considerations of justice for the plaintiff. Courts have not had much interest in this application. See, e.g., *O.N.E. Shipping v. Flota Mercante Grancolombiana*, 830 F.2d 449 (2d Cir. 1987) (majority opinion ignoring *Mannington* factors to frustration of dissenting judge).

¹⁰³ Though the value judgments may have changed, this balancing test has persisted since *Sabbatino*. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

¹⁰⁴ *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976).

¹⁰⁵ *Id.* at 687.

¹⁰⁶ *Id.*

general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due three foreign importers.”¹⁰⁷ Four Justices wanted to impose a commercial exception to the doctrine consistent with the exception in the recently-passed Foreign Sovereign Immunities Act.¹⁰⁸ Four dissenters argued for the application of the act of state doctrine under *Sabbatino*.¹⁰⁹

To the frustration of commentators and courts, the Supreme Court failed to ratify a commercial exception to the act of state doctrine.¹¹⁰ The complaint is that *Dunhill* perplexed courts and not only caused confusion between circuits, but also within circuits.¹¹¹ Courts do vary considerably in the way they discuss the doctrine, but not in the way they apply it.¹¹² The Second Circuit initially endorsed the exception,¹¹³ but has vacillated since then.¹¹⁴ The Third Circuit supported the commercial activities exception in strong dicta, but has yet to rule on the exception.¹¹⁵ The Fourth Circuit

¹⁰⁷ *Id.* at 695.

¹⁰⁸ *Id.* at 697 (The plurality stated, “We decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations. Because the act relied on by respondents in this case was an act arising out of the conduct by Cuba’s agents in the operation of cigar businesses for profit, the act was not an act of state.”).

¹⁰⁹ *Id.* at 717.

¹¹⁰ See Chow, *supra* note 11, at 445; Roger M. Zaitzeff & C. Thomas Kunz, *The Act of State Doctrine and the Allied Bank Case*, 40 BUS. LAW. 449 (1985) (contending there is clear commercial activities exception, but charting conflicting rationales for commercial activities exception).

¹¹¹ See Bazylar, *supra* note 11, at 344.

¹¹² The Federal Circuit has had little exposure. See *Voda v. Cordis Corp.*, 476 F.3d 887, 904 (Fed. Cir. 2007) (acknowledging Third Circuit precedent finding exceptions to doctrine but not reaching decision on whether to apply them). The First Circuit has yet to rule on the doctrine. The Tenth Circuit advocates a balancing test. See *Montreal Trading, Ltd. v. Amax, Inc.*, 661 F.2d 864, 869 (10th Cir. 1981). The Seventh Circuit has made one decision that stops short of the commercial activity exception but is consistent with it. See *Am. Bonded Warehouse Corp. v. Compagnie Nationale Air France*, 653 F. Supp. 861 (N.D. Ill. 1987) (indicating that act of state doctrine doesn’t apply to non-nationalized company whose majority of shares are held by state).

¹¹³ See *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977) (characterizing *Alfred Dunhill* as creating commercial activity exception but declining to apply it); *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979).

¹¹⁴ In *Braka v. Bancamer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985), the Second Circuit rejected *Hunt*’s dicta: “We leave for another day consideration of the possible existence in this Circuit of a commercial exception to the act of state doctrine under *Dunhill*.”

¹¹⁵ See *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 398 (D. Del. 1978) (“[It is unnecessary to decide commercial activity exception] suffice it to say that should the question arise again, it would have to be evaluated in light of the FSIA which by its terms denies immunity to commercial acts of the sovereign.”). The same view was espoused in *Envtl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1059 (3d Cir. 1988) and *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302 (3d Cir. 1982).

embraced Justice White's plurality in *Dunhill*, explaining that commercial activities are not public acts.¹¹⁶ The Fifth¹¹⁷ and Ninth Circuits¹¹⁸ have hedged in the absence of a Supreme Court majority on the issue, but effectively apply the exception. I think the most honest position is one that acknowledges that commercial activity is an important, but not dispositive, factor. The Sixth¹¹⁹ and Eleventh Circuits¹²⁰ have done this expressly. The Eleventh Circuit considered the changing importance of rationales for the act of state doctrine, and the changing weight of those considerations is discussed in Part I.¹²¹ In light of these considerations, the court held, "[T]he act of state doctrine either does not apply – or is at its weakest – for acts of state that consist of purely commercial transactions, and for cases in which no foreign policy goal of the Executive Branch is impeded."¹²²

Another Eleventh Circuit court disavowed the exception, but said that commercial activity was a factor that responded to the policy concerns in *Kirkpatrick*.¹²³ This reasoning is exemplary of the hypocrisy courts engage in when they must fit a factor test into the language of rules.

The D.C. Circuit's case law is illustrative of this. *Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova* held that the exception didn't exist.¹²⁴ A few paragraphs later, the court cited approvingly the *Dunhill* plurality to hold that a purely commercial activity – a breach of contract – is not a public

¹¹⁶ See *Eckert Int'l v. Fiji*, 834 F. Supp. 167, 171 n.5 (E.D. Va. 1993) (holding that commercial activities generally were not acts of state, but might be if they pose foreign relations problems).

¹¹⁷ See *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1388 (5th Cir. 1992) (act of state doctrine "does not preclude judicial resolution of all commercial consequences stemming from the occurrence of . . . public acts."); *Braka v. Bancomer, S.A.*, 762 F.2d 222, 225 (2d Cir. 1985); *Airline Pilots Ass'n, Int'l v. Taca Int'l Airlines, S.A.*, 748 F.2d 965, 970 (5th Cir. 1984); *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979) (acknowledging ambiguity of exception, but finding different exception applies).

¹¹⁸ The Ninth Circuit, acknowledging an inconsistent jurisprudence, seems to have endorsed an exception where the public act could "not have been taken by a private citizen." See *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 408 (9th Cir. 1983); see also *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 828 n.5 (9th Cir. 1987) (declining to rule on exception).

¹¹⁹ *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 907 (E.D. Mich. 1981) ("The clear trend is toward application of a commercial activity exception to the Act of State Doctrine for reasons espoused by the *Dunhill* plurality."). *But see Cent. Carthage Co. v. The Queen*, 576 F. Supp. 1416, 1418 (E.D. Mich. 1983) (expressing skepticism of the doctrine).

¹²⁰ *Ampac Group v. Republic of Honduras*, 797 F. Supp. 973 (S.D. Fla. 1992).

¹²¹ *Id.* at 978.

¹²² *Id.*

¹²³ *Hond. Aircraft Registry v. Honduras*, 129 F.3d 543, 550 (11th Cir. 1997) ("[F]actors to be considered, as recited in *Kirkpatrick*, may sometimes overlap with the FSIA.>").

¹²⁴ See *Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1, 7 (1999).

act.¹²⁵ The court endorsed a factor analysis consistent with my suggested approach to the act of state doctrine.¹²⁶ This is a prime example of the court feeling hesitant to create a sweeping exception, but seeing the inapplicability of the act of state doctrine to the facts before it. The Third Circuit has produced similar rulings.¹²⁷ This is consistent with the circuits that have been more hesitant to rule on the doctrine. A rule-based approach may well except commercial sovereign activities that are highly politically sensitive.¹²⁸

The Eleventh Circuit's reasoning highlights one major reason for the loosening of this doctrine: these disputes are becoming ubiquitous. States routinely engage in actions as commercial actors, and in most cases it would not violate principles of international comity or international relations to hold them accountable. So while these factors are still relevant, and still weighed, they interfere with a court's responsibility to adjudicate cases much less than in earlier eras. This may be why critics claim that *Sabbatino* repudiates concerns of international relations and comity.¹²⁹ If the commercial activities exception was founded on protecting the separation of powers, then there should have been no difference in courts' behaviors as globalization quickens its pace. The reframing of the act of state doctrine's justifications in *Sabbatino* and *Dunhill* has not ended courts' foreign relations analysis.¹³⁰

B. The Bernstein Exception

This exception refers to the habit of the executive branch, usually via the State Department, to instruct courts that it will not interfere in the executive's conduct of foreign relations. The case that coined its name was *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*,¹³¹ where the State Department wrote a letter to the court that the act of state doctrine should not prevent courts from hearing plaintiffs seeking redress over Nazi confiscations.

Case law is fractured and suggests no rigid application of the exception. First, *Nat'l City Bank v. Banco Nacional de Cuba*¹³² found a limited counterclaim exception to the act of state doctrine. A plurality of Justices

¹²⁵ *Id.* at 8.

¹²⁶ *Id.*

¹²⁷ *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302 n.2 (3d Cir. 1982).

¹²⁸ *See Ramsey*, *supra* note 56, at 76 (discussing over-inclusiveness of blanket commercial activity exception).

¹²⁹ *See Waller*, *supra* note 66, at 126; *see also supra* note 36.

¹³⁰ *See* Sections IIA-III.

¹³¹ 210 F.2d 375 (2d Cir. 1954).

¹³² *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

held that a State Department advisory letter was dispositive in resolving the case.¹³³ However, a majority of justices in the concurrence and dissent refused to decide the case on those grounds.¹³⁴ Justice Douglas warned that to adopt the *Bernstein* exception as a rule would make the Supreme Court a “mere errand boy for the Executive Branch which may choose to pick some people’s chestnuts from the fire, but not others’.”¹³⁵ This is an intuitive result. Separation of powers encourages judicial circumspection about the executive’s foreign affairs conduct, but it also means that the executive should not decide cases legitimately in the court system.¹³⁶ The State Department argued that the act of state doctrine should be sparingly applied even in expropriation cases, but even this argument has been ignored.¹³⁷ Some cases echo Justice Douglas’ opinion in *City Bank*,¹³⁸ and some find the letters very influential.¹³⁹ The split in case law suggests that courts are factor-balancing.¹⁴⁰ Courts are activist in their deference and aggressively inquire into the foreign relations effects of their judgments. They do not think *Bernstein* letters are dispositive, especially when the executive tries to prevent courts from hearing disputes.¹⁴¹

¹³³ *Id.* at 767-68.

¹³⁴ *Id.* at 772-73 (Douglas, J., concurring).

¹³⁵ *Id.* at 773.

¹³⁶ *Cf. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int’l*, 493 U.S. 400, 409 (1990) (“Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.”).

¹³⁷ *See Bazyler, supra* note 11, at 364 (discussing this letter).

¹³⁸ Decisions that do not grant the State Department letter much importance include *Doe I v. Unocal Corp.*, 395 F.3d 932, 959 (9th Cir. 2002); *Beaty v. Iraq*, 480 F. Supp. 2d 60, 82 (D.D.C. 2007) (holding State Department’s letters important for applying political question doctrine, but not act of state doctrine); *Burma Coalition v. Unocal*, 176 F.R.D 329, 355 (C.D. Cal. 1997).

¹³⁹ Other courts are concerned about whether a *Bernstein* letter has been issued. *Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.*, 822 F.2d 230, 235-36 (2d Cir. 1987); *Allied Bank Int’l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 519-20 (2d Cir. 1985) (reversing its decision to apply act of state doctrine after amicus brief from Justice Department); *United States v. Geffen*, 26 F. Supp. 2d 497, 502 (S.D.N.Y. 2004).

¹⁴⁰ The factor-balancing view is explicitly endorsed by several cases. *See Doe I v. Liu Qi*, 349 F. Supp. 1258, 1296 (N.D. Cal. 2004) (“In this regard, the views of the State Department, while not ‘conclusive,’ are entitled to respectful consideration.” (citing *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) and *Sharon v. Time* 599 F. Supp. 538, 552 (S.D.N.Y. 1984)).

¹⁴¹ *See Garvey, supra* note 55, at 462-63 (“Whether deciding to adjudicate or to abstain, United States courts are divining foreign policy.”). *See also Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.*, 594 F. Supp. 1553, 1563 (S.D.N.Y. 1984) (stating that courts “may, as a matter of discretion, accept the views of the State Department.”).

C. Courts Do Not Consider Some Bad Acts To Be Sovereign Acts

1. Torture

Courts craft exceptions based upon the nature of acts, as in the commercial activities exception. One of the strongest and the most rule-like exceptions is torture. In numerous settings, the act of state doctrine has not barred acts of torture.¹⁴² However, even this is not entirely a blanket rule. In the landmark case of *Filartiga v. Pena-Irala*, the court acknowledged that the doctrine may apply if the state itself endorsed and accepted torture as a state practice.¹⁴³ This reflects the concern, which was highlighted in *Sabbatino*, about only referencing well-settled international law, as only signatories to various anti-torture conventions would be in violation of that law.¹⁴⁴ Because the states themselves disavow torture and the torturer, these proceedings are unlikely to offend that government.¹⁴⁵

The court in *Mujica v. Occidental Petroleum Corp.*,¹⁴⁶ acknowledged these factors when it allowed a suit presented by plaintiffs who were bombed by an Occidental Petroleum-employed mercenary force spotting targets for the Colombian Air Force.¹⁴⁷ While acknowledging that the actions of the Air Force were an official act, it weighed the *Sabbatino* factors. It held that the first factor, the degree of consensus in international law, clearly favored waiving the doctrine. The second factor, the degree to which foreign relations would be affected, favored applying the doctrine for a few reasons. Colombia submitted a letter asking that the doctrine be applied. Colombia is America's strongest ally in South America, and angering them or restricting their military activity has severe repercussions for the United States.¹⁴⁸ The State Department also vociferously objected to the litigation. In spite of these facts and without much discussion, the court

¹⁴² See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Linder v. Portocarrero*, 963 F.2d 332, 336 (11th Cir. 1992); *Filartiga v. Pena-Irala*, 630 F.2d 876 (9th Cir. 1985); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 24 (D.D.C. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 185 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).

¹⁴³ *Filartiga*, 630 F.2d at 889. But see *Nelson v. Saudi Arabia*, 507 U.S. 349, 362 (1993) (if Saudi Arabia opted out of international prohibitions against torture, and Saudi Government really used torture as normal instrument of state policy as alleged by amicus brief, act of state doctrine could well apply).

¹⁴⁴ E.g., United Nations Conventions against Torture. See *Filartiga*, 630 F.2d at 883-84; see also *De Sanchez v. Banco Central de Nicar.*, 770 F.2d 1385, 1397 (5th Cir. 1985).

¹⁴⁵ *Filartiga*, 630 F.2d at 879 (Paraguayan law prohibited acts of torture committed by government officials in Paraguay).

¹⁴⁶ *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

¹⁴⁷ *Id.* at 1168.

¹⁴⁸ America sends billions of dollars to Colombia for counternarcotics programs. See Juan Forero, *Colombia's Coca Survives U.S. Plan to Uproot It*, N.Y. TIMES, Aug. 19, 2006, at A1.

held that the act of state doctrine should not apply.¹⁴⁹ The implication is that human rights violations are so fundamental to the international order that addressing them outweighs the substantial concerns of meddling in an American ally's ongoing struggle against highly organized drug producers and leftist guerrillas. This is a worthy and proper position, though it was an easier position to adopt because the court could opt out of hearing the case on grounds that did not require it to endorse repugnant state acts. *Mujica* demonstrates that American courts pursue a normative agenda against torture even in disregard of American foreign policy interests articulated by the executive branch.

These cases do not show much respect for the separation of powers as a rationale for the act of state doctrine. They are more concerned with foreign relations. A court is still willing to apply the act of state doctrine to torture cases, but factor balancing often will require that the defendant provide strong evidence that A) the foreign state defines torture as a sovereign act, and B) hearing the case would gravely offend a C) geopolitically crucial country.¹⁵⁰

2. Ministerial Action

The less official a government action is, the less likely it is to count as an act of state. Courts are less willing to protect the acts of those that are not involved in "high politics," such as courts,¹⁵¹ licensing boards,¹⁵² patent agencies,¹⁵³ or police acting outside their mandate.¹⁵⁴ Courts do not believe this is a strict exception and it is not often an explicitly considered factor.¹⁵⁵

¹⁴⁹ This was little consolation to the plaintiffs, whose case was dismissed on political question grounds. See *Mujica*, 381 F. Supp. 2d at 1195. This result is plausible even under the act of state doctrine, given the significance of the Colombian civil war and drug trade to American foreign policy.

¹⁵⁰ One such example may be the cases refusing to hear claims involving Israel's security policies, though those did not involve the deliberate torture adjudicated in traditional cases. See *infra* note 225.

¹⁵¹ *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).

¹⁵² See *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 54 (5th Cir. 1979) (withholding timber cutting license doesn't trigger act of state doctrine).

¹⁵³ *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979); *Forbo-Giubiasco, S. A. v. Congoleum Corp.*, 516 F. Supp. 1210, 1217 (S.D.N.Y. 1981). *But see Voda v. Cordis Corp.*, 476 F.3d 887, 904 (Fed. Cir. 2007).

¹⁵⁴ *Galu v. Swiss Air Transp. Co.*, 873 F.2d 650, 654 (2d Cir. 1989) (concerning whether Swiss police acted consistently with Swiss due process in deporting woman from Switzerland: "But we do not know if an expulsion order confers such discretion upon local police officers, nor what steps are required to invoke the immediate removal authority apparently conferred by the applicable statute.").

¹⁵⁵ *Cf. Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 337 (D.D.C. 2007) (stating that City's purchase of ill-gotten artwork not act of state).

In a situation where courts explore the nature of an act, the nature of the actor is usually also relevant. This is implied in *Dunhill*.¹⁵⁶ *Kirkpatrick* focuses on the act, holding that any “official” act may trigger the act of state doctrine. This, contrary to one commentator’s opinion, does not mean that the nature of the actor does not bear on the decision.¹⁵⁷ Courts see an important correlation between the importance of the governmental actor and the international impact. However, factor-balancing is still the rule of the day. *Williams v. Curtiss-Wright Corp.*¹⁵⁸ corroborates my argument. The *Williams* court denied any rule-based ministerial exception, but said that the position of the actor within government may determine how the sovereign responds to litigation over its acts stating, “Our emphasis, like that of the Supreme Court, focused on the effect or lack of effect upon American foreign relations.”¹⁵⁹

One example is *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*¹⁶⁰ Timberlane alleged in an antitrust action that the Bank of America conspired to exclude Timberlane from the Honduras timber market.¹⁶¹ The plaintiffs alleged an anti-Timberlane conspiracy bought out the company’s mortgages in Honduras and refused to settle them, winning judgments against Timberlane in the courts.¹⁶² Those judgments were enforced by “guards and troops” that forcibly shut down Timberlane’s operations.¹⁶³ The defendants contended the judgments of the Honduran courts were sovereign acts of state.¹⁶⁴ The court saw through this faulty logic and held that no act of Honduras was being challenged.¹⁶⁵ Honduran courts were used by private parties, but their judgment did not constitute a sovereign’s conscious policy decision to harm the plaintiff.¹⁶⁶ Because the court did not collude with the plaintiffs, the acts of the court were not questioned in the allegations.¹⁶⁷

¹⁵⁶ *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 706 (1976). In distinguishing the case on commercial grounds, it also gave emphasis to the nature of the actors. It described the case as “[a]rising out of the conduct by Cuba’s agents in the operation of cigar businesses for profit, the act was not an act of state.”

¹⁵⁷ *Ramsey*, *supra* note 56, at 36.

¹⁵⁸ *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3d Cir. 1982).

¹⁵⁹ *Id.* at 303.

¹⁶⁰ *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (1976).

¹⁶¹ *Id.* at 601.

¹⁶² *Id.* at 604.

¹⁶³ *Id.* at 605.

¹⁶⁴ *Id.* at 607.

¹⁶⁵ *Id.* at 608.

¹⁶⁶ *Timberlane*, 549 F.2d at 608 (“[T]here is no indication that the actions of the Honduran court and authorities reflected a sovereign decision that *Timberlane*’s efforts should be crippled or that trade with the United States should be restrained.”).

¹⁶⁷ *Cf. Timberlane*, 549 F.2d at 608.

This answer is overly inclusive. If the court really meant what it said, a sovereign must not just intend to do the act, but intend the consequences of the act as well. The court probably meant to acknowledge the court's decision as an act of state, but also believed that the case posed little risk of offending Honduras.¹⁶⁸ Because the courts were not enacting a chosen policy of the sovereign, indirectly undermining the court's result would not frustrate Honduran policy or anger their government. Post-*Kirkpatrick*, the court could have held that the validity of the act was not in question. The court acknowledges, contrary to *Kirkpatrick*'s implications, that this case would require an inquiry into the acts of Honduran courts.

There are cases that contradict the result in *Timberlane*, but they involve deliberate actions by highly-placed officials, which is the opposite of ministerial action.¹⁶⁹ They also involve oil, a resource that often strikes political nerves.¹⁷⁰ Lawsuits over oil in Middle Eastern countries have generally been flagged as politically sensitive and poorly suited for adjudication.¹⁷¹ One such case, in opposition to *Timberlane*, is *Hunt v. Mobil Oil Corp.*,¹⁷² where the plaintiff alleged that oil companies manipulated the levers of the state in Libya to harm the plaintiff.¹⁷³ The dictatorial nature of the Libyan state left no daylight between the head of state, Qaddafi, and the decision-maker that hurt the plaintiff in *Hunt*. The *Kirkpatrick* court's narrow reading of what it means to question an act's validity is inconsistent with the reasoning in *Hunt*, that "the issue of legality cannot be isolated from the issue of motivation of the foreign sovereign."¹⁷⁴ The court seemed to support this statement with a concern that it would be forced to make an inquiry into the sovereign's motivation that could damage foreign relations. The Court explained that:

¹⁶⁸ While in some sense the reputation of Honduras might be sullied by the fact that its courts were used for ill purposes by private parties, and no choice of Honduras was being impugned. See *supra* text accompanying note 166.

¹⁶⁹ *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225-26 (2d Cir. 1985) (discussing actions of Mexican government nationalizing banks and devaluing currency); *World Wide Minerals v. Kazakhstan*, 296 F.3d 1154, 1157 (D.C. Cir. 2002) (applying act of state doctrine when state actor was the State Committee of Kazakhstan).

¹⁷⁰ See *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 408-09 (9th Cir. 1983); *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 111 (C.D. Cal. 1971) (Court applied doctrine in suit alleging that sovereign pressed oil company's claims to detriment of another in boundary dispute involving Iran, Great Britain, and several of United Arab Emirates); discussion *infra* Section IID.

¹⁷¹ See *infra* Section IID.

¹⁷² *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 68 (2d Cir. 1977).

¹⁷³ *Id.* at 78.

¹⁷⁴ *Id.*

The American judiciary is being asked to make inquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far reaching national concern.¹⁷⁵

However, the underlying foreign policy concern in this context is real and should not be extinguished with *Kirkpatrick*. Indeed, *Hunt* found justification for its holding in the text of *Timberlane*.¹⁷⁶ It is hard to climb down in a principled way from the *Kirkpatrick* court's stand that questioning the propriety of an act is not questioning its validity. One court has tried by differentiating cases where the act was more central to the harm to plaintiff than was the contract issued in *Kirkpatrick*.¹⁷⁷ Indeed, the *Timberlane* court saw *Hunt* as valid, but inapplicable.¹⁷⁸ The differences between *Timberlane* and *Hunt* and *Kirkpatrick* may be more due to factual issues, and the reasoning in *Kirkpatrick* an unfortunate consequence of the court's desire to decide the case on limited and simple grounds.

This inquiry turns the *Sabbatino* court's separation of powers analysis on its head. Courts analyze the separation of powers of the foreign country to judge the likely impact of their case on foreign relations. Courts do not worry about the relationship between branches of the federal government. The concern about external relationships again trumps the internal concerns. That courts balance factors is the only principled way to explain the difference between *Hunt* and *Timberlane*. Armed with different sets of facts, courts reach different judgments on the impact a case would have on foreign relations.

3. Corruption

Numerous cases imply that the act of state doctrine does not protect officials engaging in corruption. However, as with torture, the state usually disavows or condemns the corrupt acts. An extreme example is in the litigation against Ferdinand Marcos, ruler of the Philippines, and his wife Imelda. The Philippines government sued the Marcoses in the Second¹⁷⁹ and Ninth¹⁸⁰ Circuits to recover the vast sums that the couple embezzled.¹⁸¹

¹⁷⁵ *Id.* at 77.

¹⁷⁶ *Id.* at 78 n.14 (quoting *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 607-08 (9th Cir. 1976) ("We do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action.")).

¹⁷⁷ *See infra* Section IIIA.

¹⁷⁸ *Timberlane*, 549 F.2d at 608.

¹⁷⁹ *Philippines v. Marcos*, 806 F.2d 344, 359-60 (2d Cir. 1986).

¹⁸⁰ *Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988).

¹⁸¹ *Marcos*, 806 F.2d at 348.

The courts also drew a distinction between public acts, and the private acts (i.e. embezzlement) of an official.¹⁸² *Kirkpatrick*¹⁸³ is also strongly in line with these cases, suggesting that an inquiry into whether an act was motivated by corruption does not trigger the act of state doctrine.¹⁸⁴ The oil cases that run counter to *Timberlane* suggest that there are scenarios where other factors outweigh concerns over corruption.¹⁸⁵ On the other hand, courts have their limits to how much they will protect via the act of state doctrine, even when dealing with governmental officials of temperamental oil states.

In *United States v. Giffen*,¹⁸⁶ the President of Mercator Corporation, James H. Giffen, was appointed a Special Counselor to the President of Kazakhstan.¹⁸⁷ In that capacity, he bribed senior Kazakh officials with payments in excess of seventy million dollars.¹⁸⁸ The act of state doctrine did not prevent him from criminal prosecution because the bribes were not paid as official or sovereign acts in his ministerial capacity.¹⁸⁹ Similarly, the official in *Kirkpatrick* openly directed the defendant to pay a clearly illegal bribe through a Panamanian entity.¹⁹⁰

While the courts will want to avoid angering sovereigns engaged in corruption, the more flamboyant and criminal (i.e. more severe) the corruption, the less courts will be concerned about the opinion of the foreign sovereign.

D. Factors Suggesting Strong National Sovereignty Interests

These factors have not, to my knowledge, been explicitly cited as exceptions, but they appear to systematically affect the behavior of courts in deciding whether to apply the doctrine.¹⁹¹

1. Vital Natural Resources

Attempts to adjudicate sovereign management of resources would cause

¹⁸² *Id.* at 359.

¹⁸³ *See* *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990).

¹⁸⁴ *Marcos*, 806 F.2d at 406.

¹⁸⁵ *See supra* notes 171-72.

¹⁸⁶ 326 F. Supp. 2d 497 (S.D.N.Y. 2004).

¹⁸⁷ *Id.* at 499-500.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 503.

¹⁹⁰ *Kirkpatrick*, 493 U.S. 400, 402 (1990).

¹⁹¹ Niles, *supra* note 19, at 340 (providing thoughtful consideration of act of state cases and concluding that “[j]udicial interference with items that affect a foreign sovereign’s military or economic strength is more likely to bear upon foreign affairs.”).

any government to bristle. Oil is an example of a politically sensitive natural resource. Unsurprisingly, courts have been circumspect in adjudicating disputes around sovereign territorial oil concessions.¹⁹² As with the other Section II factors, courts are concerned here with the effects the judgment would have on foreign relations, not domestic separation of powers.

For oil-producing kingdoms in the Middle East, oil concessions are their primary, if not only, source of revenue. The thought of private plaintiffs in the United States interfering with this exercise of sovereignty frightens courts. One piece of conflicting authority is in *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*¹⁹³ Clayco alleged that Occidental bribed the Petroleum Minister of Umm Al Qaywan.¹⁹⁴ The *Clayco* court's reasoning is contrary to that of *Kirkpatrick*, and it unconvincingly distinguishes itself from other cases consistent with *Kirkpatrick*.¹⁹⁵ Presumably, the court thought that an oil dispute with a personality-driven, hereditary micro-state would be poorly adjudicated in a United States forum. In the court's estimation, strongly condemning the Petroleum Minister, who the court notes was the son of Umm Al Qaywan's Sheik, would upset the United States' foreign relations with a valuable supplier of oil.¹⁹⁶ The court also found it helpful that the United States could still pursue charges under federal statute.¹⁹⁷ This relates back to the very core assumptions of *Underhill*, weakened but not obliterated, that states must pursue grievances against other states. The core, pre-*Sabbatino* rationale for the doctrine continues to motivate courts' thinking.

Int'l Ass'n of Machinists & Aerospace Workers (IAM) v. OPEC,¹⁹⁸ a harshly criticized decision,¹⁹⁹ is similarly explainable. IAM, a labor union, sued OPEC and its member-nations for fixing the price of oil on

¹⁹² See *Occidental of Umm Al Qaywayn, Inc. v. Cities Serv. Oil Co.*, 396 F. Supp. 461 (W.D. La. 1975); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 92 (C.D. Cal. 1971).

¹⁹³ 712 F.2d 404 (9th Cir. 1983).

¹⁹⁴ *Id.* at 405.

¹⁹⁵ *Id.* at 407. The court claiming it was consistent with *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.* characterized *Indus. Ind. Dev. Corp. v. Mitsui & Co.*, stating, "That opinion does not foreclose application of the act of state doctrine to cases where motivation but not validity must be scrutinized."

¹⁹⁶ *Id.* at 405.

¹⁹⁷ *Id.* at 409 (referring to the The Federal Corrupt Practices Act).

¹⁹⁸ 649 F.2d 1354 (9th Cir. 1981).

¹⁹⁹ Andres Rueda, *Price-Fixing At the Pump – Is the OPEC Oil Conspiracy Beyond The Reach of the Sherman Act?* 24 HOUS. J. INT'L L. 1, 50 (2001); Andrew C. Udin, *Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC*, 50 AM. U.L. REV. 1321, 1362-63 (2001); Waller, *supra* note 66, at 105, 107, 119-22.

international markets.²⁰⁰ The court held that the act of state doctrine applied. First, while price-fixing may be a commercial activity, it was also a substantially sovereign act, given that the OPEC nations were acting to manage their country's national resources for the public interest.²⁰¹ Second, the court analyzed the *Sabbatino* factors and concluded that international law was unsettled on this point and ruling on the matter would interfere with "a delicate area of foreign policy which the executive and legislative branches have chosen to approach with restraint."²⁰² OPEC's very purpose is for sovereigns to coordinate oil management.²⁰³ *OPEC* was decided in recent memory of stagflation and high pump prices brought on by OPEC's oil embargo and while the United States faced harsh macroeconomic consequences for its failures in international oil politics. The court, understandably, would want to avoid contributing to the catastrophe by angering OPEC for little benefit.²⁰⁴ The argument for applying a commercial exception is weakened because the oil companies of OPEC nations are closely aligned with the sovereigns of many OPEC members, who often rely on oil revenues to maintain their rule.²⁰⁵

One problem commentators have with this distinction is that several cases against Nigeria, an OPEC member, have been allowed to proceed.²⁰⁶ One commentator suggests that courts do not realize Nigeria is an OPEC member and hugely important in world affairs.²⁰⁷ Given the Middle Eastern face of OPEC, this is a plausible claim, yet it seems likelier that two other factors account for this difference. First, none of those cases, save one, have involved oil.²⁰⁸ Second, the less-authoritarian internal politics of Nigeria may account for reduced deference. This is consistent with the concerns about offending hereditary monarchs and their families in *Clayco*.²⁰⁹

²⁰⁰ Udin, *supra* note 199, at 1356.

²⁰¹ *Id.* at 1361.

²⁰² *Id.* at 1361-62.

²⁰³ *Id.* at 1355.

²⁰⁴ Cf. VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS (2d ed. 2005), available at Westlaw 2 LOID 13:1 (arguing that courts are always very concerned in act of state cases in their ability to effect a remedy).

²⁰⁵ See Rueda, *supra* note 199, at 60.

²⁰⁶ See *W.S. Kirkpatrick & Co., Inc. v. Evtl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990); *Kiobel v. Royal Dutch Petroleum Co.*, 2004 U.S. Dist. LEXIS 28813, at *1 (S.D.N.Y. Mar. 11, 2004); *Tex. Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) (commercial dispute); *Nat'l Am. Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978).

²⁰⁷ See Niles, *supra* note 19, at 340 n.49.

²⁰⁸ See *Kiobel v. Royal Dutch Petroleum Co.*, 2004 U.S. Dist. LEXIS 28813, at *23-24 (S.D.N.Y. Mar. 11, 2004) (weighing severity of human rights violations against oil politics involved and letter of protest from Nigerian Attorney General).

²⁰⁹ *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983).

Experience has shown that Nigerian governments have been thick-skinned enough to maintain relations with the United States while litigating in American courts on several occasions.²¹⁰ Other cases suggest that courts tread with caution only when dealing with strategic natural resources. Cases involving lumber disputes have been heard by courts.²¹¹ Uranium disputes have also been handled cautiously by courts.²¹²

Many human rights cases involving oil politics have been allowed to proceed. Courts accord little respect for state acts of torture.²¹³ It also seems relevant that courts here rarely lay blame for the bad acts on the state. Instead, plaintiffs seek relief against the private company that induced or encouraged the state to use force against its own citizens.²¹⁴ This is consistent with the concerns in *Sabbatino*. In this context, both the first and second factors of the test support waiver of the doctrine.

First, international law is ambiguous about sovereign assignment of oil rights, and rules over processes are not codified or respected in international law. In contrast, state torture is the clearest possible violation of international law. A case may involve oil, but if the litigation is really about torture, a court is less likely to apply the doctrine. Second, *Sabbatino* is concerned about the political sensitivity of the topic. While always contentious, cases where the pressure is placed on a private international company are less likely to upset a foreign government or interfere with the United States' foreign relations apparatus. Nor does a successful suit infringe upon the sovereignty of a foreign state to make choices about who shares in its oil benefits. So, while many considerations under *Sabbatino* are at play, courts do not concern themselves with separation of powers analysis. Instead, we see that courts engage in factor-balancing for foreign relations concerns. The presence of oil politics in a dispute is a very strong factor arguing for the application of the doctrine, and one clear case where that factor may be overcome is if the plaintiff is seeking redress for a torture claim.

²¹⁰ See cases *supra* note 206; see also *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480 (1983) (allowing suit against Central Bank of Nigeria in Foreign Sovereign Immunities act analysis).

²¹¹ See *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 54 (5th Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 597 (9th Cir. 1976).

²¹² See *Niles*, *supra* note 19, at 327 n.44. Compare *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002) (uranium dispute not adjudicable); *Montreal Trading, Ltd. v. Amax, Inc.*, 661 F.2d 864 (10th Cir. 1981) (uranium dispute not adjudicable); *with In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980) (uranium dispute was adjudicable).

²¹³ *Doe I v. Unocal Corp.*, 395 F.2d 932 (9th Cir. 2002); *Kiobel*, 2004 U.S. Dist. LEXIS 28813, at *1.

²¹⁴ See *infra* Section IID2.

2. Nature of the Defendant

Two aspects of the defendant are relevant to a court's decision. The first is whether the defendant is the state, or a private third party. The second is the size and importance of the state in question. In matters regarding a volatile and important country, judicial interference risks offending a sovereign.

(a) *Factor 1: Is the defendant a state?*

Courts believe that suing a state assigns more blame to a sovereign, and thus offends it more than suing a private defendant, even if the suit against the private defendant describes the state's behavior as a litany of horrors. Courts may decide to dismiss otherwise valid charges against the defendant government but allow suits against private defendants.²¹⁵ In *World Wide Minerals, Ltd. v. Republic of Kazakhstan*,²¹⁶ the court dismissed claims against the Republic of Kazakhstan and allowed claims against private plaintiffs.²¹⁷ The plaintiff had signed a host of agreements with the Kazakh government in order to extract uranium, but the Kazakh government never gave the final export license to the plaintiff.²¹⁸ Instead, the Kazakh government granted another company, Nukem, the right to export Uranium. Kazakhstan also seized more than a million dollars of the plaintiff's property.²¹⁹ The court reasoned that this was not simple fraud in the marketplace.²²⁰ Instead, even if the act was a commercial breach it was a "sovereign act" of the state in licensing uranium extraction.²²¹ The court followed OPEC's lead in deferring to the state's right to regulate its own natural resources even in the breach of a commercial contract.²²²

²¹⁵ The Ninth Circuit even allowed suit against a diplomatic mission in *Risk v. Kingdom of Norway*, 707 F. Supp. 1159 (N.D. Cal. 1989). The court anticipated *Kirkpatrick*, reasoning that they need not inquire into Norway's acts – their refusal to aid the plaintiff – to adjudicate the conspiracy charge against the plaintiff's wife and the Norwegian mission to the United States. As in *Kirkpatrick*, this narrow distinction between the state and the mission seems technical and unhelpful. The *Risk* court also went out of its way to discuss the *Sabbatino* factors. It is likely the first thing the court did was weigh the foreign policy considerations, and work backwards from there to dismiss claims against Norway itself, but allow claims against other parties. See also *Timberlane*, 549 F.2d at 608; *John Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005).

²¹⁶ *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002).

²¹⁷ *Id.* at 1167-68.

²¹⁸ *Id.* at 1157-58.

²¹⁹ *Id.*

²²⁰ *Id.* at 1166.

²²¹ *Id.*

²²² The *World Wide Minerals* court held that to hear the claims against Kazakhstan means

This decision is open to criticism. The court did not have to invalidate the refusal to grant the uranium license. The court could have found the refusal valid but still a breach of the contract.²²³ However, the Kazakh government prevailed because it was able to better frame its commercial breach than the private parties in *Kirkpatrick*. On the other hand, the company that won the license instead of the plaintiff was not protected by act of state doctrine. If the plaintiff's allegations were true, then the Kazakh government was as liable as the corporation for commercial misconduct. This is a clear example of courts articulating indirectly, through the "sovereign act" analysis, their concern that suing a government poses a heightened foreign relations problem. Courts, constrained by the need to refer to precedent, continue to characterize their concerns in the language of *OPEC*. The distinction between state and private entity is not always principled, but it is necessary to avoid angering a foreign sovereign while permitting as much justice as possible.

That *World Wide Minerals* was decided this way shows that the nature of the defendant is at times a dispositive factor in courts' decision-making. The only difference in facts between the two defendants was their status as a private entity or government, and that difference determined whether or not the act of state doctrine was applied.

(b) *Factor 2: Significance of the country*

Courts are hesitant to interfere with states that are powerful or influential on the world stage. Presumably, this is because courts understand that the foreign policy impact of angering a major ally or foe is greater than alienating an isolated or ineffective government.²²⁴ Large, high-profile countries generally receive more deference.²²⁵ The circumspect treatment of

they would have to "question the 'legality' of Kazakhstan's denial of the export license by ruling that denial a breach of contract." That phrasing makes Kazakhstan's activity seem commercial. The court's reasoning here is circular – the court did not want to question the act, because to question the act would find that it was a commercial, non-sovereign act. The court did not want to rule on the presence of a commercial activities exception, so it is likely that the court balanced the equities before trying to justify its decision in the existing contours of act of state jurisprudence. Any other interpretation of the court's actions would render their reasoning incomprehensible.

²²³ This would be analogous to *Kirkpatrick*, where the question is not the legality or validity of the act – regardless of the court's assertion, quoted in *Worldwide Minerals Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002), but whether the government's denial of the export license occurred, thus incidentally breaching the plaintiff's agreement with Kazakhstan.

²²⁴ Some critics note courts may be inept at this, but a federal court decision has yet to issue an opinion that has sparked an armed conflict or destroyed diplomatic relations with a foreign country. See Goldsmith, *supra* note 67, at 1395-96; Niles, *supra* note 19, at 342.

²²⁵ See *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005) and *Doe*

Iran's revolutionary government is one example. Countries in the Soviet bloc received more deference during the Cold War, consistent with the fact that they were satellites of the largest foe of the United States.²²⁶ The Soviet Union reaped the benefit of the act of state doctrine even when it violated human rights.²²⁷

Courts seem happier to issue judgments against countries with less perceived geopolitical importance.²²⁸ The most glaring example of this is *DeRoburt v. Gannett Co.*²²⁹ A Guamanian newspaper published an article accusing the President of Nauru of making illegal loans to his own political party, a serious allegation of fraud.²³⁰ Nauru is a tiny island nation boasting a population of 13,528, and its supply of phosphate, its only export besides coconuts, has been exhausted.²³¹ The President sued in libel against the

v. State of Israel, 400 F. Supp. 2d 86, 113-14 (D.D.C. 2005). They apply the act of state doctrine to cases that if true would be a *jus cogens* violation of human rights. This is probably because restricting Israel's ability to defend itself through liability-imposing lawsuits would genuinely interfere with relations with a vital American ally, and because the suits would interfere with the executive's complex dialog with Israel over questions of territory and politics in the Middle East. ("Plaintiffs' claims would require the Court to adjudicate sensitive issues of a political nature that would offend notions of international comity. The fact that plaintiffs have alleged *jus cogens* violations does not change things."). *Doe*, 400 F. Supp. 2d at 115. The judiciary seems to fear treading in the contentious and oil-rich Middle East. The same treatment was afforded to Libya in *Tel-Oren v. Libya*, 726 F.2d 774, 803-04 (D.C. Cir. 1984) (Bork, J., concurring). On the other hand, litigation against Chinese and Taiwanese officials, both countries of immense importance to the United States, was held to be consistent with US foreign policy. See *Liu v. Republic of China*, 892 F.2d 1419, 1425 (9th Cir. 1989) (allowing litigation over murder allegedly ordered by Taiwanese minister); *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1294-95 (N.D. Cal. 2004) (citing executive's approval of wide range of tools to pursue human rights reform in mainland China).

²²⁶ *Zschernig v. Miller*, 389 U.S. 429 (1968) (striking down Oregon statute denying inheritance rights to East Germans); *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982) (East Germany's expropriation of art against claim of West German Grand Duchess); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981). *But see* *Dayton v. Czechoslovak Socialist Republic*, 672 F. Supp. 7 (D.D.C. 1986); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978) (allowing suit against Polish state-owned enterprise selling golf carts in United States).

²²⁷ *Frolova v. Union of Soviet Socialist Republics*, 558 F. Supp. 358 (N.D. Ill. 1983); *see also* *Von Dardel v. Union of Soviet Socialist Republics*, 736 F. Supp. 1 (D.D.C. 1990) (reversing decision waiving act of state doctrine because of FISA grounds, but not ruling on act of state doctrine); *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18 (S.D.N.Y. 1976). *Cf.* *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir. 1989).

²²⁸ *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982) (Indonesia); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) (Honduras); *Eckert Int'l v. Fiji*, 834 F. Supp. 167 (E.D. Va. 1993); *Nat'l Am. Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978).

²²⁹ *DeRoburt v. Gannett Co.*, 733 F.2d 701 (9th Cir. 1983).

²³⁰ *Id.* at 702.

²³¹ Furthermore, Nauru is "mostly dependent on a single, aging desalination plant" and

newspaper, also alleging that the paper libelously claimed that he was financially supporting a secessionist movement in neighboring Micronesia.²³² His complaint was dismissed three times, with the district court citing the act of state doctrine each time.²³³ Following *Hunt's* logic, the appellate court reasoned that to litigate the dispute over the secessionist movement would “involve serious intrusion into the propriety of the acts and policies of a foreign state and thus clearly call into play the acts of state doctrine.”²³⁴ The acts and policies, of course, were of Nauru itself. Given that the President of Nauru was the plaintiff, this perverse application of the act of state doctrine is entirely contrary to the well-reasoned Marcos cases above. The *Sabbatino* court’s concern about foreign relations is ill-served by the behavior of the court, which used the doctrine to *anger* a foreign leader.²³⁵

The court finally allowed the suit on the fourth try. To avoid the act of state doctrine, the President dropped the allegations relating to the secessionist movement and those challenging the motives of Nauru, keeping only the claim that he had not made the loans.²³⁶ The contempt for the President of Nauru radiates through the court’s opinions.²³⁷ When the suit finally did proceed, the district court judge who had denied the first three pleadings gave a directed verdict for the defense.²³⁸ The appellate court upheld the district court and criticized the plaintiff’s arguments at trial as inconsistent with its underlying legal theories.²³⁹ A concurrence held the offending reporter in high regard and thought the President’s case meritless.²⁴⁰ This case implicated First Amendment issues, which the court held more dearly than the feelings of the ruler of a tiny island nation.²⁴¹ The

mining has left “the central 90% of Nauru a wasteland and threatens limited remaining land resources.” CIA World Factbook, *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/nr.html>.

²³² *DeRoburt*, 733 F.2d at 701, 703.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

²³⁶ *DeRoburt*, 733 F.2d at 703.

²³⁷ *DeRoburt v. Gannett Co.*, 558 F. Supp. 1223, 1228-29 (D. Hawaii 1983) (awarding plaintiff maximal amount possible in costs, totaling in thousands of dollars).

²³⁸ *DeRoburt v. Gannett Co.*, 859 F.2d 714, 715 (9th Cir. 1988).

²³⁹ *Id.*

²⁴⁰ Judge Chambers’ concurrence is sympathetic to the defendant: “The reporter was the first small Pacific Islands native to be hired by a paper or papers with a large circulation. He had been apparently indoctrinated on the glories of our First Amendment, and the reporter’s duty to even go to jail to protect his sources.” As for the President of Nauru, “I would hold that the First Amendment . . . [does] not preclude a two dollar judgment in favor of the plaintiff.” *DeRoburt*, 859 F.2d at 716-17.

²⁴¹ *Id.*

court explicitly acknowledged that a foreign-relations balancing test-drove its decision-making.²⁴²

A case very similar involving Israel, *Sharon v. Time, Inc.*,²⁴³ was not barred by the act of state doctrine. The case should have involved even more concerns about foreign policy, as it litigated events in the 1983 Israeli invasion of Lebanon. Israeli-backed Lebanese militias murdered hundreds of Palestinian civilians. An Israeli commission found that Israel's Defense Minister, Ariel Sharon, was indirectly responsible for the massacre by failing to consider that the Lebanese militia might murder civilians.²⁴⁴ Sharon sued because Time magazine also reported on an unpublished part of the commission's report that Sharon reportedly discussed with the militia the need to "take revenge" for a political assassination. The court's reasoning was equally applicable to *DeRoburt*, suggesting that Israel's importance in international politics is what allowed Sharon to defend his reputation in court.²⁴⁵

This is *extremely* strong evidence that courts are engaged in factor-balancing. A rule-based exception should apply evenly to both Nauru and Israel, and these decisions clearly show that courts are instead considering the stature of the country in choosing to apply that "exception" in its factor analysis.

The third factor in *Sabbatino* is also keyed to these concerns. A government is at its least influential or powerful when it is no longer in power.²⁴⁶ Even if the government formally persists, a long enough wait between the act and the lawsuit can prompt a court to waive the doctrine.²⁴⁷

²⁴² *Id.* at 703 (rejecting rule-based conception of act of state doctrine. The court stated that "rather, it is a balancing test with the critical element being the potential for interference with our foreign relations.").

²⁴³ 599 F. Supp 538 (S.D.N.Y. 1984).

²⁴⁴ *Id.* at 542.

²⁴⁵ *Id.* at 546 ("By contrast, the litigation here involves no challenge to the validity of any act of state. With respect to Sharon's alleged acts, no one is suggesting that these acts – by which Time claims Sharon condoned the massacre of unarmed noncombatant civilians – have validity in the sense that they cannot be attacked. All agree – Israel, the United States, and the world community – that such actions, if they occurred, would be illegal and abhorrent. The issue in this litigation is not whether such acts are valid, but whether they occurred."). This reasoning equally applies to *DeRoburt*, suggesting that Israeli's centrality to international politics explains the difference in result.

²⁴⁶ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

²⁴⁷ *See Bigio v. Coca-Cola Co.*, 239 F.3d 440, 453 (2d Cir. 2000) (An expropriated owner of a factory seeking restitution from Coca-Cola. Coca-Cola had invoked the act of state doctrine, but it had been thirty years. The court tried to argue that Egypt's attempt to restore the property constituted a repudiation. However, there had been no repudiation, and given the importance of formal acknowledgements in the affairs of states, this seems weak. Instead, the court reasoned "[a]ny finding of impropriety with respect to Egyptian expropriation of Jewish-owned property in the early 1960's would more likely be consonant, than at odds, with the

This suggests that the third factor is also concerned with the importance of a state; a government that no longer exists will rarely be considered important and worthy of respect.

This factor is exclusively concerned about the foreign relations impact of hearing a case. Even the exceptions demonstrate that separation of powers concerns are ignored in case law. The foreign relations problems in *DeRoburt* were minimal.²⁴⁸ The court ignored any separation of powers analysis that might prompt a different result and instead prioritized equity and First Amendment protections.²⁴⁹ Courts seem either uninterested or unable to reconcile separation of powers concerns within the current formulation of the act of state doctrine.

3. Regulatory Actions

State acts receive deference when they regulate the issues at the heart of national sovereignty, i.e. territorial management and export or immigration policy.²⁵⁰ When states appear to be mundane participants in the marketplace, courts are more ready to hold them accountable.²⁵¹ This nicely tracks the changes that prompted *Sabbatino*. The traditional functions of the state receive something close to their traditional deference. On the other hand, as the state vastly expands its role in the lives and economies of its citizens in scope and scale, it ought to receive less deference.²⁵² Defense contracts are in the middle of this cleavage. It is unsurprising that courts apply the doctrine inconsistently when defense contracts are at the heart of a dispute. Courts are pulled in two directions. War-making is perhaps the most sovereign of all acts. On the other hand, an army must purchase and consume an immense amount of everyday objects such as food, clothing,

present position of the Egyptian government.” The court was more likely swayed by that the current Egyptian government was the same as the expropriating government in name only: “But there is little doubt that the Egyptian government that is now in power is far removed in time and circumstance from that which seized the Bigios’ property. The expropriation took place thirty-four or more years ago; President Nasser has been dead for thirty years.”).

²⁴⁸ See *supra* notes 205-06.

²⁴⁹ See *supra* notes 215-16.

²⁵⁰ See *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (9th Cir. 1971) (boundary disputes); *Galu v. Swiss Air Transp. Co.*, 734 F. Supp. 129 (S.D.N.Y. 1990) (immigration enforcement); *U.S. v. 2,507 Live Canary Winged Parakeets, etc.*, 689 F. Supp. 1106 (S.D. Fla. 1988) (waiving act of state doctrine because issuance of animal export permit violates Peruvian law and international treaty); *MOL, Inc. v. People’s Republic of Bangladesh*, 572 F. Supp. 79, 85 (D. Or. 1983) (animal export licenses); *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977) (export licenses).

²⁵¹ For example, when the Polish government sold golf carts in the United States. See *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 398 (D. Del. 1978).

²⁵² See *supra* p. 8.

and civilian automobiles.

Courts have responded by granting some decisions more deference than others. In *Northrop Corp. v. McDonnell Douglas Corp.*,²⁵³ an antitrust action over the fighter design that would become the F-18, the court asserted that “military procurement decisions by foreign sovereigns are acts of state.”²⁵⁴ The *Northrop* court made an overbroad statement when faced with a dispute over warplanes. A sovereign’s choice of weapons is much more essential to sovereign war-making power than mundane logistical or commercial contracts. Interfering with logistical contracts in peacetime is rarely likely to interfere with a state’s ability to defend itself. In practice, the more the case involves a choice in the instrumentalities of war, the more a court will see it as a case where procurement is a sovereign act instead of a commercial one.²⁵⁵

Courts may show too much respect for a sovereign’s licensing decisions. This may be the area where the doctrine is genuinely vulnerable to criticism. *World Wide Minerals*²⁵⁶ is one example. *Bokkelen v. Grumman Aerospace Corp.*²⁵⁷ illustrates all of the concerns about deference to regulatory actions. In *Bokkelen*, Grumman contracted with a broker to sell crop dusters to Brazilian companies.²⁵⁸ The Brazilian government approved and financed the importation of those planes for a consortium of private corporations.²⁵⁹ Two years later the Brazilian government established a board to manage aircraft imports.²⁶⁰ Grumman allegedly sold or licensed technology directly to the Brazilian government.²⁶¹ After this technology transfer, the import board then denied a license for the importation of the remaining planes scheduled for delivery, citing, *inter alia*, a “national

²⁵³ *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983).

²⁵⁴ *See id.*

²⁵⁵ *See* *W. S. Kirkpatrick & Co. v. Evtl. Tectonics Corp., Int'l*, 493 U.S. 400 (medical facility at air force base); *Virtual Def. & Dev. Int'l, Inc. v. Republic of Mold.*, 133 F. Supp. 2d 1, 7 (D.D.C. 1999) (sale decommissioning aircraft is adjudicable); *Miller v. U.S.*, 921 F. Supp. 494 (N.D. Ohio 1996) (Raytheon liable for radar design); *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 908 (E.D. Mich. 1981) (“unsophisticated” armored cars adjudicable); *Gen. Aircraft Corp. v. Air Am., Inc.*, 482 F. Supp. 3 (D.D.C. 1979) (contract over aircraft not adjudicable); *Behring Int'l v. Imperial Iranian Air Force*, 475 F. Supp. 396, 401 (D.C.N.J. 1979) (logistical shipments to Iranian Air Force adjudicable). While some of the adjudicated cases involve valuable defense technologies, these don’t directly affect the ability of states to make war the way the purchase of highly technical front-line military equipment does.

²⁵⁶ 296 F.3d 1154 (D.C. Cir. 2002).

²⁵⁷ *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977).

²⁵⁸ *Id.* at 330.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 331.

capacity of production.”²⁶² The broker sued Grumman in tort.²⁶³ The court applied the act of state doctrine, relying on *Hunt* for the rationale; to inquire into Grumman’s acts would be an inquiry into:

[w]hy the Brazilian government acted as it did in denying the licenses. Such an inquiry would necessarily have to include the question of whether Grumman, directly or indirectly, improperly influenced that decision. The answer to that question easily might embarrass the Executive Branch of our Government in the conduct of our foreign relations.²⁶⁴

This case may be one of a handful that should and would be decided differently after *Kirkpatrick*. As in *Hunt*, the court’s reasoning that the act of state doctrine bars a factual inquiry into what prompted a sovereign act is rejected by *Kirkpatrick*. *Bokkelen* is very similar to *Kirkpatrick* in that the defendant was a private company, and the character of the government is markedly different from that of *Hunt*. The factors that make the outcome defensible in *Hunt* are missing here.

An alternate scenario reveals that overdeference to import/export licensing is still very dangerous. If the Brazilian government were to purchase the planes, and then the import board were to deny the licenses, it is likely a court would be drawn to the same conclusions as the *Bokkelen* court, and for the same reason – an inquiry in that situation would require challenging the validity of a licensing decision, which courts venerate as an important act of state. The license denial itself constitutes the breach of the defendant government. In this scenario, the *Kirkpatrick* court’s hair-splitting does not circumvent the doctrine.²⁶⁵ This line of thinking allows state or private companies that have captured the regulatory mechanisms of a state to breach commercial obligations. Import licensing is a mechanism that lulls the court into thinking the state is exercising a sovereign act of such sensitivity that the act of state doctrine should be applied. In *World Wide Minerals*²⁶⁶ and *Bokkelen*, the government seemed to be engaged in strategic behavior; the same facet of the government who negotiated the original contract also engineered the license denial to avoid its obligations.²⁶⁷ Courts

²⁶² *Bokkelen*, 432 F. Supp. at 331.

²⁶³ *Id.* at 330-31.

²⁶⁴ *Id.* at 333.

²⁶⁵ If the defendant and sole actor is the Brazilian government, there is no private party to hold liable for inducing the bad act. The court would have a harder time than in *Kirkpatrick* asking merely whether the bad act occurred, without questioning its validity.

²⁶⁶ See cases *supra* note 211.

²⁶⁷ In *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977), the decision of the import licensing board came at a time when the Brazilian government was promoting Soviet-style heavy industry development with the eventual goal of import

must be wary of justiciable commercial breaches hoping to masquerade as regulatory actions.²⁶⁸

The court in *MOL, Inc. v. Peoples Republic of Bangladesh*²⁶⁹ made just this mistake. The defendant government rescinded a license allowing the plaintiff to capture and export monkeys to the United States.²⁷⁰ The monkeys were only to be used for “the purposes of medical and other scientific research by highly skilled and competent personnel for the general benefit of all peoples of the world.”²⁷¹ The Bangladeshi Ministry of Agriculture granted the license for the commercial transaction and later broke the agreement by revoking the license. The Ministry unilaterally determined that the plaintiff was in breach because it was selling monkeys to American military researchers conducting neutron bomb experiments. The Ministry refused to abide by the binding arbitration clause it signed in the license.²⁷² The court gave an uncharacteristically vague justification for the political nerves this suit would upset stating, “[t]he entertaining of this suit could give rise to charges of colonialist bias in third world countries...”²⁷³ Courts should scrutinize the record for evidence of bad faith regulatory actions of governments that would warrant waiving the doctrine. Alternatively, when different branches of government acting independently of each other produce a *Bokkelen*-like result, there is a stronger rationale for

independence.

²⁶⁸ See *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 698-99 (1976); *Eckert Int’l v. Fiji*, 834 F. Supp. 167 (E.D. Va. 1993).

²⁶⁹ *MOL, Inc. v. Peoples Republic of Bangladesh*, 572 F. Supp. 79 (D. Ore. 1983), *aff’d*, 736 F.2d 1326 (9th Cir. 1984).

²⁷⁰ *Id.* at 81-82.

²⁷¹ *Id.* at 81.

²⁷² *Id.* at 82.

²⁷³ *Id.* at 86. The court continued, but with little more persuasive force. “The entertaining of such a suit seeking the reverse could give rise to diplomatically embarrassing charges of a double standard in international sovereignty . . . [S]uch a ruling would require that I overturn Bangladesh’s own view of its public interest in wildlife’s management . . . Bangladesh takes the position that delivery of the animals to the [military research institute] they were used in radiobiological research, violated the requirement that the monkeys be used “exclusively . . . for the general benefit of all peoples of the world.” The court, without much justification, decided that “[a] ruling on whether or not radiobiological research is or is not for the general benefit of all peoples of the world will “embarrass the United States in the eyes of the world.” It would not be hard to characterize medical research, even if conducted for the army, as generally beneficial. Similarly, the vague potential for embarrassment is unaddressed; other branches of the American government make the decision to use its soft and hard power to sway smaller, less-developed countries constantly. Every case against a developing nation could be dismissed using this general, milquetoast justification. It seems that this case is best explained by courts’ deference export/import regulation, or a distaste for animal experimentation or weapons development.

respecting the sovereign act of the government.²⁷⁴

This respect for regulatory action suggests not just the continued concern over foreign relations, but also respect for international comity. Courts wish to give deference to foreign regulatory regimes for their own sake, even if challenging them would not provoke a diplomatic crisis.

III. TWO RECENT PARADIGMATIC CASES

I use two recent examples, *Oceanic Exploration Co. v. ConocoPhillips, Inc.*²⁷⁵ and *Sarei v. Rio Tinto*,²⁷⁶ to show that the concerns of the cases discussed in Section II, and the factor-balancing approach, remain in use by courts. Even the concerns of technically disapproved cases, like *Hunt*, still animate decisions.

A. *Oceanic Exploration Co. v. ConocoPhillips, Inc.*

Portugal, when it owned East Timor, awarded Oceanic exploitation rights in a disputed oceanic area called the “Timor Gap” between East Timor and Australia. Shortly thereafter, East Timor was conquered by Indonesia.²⁷⁷ In 1991, Australia and Indonesia signed the Timor Gap treaty that negated all prior concessions granted unilaterally in the Timor gap by Australia, Indonesia and/or Portugal.²⁷⁸ A joint body created by the treaty, the TSDA, awarded concessions via a treaty annex. The TSDA gave Oceanic’s concessions, valued at over fifty billion dollars, to ConocoPhillips.²⁷⁹ Oceanic sued ConocoPhillips and the TSDA under RICO and various common law claims.²⁸⁰ The court ruled that the act of state doctrine precluded these claims against the TSDA, but not those against ConocoPhillips.²⁸¹

On its face, this case is hard to distinguish from *Kirkpatrick*. The plaintiff alleges that a governmental actor assigned a concession to another contractor in violation of American law. A court could plausibly find these facts squarely on point with *Kirkpatrick*: The validity of the concession is not in question because the plaintiff does not seek to nullify the state act. The valid act is merely an element of wrongdoing due to other existing legal

²⁷⁴ Cf. U.S. v. 2,507 Live Canary Winged Parakeets, 689 F. Supp. 1106 (S.D. Fla. 1988).

²⁷⁵ 2006 U.S. Dist. LEXIS 72231, at *6 (D. D.C. Sept. 21, 2006).

²⁷⁶ 456 F.3d 1069 (9th Cir. 2006).

²⁷⁷ *Id.*

²⁷⁸ *Id.* at *7.

²⁷⁹ *Id.* at *7-8.

²⁸⁰ *Id.* at *9-10.

²⁸¹ *Id.* at *29.

relationships. Instead, the court chose to apply the act of state doctrine. The court mostly cited the factual differences from *Kirkpatrick* in justification. The court reasoned that acts of the TSDA were acts of state because the organization acted with the sovereign authority of both Australia and East Timor.²⁸² The TSDA functions as an intergovernmental regulatory agency.²⁸³ The court held that if it recognized the plaintiff's right to TSDA-assigned concessions, it would have to invalidate the TSDA's charter provisions that denied those rights.²⁸⁴ The court apparently also thought that to award damages from an act of state would question its validity: "Here plaintiffs' claims are premised on the TSDA undoing or disregarding an official directive mandated by Australia and East Timor."²⁸⁵ The court would have "to pass judgment on the official sovereign acts of Australia and East Timor that resulted in the ratification the Timor Sea Treaty."²⁸⁶ This is a plausible reading of validity after *Kirkpatrick*, but probably violates the spirit of *Kirkpatrick*, which was to limit the application of the act of state doctrine.²⁸⁷

The court's work to distinguish *Kirkpatrick* may just be a technical tool to rule on what it considers important: the presence of several Section II factors. The rest of the decision explains how these factors differentiate *Oceanic* from *Kirkpatrick*. The court found it significant that the TSDA was a regulatory agency rather than a private corporation. This indicates an inherent concern with state defendants versus private ones. It also evokes the problem of over-deference to regulatory regimes posed by *Bokkelen* and *MOL*. The governments used the TSDA and its treaty to extend contracts to ConocoPhillips.²⁸⁸ The governments then used a regulatory action to breach their commercial exploitation contract with *Oceanic*. Australia and East Timor thus shirked their commercial obligations with a regulatory shell-game. On the other hand, numerous other factors support the decision. The court found more of a foreign relations interest because there were two sovereigns' regulatory interests at stake.²⁸⁹ The court cited *World Wide Minerals* for the notion that deference should be shown when a sovereign exercises control over natural resources, which Section II shows is an even stronger interest when oil concessions specifically are in dispute. The court

²⁸² *Oceanic*, 2006 U.S. Dist. LEXIS 72231, at *28 n.18.

²⁸³ *Id.*

²⁸⁴ *Id.* at *27-28.

²⁸⁵ *Id.* at *28 n.18.

²⁸⁶ *Id.* at *28.

²⁸⁷ I argue that *Oceanic* is correctly decided. That *Oceanic* had to subvert *Kirkpatrick* to reach the correct result suggests that *Kirkpatrick*'s rule paradigm is ill-suited to complex facts of acts of state cases.

²⁸⁸ *Oceanic*, 2006 U.S. Dist. LEXIS 72231, at *22.

²⁸⁹ *Id.* at *28.

turned aside the plaintiff's attempt to invoke the corruption exception by directly invoking *Hunt*.

It is no coincidence that the court chose to invoke *Hunt*, an oil case, for the proposition that alleging high-level corruption within the TSDA may embarrass Australia and East Timor. Recalling the logic in *Hunt*, the court explained, "It is one thing to question the motives of an official in approving a contract [in *Kirkpatrick*], and quite another to question the motives of... foreign legislature[s]."²⁹⁰

It made the judgment that the sensitivity of the situation outweighed any interests in resolving the injustices of a corruption lawsuit, endorsing *Hunt* when the foreign relation interests are stronger than in *Kirkpatrick*. The court discounted the commercial nature of TSDA's acts. The court reasoned that because the TSDA contracted through a regulatory act, it was not commercial; ergo, it was an act of state. This analysis puts the cart before the horse. A regulatory act awarding a contract is certainly also a commercial act. On the other hand, the court treated commercial activity as a *factor*, weighing it against foreign policy concerns, even as it referred to a "commercial activities exception."²⁹¹ Even if the court gave too little credence to the commercial aspect of TSDA's acts, it still engaged in factor-weighting. In dismissing the TSDA but not the private defendants, the court was consistent with the *Kirkpatrick* court's desire to hold private wrongdoers accountable. This is also consistent with my analysis in Section II, finding that courts weigh the nature of the defendant as an important factor in deciding how to apply the doctrine.

Oceanic confirms that courts deploy rule-language for the sake of expediency or legitimacy. If courts really were looking for exceptions rather than factors, the court would not be concerned about factual issues in deciding the threshold question of whether an act's validity was in question. Instead, the factor analysis is used to support the court's decision on whether the case challenges a public act. *Oceanic* was allowed to stand, and may have carved out an exception from *Kirkpatrick* for *Hunt* and similar cases if there are compelling enough facts.

Oceanic was a difficult case to decide, and the court made the right decision. While the regulatory analysis is unsatisfactory, it is likely the court gave extra credence to the regulatory factor because of East Timor's tumultuous history. *Oceanic* did not contract with East Timor; instead, oil contracts were negotiated by Portuguese and Indonesian occupiers. The TSDA was a complex regulatory mechanism that created a clean slate in a

²⁹⁰ *Id.*

²⁹¹ *Id.* at *34.

zone of political conflict. Management of a country's oil reserves is always a sensitive and sovereign issue. It would be even more offensive if a court were to deny East Timor, a newly created state acting responsibly with its neighbors, the right to carve its own economic destiny.

Oceanic demonstrates the continued disregard for the *Sabbatino* court's separation of powers analysis in adjudicating these cases. The court was concerned about foreign relations and respecting the TSDA's sovereignty, concerns of international comity that date back to *Underhill*.

B. Sarei v. Rio Tinto

The plaintiffs were citizens of Papua New Guinea ("PNG") who worked in a Bougainville copper and gold mine operated by the Rio Tinto corporation.²⁹² Plaintiffs alleged that Rio Tinto seriously polluted Bougainville's ecosystem and engaged in wage discrimination against black laborers who lived in "slave-like" conditions.²⁹³ When Bougainvillians retaliated by sabotaging the mine, Rio Tinto brought in the PNG army to restore order.²⁹⁴ The PNG attacked, killing many civilians and sparked a ten-year long civil war.²⁹⁵ Rio Tinto was accused of directing the PNG army to commit a host of atrocities including "burning of villages, rape and pillage."²⁹⁶ Thousands were killed and many more were maimed and dislocated.²⁹⁷ The district court waived the act of state doctrine for the claims of war crimes, but otherwise held that it barred the plaintiff's claims.²⁹⁸ The Court of Appeals waived the doctrine completely after weighing the factors arguing for and against the doctrine.

The arguments for applying the doctrine are substantial. During the litigation, the State Department issued a "statement of interest" that could disrupt relationships with and within the previously warring factions in the PNG.²⁹⁹ The PNG entered into a contract with Rio Tinto to manage PNG's gold and copper mines.³⁰⁰ Thus, there was a regulatory function to the defendant's acts as they were asserting control over its sovereign territory and resources.³⁰¹

²⁹² See *Sarei v. Rio Tinto*, 456 F.3d 1069, 1075 (9th Cir. 2006), *withdrawn, hearing en banc granted by Sarei v. Rio Tinto*, 499 F.3d 923 (9th Cir. 2007).

²⁹³ *Sarei*, 456 F.3d at 1075.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 1076.

²⁹⁹ *Id.* at 1075-76.

³⁰⁰ *Id.* at 1085.

³⁰¹ *Id.*

The court held that these concerns were insufficient. Plaintiffs responded to the state department letter with declarations from parties to the peace agreement that hearing this case would not disrupt the peace process.³⁰² The court waived the doctrine for the racial discrimination claims, because, like torture, racial discrimination violates *jus cogens* norms. It was unclear if the violations of the Law of the Sea treaty violated *jus cogens* norm as well.³⁰³ While many of the regular concerns that may trigger the doctrine apply here, the atrocious conduct of the defendant in violation of *jus cogens* norms outweigh those concerns and establish that the court should not apply the act of state doctrine.³⁰⁴ The court outright rejected a *Bernstein* letter, in part because other evidence showed that relations with PNG would not be harmed. The application of the *Bernstein* exception here does not reveal deference to executive agencies, but the court's desire to draw on State Department expertise, as one of many sources, to analyze the foreign relations impact of hearing a case. It characterized the letter as worthy of "serious weigh," but it did not apply this factor as a dispositive rule that meant the act of state doctrine must apply because the State Department voiced concerns.³⁰⁵

The *Sarei* court engaged in the kind of intelligent factor-balancing that I attribute to courts in Section II. The treatment of the *Bernstein* letter is clear evidence of this, as it was accorded respect but ultimately not followed. In general, the court acknowledged the importance of the factors raised by the defendant, but *Sarei* follows a long line of cases that demonstrate that *jus cogens* violations should almost never be barred by the act of state doctrine. *Sarei* has been approved to be heard *en banc*, but this is almost certainly on two issues unrelated to most of the act of state analysis.³⁰⁶

IV. REFORM PROPOSALS

Reform proposals are unnecessary in light of my observations. Abolishing the act of state doctrine outright is very problematic.³⁰⁷ Doing so will mean that courts hear fewer cases, not more. Courts will not stop considering the foreign policy impact of the decisions. As in *Sarei* or *Mujica*, courts could also apply the six-factor political question doctrine to determine whether they should abstain from the case. The political question

³⁰² *Id.* at 1075-76.

³⁰³ *Id.* at 1079.

³⁰⁴ *See id.* at 1086 n.17.

³⁰⁵ *Sarei*, 456 F.3d at 1086.

³⁰⁶ It is likely the court will reconsider whether the Alien Tort Claims Act should give plaintiff entrance to federal court before plaintiff exhausted options in his home country, and whether an UNCLOS violation is *jus cogens* wrongdoing.

³⁰⁷ Bazylar, *supra* note 11, at 397.

doctrine's case law is more deferential to the executive and is easier to trigger than the current formulations of the act of state doctrine.³⁰⁸ Forcing courts to rely on the political question doctrine to decide act of state cases will only deny a hearing to more plaintiffs than is done at present. Insofar as the doctrine does prohibit cases being heard, it serves a very useful function: to preserve the foreign relations of the United States by keeping courts out of situations where interference could be harmful. It is hard to quantify the impact of allowing such cases to go forward, but it could well disrupt American diplomatic efforts that had previously been successful. Two strong examples of the act of state doctrine enabling diplomatic successes are in the mass restitution funds created in compensation for the nationalizations during Mexico's and Iran's revolutions, where individual lawsuits had been blocked by the act of state doctrine.³⁰⁹

Calls to apply a commercial activity or corruption exception are not very useful given that courts already consider the commercial nature of the activity as a factor in deciding whether to apply the doctrine. If the fate of the second Hickenlooper amendment is any guide, Congressional attempts to limit the doctrine could counterproductively provoke courts to apply the doctrine to assert their authority.³¹⁰ A more sophisticated proposal is to reform the commercial activities exception to include regulatory breach situations, such as those in *MOL*.³¹¹ One commentator proposes to do this by importing the "unmistakability" exception, which would waive the doctrine when a sovereign unmistakably decides to form a commercial contract.³¹² Little would change, however. It is hard to see why the addition of this new language would alter the way courts undertake this analysis. I showed that the *MOL* court largely weighed factors to see whether the state's act was commercial or sovereign. While I agree that the court should have seen the activity in *MOL* as commercial, it seems unlikely that an unmistakability analysis would have changed the *MOL* court's thinking. Because the court has just as much discretion in applying that unmistakability analysis, it would likely just weigh the same factors and reach the same result under a slightly different paradigm.

³⁰⁸ See Michael J. O'Donnell, Note, *A Turn For the Worse: Foreign Relations, Corporate Human Rights Abuse, and the Courts*, 24 B.C. THIRD WORLD L.J. 223, 242-43.

³⁰⁹ See *Ricaud v. Am. Metal Co.*, 246 U.S. 304 (1918); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918); DAVID J. BEDERMAN, *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 167 (Mark W. Janis ed., Martinus Nijhoff Publishers 1992) (discussing lengthy but ultimately successful claims process). For Iran, see *Tchacos Co. v. Rockwell International Corp.*, 766 F.2d 1333 (9th Cir. 1985); Iran-United States Claims Tribunal, <http://www.iusct.org/index-english.html> (last visited Jan. 24, 2009).

³¹⁰ Kim, *supra* note 88, at 318.

³¹¹ See Ramsey, *supra* note 56, at 93-94.

³¹² *Id.* at 93.

Courts will have to lead the charge to correct the error in *MOL*. Courts must temper regulatory deference by being aware that an agency could act in bad faith to breach its commercial obligations via regulatory action. Courts should be more skeptical when it is the same agency or individual government official who creates and also ends the commercial relationship. On the other hand, it is possible a good-faith regulatory reform effort could nullify earlier contracts. In those situations, such as the scenario in *Oceanic*, the need to wipe the regulatory slate clean or enact a drastic reform may outweigh the need to adjudicate the commercial dispute. This is a way international comity is voiced. Whenever possible, courts want to respect the domestic authority of other governments. However, reforming the act of state doctrine in this way will not give critics the uniformity or certainty they seek.³¹³ There is no easy fix to this problem, and no exception to apply that can take discretion from the hands of the adjudicator. Doing justice in act of state cases still requires a hard look at the facts to make a decision. Rather than decry discretion, we must continue to trust courts and arm them with more relevant facts. Courts should embrace the doctrine's complexity, not hide from it behind rule-talk.

Even if critics concede that the doctrine is being applied correctly, they may still argue that the opacity of judicial opinions delegitimizes the doctrine by making it appear inconsistent or incoherent. One possible response to this criticism is to impose more transparency by requiring courts to more openly discuss the factors that they consider in making a decision. However, this procedural proposal is as flawed as the substantive reform efforts. Increased judicial transparency runs counter to the goal of the doctrine, which as I have shown is to avoid angering a foreign sovereign. In the cases where the doctrine is most necessary to avoid angering a sovereign, candor is least desirable. For example, when an important but thin-skinned and authoritarian sovereign acts badly, a court case that describes the sovereign in negative terms is likely to garner media attention, and thus allow plaintiffs to leverage courts as a platform to air their grievances against a foreign state. If courts behave as this article argues they do, then courts are already deciding cases correctly. Transparency would allay current criticism, but it would also deprive the doctrine of much of its efficacy.

CONCLUSION

The act of state doctrine is the least harmful way courts can abstain from hearing cases that would offend sovereigns and derail foreign policy. As courts have been overwhelmingly accurate in their use of the doctrine,

³¹³ See *supra* notes 10-12.

2008]

The Act of State Doctrine is Alive and Well

155

there is little reason to introduce reform proposals of dubious effect. Historically, legislative and judicial attempts to limit the doctrine have failed because courts engage in a common sense inquiry into the facts of the case. To change the behavior of the judiciary, they would have to narrow or abolish the doctrine so as to abolish a discretionary, fact-intensive application of the doctrine. As a result, reform would merely push courts into adopting the political question doctrine, which would only increase the harm that critics hope to reduce. Critics attack the doctrine for having a vague or shifting justification. This paper shows that its pragmatic value more than compensates for theoreticians' discomfort. The act of state doctrine strikes an effective balance between providing protection to American foreign policy and ensuring justice for plaintiffs.