Clayco Petroleum Corp. v. Occidental Petroleum Corp.: Should There be a Bribery Exception to the Act of State Doctrine

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INTRODUCTION

The act of state doctrine\(^1\) has precluded judicial review of the validity of the acts of a foreign sovereign since 1897.\(^2\) Nevertheless, the courts apply the doctrine flexibly. This flexible application has generated much confusion and afforded little guidance in determining whether a particular activity falls within the doctrine's protection.\(^3\) As a result, the status of bribes to foreign officials under the doctrine is unclear. This Note argues that there should be an exception to the act of state doctrine when a previous Foreign Corrupt Practices Act investigation has found that an American multinational corporation has bribed a foreign government official with the intent to retain or obtain business for that corporation.\(^4\)

Section I of this Note discusses the act of state doctrine and the Foreign Corrupt Practices Act of 1977 (FCPA),\(^5\) which prohibits U.S. domestic concerns from bribing foreign government officials for the purpose of retaining or obtaining business.\(^6\) Section II presents *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*,\(^7\) in which the United States Court of Appeals for the Ninth Circuit held that the act of state doctrine barred an antitrust suit against an American oil company that allegedly made illegal payments to a foreign government official.

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2. \See infra note 10 and accompanying text.
4. \But see id. at § 8.09, 251-52, 252 n.88. Atwood and Brewster argue that there should not be a bribery exception to the act of state doctrine. Their argument, however, does not address the viability of such an exception when there has been an FCPA investigation that links the bribe to the foreign sovereign's act. \See infra notes 80-118 and accompanying text.
6. \Id. \See infra note 34.
to obtain an off-shore oil concession. Noting the absence of a full investigation under the FCPA, the court rejected Clayco’s assertion that the FCPA abrogated the act of state doctrine. Section III of the Note evaluates the Clayco decision and proposes an exception to the act of state doctrine when an FCPA investigation establishes a link between an illegal payment and a foreign act of state.

I

BACKGROUND

A. THE ACT OF STATE DOCTRINE

The United States Supreme Court first announced the act of state doctrine in 1897 in Underhill v. Hernandez:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not 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.

It was not until 1964, in Banco Nacional de Cuba v. Sabbatino, that the Court elaborated upon the doctrine, explained how it should be applied, and discussed the policies supporting its application. The

8. 712 F.2d at 409. See infra notes 54-67 and accompanying text.
9. See infra notes 68-118 and accompanying text.
10. 168 U.S. 250 (1897) (suit by an American citizen against a foreign official for unlawful detention and harassment by army troops barred by the act of state doctrine).
12. 376 U.S. 398 (1964) (suit to recover the proceeds of property expropriated by a foreign government barred by the act of state doctrine despite allegation that the expropriation may have violated international law). For a detailed discussion of the Sabbatino decision, see Falk, The Complexity of Sabbatino, 58 AM. J. INT’L L. 935 (1964). For other instances in which the Supreme Court applied the act of state doctrine, see American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (antitrust suit); Oetjen v. Central Leather Co., 246 U.S. 297 (1918) (replevin action over title to consignments); Ricaud v. American Metal Co., 246 U.S. 304 (1918) (dispute over title to consignment); United States v. Belmont, 301 U.S. 324 (1937) (dissolution of a corporation by a foreign sovereign); United States v. Pink, 315 U.S. 203 (1942) (nationalization of industry and consequent dismissal of corporation’s debts by a foreign sovereign). See also J. ATWOOD & K. BREWSTER, supra note 3, at §§ 8.03-8.13, for a full discussion of the act of state doctrine in an antitrust context.
Court declared that neither the language of the Constitution nor the inherent nature of sovereignty nor principles of international law requires application of the act of state doctrine. The Court, however, stated that the doctrine has “constitutional underpinnings” insofar as it arises from the basic relationship between the executive and judicial branches of government in a system of separation of powers. Based on established precedent, the Court reasoned that the judiciary’s “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.”

While the Court did not articulate a specific test, the Sabbatino opinion alluded to several factors that are relevant to whether judicial review of a foreign act of state is appropriate. These factors include possible impairment of the Executive’s conduct of foreign affairs, the degree of consensus in international law on the act in question, the existence of standards in a treaty or other agreement, the continued existence and recognition by the United States of the foreign government, the sensitivity of the issues to national concerns, and the singular ability of the executive branch.

doctrine was reexamined and reformulated in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) . . . .


15. *Id.* at 423.

16. *Id.*

17. *Id.* at 428-31. *See infra* notes 97-115 and accompanying text.

18. This factor was not expressly enumerated in the opinion but was implied in the Court’s discussion of the separation of powers doctrine. *Id.* at 423-24. *See supra* text accompanying notes 15-16. Justice Brennan recognized the possible impairment in the conduct of foreign affairs as a factor in his summary of *Sabbatino* for his dissent in First Nat’l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 787-88 (1972).

19. *Sabbatino*, 376 U.S. at 428. This factor appears to have a greater impact on the applicability of the act of state doctrine when the foreign government is no longer in existence or not recognized by the U.S. *See, e.g.*, *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.”). *See also* Restatement (Second) of Foreign Relations, *supra* note 11, at § 42 (“The [act of state doctrine] does not apply in the case of an act by a regime that: (a) is not recognized as the government of the acting state by the United States at the time the court determines whether to examine the validity of the act . . . .”).

There is no evidence, however, that the existence of the foreign government and its recognition by the U.S. is a critical factor in applying the act of state doctrine. In *Sabbatino*, the Court focused on the international consensus factor. *Sabbatino*, 376 U.S. at 428-31. The existence of the foreign government was addressed only because of the particular circumstances in Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375 (2d Cir. 1954), which involved actions of Nazi Germany.

20. This reference to national concerns apparently includes concerns of both the United States and the foreign nation, such as the national interests of capital importing countries as compared with those of capital exporting countries, or the social ideology of nations exhibiting state control over the means of production as compared with that of nations with free enterprise economies. *See Sabbatino*, 376 U.S. at 429-30.
to compensate U.S. citizens harmed by the act of a foreign state.\textsuperscript{21}

\section*{B. THE Bernstein Exception}

Scholars\textsuperscript{22} and courts\textsuperscript{23} argue that the act of state doctrine is inapplicable when the executive branch waives any objection to judicial scrutiny of the validity of the act of a foreign state. This is known as the "Bernstein exception," derived from the United States Court of Appeals for the Second Circuit's opinion in \textit{Bernstein v. N.V. Nederlandsche-Amerikaansche}.\textsuperscript{24} In \textit{Bernstein}, the owner of stock in a German liability company sought to recover proceeds from a Dutch corporation that converted this stock in a plan with Nazi officials.\textsuperscript{25} In a prior appeal of the case, the court had ordered the plaintiff to refrain from alleging matters that would require the court to judge the validity of acts of Nazi officials.\textsuperscript{26} After the first decision, the Department of State issued a press release in which it declared that the policy of the executive branch was to "relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."\textsuperscript{27} Based on this expression of executive policy, the Second Circuit modified its prior decision, allowing the

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  \item \textsuperscript{21} \textit{Id.} at 428-31. The \textit{Sabbatino} Court, applying these factors, found that the act of state doctrine barred plaintiff's claim based upon the likelihood of judicial interference in the conduct of foreign affairs because the executive branch had not indicated its position on the expropriation issue; the division of international opinion on the question of a state's power to expropriate an alien's property; the lack of relevant standards in any international agreement; the appropriateness of diplomatic negotiation between the executive branch and the foreign government as the means of settling the claim; and U.S. recognition of Cuba. \textit{Id.} at 428-34.
  \item \textsuperscript{22} \textit{See}, e.g., \textit{Restatement (Second) of Foreign Relations}, \textit{supra} note 11, at \textsection 41 comment h ("The considerations underlying the act of state doctrine do not call for its application where it is clear that the executive branch of the government does not consider inquiry into the act of the foreign states inimical to its conduct of foreign relations. When a court in the United States is assured that possible rejection of a foreign act of state will not embarrass foreign policy and when that assurance comes from the branch of government responsible for the conduct of foreign relations, there would appear to be no reason for the court to abstain from ruling on the merits."). \textit{Cf.} \textit{Restatement of Foreign Relations (Revised)}, \textit{supra} note 13, at \textsection 428 comment d & reporters' note 6 ("If the State Department issues a letter stating that it has no objection on foreign relations grounds to adjudication of the validity of a given act of a foreign state, U.S. courts will make their own determination as to whether to apply the act of state doctrine, taking the view of the Executive Branch into account but not being bound by it.").
  \item \textsuperscript{23} \textit{See} \textit{Bernstein} v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375 (2d Cir. 1954); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). \textit{See infra} notes 24-32 and accompanying text.
  \item \textsuperscript{24} 210 F.2d 375 (2d Cir. 1954). For a brief discussion of the \textit{Bernstein} case and exception, see Note, \textit{The Supreme Court, 1971 Term}, 86 \textit{Harv. L. Rev.} 50, 286 & n.14 (1972).
  \item \textsuperscript{25} Bernstein v. N.V. Nederlandsche-Amerikaansche, 173 F.2d 71, 72-73 (2d Cir. 1949), \textit{modified}, 210 F.2d 375 (2d Cir. 1954).
  \item \textsuperscript{26} \textit{Id.} at 76.
  \item \textsuperscript{27} \textit{Bernstein}, 210 F.2d at 376 (quoting Department of State press release). This written expression of executive branch policy is known as a "Bernstein letter."
\end{itemize}
lower court to pass on the act of state in question.\textsuperscript{28} A plurality of the Supreme Court adopted the Bernstein exception in First National City Bank v. Banco Nacional de Cuba.\textsuperscript{29} The Supreme Court held that the act of state doctrine did not apply to a counterclaim for excess pledged collateral as an offset against the value of property expropriated by the Cuban Government without compensation.\textsuperscript{30} The petitioner requested the Court to review the validity of the expropriation. Justice Rehnquist, writing for the plurality, concluded that a "waiver" by the executive branch would free the courts from act of state concerns.\textsuperscript{31} The plurality in First National City Bank applied the Bernstein exception because the Legal Adviser of the Department of State had sent a letter to the Supreme Court advising that "the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."\textsuperscript{32} This freed the Court to hear the claim, otherwise barred by the act of state doctrine, on its merits. A majority of the Supreme Court has yet to adopt the Bernstein exception.

C. THE FOREIGN CORRUPT PRACTICES ACT OF 1977

The Foreign Corrupt Practices Act of 1977\textsuperscript{33} prohibits domestic concerns from making payments to foreign officials for the purpose of retaining or obtaining business.\textsuperscript{34} The FCPA was passed in response

\textsuperscript{28} Id.
\textsuperscript{30} 406 U.S. at 768, 772 (Douglas, J., concurring), 774 (Powell, J., concurring).
\textsuperscript{31} Id. at 762-70. See infra text accompanying note 32. Chief Justice Burger and Justice White joined in this opinion. Justice Douglas' concurrence relied on a precedent unrelated to the act of state doctrine. Id. at 770-73. Justice Powell's concurrence applied the factors, but not the holding, of Sabbatino and concluded that the act of state doctrine did not apply. Id. at 773-76. Justice Brennan's dissent, in which Justices Stewart, Marshall, and Blackmun joined, concluded that the factors and holding of Sabbatino controlled. Id. at 776-96. The dissent and both concurrences rejected the plurality's waiver theory. Id. at 772-773 (Douglas, J., concurring), 773 (Powell, J., concurring), 777 (Brennan, J., dissenting).
\textsuperscript{32} First Nat'l City Bank, 406 U.S. at 764. The plurality also emphasized the exclusivity of the executive branch's control of foreign relations, as enumerated in Sabbatino. Id. at 767-68.
\textsuperscript{34} 15 U.S.C. § 78dd-2(a)(1).
\textsuperscript{(a) Prohibited Practices. It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instru-
to the disclosure of overseas payments by more than four hundred U.S. corporations, totalling in excess of $300 million. Congress sought to redress several problems in the area of corrupt foreign payments. First, the United States was blamed frequently for the acts of American corporations. This damaged relations with major industrial nations, where the disclosure of corrupt payments caused embarrassment. Second, these activities spread corruption in friendly governments and promoted disrespect among their citizens. Third, such payments may mislead consumers, because increased sale prices reflect illicit payments rather than the quality of the product. Finally, Congress feared low regard for American businessmen abroad.

The Securities and Exchange Commission (SEC) and the Department of Justice enforce the FCPA. The SEC has the authority to investigate alleged violations by companies within its jurisdiction. Its only remedy, however, is civil injunction. Upon accumulating sufficient evidence to maintain a criminal action, the SEC refers the case to the Department of Justice, which has exclusive criminal jurisdiction over domestic businesses that are covered under the FCPA. Additionally, the Department of Justice may bring suit for a

mentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person . . . .

15 U.S.C. § 78dd-2(a). The Act also prohibits contributions to political parties or officials for corrupt purposes. Id. at § 78dd-2(a)(2). Similar restrictions apply to issuers of securities pursuant to § 78dd-1.


37. Id.

38. 15 U.S.C. § 78u(a), (d).


40. In 1978, the SEC had jurisdiction over approximately 9000 issuers and reporting companies. See Note, A Congressional Response, supra note 33, at 1278.


civil injunction to prevent an anticipated violation.\textsuperscript{44}

Congress failed to address the act of state doctrine during its deliberations on the FCPA. This failure is surprising, because effective enforcement of the FCPA would seem to require courts to review foreign involvement in an alleged bribe. Presumably, Congress left the relationship between the act of state doctrine and the FCPA to judicial interpretation.

II
THE JUDICIAL INTERPRETATION: CLAYCO PETROLEUM CORP. v. OCCIDENTAL PETROLEUM CORP.

The United States Court of Appeals for the Ninth Circuit assessed the impact of the FCPA on an act of state defense to an antitrust claim based on corporate payments to foreign government officials abroad in Clayco Petroleum Corp. v. Occidental Petroleum Corp.\textsuperscript{45} Clayco based its antitrust claims on allegations that Occidental made secret payments totalling $417,000 to the Petroleum Minister of Umm Al Qaywayn.\textsuperscript{46} Clayco also asserted that, with these bribes, Occidental was able to secure a valuable off-shore oil concession, despite a prior agreement between Clayco and Umm Al Qaywayn's ruler which granted Clayco the concession.\textsuperscript{47} Occidental moved to dismiss the claim based on the act of state doctrine. The United States District Court for the Central District of California granted Occidental's motion, holding that proof of Clayco's claim would require the court

\textsuperscript{44} 15 U.S.C. § 78dd-2(c). Congress did not provide an express private right of action. See 123 CONG. REC. 37,777 (1977) (statement of Rep. Samuel Devine, one of the conferees who worked on the FCPA, made before the House unanimously adopted the conference report). Although commentators have addressed the issue, see, e.g., Siegel, The Implication Doctrine and the Foreign Corrupt Practices Act, 79 COLUM. L. REV. 1085 (1979); Comment, The Foreign Corrupt Practices Act: Curse or Cure?, 19 AM. BUS. L.J. 73, 83 (1981); Note, A Congressional Response, supra note 33, at 1288-92, no court has held that a private right of action can be implied from the FCPA. Analysis of this issue is beyond the scope of this Note; this Note assumes that no private right of action exists.

\textsuperscript{45} 712 F.2d 404 (9th Cir. 1983), cert. denied, 104 S. Ct. 703 (1984). Clayco sued Occidental for damages under the Sherman Antitrust Act, 15 U.S.C. § 1 (1982) (prohibiting contracts, combinations, and conspiracies in restraint of trade either among the several states or with foreign nations), the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. § 13(c) (1982) (prohibiting the payment or acceptance of anything of value by anyone engaged in commerce, except for services rendered in connection with a sale or purchase), the California Business and Professions Code, §§ 16720, 17045 (West 1964) (prohibiting restraints on competition by "trusts" and secret payments which injure competitors and tend to destroy competition), and common law. Clayco, 712 F.2d at 405. The court failed to discuss Clayco's common law claims.

\textsuperscript{46} Clayco, 712 F.2d at 405. Umm Al Qaywayn is part of the United Arab Emirates. Id. at 405 n.1.

\textsuperscript{47} Id. at 405.
to review the propriety of the act of a foreign sovereign.48

Clayco appealed on the theory that the FCPA created a "corruption" exception to the act of state doctrine.49 This contention rested on two grounds. First, Clayco argued that the doctrine should not apply in a private action against a bribing corporation because this kind of action is consistent with Congress' goal of eliminating bribery by American corporations abroad.50 Second, Clayco argued that because the SEC had previously commenced an action against Occidental regarding the bribes,51 there was no fear of further disclosure of information potentially embarrassing to the foreign government.52 Thus, act of state concerns did not apply.53

The Ninth Circuit rejected Clayco's assertion of a bribery exception to the act of state doctrine.54 The court began its discussion with quotes from Underhill v. Hernandez55 and Banco Nacional de Cuba v. Sabbatino,56 emphasizing the separation of powers rationale and the danger of judicial interference in foreign relations.57 The court observed that neither the Supreme Court nor any court of appeals had addressed the proposed bribery exception.58 Conceding that in enacting the FCPA Congress intended to eliminate bribery overseas,59 the court emphasized that FCPA enforcement "entails risks to our rela-

48. Id. at 406.
49. Clayco, 712 F.2d at 406. Appellants also argued that the act in issue was not a sovereign act, that the necessary judicial inquiry would not be sufficiently intrusive to warrant act of state concerns, and that the commercial exception suggested in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976), should be applied. Assuming the truth of the underlying antitrust allegations, the court rejected each argument. First, the court held that granting an oil concession is a sovereign act in that it affects the public interest. In the cases presented by appellants, the sovereign activity merely formed a background to the dispute. Clayco, 712 F.2d at 406-08. Second, the required analysis would be intrusive because plaintiff's claim requires proof of bribery as the motivation for the sovereign act. Embarrassment would therefore result from a judicial probe. Id. at 407. Finally, the commercial exception suggested by a plurality of the Supreme Court in Dunhill envisioned situations in which governments were not exercising powers peculiar to sovereigns. Granting an oil concession is peculiar to a sovereign. Id. at 408.
50. Id. at 408. See supra notes 33-37 and accompanying text for the legislative policies supporting eliminating bribery.
51. Id. at 405. In 1977, the SEC commenced an action against Occidental alleging illegal and questionable payments. Occidental consented to a permanent injunction and agreed to conduct an internal investigation of the matter, a report of which was filed with the SEC. Id.
52. Id. at 409 n.6.
53. Id. at 406.
54. Id. at 409.
55. Id. at 406 (quoting Underhill, 168 U.S. at 252). See supra text accompanying note 11.
57. 712 F.2d at 406.
58. Id. at 408 n.3. The court did mention two district court opinions which supported the proposed exception. See infra note 81.
59. See supra notes 34-35 and accompanying text.
tions with the foreign government involved." But, the court distinguished governmental actions under the FCPA from private actions. When the executive branch initiates an FCPA action, the Department of State screens the proceedings to ensure conformity with foreign policy goals concerning the nation in question. The court concluded that "in private suits, the act of state doctrine remains necessary to protect the proper conduct of national foreign policy."

The court also rejected Clayco’s contention that the SEC enforcement action prior to Clayco’s private action had already exposed all the potentially embarrassing facts. The court stated that the SEC action had disclosed only some of the facts concerning some of the payments, but did not inquire into the reasons for granting the concession to Occidental. As a result, the limited disclosure in the SEC action did not eliminate the act of state concerns. To hear Clayco’s claim, the district court would have had to ascertain whether the concession was granted in return for a bribe. This judicial finding of the propriety of a foreign sovereign’s act would have violated the act of state doctrine.

III
ANALYSIS
A. CLAYCO WAS CORRECTLY DECIDED

In Clayco, the Ninth Circuit focused on the separation of powers rationale underlying the act of state doctrine as enumerated in Sabbatino. The Clayco court declared, “[T]he critical element is the potential for interference with our foreign relations.” This reasoning justifies the Clayco decision; the risk of embarrassing or irritating foreign officials by examining their actions in a U.S. court is evident.

60. Clayco, 712 F.2d at 408.
61. See Brief for Respondent at G-3, Clayco, 712 F.2d at 409. Daniel W. McGovern, Deputy Legal Adviser of the Department of State, describes the screening process as notification to the Department of State by the Department of Justice or the SEC. This permits the Department of State to notify any affected foreign government in advance and to discuss any foreign relations concerns with the Department of Justice or the SEC. Id.
63. See supra note 51 and accompanying text.
64. See supra note 52 and accompanying text.
65. Clayco, 712 F.2d at 409 n.6. The court did not elaborate on which facts were disclosed. Presumably, if there was no inquiry into the reasons for granting the concession, the SEC only investigated the actual bribe.
66. See id. at 409 n.6.
67. See id. at 404.
68. See supra notes 15-16 and accompanying text.
70. Clayco, 712 F.2d at 406.
71. Statements by businessmen and officials in the United Arab Emirates indicate that such a risk arises from the inherent inference of impropriety associated with efforts of U.S.
Commentators have argued that the acceptance of a bribe is not a sovereign act and should not be protected by the act of state doctrine. The Fifth Circuit has adopted this position. Stating that "[i]t is only when officials having sovereign authority act in an official capacity that the Act of State Doctrine applies," the court held that a dictator's illegal acts and receipt of money and securities with knowledge of their unlawful origin were for private financial gain and exceeded his official authority. As a result, the doctrine did not bar his extradition. In that case, however, the entire purported act of state was not a sovereign act.

In Clayco, granting the oil concession can be separated from accepting the bribe. Even if acceptance of the bribe were not considered an act of state, granting the oil concession would be. The court could not confine its review to the bribe alone, because an award of damages would have required proof of an antitrust violation, not merely a bribe. The Ninth Circuit addressed this distinction between the act of state and the related non-sovereign illegal acts in Occidental Petroleum Corp. v. Buttes Gas & Oil Co. There, the plaintiff asked the court to limit its review to the defendant's illegal actions in "cata-lyzing" the act of state. The Ninth Circuit rejected this approach on the grounds that an award of antitrust damages "requires proof of damage resulting from forbidden conduct." Such proof would force the court to review the act of state induced by the defendant's conduct. Similarly, in Clayco, the Petroleum Minister's acceptance of a bribe...
was not an act of state. The court could not have limited its inquiry to Occidental's alleged bribes; a judgment for Clayco would have required judicial review of the sovereign act of granting the oil concession.

B. A PROPOSED BRIBERY EXCEPTION TO THE ACT OF STATE DOCTRINE

Although the Ninth Circuit's application of the act of state doctrine was correct under the facts in Clayco, a bribery exception to the doctrine is viable under other circumstances. The Clayco court rejected the exception because the SEC action against Occidental did not disclose the reasons for granting the oil concession. This leaves open the possibility of a different result when U.S. enforcement agencies have investigated the reasons behind the purported act of state.

The act of state doctrine does not shield all actions of a foreign sovereign from judicial scrutiny. The Supreme Court emphasized in Banco Nacional de Cuba v. Sabbatino that the classic formulation of the act of state doctrine is not "an inflexible and all-encompassing rule." Recognition of the Bernstein exception by the plurality in First National City Bank v. Banco Nacional de Cuba indicates a willingness on at least part of the Supreme Court to apply the doctrine with the flexibility suggested in Sabbatino. An executive branch FCPA investigation or prosecution that inquires into the reasons behind a foreign sovereign's act should trigger a Bernstein-like excep-

79. Acceptance of a bribe by a foreign official is not an act of state because it is not an official sovereign action in furtherance of the foreign nation's public interest. See supra note 11. In Clayco, the act of state was the granting of an oil concession.
80. See supra notes 63-65 and accompanying text.
81. Dictum in Sage Int'l Ltd. v. Cadillac Gage Co., 534 F. Supp. 896 (E.D. Mich. 1981), supports such an exception. In that case, the defendant tried to invoke the act of state doctrine to bar the plaintiff's antitrust claim involving sham litigation and a conspiracy with foreign government personnel to receive illegal kickbacks. The court held the act of state doctrine inapplicable because much of the alleged antitrust violation occurred within the territory of the U.S. The plaintiff did not challenge the actions of the foreign sovereign, which limited the potential for judicial interference with foreign relations. Id. at 908-09. The court suggested, however, that the act of state doctrine could also have been avoided had the allegations called for "review of foreign sovereign corruption charges." Id. at 910. Such corruption charges are analogous to a bribery allegation. Because the plaintiff in Sage International did not allege wrongdoing by the foreign sovereign, the court refrained from actually deciding this question. In support of the adoption of a corruption exception, the court cited another district court opinion that declared in dictum, "[E]ven an unrepudiated act of state may be scrutinized by the courts if it resulted from the corruption of government officials." Id. at 910 (quoting Dominicus Americana Bohio v. Gulf & Western Indus., 473 F. Supp. 680, 690 (S.D.N.Y. 1979)).
82. 376 U.S. 398 (1964).
83. Id. at 428.
84. See supra notes 22-32 and accompanying text.
tion in a civil suit based upon the same.\textsuperscript{86}

\section{Executive Branch Action Pursuant to the FCPA: An Implied Waiver}

A Bernstein letter from the executive branch informs the judiciary that it need not apply the act of state doctrine in a particular case.\textsuperscript{87} This express waiver rebuts the doctrine's presumption that judicial inquiry into the act of a foreign sovereign will interfere with the Executive's conduct of foreign policy.

An FCPA investigation or prosecution that reveals that an act of state was induced by a bribe\textsuperscript{88} has the same effect as a Bernstein letter. The executive branch enforces the FCPA through investigations, injunctive suits, and criminal prosecutions.\textsuperscript{89} When the executive branch conducts a thorough investigation under the FCPA, it necessarily reviews the foreign sovereign's acts.\textsuperscript{90} A Bernstein letter expressly permits a court to review these acts.\textsuperscript{91} An FCPA action is, in effect, an implied waiver of act of state concerns. Indeed, judicial intervention following an FCPA action may be more justifiable from a separation of powers standpoint than when there has been a Bernstein letter. Although in such a letter the executive branch expressly permits judicial review of a foreign state's acts, it is the judicial branch which actually determines whether those acts were valid. In an FCPA action, the executive branch determines the validity of the foreign state's acts while in a Bernstein letter, judicial review is permitted.

\textsuperscript{86} See infra notes 87-91 and accompanying text.
\textsuperscript{87} See supra notes 27, 31-32 and accompanying text.
\textsuperscript{88} This finding was absent in the Clayco case. See supra notes 63-65 and accompanying text. One argument against viewing an FCPA action as a waiver of the act of state doctrine in a civil antitrust suit is that in the civil suit, the plaintiff must establish a causal link between the bribe and the antitrust violation. See supra text accompanying notes 72-79. In an FCPA action, only proof of an intent to bribe for the purpose of retaining or obtaining business is required. See supra note 34 and accompanying text. Although this argument is persuasive in theory, its practical impact is limited. First, in the case of an FCPA prosecution, it seems inevitable that the question of whether the bribe had its alleged intended effect would be raised. If the bribe did have this effect, the prosecution could strengthen its case substantially by introducing this evidence. Dicta from Sage International supports this point:

\[[S]ince the Act imposes criminal sanctions for bribery "for the purposes of" improper influence or inducement, it is inconceivable that a trial would proceed without some inquiry into whether the alleged improper activity could have had the intended effect, an examination that will call into question the operations of the foreign entity to which the bribe was allegedly directed. The standards of proof in a criminal action, particularly with respect to intent, would seem to require no less.\textsuperscript{534} F. Supp. at 910 n.26. Second, in a civil suit, the court would review the investigation or prosecution and require the plaintiff to show that the sovereign's acts had been examined pursuant to an FCPA action. Such a showing would ensure that the executive action actually constituted a waiver.\textsuperscript{89} See supra text accompanying notes 38-44.
\textsuperscript{90} See supra note 88.
\textsuperscript{91} See supra notes 27, 31-32 and accompanying text.
state's act. Subsequent judicial action in a civil suit would merely adopt the determination by the executive branch that the foreign state's acts were invalid.

2. The Bribery Exception Under the Bernstein Approach

The Bernstein court found that an executive branch waiver alone justified disregarding the act of state doctrine. According to the "Bernstein approach," the act of state doctrine is based solely on the unimpaired conduct of foreign policy by the executive branch. The plurality in First National City Bank, which adopted the Bernstein exception, also saw executive authority as the basis of the act of state doctrine:

It would be wholly illogical to insist that . . . [the act of state doctrine,] fashioned because of fear that adjudication would interfere with the conduct of foreign affairs, be applied in the face of an assurance from that branch of the Federal Government that conducts foreign relations that such a result would not obtain. An FCPA investigation similarly assures that the court's review will not interfere with the conduct of foreign policy. Therefore, executive branch action pursuant to the FCPA, exposing a bribe and its intended effect, should operate as an exception to the act of state doctrine under the Bernstein approach.

3. The Bribery Exception Under the Sabbatino Test

The Sabbatino decision implies that a Bernstein letter alone does not enable a court to inquire into the validity of the act of a foreign state. The "Sabbatino test," contrary to the Bernstein approach, rests upon the rationale that "the act of state doctrine is a judicial

92. Bernstein, 210 F.2d at 376. See supra notes 22-28 and accompanying text.
93. This Note uses the term the "Bernstein approach," as opposed to the "Bernstein exception," to include any executive branch waiver of act of state concerns. Under the Bernstein exception, only a Bernstein letter operates as an executive branch waiver. See supra notes 22-28 and accompanying text. The Bernstein approach is therefore broader than the Bernstein exception in that an FCPA investigation may also operate as an executive branch waiver. See supra notes 88-91 and accompanying text.
94. RESTATEMENT OF FOREIGN RELATIONS (REVISED), supra note 13, at § 428 comment d ("The argument in favor of according deference to the Executive Branch is that only that branch is in position to judge the potential for adverse effect on the conduct of foreign relations of examination by a court of the validity of a foreign act.").
95. 406 U.S. at 769-70.
96. See supra notes 88-91 and accompanying text.
97. See supra notes 12-21 and accompanying text.
98. See supra notes 92-96 and accompanying text.
doctrine for the guidance of the courts, and that the primacy of the executive branch in foreign relations is but one of the bases for the doctrine." 99

Even under the more demanding Sabbatino test, courts should allow an exception to the act of state doctrine. The court must consider other factors100 in addition to the Executive's exclusive control in foreign relations. The first additional factor is the degree of consensus in international law on the objectionable nature of the foreign state's act.101 There was no international consensus in Sabbatino concerning the expropriation of an alien's property.102

There is a consensus, however, on the impropriety of bribing foreign government officials.103 Thus, the illegality of bribery is a generally accepted principle of law recognized by all civilized nations.104 The consensus in international law is manifested in various resolutions and agreements of the United Nations,105 the Organisation of Economic Co-operation and Development,106 the Organization of Amer-
can States, and the International Chamber of Commerce. The standards in these resolutions and agreements by international organizations also fulfill Sabbatino's requirement of standards from a treaty or "other agreement."  

Another criterion discussed in Sabbatino is the sensitivity of the issue to national concerns. The act of state considered in Sabbatino, the expropriation of an alien's property, is accepted under the economic and social systems of some nations and rejected under others. Reviewing the act of state would have required a choice between opposing ideologies. These concerns do not apply to the bribery of foreign government officials, which is condemned universally.  

The final consideration under Sabbatino involves judicial abstention when the executive branch alone can redress the grievances of a U.S. citizen harmed by the act of state. Again, this concern was appropriate in Sabbatino, in which the Supreme Court adjudged an expropriation claim. In that case, the executive branch could negotiate a settlement with the foreign sovereign through diplomatic channels. In a bribery situation, however, the defendant is a private enterprise or an individual, not a sovereign. Diplomatic negotiation is not a viable option. Therefore, redress through the courts is most appropriate. The adoption of a bribery exception to the act of state render bribes, to any holder of public office. Annex, General Policies, point 7, 15 I.L.M. at 972.

107. The Permanent Council of the Organization of American States (OAS) unanimously adopted a Resolution on the Behavior of Transnational Enterprises on July 10, 1975. OAS CP/Res. No. 154 (167/75), reprinted in 14 I.L.M. 1326 (1975). The OAS resolved to condemn bribery by a transnational corporation as well as the acceptance of such payments by any person. The Council also urged governments of member states to clarify their laws with respect to such acts. Id., 14 I.L.M. at 1328.


109. The phrase "other agreement" is subject to interpretation. The court did not define "other agreement" and its meaning is unclear. This Note adopts a broad interpretation of the phrase that includes resolutions and guidelines of international organizations.

110. See supra note 12.

111. See Sabbatino, 376 U.S. at 430.

112. See supra note 103 and accompanying text.

113. Technically, there is an additional consideration: the existence of the foreign government and U.S. recognition of it. See supra note 19. In a bribery situation, application of all the other Sabbatino test factors support an exception to the act of state doctrine. See supra notes 100-12 and accompanying text. Therefore, the "existence and recognition" factor alone is insufficient to warrant application of the doctrine.

114. See supra note 12.

115. See Falk, The Complexity of Sabbatino, supra note 12, at 939-45, for a more detailed application of the factors of this test to the Sabbatino case.
doctrine would enable private parties damaged by bribery in an antitrust setting to satisfy their claims in court.

The proposed bribery exception is consistent with the *Sabbatino* test. The addition of the *Sabbatino* factors beyond the implied waiver by the executive branch does not affect the conclusion that the act of state doctrine should not apply to bribery of foreign officials. Thus, even the more rigorous *Sabbatino* test supports the proposed bribery exception to the act of state doctrine.

4. Policy Supporting a Bribery Exception

Judicial recognition of a bribery exception to the act of state doctrine would aid in enforcement of the FCPA. Although many investigations have been conducted under the FCPA, there have been very few prosecutions. The Department of Justice attributes this to the "immense practical difficulty in gathering evidence necessary to build a case under difficult circumstances in foreign countries." The bribery exception should lead to the prosecution of more violators. If a company is harmed by a competitor's bribe to a foreign government official, the damaged company is likely to provide helpful information to the SEC or the Department of Justice if a civil action following the FCPA action will be unencumbered by the act of state doctrine.

Treble damages awarded to a successful antitrust plaintiff would serve as a powerful incentive to provide evidentiary assistance in the FCPA action. This would aid the executive branch in the enforcement of law and the administration of justice, help fulfill the congressional goal of eliminating overseas bribery by domestic corporations, compensate injured parties, and prevent wrongdoers from reaping unjust rewards.

CONCLUSION

The *Clayco* decision is sound within the parameters of its factual situation. The relevant foreign policy considerations required that the act of state doctrine preclude *Clayco*’s claim. The policies underlying the FCPA and the flexible application of the act of state doctrine, however, provide the foundations for a bribery exception to the doctrine, given that an FCPA action has inquired into the alleged act of state. The exception would further the legislative intent to eliminate

116. See *supra* notes 87-91 and accompanying text.
117. In 1978, just one year after passage of the FCPA, the SEC was investigating over 400 cases which were opened following that agency's voluntary disclosure program. SEC. REG. & L. REP. (BNA) No. 466, at A-4 (Aug. 16, 1978).
118. *Id.* (Statement of Mark Richard, Dep’t of Justice).
bribery by Americans overseas. A bribery exception also meets the standards for exceptions to the act of state doctrine under both the Bernstein approach and the more stringent Sabbatino test. Businesses that violate the FCPA should not be permitted to hide behind the cloak of the act of state doctrine in a civil suit after the executive branch has already linked an illegal payment with a foreign sovereign's acts. Disregard of the act of state doctrine in such a situation would be "no more than an application of the classical common-law maxim that '[t]he reason of the law ceasing, the law itself also ceases.'"119

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119. First Nat'l City Bank, 406 U.S. at 768 (quoting BLACK'S LAW DICTIONARY 228 (4th ed. 1951)).