

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES



CAPTION: W. S. KIRKPATRICK & CO., INC., ET AL., Petitioners V.
ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL

CASE NO: 87-2066

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1 PROCEEDINGS

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next in
4 No. 87-2066, W.S. Kirkpatrick & Company versus
5 Environmental Tectonics Corporation.

6 Mr. Brodsky.

7 ORAL ARGUMENT OF EDWARD BRODSKY, ESQ.

8 ON BEHALF OF PETITIONERS

9 MR. BRODSKY: Mr. Chief Justice, and may it please
10 the Court:

11 The issue in this case is whether or not the act of
12 state doctrine bars the prosecution by the plaintiff of
13 this action which we say that it does.

14 The facts are as follows. In 1982 our client, W.S.
15 Kirkpatrick Company, entered into an agreement with the
16 Government of Nigeria to supply equipment on an air base,
17 a military air base, in Nigeria. The equipment was part
18 of -- was to be used in an aeromedical center in Nigeria
19 as part of its defense program. The equipment were things
20 like ejection seats for jet aircraft and centrifugal
21 machines to train pilots.

22 In connection with obtaining this contract with the
23 Government of Nigeria, our client paid an intermediary,
24 not an official of the Government of Nigeria -- our client
25 paid an intermediary an amount of money which, pursuant to

1 an arrangement with the intermediary, was to be used as
2 bribes to officials of the Government of Nigeria. The
3 amount of money paid was about \$1.7 million. The total
4 contract price was about \$10 million.

5 In 1984, our company was indicted, along with our
6 chief executive officer -- actually, it was our
7 predecessor -- for violating the Foreign Corrupt Practices
8 Act. We pleaded guilty. And after that, the plaintiff in
9 this case brought an action against us and is claiming
10 that it is entitled to damages because, but for our bribe,
11 it would have obtained the contract. It is suing us under
12 the RICO statute, under the Robinson-Patman Act, and it is
13 suing us under a New Jersey RICO statute. It is not suing
14 under the Foreign Corrupt Practices Act.

15 The district court agreed with our position, even
16 after receiving a letter from the legal advisor to the
17 Secretary of State. That letter was requested by the
18 district court. And the letter that was received by the
19 district court was kind of inconsistent, internally
20 inconsistent.

21 One the one hand, it said that the State Department
22 had no objection if this case would go forward. But, on
23 the other hand, it also said that discovery in this case
24 might seriously affect -- that's a quote from the letter -
25 - might seriously affect United States foreign relations.

1 Therefore, the district court said, look, I'm not a
2 member of the State Department, I'm not an expert in
3 foreign relations and this case should be dismissed.

4 The court of appeals disagreed in the Third Circuit
5 and the court of appeals made a distinction between
6 something which motivates an act of state -- namely, in
7 this case we say the act of state is the awarding of the
8 contract itself -- and the validity of a contract.

9 The court of appeals said that we are not claiming --
10 we disagree with this position of the court of appeals --
11 but the court of appeals said that we are not claiming
12 that the act of state here, namely the awarding of the
13 contract, is an invalid act. We are simply saying that
14 the contract was achieved through bad motives, through a
15 bribe. That evidence might embarrass the Government of
16 Nigeria but that, the court of appeals says, makes no
17 difference. It makes this bright line distinction between
18 motivation and validity.

19 When the court of appeals did that, it went in
20 conflict with the Ninth Circuit in the Clayco case which
21 does not make that distinction. And that case we say on
22 the facts is the same as this case and, therefore, the two
23 circuits are in conflict.

24 First, with regard to the motivation validity
25 distinction. In the first place, it is our contention

1 here that in order for the plaintiff to prevail, the
2 plaintiff does indeed impinge upon the validity of the act
3 of state of the Government of Nigeria. And the act of
4 state doctrine says that the courts in the United States
5 shall not examine and pass judgment upon the acts of
6 foreign governments.

7 Now, the act here -- the act of state -- is the award
8 of the contract and what the plaintiff is saying is that
9 we obtained this contract through the payment of a bribe;
10 we obtained this contract, they say, in violation of the
11 laws of the Government of Nigeria. They say that they
12 should have received the contract, not us. And in doing
13 all of that, it seems to me that the plaintiff would be
14 required to examine the procedures of the award of the
15 contract by the Government of Nigeria, what officials get
16 involved in the award of such a contract, how the award is
17 made.

18 The complaint in this case doesn't even say that they
19 were the low bidder. They do say elsewhere in the record,
20 their own statement, that they were the low bidder. But
21 there is nothing in this record or anyplace else which
22 would even indicate that the low bidder would get the
23 contract.

24 So, what they would be doing in this case and what we
25 say that the courts in the United States should not be

1 doing, is examining the internal workings of high
2 officials in the Government of Nigeria on matters which
3 directly affect the Government of Nigeria because this is
4 a military contract, a contract that's made in connection
5 with the air force of the Government of Nigeria.

6 QUESTION: Certainly there is nothing in the act of
7 state doctrine that would require a United States court to
8 refrain from examining Nigerian law --

9 MR. BRODSKY: No. .

10 QUESTION: -- in the abstract, is there?

11 MR. BRODSKY: I would agree with that, Your Honor.
12 But this is more than examining Nigeria law. What they
13 would have to say in this case -- this Court would have to
14 say, in our view -- is that the contract was invalid. It
15 was made for the wrong purpose. It was made because a
16 bribe was taken.

17 QUESTION: But there must be many cases in which one
18 --the United States courts will examine the law of a
19 foreign country and say that a contract was or was not
20 valid under the law of that country.

21 MR. BRODSKY: Well, that's true but what the courts
22 do not do is to say that when the foreign government
23 entered into that contract, that act, that contract was
24 invalid.

25 QUESTION: So you say that the critical factor is

1 that it was a contract by the Government of Nigeria?

2 MR. BRODSKY: Oh, yes. Yes, indeed.

3 QUESTION: And no contract entered into by the
4 Government of Nigeria could be examined under the act of
5 state doctrine?

6 MR. BRODSKY: I don't think I have to go that far if
7 one accepts the so-called commercial exception to the act
8 of state doctrine.

9 But I say -- and, indeed again, the government has
10 been inconsistent in this way as well -- even the -- well,
11 first of all, the two courts below say that the commercial
12 exception to the act of state doctrine would not apply in
13 this case.

14 The Solicitor General, in his amicus brief to this
15 Court, said the same thing. Now the Solicitor General --
16 yes -- seems to say -- seems to say, because even the
17 brief in this Court is somewhat inconsistent, that that
18 commercial exception would apply. But I do not believe
19 that the commercial exception to the act of state doctrine
20 should apply in this case because we weren't dealing with,
21 as I think one of the courts said, is this the kind of an
22 agreement that a company ordinarily would enter into in
23 the regular course of commerce, and it's not.

24 This is an agreement which has to do with the
25 security of the air force, the military of the Government

1 of Nigeria. If anything is not a commercial contract
2 which would come within the commercial exception, such as
3 we had in the Dunhill case in this Court -- it's this
4 contract.

5 QUESTION: So, if Nigeria -- if the Nigerian
6 Government were buying fertilizer, the result would be
7 different under your view than in this case?

8 MR. BRODSKY: Well, in my view it would not -- it
9 might be in this Court's view.

10 QUESTION: Not fertilizer for the military, but
11 fertilizer for farming.

12 (Laughter.)

13 MR. BRODSKY: Well, yeah, if they buy fertilizer for
14 a farm. I think if there is a commercial exception,
15 that's the kind of thing that it would apply to. Yes, I
16 would think so.

17 QUESTION: How about food for the troops? I mean,
18 food that's going to be used by the army?

19 MR. BRODSKY: Food for the troops gets closer, you
20 know, as a fuzzy area as far as --

21 QUESTION: Well, this stuff wasn't missiles.

22 MR. BRODSKY: No.

23 QUESTION: It was training -- training equipment for
24 pilots of the sort --

25 MR. BRODSKY: That's correct.

1 QUESTION: -- of the sort that commercial airlines
2 might well use.

3 MR. BRODSKY: Well, no. Not ejection seats. Not
4 centrifugal force machines to train jet pilots. No, I
5 don't think so, Your Honor. All of this equipment was
6 really a design for jet aircraft --

7 QUESTION: Just military planes.

8 MR. BRODSKY: -- that's used in warfare.

9 QUESTION: Mr. Brodsky, why do you -- why do you --
10 you know, in your brief and also in your oral argument you
11 asserted that the letter that the district court got from
12 -- from Judge Sofaer was very ambiguous and unhelpful. I
13 don't think it's ambiguous at all. It seems to me the
14 letter says very clearly that the act of state doctrine
15 does not apply.

16 MR. BRODSKY: Well --

17 QUESTION: It answered the question that, you know,
18 the court was interested in squarely. It said that the
19 doctrine only -- in the State Department's view -- only
20 applies to the inquiries into the validity of foreign
21 government acts, not into the background of it.

22 MR. BRODSKY: Yeah, but let's look at the rest of the
23 letter. If I may --

24 QUESTION: The rest of the letter said, of course
25 this is a sensitive case and be careful.

1 MR. BRODSKY: But it goes further.

2 QUESTION: On the act of state doctrine it was dead
3 clear, wasn't it?

4 MR. BRODSKY: Well, it was dead clear in the sense of
5 making the legal distinction which the State Department
6 makes and which indeed the Solicitor General says is
7 wrong, in this brief.

8 QUESTION: Apparently the Solicitor General doesn't
9 agree with Judge Sofaer.

10 MR. BRODSKY: That is correct. But --

11 QUESTION: He doesn't seem to have been copied on the
12 letter either.

13 (Laughter.)

14 MR. BRODSKY: Well, we told him what the position
15 was, Your Honor.

16 But you see what else that letter says, Your Honor.
17 It says that inquiries into the motivation and validity of
18 foreign state's actions and discovery against foreign
19 government officials may seriously affect United States
20 foreign relations.

21 QUESTION: So what?

22 MR. BRODSKY: Well, if I may answer the so what --

23 QUESTION: A lot of things may. That doesn't prove
24 that --

25 MR. BRODSKY: Let me answer the so what. How is a

1 district court going to deal with that? What kind of
2 rules does a district court follow when the district court
3 judge is not the Secretary of State; he's not an expert in
4 foreign relations?

5 QUESTION: Lord knows, but there is no way that one
6 can read that to contradict what Judge Sofaer said in the
7 earlier part of the letter quite flatly, which is that the
8 act of state doctrine -- whatever else may apply -- the
9 act of state doctrine does not apply.

10 MR. BRODSKY: Well, I quite agree with that in that
11 sense, but by saying that it doesn't apply and in the same
12 breath saying to the district court judge be very careful
13 because there are foreign policy concerns here that may
14 adversely affect the foreign policy of the United States,
15 what we're saying is that although his conclusion is --
16 he's saying to the district court and later to this Court
17 -- go ahead and let this case be tried.

18 What we're saying is that this Court should examine
19 that very closely to see whether or not in its judgment
20 this case should be tried. Not to --

21 QUESTION: Or it may be an invitation to invent some
22 new doctrine, which invitation you may be accepting. But
23 it certainly -- it certainly does not speak to whether
24 it's the act of state doctrine.

25 MR. BRODSKY: Well, I -- look, there's no dispute

1 about what the letter says. The Secretary of State says -
2 - the legal advisor to the Secretary of State says -- go
3 ahead and let this action be prosecuted, which goes to the
4 issue of whether or not this Court should simply listen,
5 without itself making a decision or having rules on this
6 subject, to the Secretary of State.

7 Mr. Justice Douglas in the Citibank case said that to
8 do that would make this Court nothing more than an errand
9 boy with respect to the Secretary of State, nothing more
10 than an errand boy for the Secretary of State to decide
11 that the court, rather than he, should decide which
12 chestnuts to pull out of the fire and which ones to leave
13 in the fire.

14 And we say that that -- that rule, if you will, that
15 Bernstein exception -- while the Secretary of State's
16 views, we would agree, should be considered by the Court
17 as to whether or not the Court should permit an action
18 like this to proceed, the Secretary of State's view should
19 not be the final word on the subject.

20 The final word on the subject should be this Court's
21 views, because secretaries of states come and go.
22 Policies change. Indeed, the very policies, arguments, in
23 this case have been, we say, inconsistent. When the plea
24 of guilty was being taken, the United States Attorney said
25 to the district court -- and, mind you, this was a very

1 carefully orchestrated plea of guilty in this sense
2 because foreign relations sensibilities were very
3 important to the government. First of all, the indictment
4 itself was an indictment which accused us of paying money
5 to an intermediary, not to any official of the Government
6 of Nigeria.

7 Now, the government which is charged with enforcing
8 the Foreign Corrupt Practices Act -- it is the government
9 that can decide what kind of allegations to make and what
10 kind of allegations not to make.

11 So that, for example, in this case, the government
12 very carefully decided that the allegations that it was
13 going to make were allegations that an intermediary
14 receive the payment rather than any official of the
15 Government of Nigeria. And when the plea of guilty was
16 being taken, the United States Attorney was very careful
17 to make that distinction and to say to the court there are
18 things that I know that I don't want to reveal to the
19 court because of what may happen in the Government of
20 Nigeria as a result of this prosecution.

21 QUESTION: Mr. Brodsky --

22 MR. BRODSKY: Yes?

23 QUESTION: -- which of our -- can you tell us which
24 of our cases has applied the act of state doctrine to a
25 situation in which the validity and the effectiveness of

1 the act of a foreign government was not an issue in the
2 case?

3 MR. BRODSKY: I don't believe -- I don't believe
4 there are any. And we're saying that that's the same here
5 as our primary argument. I mean, we're saying that this
6 case is not -- certainly it's different on the facts, but
7 it's the same in principle to Sabbatino, which is an
8 expropriation case.

9 Now, this is a government contract case. But what we
10 are saying is that, inevitably, the proof by the plaintiff
11 will have to demonstrate that the contract that we entered
12 into with the Government of Nigeria was an invalid
13 contract. So we're saying it's the same as those cases.

14 Now -- in other words, the same as --

15 QUESTION: That it is invalid --

16 MR. BRODSKY: Yes.

17 QUESTION: -- under Nigerian law and ineffective
18 internationally?

19 MR. BRODSKY: Well, I think that's what the plaintiff
20 would have to show here. In other words, I don't think
21 that the two concepts can live together, (a) a valid
22 contract in the Government of Nigeria but (b) coming to
23 the United States and taking out profits -- indeed, more
24 than our profits -- in this valid contract in Nigeria.

25 I don't think you can say it's a valid contract when

1 bribes were paid to get that contract which violated
2 Nigerian law, at least the stated law.

3 Now, we go further than that, and that's what the
4 plaintiff would have to show in this case. That's what we
5 are saying. We don't think the two concepts can live
6 together, a valid --

7 QUESTION: I would think that if the plaintiff can
8 show that the contract is invalid, the plaintiff would
9 lose its case.

10 MR. BRODSKY: No, I respectfully disagree.

11 QUESTION: Well, wait --

12 MR. BRODSKY: I think that's the plaintiff's theory.
13 I don't think the plaintiff would agree in this court that
14 he has to go that far as to show it's invalid. But that's
15 basically what he has to show. I mean, what do we have in
16 either the words "validity" and "invalidity" when you say
17 the contract is valid but you take all our profits away,
18 when you say the contract was valid but made in violation
19 of Nigerian law, I think you're just using words to say
20 that this contract is invalid. This contract has no
21 validity to us if they take all our profits away.

22 QUESTION: Well, that's true in any case where you're
23 suing somebody under the Robinson-Patman Act or under lots
24 of statutes. You take away the defendant's profits, but
25 you don't set aside the underlying contract. I don't

1 understand that concept.

2 MR. BRODSKY: Well, you --

3 QUESTION: Lots of times you recover the damages that
4 the defendant -- the profits the defendant earned out of a
5 contract as the measure of damages that the plaintiff
6 seeks to recover.

7 MR. BRODSKY: That is correct. But what else is
8 going on here is that they're not only claiming that kind
9 of a violation -- they're claiming that we bribed
10 officials to get this contract. They're claiming that
11 this contract was made in violation of Nigerian law. The
12 Nigerian --

13 QUESTION: Well, why is that any -- take the
14 Robinson-Patman -- I guess one of their counts under
15 Robinson-Patman. Why is that any different than any other
16 commercial bribe situation where you say the purchasing
17 agent was paid off on the side and that violates a lot of
18 statutes? You don't set aside the underlying contract?

19 MR. BRODSKY: I don't think it becomes an issue -- it
20 doesn't become important in those cases.

21 QUESTION: Well, why is it important in this case?

22 MR. BRODSKY: Oh, because the contract itself, we
23 say, is the act of state.

24 QUESTION: I understand.

25 MR. BRODSKY: In those other cases it doesn't make

1 any difference whether the contract is valid or invalid.
2 You get your damages and nobody argues the --

3 QUESTION: Well, why does it make a difference here -
4 -

5 MR. BRODSKY: Well, because --

6 QUESTION: -- if they don't have to prove its
7 invalidity, and they don't think they do?

8 MR. BRODSKY: Well, it makes a difference here
9 because what we would have here is the courts in the
10 United States examining corruption in Nigeria. And
11 whether you -- you see, I want to make the second argument
12 now. Whether you call it valid or invalid, that contract,
13 I mean our position is the same as the position of the
14 Solicitor General on this issue.

15 Even if the contract is valid, it doesn't make any
16 difference because the proof is really the important thing
17 here as far as the act of state doctrine is concerned.
18 The proof in this case, whether the contract is valid or
19 invalid, will be -- must be from the plaintiff's point of
20 view -- that people at the highest level of government in
21 Nigeria took substantial bribes for us to get this
22 contract.

23 The proof also will be because it will be part of the
24 defense, that not only did they take bribes in this case,
25 but the Government of Nigeria lives that way. You get a

1 contract with the Government of Nigeria by paying bribes
2 because if that's true, then the plaintiff has no damages
3 in this case.

4 That is to say, if the proof in this case if it goes
5 ahead -- if the proof in this case shows that the only way
6 to get a contract with the Government of Nigeria is to pay
7 a bribe, then the plaintiff in this case has no damages
8 because it couldn't have received this contract without
9 paying a bribe.

10 QUESTION: We've got to give the doctrine a new name
11 then, if it covers this, Mr. Brodsky. We'd have to call
12 it the don't embarrass foreign governments doctrine, or
13 something else.

14 MR. BRODSKY: Well, perhaps --

15 QUESTION: It's a misnomer to call it the act of
16 state doctrine then. You're saying it doesn't matter
17 whether there is an act of state involved here, it's the
18 acceptance of bribery by state officials, contrary to
19 state law, that comes under the act of state doctrine
20 because it will embarrass our diplomatic relations with a
21 foreign country. We ought to really give it a new name if
22 we accept your theory.

23 MR. BRODSKY: Your Honor, if I win this case, give
24 it any name you want to. No, but seriously --

25 QUESTION: But you are urging upon us an ancient

1 theory, not a --

2 MR. BRODSKY: I don't think so.

3 QUESTION: You are saying it comes upon -- under this
4 act of state doctrine, but you give us no case in which
5 we've ever applied it to anything except questioning the
6 validity of an act.

7 MR. BRODSKY: But I also -- you also don't have the
8 case, Your Honor, not to this date, where this Court has
9 made the distinction that is being made by the Third
10 Circuit in this case. That is the distinction between
11 embarrassment and validity.

12 This Court has never made that distinction yet. So,
13 when you ask me for a case on that subject, we don't have
14 a case either way.

15 In that sense, if you disagree with my first argument
16 that they are looking at the validity of the contract,
17 then we have to get to the second point, and the question
18 is whether or not this Court will indeed make that
19 distinction.

20 I say, and the Solicitor General says, that there
21 should be no distinction because, after all, when you look
22 at the purposes of the act of state doctrine, it really
23 doesn't become that important as to whether or not you're
24 trying to declare the act of state invalid. The real
25 important thing about the doctrine, when you get to the

1 reason for it, is that the United States courts will be
2 looking at in this case corruption at the highest level of
3 the Government of Nigeria. That's what we're trying to
4 prevent in this case.

5 QUESTION: But our previous act of state doctrine
6 cases don't point in that direction. They don't suggest,
7 as Justice Scalia said, that it would be embarrassing to a
8 foreign government with whom we have friendly relations to
9 have discovery about what went on in the award of the
10 contract. Therefore, the Court shouldn't hear it.

11 MR. BRODSKY: Well, no, I think the case -- I mean,
12 the case that looks this way, in my opinion, is the
13 Sabbatino case. That was an expropriation case, so in
14 that sense distinguishable on the facts. But when you
15 look at Sabbatino, look at the kind of allegations that
16 the claimant -- or that the defendant actually in that
17 case was making. And this Court said you can't hear those
18 allegations.

19 Things like property was being taken, discriminating
20 against Americans -- property had been taken by the
21 Government of Cuba without just compensation. Our
22 government had --

23 QUESTION: But did we say it shouldn't hear it
24 because it might embarrass the Cuban Government?

25 MR. BRODSKY: No, the Court did not make that

1 analysis. No, it did not. In that case the Court said
2 that, because it was an act of state that was the end of
3 it, no matter what else might flow from that.

4 But I look at the -- I mean, we're not just using
5 those words in the abstract, using the words "act of
6 state" in the abstract. The purpose is what I am looking
7 at of the act of state doctrine, whether it's in Sabbatino
8 or it's in any of the other cases decided by this Court.

9 QUESTION: The purpose of the Fourth Amendment is to
10 protect invasions of privacy. But that doesn't mean you
11 can't search with a warrant. I mean, yes, the act of
12 state doctrine moves toward that purpose a certain step.
13 But you're saying since we've moving in that direction we
14 go all the way and, therefore, anything that embarrasses a
15 foreign government, not just calling into question the
16 validity of its acts -- anything that embarrasses a
17 foreign government shouldn't be inquired into.

18 That's a great step further from what our --

19 MR. BRODSKY: Mr. Justice Scalia, I don't go that
20 far. I could -- I could perceive of situations where a
21 government might be embarrassed and the act of state
22 doctrine would not apply. But not this case.

23 I mean, what do we have in this case? Corruption at
24 the highest level of another government. And that's why I
25 say it applies in this case. I don't take the position

1 that every time a different government might be
2 embarrassed you don't apply the act of state doctrine.

3 QUESTION: Mr. Brodsky, imagine a case where there
4 were allegations of corruption in high officials in
5 Nigeria and the United States. Now, courts could
6 investigate the United States but not Nigeria.

7 MR. BRODSKY: I'm not sure about that, Your Honor.
8 It seems to me under that -- because, after all, what
9 we're arguing for is a position of flexibility for the
10 courts to have. What we're arguing for is that the courts
11 should consider --

12 QUESTION: You don't need any flexibility to decide
13 whether or not you can enforce it against the United
14 States but not Nigeria. That doesn't take flexibility.

15 MR. BRODSKY: I would agree with that. I'm only
16 trying to --

17 QUESTION: You agree with that?

18 MR. BRODSKY: That if somebody in the United States
19 violated United States law and it had nothing to do with
20 the Government of Nigeria --

21 QUESTION: That's not what I said.

22 MR. BRODSKY: I'm sorry.

23 QUESTION: I said there were two groups of people
24 violating the law together, those in Nigeria in high
25 office and those in the United States in high office.

1 MR. BRODSKY: Well, I would think if there were
2 people in high office in the United States that were
3 violating the laws, I would think that the courts would
4 certainly want to get into that. And if --

5 QUESTION: And why not Nigeria?

6 MR. BRODSKY: Well, because we have different
7 concepts as far as that's concerned. We don't have a
8 concept involving our own government involving the act of
9 state.

10 The courts in the United States look at what the
11 government does and it's supposed to look at what this
12 government does, but not the Government of Nigeria or any
13 other government. That's what the act of state doctrine
14 is. And you may have --

15 QUESTION: That's what you say it is.

16 MR. BRODSKY: Yes, Your Honor, of course. That's
17 what I say it is, Your Honor. Of course.

18 But, I mean, what -- we have an act of state doctrine
19 in the first place, I say, so that the kinds of things
20 that might be adduced in a case like this will not be
21 adduced in American courts.

22 I see that I have a short time remaining. I'd like
23 to reserve the rest of my time, if I may.

24 QUESTION: Very well, Mr. Brodsky.

25 Mr. Rutter.

1 ORAL ARGUMENT OF THOMAS B. RUTTER, ESQ.

2 ON BEHALF OF RESPONDENT

3 MR. RUTTER: Good morning, Mr. Chief Justice, and may
4 it please the Court:

5 If there is one thing that is very clear as we come
6 to the podium it is that despite any broad statements we
7 might find in the Oetjen or Ricaud case, or in any of the
8 other cases, the mere fact that the conduct of foreign
9 relations is committed by the Constitution to the
10 Executive Branch does not mean that every case or
11 controversy which touches foreign relations lies beyond
12 judicial cognizance.

13 And that's an exact quotation, if the court please,
14 from Mr. Justice Harlan's opinion for this court in the
15 Sabbatino case.

16 What needs to be done here, I suggest, is to decide
17 which of the several bases that are available for
18 affirmance of the Third Circuit Court of Appeals should be
19 adopted.

20 And I mean by that this. The case can be affirmed on
21 a very narrow basis. That is, by saying this Court's
22 decisions in Sisal Sales and Continental Ore, which I
23 discuss in my brief, squarely rule the outcome of this
24 case.

25 Those cases say very simply and succinctly that where

1 American citizens are brought before an American court for
2 acts which violate American law, even if those acts have
3 the tangential involvement of a foreign government -- in
4 Sisal Sales it being the Country of Mexico and the State
5 of Yucatan and in Continental Ore it being a Canadian
6 agent, exporter in Canada -- that nonetheless,
7 notwithstanding those tangential involvements of the
8 foreign countries, the American federal courts can, will,
9 and should decide those cases.

10 Likewise, I can take it to the broadest extreme.
11 I'll pass for the moment the proposition that there is no
12 act of state involved here, which I have briefed in some
13 length. And likewise I'll pass the proposition that
14 Sabbatino, when you read its analysis and apply the
15 underlying premises to this case, that you find that
16 Sabbatino says this case goes forward and so, too, our
17 past commercial activity exception which I think applies,
18 and, indeed, the motivation against validity argument
19 which is sometimes advanced and which the Third Circuit
20 followed.

21 To say to you that I think in the broadest reach of
22 this case this Court is presented with the opportunity to
23 now say the act of state doctrine, if it means anything,
24 means merely that in a case where foreign relations are
25 involved, the Court will invite the State Department to

1 express its views, and if in that first time in the
2 history of the United States of America, the State
3 Department says, stay your hand, we will then, as a matter
4 of federal jurisprudence, make the determination of
5 whether we should stay our hand applying an abuse of
6 discretion standard.

7 What I mean by that last statement is this. The act
8 of state doctrine, which is now 25 years old as defined by
9 Sabbatino, but which is much older than that -- the act of
10 state doctrine, I suggest with respect, has done nothing
11 more than give rise to a cottage industry amongst the law
12 professors and the law commentators, and has permitted
13 people who want to weep crocodile tears for places like
14 the Country of Nigeria to come to federal court and say we
15 ought not be held liable for our wrongdoing because a
16 foreign country is involved. Let me pause.

17 I think Mr. Justice Stevens put his finger on it
18 precisely. This case would not be here, nor would we be
19 without our verdict and judgment, if the people bribed and
20 paid off had been an American company or, indeed, if it
21 had been an American government, be it federal, state or
22 municipal.

23 The act of state doctrine has permitted these people
24 --and, by the way, the depth and breadth of the depravity
25 existing in terms of this company and these petitioners'

1 behavior in Nigeria is set forth in their own memoranda on
2 pages 212 to 222 of the joint appendix. They were not
3 dealing with a single intermediary. They were dealing
4 with at least two. And this went on for over a year. So
5 that the depth and breadth of what occurred here is amply
6 set forth in the record.

7 And so, too, we have amply set forth in our
8 complaint, paragraphs 39, 40, and 41 of the complaint,
9 where we specifically say, but for this conduct in
10 Nigeria, and in London, and in America, by these
11 petitioners, we would have had this contract. We would
12 have had the profit.

13 Therefore, the act of state doctrine has simply said
14 in this case because Nigeria is involved, these
15 petitioners, these wrongdoers, get some special benefit
16 which would not exist if they were a straight American
17 corporation or American government.

18 QUESTION: Mr. Rutter --

19 MR. RUTTER: Yes, sir.

20 QUESTION: -- it is correct though, isn't it, that
21 they may well have a defense that you wouldn't have had
22 the contract unless you were willing to engage in the same
23 kind of conduct?

24 MR. RUTTER: No, sir, I don't agree with that.
25 Number one, there are ample cases, as you know, Mr.

1 Justice Stevens, for the proposition that you cannot
2 defend an antitrust case by saying you are one too. That
3 is to say, you cannot --

4 QUESTION: No, it's not in pari delicto. It's simply
5 that, in order to get this contract, you have to pay off
6 the officials of this country. That's the way they've
7 done business for a long time. That's the way the French,
8 the British, and all the other countries do business with
9 them and you would presume you would have to have done the
10 same thing. It's not totally unreasonable to assume that.

11 MR. RUTTER: It is, Mr. Justice Stevens. The first
12 answer is the legal answer which I've suggested, in pari
13 delicto.

14 QUESTION: That's not the point. It's no damages, is
15 their argument.

16 MR. RUTTER: Well, the second answer is that, first
17 of all, how will they prove it. But more importantly, we
18 will have countervailing evidence. We are prepared at the
19 trial of the case to go forward with our people who have
20 done business in Nigeria, who would have done business on
21 this contract, who will testify au contraire.

22 Now, that's not of record, Mr. Justice Stevens, but
23 I'd represent to you that that is the situation.

24 QUESTION: Well, I'm not trying to predict how the
25 case will come out. All I'm saying is that it is not

1 unreasonable to assume that the inquiry into possible
2 corrupt practices in this government may be broader than
3 the facts of this particular case because of the defense
4 they've alleged in their pleadings.

5 MR. RUTTER: That may be so, but Mr. Justice Stevens

6 -- QUESTION: And I don't know if that makes any
7 difference, but at least it's certainly something we have
8 to think about.

9 MR. RUTTER: I don't think it makes any difference
10 and I would suggest to you, sir, that it really makes no
11 difference when you look at what the Republic of Nigeria
12 has done in response to my request.

13 You will recall, Mr. Justice Stevens, that as it
14 appears in the appendix, I asked the Republic of Nigeria,
15 through its ambassador, to take a position, namely that we
16 could go forward with this litigation. They have not
17 responded.

18 That suggests to me that that answer is at worst
19 neutral, as I see it from my point of view in the case.
20 It is, I suggest to you, a positive fact in my case.
21 Namely, if Nigeria seriously didn't want to have the
22 corruption in a previous regime -- and that, too, is set
23 forth in our appendix -- if the Republic of Nigeria did
24 not want corruption in its previous regime to become well
25 known, they would by now have stepped forward either in

1 this case or through the State Department and said,
2 please, please don't disclose to the whole world what's
3 going on in Nigeria.

4 Therefore, I say to you, Mr. Justice Stevens, that
5 their suggested defense that everybody is doing it, doing
6 it, is not one which is going to be, (a) admissible as a
7 matter of law, and (b) will not fly as a matter of fact.
8 And, in any event, it is not something worthy of
9 consideration by this Court in deciding whether the court
10 of appeals should be reversed..

11 QUESTION: Mr. Rutter, can I come back to the
12 suggestion you're making as to how we ought to handle act
13 of state cases. I don't remember this in your brief. But
14 you're suggesting that if the district court gets a
15 representation from the State Department that says, go
16 right ahead, then, in reviewing whether that district
17 court correctly applied the act of state doctrine or not,
18 we should say it did correctly apply it -- I'm sorry -- it
19 did correctly not apply it unless it was an abuse of
20 discretion to ignore the State Department's letter?

21 MR. RUTTER: No, Mr. Justice Scalia, I obviously did
22 not say what I intended to say which is --

23 QUESTION: Or I didn't hear what you intended me to
24 hear, I'll put it that way.

25 MR. RUTTER: Well, if you look at the last few pages

1 of our brief, I think I've said it there at greater length
2 and perhaps with greater persuasion.

3 What I mean to say is this. I am talking in terms of
4 what I denominate a reverse Bernstein rule, which is to
5 say that rather than deal with a straight Bernstein
6 exception, which has been adopted by some members of this
7 Court and by lower courts, and which has led to the kind
8 of criticism that Mr. Brodsky refers to from Mr. Justice
9 Douglas, what I am saying to you is this, and I think it's
10 implicit in Mr. Justice White's dissenting opinion in
11 Sabbatino and other cases that follow.

12 It's simply this. The court or the litigants notify
13 the State Department that there is a -- quote -- act of
14 state issue arising in this case, i.e., the conduct of a
15 foreign nation. The State Department then either takes a
16 position or not.

17 And I'm saying to you, Mr. Justice Scalia, the State
18 Department, so far as my research shows, has never, ever
19 stepped up and said to a court, "Don't litigate this
20 case." The most they've done is in Sabbatino where it's
21 a no-comment kind of letter.

22 QUESTION: Because they knew the court wouldn't
23 listen to --

24 (Laughter.)

25 QUESTION: -- for nothing.

1 MR. RUTTER: In any event, sir, my proposed
2 procedure, as set forth in the brief and as proposed here
3 is simply this on the over-arching rule. If the State
4 Department steps forward to the district court and says,
5 you ought not hear this case, you ought to pass on this
6 case, you should defer this case or perhaps even dismiss
7 it, the court then responds to the State Department
8 recommendation either by accepting it or rejecting it,
9 subject on appeal and in this Court to a review as to
10 abuse of discretion.

11 That's the one safeguard that's necessary to make
12 sure that the State Department is not playing fast and
13 loose.

14 QUESTION: Well, what standards does the State
15 Department follow in deciding whether or not to give such
16 a letter?

17 MR. RUTTER: I think those are matters remitted to
18 the Executive Branch. The question is what standard
19 should the court apply in deciding whether or not to
20 follow the suggestion.

21 For example -- and foolishly -- if the State
22 Department were to say, please don't adjudicate this case
23 because it would be an embarrassment to the First Lady,
24 the court could then well say, well, that's not a very
25 good reason and we do not accept that reason.

1 If, however, the State Department says --

2 QUESTION: Well, I'm assuming that in making that
3 judgment we're saying that the State Department has or has
4 not followed an appropriate policy. And so I don't think
5 it's an answer for you to say, well, the State Department
6 can do whatever it wants.

7 I assume the State Department has to have some
8 guidance from us as to what is or is not an appropriate
9 answer.

10 MR. RUTTER: May I, with deference, Mr. Justice
11 Kennedy, disagree with that because the political issues
12 which would be involved in the State Department's decision
13 in whether or not to write such a letter are not matters
14 that are properly within the purview of the judiciary,
15 even of this Court.

16 All this Court can do is to say, has the Bernstein-
17 type representations by the State Department in this case
18 been sufficient in order for the Court to properly
19 exercise its discretion and not proceed? I would be
20 candid and say to you that in the overwhelming majority of
21 the cases, if not all the time, the answer would be yes.

22 But I think the Court has to, in deciding how to
23 handle a reverse Bernstein, should it decide to take that
24 course, has got to nonetheless reserve unto itself the
25 last and final decision, which is to say has the court

1 below properly conducted itself as a court, after we have
2 the representation from the State Department.

3 QUESTION: What if the State Department says, go
4 right ahead?

5 MR. RUTTER: Then the court goes ahead, sir.

6 QUESTION: No matter what?

7 MR. RUTTER: Yes, sir.

8 QUESTION: It doesn't -- the court then doesn't ask
9 any questions?

10 MR. RUTTER: No, sir, because, again, as I've said to
11 Mr. Justice Kennedy, the political questions that would be
12 involved in "embarrassment" --

13 QUESTION: Well, you say then in this case the -- the
14 case is over because you have a representation from the
15 State Department to go ahead.

16 MR. RUTTER: Yes, sir. I think under the Bernstein
17 exception, or under any other careful consideration of
18 what an act of state is supposed to mean, and the State
19 Department having said not once but now twice, it doesn't
20 matter to us, please feel free to go ahead, --

21 QUESTION: Even if this is -- even if this is an act
22 of state, go ahead.

23 MR. RUTTER: Even if it's an act of state, yes sir.

24 QUESTION: Which was the case in Citibank.

25 MR. RUTTER: Yes, sir. Yes, sir. .

1 QUESTION: And what if the State Department says,
2 sorry, no comment?

3 MR. RUTTER: There, again, sir, I suggest that given
4 the proper application of the rule that the case goes
5 forward. I'm saying to you, Mr. Justice White, that the
6 only time the court should even consider staying its hand
7 is when the State Department, because of its exercise of
8 executive powers for the political reasons it has in mind
9 says, please don't.

10 QUESTION: Well, that's a -- you do say, then, that
11 that takes a reworking of our past cases?

12 MR. RUTTER: Absolutely. But I say it's a natural
13 corollary of your opinion in Sabbatino.

14 QUESTION: Well, I know, but I was the sole dissent.
15 (Laughter.)

16 MR. RUTTER: Well, --

17 QUESTION: So, I wouldn't mind reworking it, I
18 suppose.

19 (Laughter.)

20 QUESTION: But it's against the law. It's against
21 the law right now because there was silence in Sabbatino.

22 MR. RUTTER: That's exactly right, Mr. Justice White.
23 It was a no panel --

24 QUESTION: And the Court went ahead and held that the
25 act of state doctrine applied.

1 MR. RUTTER: But let me remind you of the further
2 history because that then suggest to me why the reworking
3 along the lines I have suggested is necessary.

4 After this Court decided Sabbatino, Congress passed
5 the second Hickenlooper amendment, under which the
6 President has the authority to step up in any
7 expropriation case and say, please do not hear this case.
8 They have never, ever exercised that authority. In fact,
9 when Sabbatino went back to the lower court, the State
10 Department declined to intervene.

11 So, that's one of the reasons I'm suggesting to you,
12 in line with perhaps what Mr. Justice Scalia suggested in
13 asking the questions of Mr. Brodsky, I think it's time to
14 rethink this doctrine and turn it around instead of --
15 instead of making all of these lawsuits in this Court's
16 docket -- about a half a dozen in the past couple of years
17 on petitions -- instead of having these lawsuits around
18 and law review professors having things to write about,
19 let's let the litigants litigate the cases.

20 QUESTION: Yes, but you certainly are making an
21 argument you don't need to make --

22 MR. RUTTER: Absolutely, Mr. Justice --

23 QUESTION: -- to win this case.

24 MR. RUTTER: Absolutely.

25 QUESTION: I don't know why you'd want to carry a big

1 load like that.

2 MR. RUTTER: I'm doing it, sir, because I have said
3 that there are several levels at which this case can be
4 decided.

5 On the narrowest ground, as I've said to you, under
6 Sisal Sales and Continental Ore, I win. Under the
7 commercial activity exception, I prevail, because we know
8 this is commercial activity by --

9 QUESTION: Well, just on the Bernstein letter you --

10 MR. RUTTER: Yes, sir.

11 QUESTION: -- just on the State Department's
12 representation.

13 MR. RUTTER: Yes, sir.

14 QUESTION: No matter what else is true.

15 MR. RUTTER: Absolutely, Mr. Justice White.

16 QUESTION: You don't even have a very good Bernstein
17 letter, though. I mean, this isn't a letter in which the
18 State Department says, go right ahead, it's not going to
19 embarrass us.

20 MR. RUTTER: But as you said --

21 QUESTION: The State Department says, go right ahead
22 because, as we read the law, the act of state doctrine
23 doesn't apply. Now, we should defer to the State
24 Department as to whether the act of state doctrine applies
25 or not?

1 MR. RUTTER: Absolutely not.

2 QUESTION: But what it then goes on to say --
3 although I've got to admit it's going to embarrass the
4 devil out of us, so be very careful --

5 MR. RUTTER: It may embarrass --

6 QUESTION: -- that seems to me to be a reverse
7 Bernstein letter. I don't know why you want to rely on
8 that letter.

9 MR. RUTTER: Well, it's good enough for my purposes
10 to satisfy the Bernstein exception, hence I rely upon it,
11 Mr. Justice Scalia.

12 But it is the fact that it is not as pellucid as one
13 might desire. But, nonetheless, as you pointed out, it
14 does in that paragraph, fulfill the Bernstein
15 requirements. And now Judge Sofaer has done it again.
16 He's given us another letter which is appended to the
17 Solicitor General's brief as amicus where again he says,
18 whatever weight I have folks, the State Department says we
19 don't mind. That, I think, as Mr. Justice White points
20 out, is --

21 QUESTION: He said, we do mind, but as we read the
22 law, the act of state doctrine doesn't apply. That's how
23 -- there's no other way to read that letter.

24 MR. RUTTER: Well, I -- in deference --

25 QUESTION: He says, you know --

1 MR. RUTTER: -- Mr. Justice Scalia, I think what he
2 says is, we don't mind, but please don't do things which
3 are embarrassing to the extent you can avoid it, whatever
4 that means.

5 In any event, I see that my time is about at an end.
6 Unless there is another question from the Court, I would
7 simply suggest to you, as I've tried to suggest in the
8 response to Mr. Justice White, we can solve this case and
9 affirm the Third Circuit, as we properly should, on any of
10 several levels.

11 I invite the Court to take whichever one of the
12 methods which I have suggested in my brief and tried to
13 suggest to you, seems most appropriate. However,
14 notwithstanding Mr. Justice White's suggestion, I don't
15 need to carry the burden. As a lawyer who is involved in
16 federal practice, I would most urge this Court to consider
17 -- to consider -- redefining the act of state doctrine.

18 Thank you very much for listening to me.

19 QUESTION: Thank you, Mr. Rutter.

20 Mr. Merrill, we'll hear now from you.

21 ORAL ARGUMENT OF THOMAS W. MERRILL, ESQ.

22 AS AMICUS CURIAE SUPPORTING THE RESPONDENT

23 MR. MERRILL: Thank you, Mr. Chief Justice, and may
24 it please the Court:

25 The United States supports the judgment of the court

1 of appeals in this case, but we do so for grounds -- on
2 reasons that are narrower than those that the court of
3 appeals itself enunciated and also those that have -- some
4 of those that have been argued by respondent in this
5 Court.

6 Let me begin by addressing the threshold question of
7 whether there is an act of state inquiry required in this
8 case or not.

9 The classic or traditional formulation of the act of
10 state doctrine is that it applies when the courts are
11 called to question or inquire into the validity of a
12 public act of a recognized foreign sovereign within its
13 own territory.

14 In terms of that formulation, it seems to us that the
15 critical inquiry here at the threshold is whether this
16 case will involve the questioning or the inquiring into
17 the validity of a foreign sovereign act.

18 And, more precisely, do those words mean only --
19 refer only to a direct adjudication of the legality of the
20 foreign act of state, which appears to be the reading that
21 respondent implicitly adopts or that the court of appeals
22 implicitly adopted, or are those words broad and flexible
23 enough to encompass some additional types of cases that
24 might also be understood as inquiring or questioning the
25 validity of a foreign act?

1 We believe that this case -- the type of situation of
2 this case -- is one where there ought to be an act of
3 state inquiry. That, because of the need to prove
4 causation in this case, the case, if it goes forward,
5 could establish the factual predicate which would
6 establish as a matter of Nigerian law that this contract
7 is either void or voidable. And that that type of
8 situation sufficiently implicates the general policies of
9 the act of state doctrine that at least an inquiry into
10 the act of state question ought to be undertaken.

11 Second, let me address very briefly the commercial
12 activities --

13 QUESTION: Excuse me. Do you have any prior case
14 that supports that?

15 MR. MERRILL: I think American Banana at least
16 provides some indirect support for that, Justice Scalia.
17 Remember, in that case, the allegation was that a foreign
18 government, Costa Rica, had been induced by an American
19 company to engage in expropriate -- acts of essentially
20 expropriation against another American company.

21 It's hard to read the case as saying that the Court,
22 if it head the case, would have to inquire directly into
23 the legal validity of the acts of the Costa Rican
24 government, but, nevertheless, this Court --

25 QUESTION: Wouldn't it have had to? Wasn't -- wasn't

1 the setting aside of the expropriation at issue?

2 MR. MERRILL: No. It was an antitrust action brought
3 to recover damages in the United States and the cause of
4 the damages was the act of expropriation --

5 QUESTION: Yeah.

6 MR. MERRILL: -- but the defendant who was alleged to
7 have violated the antitrust laws by conspiracy and so
8 forth -- whether their conduct was legal or illegal could
9 have been determined without determining the legality of
10 the expropriation itself.

11 I think the reaction of the court in that case was
12 that essentially what was being alleged was that Costa
13 Rica was a puppet of an American corporation and that that
14 type of inquiry was of sufficient -- had sufficient
15 implications for the conduct of America's foreign
16 relations that such an inquiry ought not to be permitted.

17 That obviously isn't directly parallel to this case
18 and the two are obviously distinguishable. But we think
19 it provides at least some inferential support for the
20 proposition that the narrowest possible reading of the act
21 of state doctrine, that it only applies where there is a
22 direct adjudication of illegality, is not necessarily one
23 that this Court's cases require that it adopt.

24 Let me address briefly the commercial activities
25 exception. We agree with the petitioners that this act,

1 the decision to enter into a defense procurement act, is
2 sufficiently sovereign, that the case should not, by that
3 reason alone, be held to fall within the commercial
4 activities exception.

5 What we said in our brief was that it's nevertheless
6 relevant under the type of comity -- international comity
7 analysis that the Court has undertaken in Sabbatino and
8 succeeding cases, that the relationship the parties would
9 enter into once this decision was made to enter into the
10 contract would be commercial in nature.

11 So, for example, questions about breach of warranty,
12 questions about other issues that might come up in the
13 governance of the contractual relationship we think, for
14 example, would fall into the commercial exception for this
15 Foreign Sovereign Immunities Act and if there were a
16 commercial activities exception recognized, would
17 presumably also those questions would come within a
18 commercial activities exception of the act of state
19 doctrine.

20 So, because the relationship that would be entered
21 into is commercial, we think that's one factor that the
22 Court could weigh under a comity type analysis in deciding
23 whether or not the act of state doctrine precludes giving
24 a questioning -- or not giving effect to the act of a
25 foreign sovereign.

1 I'd also like to speak, if I could, to the general
2 question of the institutional relationship between the
3 federal courts and the executive branch in applying the
4 act of state doctrine. It's a matter that this Court has
5 not spoken to in an opinion enjoined by a majority of the
6 Court and is also of some considerable institutional
7 interest to the United States.

8 The position that we've taken in our brief in this
9 case really attempts to build on two principles that we
10 think there is a fair consensus about within this Court's
11 opinions, even though the Court has not reached a
12 concluded view about them.

13 One is the principle that the courts, of course, are
14 the final arbiters of question of law, and the second is
15 the principle that the Executive Branch ought to be the
16 final arbiter of questions of foreign relations and
17 foreign policy.

18 And the way we propose that these two principles can
19 be reconciled in this area is that when a court undertakes
20 an act of state inquiry in deciding whether or not the act
21 of state doctrine should in any particular case preclude
22 examination of a foreign sovereign act that any questions
23 about the foreign relations impact, about sensitivities of
24 foreign governments, about the consequences for ongoing
25 American diplomatic efforts, that those questions ought to

1 be referred to the legal advisor of the State Department
2 through the Justice Department and courts should give the
3 very greatest deference to those determinations.

4 But that the legal elements of the doctrine,
5 including the threshold questions about whether it is or
6 is not an act of state, in the final determination after
7 the courts engaged in the balancing process would, of
8 course, remain for the courts themselves.

9 We think that this reconciliation is one that is
10 consistent with all this Court's prior opinions, including
11 the rejection by six Justices in --

12 QUESTION: So what if -- so, giving all the deference
13 you suggest to the State Department's letter you would
14 still say that -- that the Court should make an
15 independent inquiry as to whether there is an act -- the
16 act of state doctrine isn't law.

17 MR. MERRILL: We think the Court should not question
18 the foreign policy judgments. And to the extent that
19 foreign policy judgments are a very important element in
20 the calculus, the Court should take those as a given. But
21 other elements in the doctrine, for example, the question
22 of whether an act is sufficiently sovereign to trigger the
23 act of state, or whether or not the act took place within
24 the territory of a foreign government, those questions --

25 QUESTION: Well, --

1 MR. MERRILL: -- those questions are the kind, of
2 course, that the courts could determine themselves.

3 QUESTION: -- you don't -- you're not taking the
4 position that even if there is clearly an act of state
5 involved in this case, that the State Department letter
6 should determine the case?

7 MR. MERRILL: Our position is that the State
8 Department letter is not a trumping device. We think that
9 that's the reason why six justices primarily rejected the
10 Bernstein approach.

11 The Bernstein approach was perceived as one where
12 even if the court concluded as a matter of law that the
13 act of state doctrine precludes adjudication, that the
14 executive could come in and say, no, we want you to go
15 ahead anyway. And six justices in the First National City
16 case thought that that was an impermissible relationship
17 between the executive and the courts.

18 And we don't question that. We are simply suggesting
19 that when the court undertakes the Sabbatino-type analysis
20 looking at the various factors in the case, and to the
21 extent that those factors include questions like what will
22 be the impact on ongoing diplomatic efforts of the
23 executive, that it should refer to the State Department
24 and get the State Department's views on those questions.

25 In this particular case, there were two letters, as

1 has been noted. The letter in the district court we think
2 can fairly be read as saying that there would be no
3 adverse impact on the foreign relations of the United
4 States if the case goes forward. But if there is any
5 ambiguity about that, we think that reference to the
6 letter, which is appended to our brief, should resolve it.

7 In that letter, the legal advisor -- this is at page
8 2(a) of the appendix in our brief -- states quite
9 expressly that we do not see any foreign relations
10 obstacles to adjudication of this case on the merits and
11 we also believe that, in the absence of a representation
12 to the contrary, the courts may properly assume that no
13 unacceptable interference with U.S. foreign relations will
14 occur on account of adjudication of like cases.

15 So, in response to this Court's grant of certiorari
16 the State Department has undertaken a reevaluation of the
17 foreign policy implications that suits of this type
18 present and has determined that, as a general matter and
19 absent a representation to the contrary, we do not see
20 sufficient foreign policy obstacles to going forward and
21 considering a case of this nature on the merits.

22 If there are no questions, I thank the Court.

23 QUESTION: Thank you, Mr. Merrill.

24 Mr. Brodsky, you have two minutes remaining.

25 REBUTTAL ARGUMENT OF EDWARD BRODSKY, ESQ.

ON BEHALF OF PETITIONERS

1
2 MR. BRODSKY: Well, if the Court please, first, with
3 regard to the second letter that was received from the
4 State Department, I don't think there is any material
5 difference between the two letters. The second letter
6 says at the end, the legal advisor to the State Department
7 reminds the trial court to exercise appropriate
8 supervision over the trial process so as to limit damage
9 to foreign sensibilities.

10 Now, what I'm saying is that there are no rules for a
11 district court to follow in presiding over a case and
12 limiting that case to things that will involve foreign
13 sensibilities. So, for that reason, and all the other
14 reasons that I have given, I respectfully suggest that the
15 act of state doctrine should apply in this case.

16 Thank you.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Brodsky.

18 The case is submitted.

19 (Whereupon, at 11:55 a.m., the case in the above-
20 entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-2066 - W. S. KIRKPATRICK & CO., INC., ET AL., Petitioners V. ENVIRONMENTAL

TECTONICS CORPORATION, INTERNATIONAL

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Leona M. May
(REPORTER)

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