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Are bribes of foreign officials precluded from judicial review?

by Michael Peter Waxman

W.S. Kirkpatrick & Co., Inc.
v.
Environmental Tectonics Corporation
(Docket No. 87-2066)

Argument Date: Nov. 27, 1989

The Supreme Court first spelled out the Act of State Doctrine ("AOSD") in *Underhill v. Hernandez*, 168 U.S. 250 (1897). Chief Justice Fuller said for a unanimous Court that "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its 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." 168 U.S. at 252.

The Court in this case will address the AOSD for the first time since its highly fractured plurality decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). Many of the problems noted but unresolved in that case concerning the governmental status of an act and a possible "commercial activity exception" to the AOSD have been raised in *Kirkpatrick*.

In addition, the Court may for the first time confront the conflict between the public policy condemning the bribery of foreign officials (as expressed in the Foreign Corrupt Practices Act) and the judiciary's reluctance to assess the legality of the acts of a foreign sovereign (as expressed in the Act of State Doctrine).

Finally, the nexus between commercial bribery and RICO has long been established. Will the Court's resolution of this case in effect carve out a shelter for the bribery of foreign government officials?

ISSUE

Does the AOSD bar adjudication of issues that would require the Court to determine whether an award of a contract by the Nigerian government resulted from the payment of bribes to high-level Nigerian government officials?

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FACTS

In 1982, W.S. Kirkpatrick & Co. Inc. ("Kirkpatrick"), a New Jersey corporation, through its wholly owned subsidiary, W.S. Kirkpatrick & Co., International, prevailed over a number of other bidders and was awarded a contract by Nigeria's Ministry of Defense. Kirkpatrick agreed to provide aeromedical equipment (Nautilus brand) and to develop an aeromedical center at the Kaduna Air Force Base in Kaduna, Nigeria.

In 1984, the U.S. Department of Justice commenced a grand jury investigation into the circumstances surrounding the grant of the contract. Evidence revealed that Nigerian defense, medical and political officials had demanded that Kirkpatrick pay bribes in order to be awarded the contract. In addition, Kirkpatrick's Nigerian agent, Benson Akindele, explained that Nigerian officials usually demand and expect such payments from contract bidders. Kirkpatrick agreed to submit funds for the payment of bribes.

Kirkpatrick and its former chairman, Harry Carpenter, pled guilty to charges of violating the Foreign Corrupt Practices Act ("FCPA"). The FCPA outlaws not only the bribery of foreign officials, but also the mere offer of or agreement to pay bribes. Since Kirkpatrick and Carpenter pled guilty to offers of proof that only established that they intended to pay a bribe, the court did not need to determine whether any bribes were actually paid.

Upon the guilty pleas of Kirkpatrick and Carpenter in the FCPA action, the Environmental Tectonics Corporation ("ETC"), brought this suit in the same court—the U.S. District Court for the District of New Jersey—alleging RICO and Robinson-Patman Act violations.

ETC alleged that it would have been awarded the contract but for Kirkpatrick's payment of bribes. Kirkpatrick, arguing that the action was precluded by the AOSD, moved to dismiss the suit. Kirkpatrick argued that adjudication of this action, unlike the prior FCPA litigation, would require the court to determine whether Nigerian government officials were paid bribes by Kirkpatrick's agent.

Further, Kirkpatrick argued that proof as to the identity of the individual officials and representatives who allegedly accepted bribes would also have to be established. Finally, Kirkpatrick asserted that its defense to ETC's allegations of harm and damages would require the court to adjudicate whether demanding and receiving bribes is customary (to be read as mandatory) in the Federal Republic of Nigeria.

If such practice is customary, ETC would not have received the contract without paying a bribe similar to Kirkpatrick's. Therefore, Kirkpatrick reasons, there can be neither injury nor any amount of damages.

The district court requested the U.S. Department of State to comment on the application of the AOSD. The State Department's legal advisor, Abraham Sofaer, wrote, in what has come to be known as the "Sofaer Letter," that while there is a need for caution and a due regard for foreign sovereigns' sensibilities, and while there is concern that the adjudication could prove detrimental to foreign relations with Nigeria, the adjudication of this case was not barred by the AOSD to the extent that judicial inquiry delved only into the motivations of the Nigerian government's decision to award the contract, and not into the legality of the award.

On May 1, 1987, the district court granted summary judgment for Kirkpatrick, reasoning that the AOSD was applicable and that ETC could not prove its claims without establishing that the Nigerian officials violated Nigerian law by accepting payment of a bribe. The court further noted that proving the corruption of high Nigerian officials "necessarily implies a criticism of the Republic of Nigeria."

On May 2, 1988, the Court of Appeals for the Third Circuit reversed the district court's judgment. Although the Third Circuit found that Nigeria's award of the procurement contract was a sufficiently formal expression of sovereign interests as to trigger the AOSD and that the contract did not fall within a commercial activity exception to the doctrine, the court held that the AOSD did not bar ETC's claims because: (1) ETC's claims only require an inquiry into the motivations behind, rather than legality of, the Nigerian government's acts, and (2) Kirkpatrick failed to prove that the litigation would cause a demonstrable threat to foreign relations.

Thus the district court and Third Circuit decisions are in clear conflict as to the meaning and effect of the Sofaer Letter. The two courts disagree as to their ability to delve into the motivations of the Nigerian government's actions without examining the legality of its acts, and they disagree as to which party has the burden of proving whether or not the litigation would be a demonstrable threat to foreign relations.

BACKGROUND AND SIGNIFICANCE

In *Underhill v. Hernandez*, 168 U.S. 250 (1896), the acts of General Hernandez (a revolutionary Venezuelan military commander whose government had been recognized by the United States) were the basis of a damage action brought in this country by George F. Underhill, an American citizen who claimed that Hernandez had unlawfully assaulted, coerced, and detained him in Venezuela. The Court, applying the Act of State Doctrine, refused to inquire into those acts.

Aside from the Bernstein exception (explained below), the first major reexamination of the AOSD took place in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

In *Sabbatino*, Justice Harlan's majority opinion explained that, although the AOSD appears to be related to the doctrine of foreign sovereign immunity ("FSI"), the foundations and application of each doctrine are quite distinct. FSI is grounded upon international law through comity—it furthers the respect for sovereignty by denying the courts of one sovereign the right to exercise jurisdiction over another sovereign.

Conversely, the AOSD is a domestic doctrine founded on the U.S. Constitution's separation of powers requirement. Further, the AOSD does not deny the jurisdictional power of the courts. The courts' preclusion from reviewing the legality of the acts of a foreign sovereign is self-enforced. By allowing the executive branch to maintain foreign relations unfettered by the judiciary's case-based tunnel vision, the doctrine is designed to avoid national embarrassment and the impairment of foreign relations.

Unfortunately, since *Sabbatino* the Court has decided only two AOSD cases (both plurality decisions): *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), and *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). Because *Kirkpatrick* is the first AOSD case in which certiorari has been granted since 1976, it raises many significant issues that have remained unresolved for the past 25 years.

Despite an appearance of clarity, the AOSD suffers from serious communication problems that are the very nature of issues that walk the line between the executive and judiciary branches. Much like the FSI doctrine, although the AOSD appeared to be absolute it ran into a series of "exceptions."

There are three primary exceptions to the Act of State Doctrine: 1) the "Bernstein exception"; 2) the "commercial activity" exception; and 3) the "treaty exception." In addition, a series of recent cases have asserted a difference between a court's reviewing the motivation behind a foreign sovereign's actions and its reviewing the legality of those actions.

Finally, there are the issues of whether the actions were that of the sovereign at all, and whether they all took place within the sovereign's territory.

In *Kirkpatrick*, the Court has been invited to address the Bernstein and commercial activity exceptions, as well as the question of whether reviewing the motivation behind a foreign sovereign's action is tantamount to reviewing the legality of those actions and therefore precluded by the AOSD.

ETC has also argued that since no government ever legalizes the acceptance of bribes, the Court would not be "reviewing the legality of the acts of a foreign government." This argument has previously received very limited judicial discussion. See *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983).

Interestingly, that the purchase order came from the

Nigerian government for the benefit of the Nigerian military does not automatically resolve the possible commercial nature of the order. Following the passage of the Foreign Sovereign Immunities Act in 1976 and its denial of sovereign immunity for commercial transactions, a plurality of the Supreme Court found that a commercial activity exception would be permitted in AOSD cases as well. *Alfred Dunhill of London Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

Therefore, if the adjudication of a case would require a review of the legality of a foreign sovereign's acts, the justices indicated that it might be proper to proceed to review those acts so long as the subject of the case is a commercial transaction.

Of course, even if the plurality decision does indicate such a "commercial activity" exception to the AOSD, it would be necessary in each case to determine whether the transaction was truly "commercial." As noted in *International Association of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981), the commercial activity exception to the AOSD may not be as broad as the commercial activity exception to the Foreign Sovereign Immunities Act.

The commercial activity itself may remove the jurisdictional bar to the FSIA. Commercial activity does not, however, remove the potential for embarrassment in foreign relations—one of the two factors in the AOSD.

Not surprisingly, Kirkpatrick asserts that because the purchase in this case originated from the government on behalf of the military, the order was clearly an official act of the government in its public capacity for a public purpose.

ETC responds that the Court should not automatically conclude that the ordering of equipment for use by the military was for a public purpose. ETC reasons that if, for example, the government orders beverages to be sold on the premises of military bases, or equipment as part of base facilities but not exclusively for specific military training, such purchases can be commercial activities.

The other exception at issue—the "Bernstein exception"—is a product of both an attempt to bridge the constitutional separation of powers and the need for equity and compassion in the aftermath of Nazi Germany. Mr. Bernstein was a German Jew whose property and citizenship were stripped in the barbarism of 1930's Germany.

He was forced to "sell" his property to an "Aryan" under the direction and approval of the Nazi government. After the war, Bernstein attempted to reclaim his property. The holders of the property argued that the courts were precluded by the AOSD from reviewing the legality of the acts of the Nazi government. Judge Learned Hand indicated that, barring a communication from the State Department declaring that proceeding with the case would not affect U.S. foreign relations, the absolute nature of the AOSD commanded his dismissal of the case.

In a subsequent action concerning certain other Bernstein property, *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954), Judge Augustus Hand did receive such a State Department communication, dubbed the "Bernstein Letter," and therefore ignored the preclusion effect of the AOSD.

Later, in *Sabbatino*, Justice Harlan would characterize the Bernstein exception as limiting the application of the AOSD to recognized governments that (unlike the Nazi government) are still in existence. Finally, in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), while three justices relied upon a Bernstein letter as commanding, six members of a highly fractured Court denied any further respect for the Bernstein exception.

Despite the six justices in *First National City Bank*, the lower courts continue to request and receive Bernstein-type communiques from the State Department. In *Kirkpatrick*, the State Department's "Sofaer Letter" urges caution and concern for not harming relations with Nigeria, but then indicates that it is not necessary to apply the AOSD when the Court will only be examining the motivation for, rather than the legality of, the acts of a foreign sovereign.

While Kirkpatrick asserts that Bernstein letters were banned by a plurality of the Court in *First National City Bank*, and that the "Sofaer Letter" here communicates nothing, ETC claims that the letter indicates that proceeding with the case will not harm foreign relations and that therefore the AOSD is not applicable.

There is even the potential here for creating a "reverse Bernstein inference"—that is, that the AOSD should not be applied unless the State Department specifically indicates that it should be. By placing the burden to show harm on the party asserting the application of the AOSD, the Third Circuit's opinion in *Kirkpatrick* implies such an inference.

Finally, there is the question of whether a distinction can be made between examining the motivation behind the acts of a foreign government and judging the legality of those acts. In this case, it may be difficult to distinguish between the acts' "motivation" and "legality" without determining that the acceptance of bribes was not an act of government and therefore inappropriate for the AOSD.

The judicial analysis of the motivation for the awarding of the contracts could examine: (1) the purpose for which the item was purchased; or (2) whether the bribes were the motivating factor in the selection of a seller. The first line of inquiry would conflict with FSI analysis (which ignores the purported purpose), and the second would require either the impugning of the reputation of high government officials, or a Nigerian government action to separate the bribery from the legality of the government's actions.

The Court granted certiorari in this case solely to review the application of the AOSD. While the decision should provide significant and timely instruction to lower courts on the application of the AOSD, any or all of the above issues could play a part in deciding the case.

An overriding concern for the Court may be the public policy effect of allowing a party damaged by a violation of the Foreign Corrupt Practices Act to go without an opportunity to obtain redress. Ultimately, even if ETC succeeds in removing the AOSD barrier in this case, Kirkpatrick has raised serious questions about ETC's ability to show damages.

ARGUMENTS

For W.S. Kirkpatrick & Co., Inc.*(Counsel of Record, Edward Brodsky, 520 Madison Ave., New York, NY 10022; telephone (212) 935-5000):*

1. The judicially created distinction between motivation and validity should not bar application of the Act of State Doctrine to this case.
2. The Act of State Doctrine bars adjudication of Environmental Tectonics' claims.

For Environmental Tectonics *(Counsel of Record, Thomas B. Rutter, The Curtis Center, Suite 750, Independence Square West, Philadelphia, PA 19106; telephone (215) 925-9200):*

1. The rule of law reflected in *United States v. Sisal Sales Corp.* and *Continental Ore Co. v. Union Carbide & Carbon Corp.* requires affirmance in this case.
2. Bribing Nigerian officials in violation of United States and Nigerian law as well as every known standard of international conduct does not constitute an act of state.
3. Even if this were an act of state, the *Sabbatino* test is satisfied and therefore the doctrine does not apply to this case.
4. Even if this were an act of state, a "commercial activity" exception to the doctrine should be adopted by this Court and applied to the facts of this case.

AMICUS BRIEFS

In Support of W.S. Kirkpatrick & Co.

The Republic of China

In Support of Environmental Tectonics Corporation

The American Bar Association