CHAPTER 6
THE ROLE OF FOREIGN GOVERNMENTS

Most of antitrust law is designed to regulate the market behavior of individuals and private business entities. However, many restraints on competition in international markets involve national governments in some way. This can include government ownership or control of the defendants, governmental laws or policies which play a role in the restraints, governmental endorsement, encouragement or actual compulsion of the restraints in question, and lobbying foreign governments (and/or the United States) for the imposition of the restraints on competition. The United States and most other jurisdictions have softened the application of their competition laws when another government has played a significant role in the restriction on competition. Some of the largest and most intractable conflicts have occurred when the investigating jurisdiction has not deferred when another government has restricted competition for reasons that touch on vital national interests (See Chapter 5). This chapter explores the four major ways that the United States has adjusted the application of its antitrust laws when foreign governments are a player: sovereign immunity, the act of state doctrine, the foreign compulsion defense, and the potential application of the Noerr-Pennington doctrine to immunize the lobbying of foreign governments.

International Association of Machinists and Aerospace Workers (IAM) v. The Organization of the Petroleum Exporting Countries (OPEC), 649 F.2d 1354 (9th Cir. 1981).

I. Introduction

The members of the International Association of Machinists and Aerospace Workers (IAM) were disturbed by the high price of oil and petroleum-derived products in the United States. They believed the actions of the Organization of the Petroleum Exporting Countries, popularly known as OPEC, were the cause of this burden on the American public. IAM sued OPEC and its member nations in December of 1978, alleging that their price-setting activities violated United States anti-trust laws. IAM sought injunctive relief and damages. The district court entered a final judgment in favor of the defendants, holding that it lacked jurisdiction and that IAM had no valid anti-trust claim. [477 F. Supp. 553 (C.D.Cal.1979)] We affirm the judgment of the district court on the alternate ground that, under the act of state doctrine, exercise of federal court jurisdiction in this case would be improper.

II. Factual Background

IAM is a non-profit labor association. Its members work in petroleum-using industries, and like most Americans, they are consumers of gasoline and other petroleum-derived products. They object to the high and rising cost of such products.

OPEC is an organization of the petroleum-producing and exporting nations of what is sometimes referred to as the Third World. The OPEC nations have organized to obtain the greatest possible economic returns for a special resource which they hope will remove them from the ranks of the underdeveloped and the poverty-plagued. OPEC was formed in 1960 by the defendants Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela. The other defendants, Algeria, Ecuador, Gabon, Indonesia, Libya, Nigeria, Qatar, and the United Arab Emirates, joined thereafter.

The OPEC nations produce and export oil either through government-owned companies or through government participation in private companies. Prior to the formation of OPEC, these diverse and sometimes antagonistic countries were plagued with fluctuating oil prices. Without coordination among them, oil was often in oversupply on the world market resulting in low prices. The OPEC nations realized that self-interest dictated that they "formulate a system to ensure the stabilisation (sic) of prices by, among other means, the regulation of production, with due regard to the interests of the producing and of the consuming nations, and to the necessity of securing a steady income to the producing countries, an efficient economic and regular supply of this source of energy to consuming nations " OPEC Resolution of the First Conference, Resolution 1.1(3), September 1960.

OPEC achieves its goals by a system of production limits and royalties which its members unanimously adopt. There is no enforcement arm of OPEC. The force behind OPEC decrees is the collective self-interest of the 13 nations.

After formation of OPEC, it is alleged, the price of crude oil increased tenfold and more. Whether or not a causal relation exists, there is no doubt that the price of oil has risen dramatically in recent years, and that this has become of international concern.

Supporters of OPEC argue that its actions result in fair world prices for oil, and allow OPEC members to achieve a measure of economic and political independence. Without OPEC, they say, in the rush to the marketplace these nations would rapidly deplete their only valuable resource for ridiculously low prices.

Detractors accuse OPEC of price-fixing and worse in its deliberate manipulation of the world market and withholding of a resource which many world citizens have not learned to do without.

In December 1978, IAM brought suit against OPEC and its member nations. IAM's complaint alleged price fixing in violation of the Sherman Act, 15 U.S.C. @ 1, and requested treble damages and injunctive relief under the Clayton Act, 15 U.S.C. @@ 15, 16. IAM claimed a deliberate targeting and victimization of the United States market, directly resulting in higher prices for Americans.

The defendants refused to recognize the jurisdiction of the district court, and they did not appear in the proceedings below. Their cause was argued by various amici, with additional information provided by court-appointed experts. The district court ordered a full hearing, noting that the Foreign Sovereign Immunities Act (FSIA) prohibits the entry of a default judgment against a foreign sovereignty "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. @ 1608(e).

The district court initially dismissed OPEC, the organization, since it had not been properly served. It also determined at an early stage in the proceedings that monetary damages were foreclosed by the indirect-purchaser rule of Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Thus the testimony at trial was directed to what remained of the complaint a suit for injunctive relief against the 13 OPEC nations individually.

The testimony was extensive. Experts in economics and international relations were examined and cross-examined. Exhibits, including masses of statistical and technical data, were received. A full day of legal argument concluded the proceedings below.

The record reflects an outstanding effort on the part of the district judge to amass the information necessary to understand the international politics and economy of oil and to marshal the legal arguments for and against IAM's requested relief.

At the close of the trial, the district judge granted judgment in favor of the defendants. The court held, first, that it lacked jurisdiction over the defendant nations under the Foreign Sovereign Immunities Act. n4 The court further held that even if jurisdiction existed in the first instance, the anti-trust action failed because foreign sovereigns are not persons within the meaning of the Sherman Act and because there was no proximate causal connection between OPEC activities and domestic price increases. The court also decided that default judgment could not properly lie against the non-appearing defendants, and that the defendants had not waived their immunity.

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n4. The Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891, codified at 28 U.S.C. @ 1330, actions against foreign states, which states:

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement;

and 28 U.S.C. @@ 1602, et seq., which states in relevant part:

@ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

@ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

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III. Discussion

A. Sovereign Immunity

In the international sphere each state is viewed as an independent sovereign, equal in sovereignty to all other states. It is said that an equal holds no power of sovereignty over an equal. Thus the doctrine of sovereign immunity: the courts of one state generally have no jurisdiction to entertain suits against another state. This rule of international law developed by custom among nations. Also by custom, an exception developed for the commercial activities of a state. The former concept of absolute sovereign immunity gave way to a restrictive view. Under the restrictive theory of sovereign immunity, immunity did not exist for commercial activities since they were seen as non-sovereign.

In 1976, Congress enacted the FSIA and declared that the federal courts will apply an objective nature-of-the-act test n6 in determining whether activity is commercial and thus not immune: "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. @ 1603(d).

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n6. The categorization of activity as commercial or non-commercial is a source of controversy. Two different tests arose to determine the character of state activity. One focused on the purpose of the activity, the other on the nature of the activity. The purpose test, which asks whether the act in question was undertaken for sovereign ends, is subjective. The nature test, which focuses on the nature of the act itself, is objective. The purpose test grants broader immunity, since even the most commercial activity could have an underlying governmental purpose. For example, the purchase of furniture is objectively a commercial act. If the furniture is purchased for a state's embassy, however, under the purpose test, the act is sovereign and immunity applies. The problem with the purpose test is that the expectations of the furniture seller relying on the commercial appearance of the activity would be frustrated if the foreign government could claim immunity and disclaim its obligation to pay. Only the objective test would protect the seller's reliance on the nature and appearance of the purchase as commercial activity subject to domestic laws.

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A critical step in characterizing the nature of a given activity is defining exactly what that activity is. The immunity question may be determined by how broadly or narrowly that activity is defined. In this case, IAM insists on a very narrow focus on the specific activity of "price fixing." IAM argues that the FSIA does not give immunity to this activity. Under the FSIA a commercial activity is one which an individual might "customarily carr(y) on for profit." H.R.Rep.No.94-1487, 94th Cong., 2d Sess. 16, reprinted in (1976) U.S.Code Cong. & Ad.News 6604, 6615. OPEC's activity, characterized by IAM as making agreements to fix prices, is one which is presumably done for profit; it is thus commercial and immunity does not apply.

The court below defined OPEC's activity in a different way: "It is clear that the nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource to wit, crude oil from its territory." 477 F. Supp. at 567. The trial judge reasoned that, according to international law, the development and control of natural resources is a prime governmental function. Id. at 567-78. The opinion cites several resolutions of the United Nations' General Assembly, which the United States supported, and the United States Constitution, Art. 4, @ 3, cl. 2, which treat the control of natural resources as governmental acts.

IAM argues that the district court's analysis strays from the path set forth in the FSIA. The control of natural resources is the purpose behind OPEC's actions, but the act complained of here is a conspiracy to fix prices. The FSIA instructs us to look upon the act itself rather than underlying sovereign motivations.

The district court was understandably troubled by the broader implications of an anti-trust action against the OPEC nations. The importance of the alleged price-fixing activity to the OPEC nations cannot be ignored. Oil revenues represent their only significant source of income. Consideration of their sovereignty cannot be separated from their near total dependence upon oil. We find that these concerns are appropriately addressed by application of the act of state doctrine. While we do not apply the doctrine of sovereign immunity, its elements remain relevant to our discussion of the act of state doctrine.

B. The Act of State Doctrine

The act of state doctrine declares that a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state. This doctrine was expressed by the Supreme Court in Underhill v. Hernandez, 168 U.S. 250, 252 (1897):

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

The doctrine recognizes the institutional limitations of the courts and the peculiar requirements of successful foreign relations. To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy. The political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles. The timing of our decisions is largely a result of our caseload and of the random tactical considerations which motivate parties to bring lawsuits and to seek delay or expedition. When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world.

The act of state doctrine is similar to the political question doctrine in domestic law. It requires that the courts defer to the legislative and executive branches when those branches are better equipped to resolve a politically sensitive question. Like the political question doctrine, its applicability is not subject to clear definition. The courts balance various factors to determine whether the doctrine should apply.

While the act of state doctrine has no explicit source in our Constitution or statutes, it does have "constitutional underpinnings." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). The Supreme Court has stated that the act of state doctrine:

arises out of the basic relationships between branches of government in a system of separation of powers The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

The principle of separation of powers is central to our form of democratic government. Just as the courts have carefully guarded their primary role as interpreters of the Constitution and the laws of the United States, so have they recognized the primary role of the President and Congress in resolution of political conflict and the adoption of foreign policy.

The doctrine of sovereign immunity is similar to the act of state doctrine in that it also represents the need to respect the sovereignty of foreign states. The two doctrines differ, however, in significant respects. The law of sovereign immunity goes to the jurisdiction of the court. The act of state doctrine is not jurisdictional. Rather, it is a prudential doctrine designed to avoid judicial action in sensitive areas. Sovereign immunity is a principle of international law, recognized in the United States by statute. It is the states themselves, as defendants, who may claim sovereign immunity. The act of state doctrine is a domestic legal principle, arising from the peculiar role of American courts. It recognizes not only the sovereignty of foreign states, but also the spheres of power of the co-equal branches of our government. Thus a private litigant may raise the act of state doctrine, even when no sovereign state is a party to the action. The act of state doctrine is apposite whenever the federal courts must question the legality of the sovereign acts of foreign states.

It has been suggested that the FSIA supersedes the act of state doctrine, or that the amorphous doctrine is limited by modern jurisprudence. We disagree.

Congress in enacting the FSIA recognized the distinction between sovereign immunity and the act of state doctrine. Indeed, because the act of state doctrine addresses concerns central to our system of government, the doctrine must necessarily remain a part of our jurisprudence unless and until such time as a radical change in the role of the courts occurs.

The act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity. While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations. As the district court noted, OPEC's "price-fixing" activity has a significant sovereign component. While the FSIA ignores the underlying purpose of a state's action, the act of state doctrine does not. This court has stated that the motivations of the sovereign must be examined for a public interest basis. Timberlane, 549 F.2d at 607. When the state qua state acts in the public interest, its sovereignty is asserted. The courts must proceed cautiously to avoid an affront to that sovereignty. Because the act of state doctrine and the doctrine of sovereign immunity address different concerns and apply in different circumstances, we find that the act of state doctrine remains available when such caution is appropriate, regardless of any commercial component of the activity involved.

In addition to the public interest factor, a federal court must heed other indications which call for act of state deference. The doctrine does not suggest a rigid rule of application. In the Sabbatino case, the Supreme Court suggested a balancing approach:

some aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. 376 U.S. at 428.

The decision to deny access to judicial relief is not one we make lightly. In Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 606 (9th Cir. 1976), this court noted that "not every case is identical in its potential impact on our relations with other nations." The "touchstone" or "crucial element" is the potential for interference with our foreign relations. Timberlane, 549 F.2d at 607. This court has stated:

we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, repeating the terms of Sabbatino, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

There is no question that the availability of oil has become a significant factor in international relations. The growing world energy crisis has been judicially recognized in other cases. See, e. g., Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978), cert. denied, 442 U.S. 928 (1979) (dismissing an action to determine rights to oil in the Persian Gulf as raising a nonjusticiable political question); Hunt v. Mobil Oil Corp., 550 F.2d 68, 78 (2d Cir.) cert. denied, 434 U.S. 984 (1977) (affirming, on the basis of the act of state doctrine, dismissal of anti-trust claim where the act complained of was part of "a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants"). The record in this case contains extensive documentation of the involvement of our executive and legislative branches with the oil question. IAM does not dispute that the United States has a grave interest in the petro-politics of the Middle East, or that the foreign policy arms of the executive and legislative branches are intimately involved in this sensitive area. It is clear that OPEC and its activities are carefully considered in the formulation of American foreign policy.

The remedy IAM seeks is an injunction against the OPEC nations. The possibility of insult to the OPEC states and of interference with the efforts of the political branches to seek favorable relations with them is apparent from the very nature of this action and the remedy sought. While the case is formulated as an anti-trust action, the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources. On the other hand, should the court hold that OPEC's actions are legal, this "would greatly strengthen the bargaining hand" of the OPEC nations in the event that Congress or the executive chooses to condemn OPEC's actions. Sabbatino, 376 U.S. at 432.

A further consideration is the availability of internationally-accepted legal principles which would render the issues appropriate for judicial disposition. As the Supreme Court stated in Sabbatino,

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. 376 U.S. at 428.

While conspiracies in restraint of trade are clearly illegal under domestic law, the record reveals no international consensus condemning cartels, royalties, and production agreements. The United States and other nations have supported the principle of supreme state sovereignty over natural resources. The OPEC nations themselves obviously will not agree that their actions are illegal. We are reluctant to allow judicial interference in an area so void of international consensus. An injunction against OPEC's alleged price-fixing activity would require condemnation of a cartel system which the community of nations has thus far been unwilling to denounce. The admonition in Sabbatino that the courts should consider the degree of codification and consensus in the area of law is another indication that judicial action is inappropriate here.

The district court was understandably reluctant to proceed on the complaint below and the act of state doctrine provides sound jurisprudential support for such reluctance. While the act of state doctrine does not compel dismissal as a matter of course, in a case such as this where the controlling issue is the legality of a sovereign act and where the only remedy sought is barred by act of state considerations dismissal is appropriate.

IV. Conclusion

The act of state doctrine is applicable in this case. The courts should not enter at the will of litigants into a delicate area of foreign policy which the executive and legislative branches have chosen to approach with restraint. The issue of whether the FSIA allows jurisdiction in this case need not be decided, since a judicial remedy is inappropriate regardless of whether jurisdiction exists. Similarly, we need not reach the issues regarding the indirect-purchaser rule, the extra-territorial application of the Sherman Act, the definition of "person" under the Sherman Act, and the propriety of injunctive relief.

The decision of the district court dismissing this action is AFFIRMED.

Are Producer Association Cartels?

Foreign governments participate in various producer organizations in an attempt to stabilize and raise world prices, control output of various primary commodities, promote national economic development, protect national sovereignty, and control the use of natural resources. OPEC is the most prominent example of a producer association. While producer associations assert that their actions are sovereign in nature, and thus they are distinguishable from private cartels, developed countries see producers associations as conceptually indistinguishable from raw material cartels. D.E. Pollard discusses this conflict in LAW AND POLICY OF PRODUCERS ASSOCIATIONS (1984) and distinguishes producers associations from cartels based on their, "composition, structure, status, and the fact that they are organized around a single commodity in international trade."

According to Pollard:

> [A] cartel should be defined not only in terms of its structure and objectives, but also by reference to the nature of the legal rules governing its activities as an economic entity. For, in the final analysis, cartels are as much a result of the legal phenomena of regulatory systems characteristic of market-economy states, as they are a product of institutional and economic phenomena of the private enterprise system. Conventional cartel theory defines cartels as combinations of a few sellers acting in collusion, contrary to law and the public interest, to enforce agreements on prices, production levels, and market allocation with the primary objective of profit maximization. An indispensable element of cartels is collusive action prohibited by law. Where combinations of sellers act together in way permitted by law to take advantage of a dominant position, they may be described as oligopolies. The distinction between the two appears to turn on the difference between their taking advantage of a dominant position in the public interest and their abusing such dominant position contrary to the public interest. Viewed in this light, cartels are institutional phenomena of municipal law, which regards them as violating generally accepted principles of economic behavior, sanctified by the market-economy system and presumed to operate in the public interest. Such principles place heavy reliance on market forces as regulators of prices and the legitimate determinant of the efficient use of factors. These principles of economic behavior are internal components of public policy and find expression in the municipal systems of

> market economy countries. Cartels are ordinarily susceptible to prohibition by municipal law of states whose public policy deprecates specific types of restrictive business practices associated with such activities. In short, so closely are cartels identified with the preclusionary rules of municipal systems and activities contrary to public policy that it is virtually impossible to conceive of them existing outside this legal and policy framework.
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> However, producers' associations, as subjects of international law, are not normally amenable to regulation by municipal law. As such there are no preclusionary rules of public law founded on international public policy proscribing their economic activities. Consequently, given the present stage of development of international law, it does appear juridically misconceived to describe producers' associations as cartels in the ordinary meaning of the term. (380)

Pollard uses economic theory to support his views:

> Cartels, in conventional economic theory, consist of only a few sellers of a commodity enjoying a dominant market position and acting in collusion to abuse that position. The quantitative element seems to be of extreme importance since the existence of atomistic competition argues against effective collusion. In this context, it is also important to bear in mind that the absence of effective organization among consumers is normally correlative to market domination. Strictly speaking, producers' associations are not combinations of sellers, since in most cases the governments which are members of these organizations neither own nor sell the relevant commodities. As, however, they invariably have the legal competence to significantly affect the prices of these commodities, their status should be assumed for present purposes to be similar to that sellers. (129)

Pollard views the major consumers of producer association commodities as the transnational corporations which process and market them, and because those corporations participate in the control of use and pricing of the commodities, Pollard finds that it is the buyers who "enjoy considerable oligopsonistic power which could be used to exert downward pressure on prices in real terms." In fact, when considering the average rates of terms of trade of bananas, cocoa, coconut oil, coffee, groundnut oil, natural rubber, sugar, tea, bauxite, copper, iron ore, and petroleum, Pollard finds that petroleum registered the only significant increase, as the price quintupled in 1973. Because of this, Pollard concludes that

> with the exception of petroleum, members of producers' associations cannot be said to have exploited a dominant market position to the disadvantage of buyers of the commodities concerned. Only the OPEC and, to a lesser extent, the IBA, were able to reach any agreement on the prices which transnational corporations were to pay for the relevant commodities. The ability of the OPEC members to determine the prices of crude petroleum is largely a result of the price inelasticity of demand for their market share of the product, and the relatively high cost of developing alternative sources of supply or the producing substitutes. To some extent, similar conditions exist for bauxite. Further, oil exporting countries gained control of production through collective action. (121)

Pollard also examines producer association production control, but finds that little empirical evidence suggests that producer associations succeed in restricting production in order to control prices. This is in part because private enterprises can lay off workers and slow production without facing the political ramifications that government-affiliated producer associations would. Also, when production associations involve multiple countries, it is difficult for those countries to agree on why production cutbacks should be made. Pollard cites OPEC's failure in the early years to agree on production controls as support for his assertion. Pollard explains that transnational companies, not producer associations, have historically controlled commodity markets, so producer associations have not been known for market sharing among members.

Even when, for the sake of argument, Pollard assumes that producers associations engage in price-fixing, production controls, and market allocation, he finds that the producer associations' motives are distinguishable from those of cartels.

> In conventional economic theory, the object of collusive practices by the members of cartels is profit maximization. But no persuasive empirical evidence is available to support a finding that profit maximization is the principal objective of producers' associations, express or otherwise. Our examination of the objectives of producers' associations suggests that their principal objective at the present stage of their development is not so much profit

maximization as the net transfer of resources from developed to developing countries through enhancement of their net barter terms of trade. As intimated above, this objective is largely to be inferred from the operational environment of producers' associations and the actions of relevant policy-makers. Undoubtedly, one of the measures for achieving this objective is better prices in real terms for their commodities. At the same time, however, producers' associations are equally concerned about enhancing their net barter terms of trade by more direct participation in various production stages of the industry. This can be explained in terms of the broad developmental objectives of producers' associations. (171)

Among the objectives of producers associations designed to modify the market structure of international commodity trade, and to ensure for producing countries a greater measure of participation in the industrial process of production, the following may be identified as having been given a high priority: the exchange of information among members on the industry concerned; quality control of products; study of the structure of freight rates; promotion of research and development; development of markets in developing countries; promotion of markets for commodities; coordination of production and marketing policies; promotion of technical co-operation among members; removal of restrictions on trade; production control; co-ordination of negotiating positions in relevant forums, and the promotion of co-operation and the discussion of common problems. And it is this breadth of policy objectives which explains their survival in the teeth of failure to agree on pricing, production controls, or market sharing. (145)

Notes

1. Pollard argues that as a matter of international law OPEC and its member nations are not a cartel and are not subject to challenge under national law. Do you find that argument factually or legally persuasive? See Spencer Weber Waller, *Book Review*, 19 G.W. J. INT'L L. 617 (1985)(reviewing Pollard book and reaching contrary conclusion).

2. For a case holding that OPEC as an organization is immune from service under U.S. law see Prewitt Enterprises, Inc. OPEC, 353 F.3d 916 (11th Cir. 2003) (reversing default judgment and injunction against OPEC in private antitrust class action).

3. The following case presents the most recent Supreme Court decision interpreting the Act of State in a much narrower fashion than past cases suggesting that this amorphous defense may not be successful in future antitrust litigation of the type discussed in the IAM opinion.

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

In this case we must decide whether the act of state doctrine bars a court in the United States from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but that does require imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the performance of such an official act.

I

The facts as alleged in respondent's complaint are as follows: In 1981, Harry Carpenter, who was then Chairman of the Board and Chief Executive Officer of petitioner W. S. Kirkpatrick & Co., Inc. (Kirkpatrick), learned that the Republic of Nigeria was interested in contracting for the construction and equipment of an aeromedical center at Kaduna Air Force Base in Nigeria. He made arrangements with Benson "Tunde" Akindele, a Nigerian citizen, whereby Akindele would end eavor to secure the contract for Kirkpatrick. It was agreed that, in the event the contract was awarded to Kirkpatrick, Kirkpatrick would pay to two Panamanian entities controlled by Akindele a "commission" equal to 20% of the contract price, which would in turn be given as a bribe to officials of the Nigerian Government. In accordance with this plan, the contract was awarded to petitioner W. S. Kirkpatrick & Co., International (Kirkpatrick International), a wholly owned subsidiary of Kirkpatrick; Kirkpatrick paid the promised "commission" to the appointed Panamanian entities; and those funds were disbursed as bribes. All parties agree that Nigerian law prohibits both the payment and the receipt of bribes in connection with the award of a government contract.

Respondent Environmental Tectonics Corporation, International, an unsuccessful bidder for the Kaduna contract, learned of the 20% "commission" and brought the matter to the attention of the Nigerian Air Force and the United States Embassy in Lagos. Following an investigation by the Federal Bureau of Investigation, the United States Attorney for the District of New Jersey brought charges against both Kirkpatrick and Carpenter for violations of the Foreign Corrupt Practices Act of 1977, 91 Stat. 1495, as amended, and both pleaded guilty.

Respondent then brought this civil action in the United States District Court for the District of New Jersey against Carpenter, Akindele, petitioners, and others, seeking damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, and the New Jersey Anti-Racketeering Act. The defendants moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that the action was barred by the act of state doctrine.

The District Court, having requested and received a letter expressing the views of the legal adviser to the United States Department of State as to the applicability of the act of state doctrine, treated the motion as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and granted the motion. The District Court concluded that the act of state doctrine applies "if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States." Applying that principle to the facts at hand, the court held that respondent's suit had to be dismissed because in order to prevail respondent would have to show that "the defendants or certain of them intended to wrongfully influence the decision to award the Nigerian Contract by payment of a bribe, that the Government of Nigeria, its officials or other representatives knew of the offered consideration for awarding the Nigerian Contract to Kirkpatrick, that the bribe was actually received or anticipated and that 'but for' the payment or anticipation of the payment of the bribe, ETC would have been awarded the Nigerian Contract."

The Court of Appeals for the Third Circuit reversed. Although agreeing with the District Court that "the award of a military procurement contract can be, in certain circumstances, a sufficiently formal expression of a government's public interests to trigger application" of the act of state doctrine, it found application of the doctrine unwarranted on the facts of this case. The Court of Appeals found particularly persuasive the letter to the District Court from the legal adviser to the Department of State, which had stated that in the opinion of the Department judicial inquiry into the purpose behind the act of a foreign sovereign would not produce the "unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid." The Court of Appeals acknowledged that "the Department's legal conclusions as to the reach of the act of state doctrine are not controlling on the courts," but concluded that "the Department's factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect." In light of the Department's view that the interests of the Executive Branch would not be harmed by prosecution of the action, the Court of Appeals held that Kirkpatrick had not met its burden of showing that the case should not go forward; accordingly, it reversed the judgment of the District Court and remanded the case for trial. We granted certiorari.

II

This Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. We once viewed the doctrine as an expression of international law, resting upon "the highest considerations of international comity and expediency," Oetjen v. Central Leather Co., 246 U.S. 297, 303-304 (1918). We have more recently described it, however, as a consequence of domestic separation of powers, reflecting "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). Some Justices have suggested possible exceptions to application of the doctrine, where one or both of the foregoing policies would seemingly not be served: an exception, for example, for acts of state that consist of commercial transactions, since neither modern international comity nor the current position of our Executive Branch accorded sovereign immunity to such acts, see Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695-706 (1976) (opinion of WHITE, J.); or an exception for cases in which the Executive Branch has represented that it has no objection to denying validity to the foreign sovereign act, since then the courts would be impeding no foreign policy goals, see First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768-770 (1972) (opinion of REHNQUIST, J.).

The parties have argued at length about the applicability of these possible exceptions, and, more generally, about whether the purpose of the act of state doctrine would be furthered by its application in this case. We find it unnecessary, however, to pursue those inquiries, since the factual predicate for application of the act of state doctrine does not exist. Nothing in the present suit requires the Court to declare invalid, and thus ineffective as "a rule of decision for the courts of this country," Ricaud v. American Metal Co., 246 U.S. 304, 310 (1918), the official act of a foreign sovereign.

In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory. In Underhill v. Hernandez, 168 U.S. 250, 254 (1897), holding the defendant's detention of the plaintiff to be tortious would have required denying legal effect to "acts of a military commander representing the authority of the revolutionary party as government, which afterwards succeeded and was recognized by the United States." In Oetjen v. Central Leather Co. supra, and in Ricaud v. American Metal Co., denying title to the party who claimed through purchase from Mexico would have required declaring that government's prior seizure of the property, within its own territory, legally ineffective. In Sabbatino, upholding the defendant's claim to the funds would have required a holding that Cuba's expropriation of goods located in Havana was null and void. In the present case, by contrast, neither the claim nor any asserted defense requires a determination that Nigeria's contract with Kirkpatrick International was, or was not, effective.

Petitioners point out, however, that the facts necessary to establish respondent's claim will also establish that the contract was unlawful. Specifically, they note that in order to prevail respondent must prove that petitioner Kirkpatrick made, and Nigerian officials received, payments that violate Nigerian law, which would, they assert, support a finding that the contract is invalid under Nigerian law. Assuming that to be true, it still does not suffice. The act of state doctrine is not some vague doctrine of abstention but a " principle of decision binding on federal and state courts alike." Sabbatino, supra, at 427 (emphasis added). As we said in Ricaud, "the act within its own boundaries of one sovereign State . . . becomes . . . a rule of decision for the courts of this country." 246 U.S., at 310. Act of state issues only arise when a court must decide -- that is, when the outcome of the case turns upon -- the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. That is the situation here. Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires. Cf. Sharon v. Time, Inc., 599 F.Supp. 538, 546 (SDNY 1984) ("The issue in this litigation is not whether [the alleged] acts are valid, but whether they occurred").

In support of their position that the act of state doctrine bars any factual findings that may cast doubt upon the validity of foreign sovereign acts, petitioners cite Justice Holmes' opinion for the Court in American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). That was a suit under the United States antitrust laws, alleging that Costa Rica's seizure of the plaintiff's property had been induced by an unlawful conspiracy. In the course of a lengthy opinion Justice Holmes observed, citing Underhill, that "a seizure by a state is not a thing that can be complained of elsewhere in the courts." 213 U.S., at 357-358. The statement is concededly puzzling. Underhill does indeed stand for the proposition that a seizure by a state cannot be complained of elsewhere -- in the sense of being sought to be declared ineffective elsewhere. The plaintiff in American Banana, however, like the plaintiff here, was not trying to undo or disregard the governmental action, but only to obtain damages from private parties who had procured it. Arguably, then, the statement did imply that suit would not lie if a foreign state's actions would be, though not invalidated, impugned.

Whatever Justice Holmes may have had in mind, his statement lends inadequate support to petitioners' position here, for two reasons. First, it was a brief aside, entirely unnecessary to the decision. American Banana was squarely decided on the ground (later substantially overruled, see Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704-705 (1962)) that the antitrust laws had no extraterritorial application, so that "what the defendant did in Panama or Costa Rica is not within the scope of the statute." 213 U.S., at 357. Second, whatever support the dictum might provide for petitioners' position is more than overcome by our later holding in United States v. Sisal Sales Corp., 274 U.S. 268 (1927). There we held that, American Banana notwithstanding, the defendant's actions in obtaining Mexico's enactment of "discriminating legislation" could form part of the basis for suit under the United States antitrust laws. 274 U.S., at 276. Simply put, American Banana was not an act of state case; and whatever it said by way of dictum that might be relevant to the present case has not survived Sisal Sales.

Petitioners insist, however, that the policies underlying our act of state cases -- international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations -- are implicated in the present case because, as the District Court found, a determination that Nigerian officials demanded and accepted a bribe "would impugn or question the nobility of a foreign nation's motivations," and would "result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States." The United States, as amicus curiae, favors the same approach to the act of state doctrine, though disagreeing with petitioners as to the outcome it produces in the present case. We should not, the United States urges, "attach dispositive significance to the fact that this suit involves only the 'motivation' for, rather than the 'validity' of, a foreign sovereign act," and should eschew "any rigid formula for the resolution of act of state cases generally." In some future case, perhaps, "litigation . . . based on alleged corruption in the award of contracts or other commercially oriented activities of foreign governments could sufficiently touch on 'national nerves' that the act of state doctrine or related principles of abstention would appropriately be found to bar the suit,"and we should therefore resolve this case on the narrowest possible ground, viz., that the letter from the legal adviser to the District Court gives sufficient indication that, "in the setting of this case," the act of state doctrine poses no bar to adjudication.

These urgings are deceptively similar to what we said in Sabbatino, where we observed that sometimes, even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application. We suggested that a sort of balancing approach could be applied -- the balance shifting against application of the doctrine, for example, if the government that committed the "challenged act of state" is no longer in existence. But what is appropriate in order to avoid unquestioning judicial acceptance of the acts of foreign sovereigns is not similarly appropriate for the quite opposite purpose of expanding judicial incapacities where such acts are not directly (or even indirectly) involved. It is one thing to suggest, as we have, that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked; it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine (or, as the United States puts it, unspecified "related principles of abstention") into new and uncharted fields.

The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue.

The judgment of the Court of Appeals for the Third Circuit is affirmed.

Notes

1) A number of courts and commentators also have suggested a laundry list of exceptions to the act of state doctrine including an exception for commercial activity (similar to the law of sovereign immunity) and that the foreign act must take place within the territory of the foreign government. For a survey of the act of state doctrine and its various

exceptions see ABA Section of Antitrust Law, Special Defense in International Antitrust Litigation (1995).

2) Which of these exceptions do you favor?

3) Given the changing nature of the act of state doctrine and its various exceptions, is it even fair to characterize it as a single doctrine?

4) How would you counsel a client in connection with its potential antitrust liability where a foreign governmental act plays a role in the restraint on competition?

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

This is a private treble damage action under the antitrust laws. Continental Ore Company, a partnership, and its individual partners, who were plaintiffs in the trial court, are petitioners here. Henry J. Leir, the principal party in Continental, had engaged in the buying and selling of metals, including vanadium products, in Europe prior to 1938, in which year he immigrated to the United States. This case concerns his subsequent efforts in this country to build a successful business in the production and sale of vanadium.

Vanadium is a metal obtained from certain ores which, in this country, are mined principally on the Colorado plateau. The ore is processed at mills near the mines into a substance commonly known as vanadium oxide. The oxide is then transported to the East and converted into ferrovanadium, which is purchased chiefly by steel companies for use as an alloy in hardening steels.

The defendants named in the complaint were Vanadium Corporation of America (VCA), a fully integrated miner and manufacturer of vanadium products, Union Carbide and Carbon Corporation (Carbide), and the following four wholly owned subsidiary corporations of the latter company: United States Vanadium Corporation (USV), engaged in mining vanadium ore and processing vanadium oxide; Electro Metallurgical Company (Electro Met), engaged in making ferrovanadium; Electro Metallurgical Sales Corporation (Electro Met Sales), engaged in the sale of vanadium oxide and ferrovanadium; and Electro Metallurgical Company of Canada, Ltd. (Electro Met of Canada), engaged in selling vanadium products in Canada. The complaint was filed on November 15, 1949, and service was had on VCA, Carbide and USV. There was no service on Electro Met, Electro Met Sales or Electro Met of Canada. Carbide acquired the assets of Electro Met and Electro Met Sales by dissolution or merger during the year 1949, prior to the filing of the complaint herein.

The complaint alleged that, beginning in about 1933, the defendants and others acting in concert with them violated @@ 1 and 2 of the Sherman Act by conspiring to restrain, by monopolizing, and by attempting and conspiring to monopolize, trade and commerce in ferrovanadium and vanadium oxide. The defendants were charged with purchasing and acquiring control over substantially all accessible vanadium-bearing ore deposits in the United States and substantially all vanadium oxide produced by others in the United States, with refusing to sell vanadium oxide to other potential producers of ferrovanadium, including Continental and its associates, with apportioning and dividing sales of ferrovanadium and vanadium oxide among themselves in certain proportions, with fixing identical prices for the sale of ferrovanadium and vanadium oxide and for the purchase of ore, and with making certain mutual arrangements whereby one or more Carbide subsidiaries supplied VCA with substantial quantities of vanadium oxide at preferential prices to VCA. The complaint stated that between 1933 and 1949 the defendants produced over 99% of all ferrovanadium and over 90% of all vanadium oxide produced in the United States and that during the same period the defendants sold over 99% of the ferrovanadium and vanadium oxide sold in this country.

According to the complaint, as a proximate consequence of defendants' monopolistic and restrictive practices, independent producers and distributors of ferrovanadium and vanadium oxide, including Continental, were eliminated from the business. Specifically, the complaint detailed several efforts which Continental made to enter and maintain itself in the vanadium business, all of which were allegedly frustrated by defendants' Sherman Act violations: (1) In 1938, Continental negotiated a contract with Apex Smelting Company of Chicago whereby Apex was to build and operate a plant for the conversion of oxide to ferrovanadium by use of the aluminothermic process. Continental and Apex were to share the profits of this venture. On its part, Continental agreed to obtain raw materials for Apex and to sell the finished product. Operations under this contract began in the spring of 1940, but Apex terminated the agreement in 1942 allegedly because the illegal activities of defendants prevented the obtaining of a sufficient supply of vanadium oxide. (2) Meanwhile, Continental itself had begun to produce a compound called "Van-Ex," composed of vanadium oxide and other materials, which was designed for direct introduction into the steel-making process without prior conversion to ferrovanadium. This venture was allegedly terminated in 1944 because of the difficulty of securing raw materials caused by defendants' unlawful practices, including the efforts of defendants to obtain ownership or control of the mines and mills of Continental's suppliers. (3) Continental had developed a business with a Canadian customer during 1942. When Electro Met Sales of Canada was appointed by the Canadian Government as the exclusive wartime agent to purchase and allocate vanadium for Canadian industries, that company, it is alleged, acting under the control and direction of its parent, Carbide, eliminated Continental entirely from the Canadian market and divided Continental's business solely between defendants. (4) Defendants in 1943, by open threats of reprisals, allegedly frustrated certain arrangements which Continental had with the Climax Molybdenum Corporation for the manufacture of ferrovanadium. (5) In January 1944, Continental contracted with Imperial Paper & Color Corporation for the processing by the latter of vanadium oxide and ferrovanadium. Continental agreed to act as sales agent for the output. The complaint charged that Imperial abandoned the contract at the end of 1944 because of the inability to secure raw materials and that Continental then left the vanadium business altogether, all as a result of the restrictive and monopolistic practices of the defendants.

Trial was to a jury and a verdict was returned for defendants. Continental appealed, asserting error in the trial court's exclusion of various evidentiary items, in certain of the instructions given to the jury, in the refusal to give other instructions, and in other rulings of the trial court. The Court of Appeals for the Ninth Circuit announced that its task was to review the correctness of the judgment below, not the reasons therefor, and on that basis affirmed the judgment, holding that there was insufficient evidence to justify a jury finding that defendants' illegal acts were in fact the cause of Continental's failure in the vanadium business, and hence, that a verdict for defendants should have been directed. In reaching its decision, the court stated that it had considered not only all the evidence admitted by the trial judge, but also all the evidence offered by the plaintiffs which the trial judge excluded. The court did not deal with or rule upon any of the alleged trial errors relied upon by Continental, except for the issue relating to Continental's alleged exclusion from the Canadian market. Certiorari was granted, limited to issues which required examination in the light of previous decisions of this Court and which presented important questions under the antitrust laws. We have concluded, for the reasons discussed hereafter, that the Court of Appeals' decision must be reversed and the case remanded for a new trial.

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II.

Continental's alleged elimination from the Canadian market raises different issues. At the trial Continental introduced evidence to show that beginning in March 1942, it had shipped Van-Ex to a Canadian customer each month during the remainder of that year. There was then received in evidence a letter dated January 19, 1943, from Continental to Electro Met in New York City reciting that the new allocation system in Canada n11 had eliminated Continental from the Canadian market in January, that Continental had inquired about the matter from the Metals Controller for the Canadian Government and that the latter had referred Continental to Electro Met. The court then struck this letter from the record and rejected petitioners' offer to prove that Continental was excluded from the Canadian market by Electro Met of Canada, a wholly owned subsidiary corporation of Carbide, acting as exclusive purchasing agent for the Metals Controller but allegedly operating in this connection under the control and direction of Carbide for the purpose of carrying out the overall conspiracy to restrain and monopolize the vanadium industry. To that end, Continental offered to prove that its former share of the Canadian market was divided between Carbide and VCA. Continental offered various correspondence with Electro Met of Canada and a memorandum and proposed testimony by Continental's vice president concerning his conversations with an employee of Electro Met who had communicated with Continental in response to Continental's letter of January 19, 1943, to Electro Met. The court denied the entire offer of proof "for the reason that this is a transaction wholly in the hands of the Canadian Government and that whether or not this plaintiff was permitted to sell his material to a customer in Canada was a matter wholly within the control of the Canadian Government."

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n11 Canada's entry into World War II prompted the Canadian Government to take extraordinary measures to assure optimum availability of strategic materials to Canadian private industries engaged in the war effort. Pursuant to these measures, the Office of Metals Controller was established and given broad powers to regulate the procurement of the materials and to allocate them to industrial users. See Order of the Governor General in Council, P. C. 3187, July 15, 1940. The Metals Controller enlisted the aid of Electro Met of Canada in early 1943, delegating to it the discretionary agency power to purchase and allocate to Canadian industries all vanadium products required by them. The validity of these wartime measures and delegations under Canadian law is not here contested. Cf. Reference Re Regulations (Chemicals) Under War Measures Act, 1 D. L. R. [1943] 248.

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The Court of Appeals agreed with the trial court and concluded that Continental was not legally entitled to recover from respondents for the destruction of its Canadian business. The court said that no vanadium oxide could be imported into Canada by anyone other than the Canadian Government's agent, Electro Met of Canada, which refused to purchase from the petitioners. Thus, according to the court, "even if we assume that Electro Metallurgical Company of Canada, Ltd., acted for the purpose of entrenching the monopoly position of the defendants in the United States, it was acting as an arm of the Canadian Government, and we do not see how such efforts as appellants claim defendants took to persuade and influence the Canadian Government through its agent are within the purview of the Sherman Act." This ruling was erroneous and we hold that Continental's offer of proof was relevant evidence of a violation of the Sherman Act as charged in the complaint and was not inadmissible on the grounds stated by the courts below.

Respondents say that American Banana Co. v. United Fruit Co., 213 U.S. 347, shields them from liability. This Court there held that an antitrust plaintiff could not collect damages from a defendant who had allegedly influenced a foreign government to seize plaintiff's properties. But in the light of later cases in this Court respondents' reliance upon American Banana is misplaced. A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.

Furthermore, in the Sisal case, a combination entered into within the United States to monopolize an article of commerce produced abroad was held to violate the Sherman Act even though the defendants' control of that production was aided by discriminatory legislation of the foreign country which established an official agency as the sole buyer of the product from the producers and even though one of the defendants became the exclusive selling agent of that governmental authority. Since the activities of the defendants had an impact within the United States and upon its foreign trade, American Banana was expressly held not to be controlling.

Olsen v. Smith, 195 U.S. 332; United States v. Rock Royal Co-op, 307 U.S. 533; and Parker v. Brown, 317 U.S. 341, do not help respondents. These decisions, each of which sustained the validity of mandatory state or federal governmental regulations against a claim of antitrust illegality, are wide of the mark. In the present case petitioners do not question the validity of any action taken by the Canadian Government or by its Metals Controller. Nor is there left in the case any question of the liability of the Canadian Government's agent, for Electro Met of Canada was not served. What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental from the Canadian market. As in Sisal, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.

From the evidence which petitioners offered it appears that Continental complained to the Canadian Metals Controller that Continental had lost its Canadian business. The Controller referred Continental to one of the respondents. But there is no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped. The exclusion, Continental claims, resulted from the action of Electro Met of Canada, taken within the area of its discretionary powers granted by the Metals Controller and in concert with or under the direction of the respondents. The offer of proof at least presented an issue for the jury's resolution as to whether the loss of Continental's Canadian business was occasioned by respondents' activities. Respondents are afforded no defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law. There is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme.

The case of Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, cited by the court below and much relied upon by respondents here, is plainly inapposite. The Court there held not cognizable under the Sherman Act a complaint charging, in essence, that the defendants had engaged in a concerted publicity campaign to foster the adoption of laws and law enforcement practices inimical to plaintiffs' business. Finding no basis for imputing to the Sherman Act a purpose to regulate political activity, a purpose which would have encountered serious constitutional barriers, the Court ruled the defendants' activities to be outside the ban of the Act "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." 365 U.S., at 138. In this case, respondents' conduct is wholly dissimilar to that of the defendants in Noerr.

Respondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr.

Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

[Interamerican, in this antitrust action, alleges that Texaco Maracaibo and other defendants participated in a group boycott against Interamerican to deprive it of the Venezuelan crude oil necessary to its operations. Defendants did not deny that they stopped supplying crude for delivery to Interamerican but contended that they did so at the direction of the Venezuelan government. Two of the leading shareholders in Interamerican apparently were out of favor with the Venezuelan regime, and certain aspects of the company's trade were possibly inconsistent with Venezuelan import policy.]

The Law of Compulsion

No party presents dispositive authority that such acts as occurred here do or do not immunize trade restraints otherwise illegal. The statement in Sabre Shipping Corp. v. American President Lines, Ltd., 285 F. Supp. 949 (S.D.N.Y. 1968), at 954, relied on by plaintiff, is not controlling. Judge Ryan's opinion, on a motion to dismiss, properly held that allegations that the unlawful activities were engaged in at the direction of the Japanese government were a matter for defense. His additional comment that if established such allegations might not immunize defendants, even if read literally, only reserves judgment on the conditions under which such direction might not be a defense.

Such conditions were present in Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962) and United States v. Sisal Sales Corp., 274 U.S. 268 (1927). In Continental Ore, Union Carbide's subsidiary, Electro Met of Canada, had been appointed by the Canadian government to be exclusive wartime purchasing agent for vanadium. That appointment did not immunize a conspiracy with the parent to monopolize vanadium production and sale. "Respondents are afforded no defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law." 370 U.S. at 706-707.

In Sisal Sales, defendants secured a monopoly through discriminatory legislation in Mexico and Yucatan. The Court held that inasmuch as the conspiracy was entered into and overt acts performed in this country, jurisdiction existed, and the legislation procured by the conspiracy was beside the point. "True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States." 274 U.S. at 276.

Nothing in the materials before the Court indicates that defendants either procured the Venezuelan order or that they acted voluntarily pursuant to a delegation of authority to control the oil industry. The narrow question for decision is the availability of genuine compulsion by a foreign sovereign as a defense.

Defendants rely on dicta in Continental Ore and in United States v. The Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. ¶ 70, 600 (S.D.N.Y.) and on language in some consent decrees to establish the defense. Without more, these would be scant authority. It requires no precedent, however, to acknowledge that sovereignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms there have no choice but to obey. Acts of business be come effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations.

In his book, Antitrust and American Business Abroad , Professor Kingman Brewster states a proposition which should be self-evident. Anticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce. American business abroad does not carry with it the freedom and protection of competition it enjoys here, and our courts cannot impose them. Commerce may exist at the will of the government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact business in foreign lands. Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far.

Plaintiff maintains that even if compulsion is a good defense, the acts of compulsion must be valid under Venezuelan laws. It urges the Court to consider the affidavit of a Venezuelan attorney to the effect that the Minister of Mines and Hydrocarbons had no authority to bar sales of crude oil to anyone and that no officer had authority to issue binding orders without putting them in writing and publishing them in the Gazeta Oficial. Since not legal, says plaintiff, the orders were not "compulsive."

This Court may not undertake such an inquiry. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the Supreme Court held that it could not explore the validity under Cuban law of acts of expropriation by the Castro government. The act of state doctrine, based upon proper concepts of sovereignty and separation of powers, commands that conduct of foreign policy reside exclusively in the executive. For our courts to look behind the acts of a foreign government would impinge upon and perhaps impede the executive in that function.

Whether or not Venezuelan officials acted within their authority and by legitimate procedures is therefore not relevant to the instant case.

Plaintiff's attempt to limit Sabbatino to expropriation decrees finds no support either in the holding or the rationale of that case. The principal decision relied on in Sabbatino dealt with a tort claim for refusal to grant a passport, unjustified confinement, assault, and abuse. Underhill v. Hernandez, 168 U.S. 250 (1897). Other cases have applied it to lesser government acts. Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633, 646-47 (2d Cir. 1956) cert. denied 352 U.S. 871 (1956) (trademark). The reasons of policy which support the doctrine would hardly be served by limiting it to acts of expropriation.

Notes

1) Interamerican Refining is the only litigated case where the foreign compulsion defense was accepted by a court. Most other attempts to use the defense failed for lack of proof of actual compulsion. Some critics have contended that courts have been insensitive to foreign mores and culture where government and business work more closely together and governments act by persuasion and encouragement rather than outright compulsion through legislation which is more common in the United States. What would be the ramifications if US courts and agencies were to accept more informal forms of "compulsion" as a defense in antitrust litigation?

2) In addition to what constitutes actual compulsion, the question arises as to how compulsion must be proved and whether the assertions of a foreign government as to its own actions must be given conclusive effect under the act of state doctrine or notions of comity. The next case explores some of these ramifications.

In re: Japanese Electronic Products Antitrust Litig., 723 F.2d 238 (3d Cir. 1983).

[In this long running antitrust dispute, the United States television industry sued the entire Japanese television industry, alleging that the Japanese firms had conspired to monopolize the United States television market through a campaign of low prices and other tactics to drive the U.S. firms out of business. While there was strong evidence that the Japanese firms had conspired to raise price in Japan, there was much less evidence that they had agreed to price low in the United States to drive the American firms out of the market. After decades of motions and discovery, the district court granted summary judgment to the defendants on all antitrust counts. The Third Circuit reversed in part relying on certain behavior that the defendants contended had been compelled by the Japanese government.]

Evidence Supporting the NUE-Zenith Conspiracy Theory

There is also evidence from which a fact-finder could conclude that although American technology in television receivers is substantially compatible with Japanese broadcast standards, there are governmentally imposed barriers to competition by American or other non-Japanese manufacturers in the Japanese home market. That evidence is contained in the Nehmer, DePodwin, Yamamura and Haley Reports, discussed in Part V C, supra. The barriers include high tariff rates, discriminatory ocean freight rates, the Japanese commodity tax, import deposits, limitations on foreign investment in Japan, safety and design standards involving cumbersome inspection and testing procedures, and Japanese government procurement practices. Besides these governmentally erected barriers to entry, there is evidence of structural barriers to entry arising from the traditional methods of organization of Japanese businesses in keiretsu, which effectively control channels of distribution. The evidence respecting entry barriers to manufacturers whose products are technically compatible with Japanese broadcast standards would support an inference that a home-market horizontal price-fixing agreement among the Japanese manufacturers was a technically feasible project, because the parties to such an agreement would be protected from price competition from non-parties.

There is also evidence from which a fact-finder could conclude that Japanese manufacturers of consumer electronic products had relatively higher fixed costs than did their American counterparts, resulting from Japanese employment practices, and from Japanese financing practices. Japanese manufacturers are expected to maintain the permanence and stability of their workforce. They also customarily have higher debt-equity ratios, and thus greater fixed obligations. Saxonhouse Report, App., vol. 7, at 2891-92. A fact-finder could reasonably infer that higher fixed costs provide a strong incentive to utilize manufacturing capacity at the highest possible rate.

The evidence also would permit a finding that the manufacturer defendants, individually and in the aggregate, created plant capacity which exceeded what could reasonably be absorbed by the Japanese home market for consumer electronic products at a desirable price. DePodwin Report, App., vol. 5, Part III. A fact-finder could reasonably infer, from the existence of such excess capacity, that those manufacturers had strong incentives to dispose of the products of this excess capacity in a market outside Japan. Since, however, unlimited price competition in all markets in an industry characterized by excess capacity would be likely to produce losses, a reasonable inference could be drawn that if it were feasible to avoid price competition in one such market, efforts might be made to do so. Because the Japanese home market may be sheltered from outside competition by the entry barriers referred to above, it would not be unreasonable to believe that such collusion was possible.

The evidence also would permit a finding that the Japanese consumer electronic industry was in the years in issue characterized by concentration in a small number of dominant manufacturers, and that those manufacturers belonged to industry trade associations which met at regular intervals and exchanged information about plant capacity, inventories and pricing. These included the Electronic Industries Association of Japan, the TV Export Council, the

Market Stabilization Council, and others. Evidence of concentration among a small number of manufacturers, and of their common membership in industry trade associations which met regularly and exchanged information, would support the inference that there were opportunities for concert of action with respect to home market price stabilization. Such concert of action would make possible export sales at prices sufficiently low to absorb excess capacity.

To the foregoing can be added the evidence in Part VI of the DePodwin Report tending to show that fairly consistently each defendant sold comparable models in the Japanese market at prices higher than they were being sold in the United States. That parallel conduct over a long time permits an inference that each manufacturer was confident that it would be able to support low price sales in the export market by higher price sales at home.

The evidence relating to the Japanese home market to which we have referred thus far, while having some tendency to make the existence of a conspiracy to stabilize home market prices more probable than if there were no such evidence, is probably not, standing alone, sufficient to support a conspiracy finding. What it suggests is a set of economic circumstances providing a strong incentive for horizontal price stabilization, the feasibility of such a program, an opportunity to meet for the purpose of agreeing on it, and pricing activity in the export market consistent with the existence of such an agreement. Were this the only evidence, we would probably agree that a finding of conspiracy would be impermissibly speculative.

Besides the foregoing circumstantial evidence, however, we have considerable direct evidence that there was agreed-upon price stabilization in Japan. That evidence includes the findings of the Japanese Fair Trade Commission which in Part V C 4 above we have held to be admissible for the truth of the matters reported upon. The report in the Market Stabilization case finds that the six respondents in that case agreed to stabilize the domestic market by establishing high prices and enforcing that agreement among the parties. The report in the 1967 MEI case finds that MEI took steps to require that its Japanese wholesalers maintain high resale prices. Moreover the evidence of what transpired at certain meetings, which in Part V E we have held to be admissible, tends to show that the participation of the defendants in various trade groups led to agreements on price stabilization. There is, moreover, direct evidence of the exchange of production and inventory statistics which would be necessary for the functioning of a horizontal price stabilization agreement.

Liaison counsel for the defendants candidly conceded at oral argument that there was a two year period between 1964 and 1966 during which some discussions about bottom prices in Japan took place among some of the defendant companies. The defendants contend, however, that evidence relevant to this period is legally insufficient to prevent the entry of summary judgment because it does not show that the conspiracy to stabilize prices in Japan began earlier or continued later. We conclude, however, that the direct evidence of horizontal price-fixing in the periods referred to in the Japanese Fair Trade Commission proceedings, when coupled with the circumstantial evidence to which we have referred, would permit an inference that the conspiracy operated over a longer period. Particularly significant are the circumstances that the trade groups on which the Japanese Fair Trade Commission focused its attention operated over a much longer period, and that, as suggested in the price comparisons which in Part V D 1 we held to be admissible, the higher Japanese home market prices continued over many years. There is direct evidence of a horizontal price-fixing conspiracy in the home market at some points in time, and circumstantial evidence that neither the economic conditions providing an incentive for horizontal price-fixing in the home market, nor the industry circumstances providing opportunity for and feasibility of such a program, nor the price differentials between the home market and the American market, changed. That circumstantial evidence includes exchange of production and inventory statistics, which would facilitate the implementation of a horizontal price stabilization agreement. See DePodwin Report, App., vol. 5, at 1616-17, 1673. While a fact-finder might well conclude that horizontal price-fixing in Japan began in 1964 and ended in 1966, a different conclusion is on this record a permissible one.

We hold, therefore, that on this record a fact-finder could reasonably infer the existence, among some Japanese manufacturers, of an agreement to stabilize prices in the Japanese home market, thereby deriving profits which would support sales at low prices in the United States. The direct and circumstantial evidence of a price stabilization conspiracy in the home market is reinforced by the conclusions of several of the NUE-Zenith economist experts, who, after studying the industry, opine that there was a price-fixing cartel in operation.

b. Evidence Relating to Exports to the United States

We have already noted the Japanese manufacturers' high fixed costs, higher debt-equity ratios (Saxonhouse Report, App., vol. 7, at 2887), and more stable workforce. A factfinder could reasonably infer that these conditions created an incentive to find a market for excess capacity. We have also noted that Japanese and American television standards are compatible. Thus, among the developed countries likely to be a market for excess capacity of the Japanese manufacturers, the United States was the market with the greatest potential. This evidence would permit a factfinder to infer that the Japanese manufacturers had a strong incentive to find a market for excess capacity in the United States. Moreover, when considered in light of the evidence respecting price stabilization in the home market, it would permit a factfinder to infer a motive to sell at prices low enough to eliminate competition in the United States market by American firms. The trial court reasoned that "no defendant, or any other businessman for that matter, would have any motivation for entering a conspiracy to sell at low prices." On this record a fact-finder could find such a motive. Moreover a fact-finder could find, from the evidence of price stabilization in Japan, that the Japanese manufacturers, if they acted in concert, had the ability to carry out a predatory export raid on the American market sustained by home market profits. There is record evidence that the Japanese Ministry of International Trade and Industry (MITI) plays an important role in the supervision of Japanese firms engaging in exports. The purpose of that supervision is to discourage the sale of Japanese products in other countries at prices which might result in charges of dumping; charges which might encourage the erection in those countries of trade barriers against Japanese products. With the apparent encouragement of MITI, the seven principal Japanese manufacturers of television receivers between 1963 and 1973 became signatories of formal written agreements which established minimum prices for television receivers sold for export to the United States. Similar agreements were made with respect to radio receivers and tape equipment. At the same time the seven manufacturers were members of the Japan Machinery Exporters' Association, an export trade association which required all its members to register the names of all customers who purchased television receivers for the United States market, and which, after 1967, limited the number of customers so registered to five. While the minimum price agreements appear to have been encouraged, if not mandated, by MITI, a fact-finder could conclude that the five-company rule was the result of non-governmental action.

Putting aside for the moment the role of the Japanese government, an agreement fixing minimum prices for the American market would ordinarily be a per se violation of section 1 of the Sherman Act. Thus the United States might sue to enjoin enforcement of such an agreement, or a purchaser might seek damages under section 4 of the Clayton Act. Since, however, the effect of a horizontal agreement among manufacturers to set minimum prices would in isolation protect non-party competitors like NUE and Zenith from competition, they could not, absent other circumstances, bring a section 4 suit, because they could not show the requisite injury to their business or property. Likewise, a horizontal agreement to allocate customers in the American market would ordinarily be a per se violation of section 1. But again, such an agreement would not, absent other circumstances, produce an injury to the business or property of a non-party competitor.

There is record evidence, however, of other circumstances suggesting that NUE and Zenith may have been injured in their business or property from the existence of what they refer to as an export cartel. First, there is evidence from which a fact-finder might conclude that the minimum prices agreed upon were in fact dumping prices. That evidence includes the finding made in investigations under the Antidumping Act of 1921 (Part V C 2) and several expert opinions (Part V D). The collusive establishment of dumping prices could support an inference of collective predatory intention to harm American competitors. Next, there is substantial evidence that with the exception of Sony, the defendant manufacturers and their subsidiaries engaged in various schemes to rebate part of the sales price to a number of mass marketing retail customers in the United States. The evidence would permit a finding that efforts were made to conceal this activity both from MITI and from the United States Customs Service, and a finding that at least some of the manufacturers knew that others were engaged in rebating but did not report it to either government. There is expert opinion evidence that export sales generally were at prices which produced losses, often as high as twenty-five percent on sales. Long-term sales below cost are circumstantial evidence from which one can draw an inference of intentional predatory pricing. Finally, there is evidence that the five-company rule operated at a time when a fact-finder might conclude that there was a horizontal price-fixing agreement in Japan. Thus a fact-finder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market.

The trial court questioned the probative value of the five-customer rule as illusory because a defendant could avoid its impact by creating a wholly-owned American sales subsidiary, and because agreements limiting customers normally tend to keep prices high. Neither reason is sufficient to exclude as a matter of law the inference that the five-customer rule was intended to prevent competition among the Japanese manufacturers in the American market so that all could concentrate their competition on American firms.

We hold that a finding of a conspiracy to sell at artificially high prices in Japan while at the same time selling at artificially low prices in the United States would support liability to NUE and Zenith under section 4 of the Clayton Act, assuming they could show that they were in fact damaged. The defendants do not on this appeal contend that the FPS is deficient with respect to plaintiffs' proof of damage.

5. The Defense of Sovereign Compulsion

MELCO urges that all the Japanese manufacturer defendants are entitled to summary judgment because the activities of those defendants in Japan were undertaken at the direction of the Japanese Government, as an integral part of its trade policy toward the United States. MELCO's theory is that MITI mandated agreements fixing minimum export prices in order to accommodate United States concerns about dumping and to prevent the development of retaliatory trade barriers against Japanese products. We may assume, without deciding, that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of section 1 of the Sherman Act. See, e.g., International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries, 649 F.2d 1354, 1358-59 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). On this record, summary judgment on that ground is not possible for several reasons.

First, we note that NUE and Zenith rely on the minimum price agreements primarily as evidence of a low export price conspiracy. Moreover, it cannot be said with any degree of certainty that the minimum prices, claimed by the NUE and Zenith experts to be dumping prices, were in fact determined by the Japanese Government. It is possible to conclude that the government merely provided an umbrella under which the defendants gained an exemption from Japanese antitrust law, and fixed their own export prices. Second, there is abundant evidence suggesting that many defendants departed from the agreed-upon minimums and took steps to conceal their departure from MITI. Thirdly, there is no record evidence suggesting that the five-company rule originated with the Japanese Government. Finally the evidence about price stabilization in the Japanese home market suggests unequivocally that this activity violated the laws of Japan. Clearly, therefore, a summary judgment in defendants' favor on the defense of sovereign compulsion would be improper.

Note

The United States government took no position on the merits of the case during its long voyage through the lower courts. When the Japanese defendants sought certiorari to review the denial of their motion for summary judgment, the Supreme Court sought the views of the Justice Department. Following intensive lobbying by both sides and extensive inter-agency consultation within the Executive Branch, the Justice Department filed a brief supporting the granting of certiorari to review both the propriety of summary judgment and portions of the lower court opinion dealing with foreign sovereign compulsion. The international portion of the brief follows below.

In Re Japanese Elec. Products. Lit., U.S. Justice Dept. Brief in Support of Certiorari (1985)

The court of appeals erred in concluding that a factfinder could find Japanese companies liable for a Sherman Act violation based on conduct compelled by the Government of Japan. The courts have properly recognized that anticompetitive private conduct that is compelled by a foreign sovereign does not give rise to antitrust liability under United States law. See, e.g., Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F2d 597, 606-607 (9th Cir. 1976); Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1297-1298 (D.Del. 1970). Cf. Continental Ore Co. v. Union Carbine & Carbon Corp., 370 U.S. 690, 706-707 (1962). This sovereign compulsion defense is based largely on considerations of international comity and fairness to antitrust defendants who have been constrained to obey the mandates of a foreign sovereign. It also constitutes judicial recognition that conduct compelled by foreign sovereigns often raises foreign policy concerns that are primarily the province of the Executive Branch.

Petitioners contended below that certain aspects of their conduct -- the check price agreement and the give-company rule -- were compelled by the Government of Japan and therefore could not serve as the basis for imposition of antitrust liability. Petitioners relied on a written statement sent to the district court by the Ministry of International Trade and Industry of the Government of Japan. That statement (the "MITI Statement") addressed "certain agreements entered into among [petitioners], as well as certain regulations of the Japan Machinery Exporters Association [JMEA]" The MITI Statement began by affirming that both the check price agreement and the JMEA regulations (which included the five-company rule) "have come into existence pursuant to the direction of MITI" After a detailed discussion of MITI's powers and its involvement in the creation and implementation of the agreements and regulations at issue, the MITI Statement declared that when MITI

> directed [petitioners] to conclude * * * such agreement and regulation relating to the minimum prices at which televisions could be sold for the United States market and other matters, [petitioners] had no alternative but to establish the agreement and regulation in compliance with the said direction.

The district court found it unnecessary to decide whether petitioners had established their sovereign compulsion defense. However, the court of appeals reached that question and concluded that summary judgment could not be granted on the defense. The court of appeals never referred explicitly to the MITI Statement. The court "assume[d], without deciding, that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of" the Sherman Act. The court also noted that petitioner(s) check price agreement appeared to have been encouraged, if not mandated, by MITI." The court nevertheless stated that it could not "be said with any degree of certainty that the minimum prices, claimed by [respondents] to be dumping prices, were in fact determined by the Japanese Government," because {[i]t is possible to conclude that the government merely provided an umbrella under which [petitioners] * * * fixed their own export prices." In addition there was "abundant evidence suggesting that many [petitioners] departed from the agreed-upon minimums and took steps to conceal their departure from MITI." Finally, the court asserted that there was "no record evidence suggesting that the give-company rule originated with the Japanese Government." In its discussion of the evidence of conspiracy, the court of appeals expressly cited both the check price agreement and the five-company rule as supporting a possible inference of illegal conspiracy, which would preclude the grant of summary judgment for petitioners.

The court of appeals erred in rejecting petitioners' sovereign compulsion defense. The Government of Japan explained in the MITI Statement that it "directed" petitioners "to enter into" the check price agreement, supervised the establishment of the agreement to ensure that MITI's intention was correctly reflected, exercised continuous direction and supervision of the terms of the agreement, and was empowered and prepared to enforce Japanese government policy as embodied in that agreement. On this record, that explicit and detailed statement by a foreign sovereign that it mandated the check price agreement in accordance with its laws should have been given dispositive weight. It follows that the sovereign compulsion defense precluded use of the check price agreement as a basis for liability under the Sherman Act. The court of appeals therefore erred in leaving open the possibility that on remand liability might be predicated on that agreement.

The court of appeals' disregard for the explicit assurance of the Japanese Government that it required export restraints at issue in this case threatens to do serious damage to the foreign trade relations of the United States. Restrictions imposed by governments in connection with exports by their national companies are a significant feature of contemporary international trade. In some instances, foreign governments have imposed such restrictions on exports to the United States at the request of our government, acting to implement our international trade policy. Such restrictions have assumed a special importance in our trade relations with Japan, as evidenced by, e.g., the controls on automobile exports to the United States imposed by MITI in 1981, in a manner similar to imposition of the check price agreement at issue here.

The Japanese Government and other important United States trading partners have read the court of appeals' rejection of the sovereign compulsion defense in this case as indicating that imposition of voluntary restraints by foreign governments can readily subject the foreign companies involved to burdensome litigation and possible treble damages liability in this country, despite clear evidence that the foreign sovereign has mandated the allegedly anticompetitive conduct. In response to the decision these and other foreign governments understandably may be reluctant to accommodate proposals by the United States to resolve trade controversies by the imposition of voluntary restraint agreements on their own manufacturers. Such a response could deprive the United States of a tool that has proved valuable in the resolution of difficult international trade disputes. Review by this Court is warranted in order to make clear that the court of appeals erred in concluding that the compelled conduct at issue in this case could form the predicate for a finding of antitrust liability on remand.

The petition for a writ of certiorari should be granted.

Notes

1) The Supreme Court indeed granted certiorari and in a landmark ruling reversed the Third Circuit in its entirety and granted summary judgment for the defendants on the grounds that the plaintiffs had failed to show the existence of a genuine issue of material fact as to the existence of a conspiracy with respect to the United States market that made any sense as a matter of economic theory. As a result, the Court did not discuss the foreign compulsion defense.

2) Do you agree with the Justice Department that the defendants had been compelled with respect to certain of their acts aimed at the United States?

3) Does the court have to accept the conclusion of the Japanese government that its actions were binding and amounted to compulsion?

4) Does the court have to accept the assertion of the United States government that the Japanese government's actions were binding and amounted to compulsion?

Michel Waelbroeck, ***The Extent to which Government Interference can Constitute Justification under Article 85 or 86 of the Treaty of Rome.*** **This article was first published in the International Business Lawyer, Vol. 8, No. 4, April 1980 and is reproduced by kind permission of the International Bar Association, London, UK.**

The traditional Commission doctrine on this subject is that if the Government intervention has a mandatory character, and leaves no room for evasion, it can constitute an excuse under Articles 85 and 86; if, on the contrary, the intervention is in the form of a recommendation of a wish, it is not an excuse.

Although this distinction seems very clear on its face, it seems to me on reflection that it is somewhat artificial in the European contest. If I am well informed, this distinction comes from the United States where cases like Parker vs. Brown and the Noerr and Pennington cases, held that if there is a decision of the sovereign to suppress competition, companies cannot be charged for not competing since there is no possibility to do so. In the United States a distinction is made between cases where the sovereign has really totally abrogated competition and those where it has issued only a recommendation.

However, in Europe the legal and political context is different from the United States. In the United States the free enterprise system is more rigidly adhered to. In Europe government intervention is very much a fact of life in the affairs of companies although this intervention is not always mandatory. Very often it takes the form of "concentration", i.e., talking to people, getting them to agree. Those who don't agree don't go to jail, they are not fined but they may very well not receive a subsidy the next time they want to make an investment. Or if they want to increase their prices, they may have a lot of difficulty in justifying the reasons for getting approval of the price increase. Or if they want to make a foreign investment (or even, in Italy a domestic investment), the government may refuse.

In those circumstances, your "wish" comes very close to being an order and it seems to me that this similarity should be recognized in law.

We must be quite frank and recognize that sometimes government intervention is welcomed and even desired by industry. Sometimes there is lobbying, and sometimes even mandatory instructions are the result of lobbying. I want to give you one example which arose in Belgium and which has been (and still is) the subject of Commission proceedings.

The case concerns the selling price of cigarettes, cigars and cigarillos in Belgium. As you may know, we have to put on the package a little tag indicating the retail selling price. This price serves as a basis for the calculation of the turnover tax. Fifteen years ago the producers' and wholesalers' organizations put into effect a cartel designed to oblige retailers to sell cigarettes at the price mentioned on the tag, without any discount, premium or rebate of any kind. Wholesalers had to undertake to sell only to retailers who observed the price mentioned on the tag. Similarly, the manufacturers undertook to sell only to wholesalers who undertook to sell only to the retailers who observed that price. However a few retailers, supermarket chains mostly, managed to obtain goods without the obligation being imposed on them, and they gave a small discount when reselling. They were then boycotted by the manufacturers and wholesalers members of the cartel. Thus, it really was an "ugly" cartel. However, in spite of the boycott, the supermarkets managed to obtain supplies. So the cartel was not 100% effective.

The tobacco industry then had a bright idea. At that time, the draft Code on value added tax was being discussed in the Belgian Parliament. The draft contained a provision to the effect that the tax would be assessed on the basis of the price mentioned on the tag. A Member of Parliament, who was at the same time Secretary of the Tobacco Wholesalers Association, introduced an amendment to the effect that the price mentioned on the tag would be the compulsory resale price. That amendment was carried, and the cartel was legalized so that the supermarket now has to sell its products at the resale price by virtue of the Tax Code and not by virtue of the cartel.

The supermarket chain complained to the Commission, who answered that since the was a command of the state, it could not do anything about it. The supermarket replied that under the appearance of a command of the state, it could not do anything about it. The supermarket replied that under the appearance of a command of the state, what was involved was the result of clever lobbying. Nevertheless the Commission refused to take action under Article 85 and even under the general provisions of the Treaty prohibiting frustration of the purposes of the Treaty by Member States (Article 5 paragraph 2). I understand that the Commission is now acting under Article 30 (which is the prohibition on restrain of trade between Member States) but that doesn' t seem to me to be a very straightforward way of solving the problem. In my view, what is involved is a clear example of frustration of Article 85 and not a case of restriction on trade between Member States.

This shows that the distinction between mandatory and non-mandatory intervention is largely artificial. You can have mandatory intervention which is welcomed by industry. Thus, in many European countries statutes have been enacted to prohibit companies from giving certain information to foreign antitrust authorities. I do not know the background but it is at least possible that this was also the result of lobbying. If, on the contrary, a restriction is discretionary it is open to challenge under Articles 85 and 86 even though it was accepted under strong government pressure and is strongly repugnant to the private parties involved.

Such restrictions can expose the parties which accept them to the imposition of fines. I shall give you an example which concerns the North Sea. It does not concern the British Government; it concerns another government which I will not disclose. Nor will I disclose the company involved. Suffice it to say that this company wanted to get a further license for its exploration activities. The local government was prepared to give a further license only if the firm undertook to enter into an agreement under which all products obtained from the concession would be sold to a government-owned enemy. Of course, the result -- everybody knew it well -- was that this product would be used in the country and would not be exported. Everybody knew in making that contract that there might be a question of violating Article 85 of the Treaty, because the purpose was to prevent export. But if the contract was not made, there would simply have been no further licence.

Under the Commission' s theory, making a contract like that is not only a violation of Article 85 but it exposes the undertaking to fines. The Commission now imposes fines not only on the firms who have an interest in the result of the breach but also on the party who is being "nice" to the other by undertaking to restrict his freedom of action in the interest of

the other. In the BMW Belgium case, BMW Belgium had sent out a circular letter to all its dealers telling them "you cannot export, you must sell only in Belgium". It asked the dealers to send back the letter with their signature for approval. About half the dealers sent back the signature because they wanted to be on good terms with their supplier. They had no interest in tying their hands; they were just being "nice". Nevertheless, they were all fined by the Commission because they had all breached the Treaty. The Court confirmed the Commission' s decision, stating that the Commission had the power to impose fines and had not misused its power by imposing fines and had not misused its power by imposing fines in these circumstances. This case shows that if a company which wants to have a further license agrees to make a contract restricting its freedom to export, it could be said that the company is negligently infringing the Treaty and that it should therefore be fined.

Compulsion and Authorization by Third Countries Under EEC Law, EC Commission, Third Report on Competition Policy 24 (1974).

20. Consideration of the measures notified to the Commission concerning voluntary limitations by Japanese firms to the Community has shown that there ware various types of measures which should be assessed differently with regard to the competition rules. Voluntary restraint provisions in trade agreements between Community and non-Community countries, if they are acts of foreign trade policy which, provided that the quantities to which the restraint applies can be freely disposed of within the Community, are not as such caught by the competition rules. Likewise, Article 85 would not apply to export agreements imposed on firms in non-member countries by their governments, unless there was an agreement or concerted practice between the firms. The Community should seek to solve this situation by measures of official commercial policy.

Note

The final case concerns the situation where the antitrust defendants have sought and/or obtained the restrictions on competition that is the very subject of the litigation. While this is inherently an unsympathetic position (lobbying for a restriction on competition and then asserting the governmental action as a defense), firms in the United States would normally be on safe ground in lobbying any branch or level of the United States government under the Noerr-Pennington doctrine. The question arises whether that doctrine or its equivalent protects lobbying a foreign government to take anticompetitive action.

Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358 95th Cir. 1983).

The Libyan Government granted Concession No. 65 to Nelson Bunker Hunt and his brothers in 1957. The concession gave the Hunts, for fifty years, the exclusive right to "search for . . . bore for, and extract petroleum" from an area within the Province of Cyrenaica, Libya, and "to use, process, store, export and dispose of the same." In 1960, the Hunts assigned a fifty percent interest in the concession to BP Exploration Company (Libya) Ltd., a subsidiary of the British Petroleum Company, Ltd. (together referred to as BP).

The Hunts and BP discovered oil in the concession area in 1961. They developed the find into the Sarir oil field and constructed a pipeline from the field to the Libyan coast. By 1967 they were exporting and marketing Sarir crude oil.

In 1971, the Libyan Government nationalized BP's interest in Concession No. 65, assigning it to the government-owned Arabian Gulf Exploration Company (AGEC). BP, of course, refused to accept the Libyan action. It published notices claiming title to Sarir crude in newspapers throughout the world. Its investigators traced the movement and sale of oil produced from the concession. It sent notices of its title claim to everyone suspected of dealing in Sarir crude. In addition, BP initiated twenty-nine lawsuits in various countries claiming title to Sarir crude oil that had been exported by the Libyans.

In May 1973, the plaintiff, Coastal States, had contracted with Ashland Oil Company of California and AGEC to purchase Sarir crude. Coastal made arrangements to process the oil at the Montedison refinery in Italy and began to market products refined from Sarir crude.

Sometime prior to June 1973, Don Harris, a BP employee, communicated with Sam Willson of Coastal. Willson testified that Harris warned him against Coastal's involvement with Sarir crude. According to Willson, Harris stated that "BP would be doing everything in their power to hamper the fulfillment of any contract that was entered into for this crude."

In June 1973, the Libyan Government nationalized the Hunts' interest in Concession No. 65. The Libyans transferred this interest also to AGEC. Shortly after the nationalization, a BP director wrote to Nelson Bunker Hunt suggesting that they "join together in claiming ownership" to Sarir crude "or to take other joint action to protect our respective rights."

The Hunts initiated a worldwide campaign to notify crude oil users of their claim to Sarir crude. Like BP, the Hunts tried to investigate the movement of Sarir oil from Libya. The Hunts also joined in twenty-one of the suits filed by BP claiming title to Sarir oil.

The suits included a conversion action by the Hunts and BP against Coastal filed in the Texas state courts. Coastal counterclaimed for tortious interference with business relations. The counterclaim was based upon the same events as is the present suit. The state trial court denied both parties recovery, and the decision was affirmed in the state court of appeals and supreme court.

Another legal skirmish between Coastal and the Hunts occurred in connection with an oil tanker, the S/T Hilda. The Hilda was chartered by Coastal to lift crude oil from the Montedison refinery to the east coast of the United States. She was scheduled to deliver the crude to Texaco Oil Co. in Boston. While the Hilda was en route, the Hunts informed Texaco that they intended to attach her cargo when she docked. As a result, Texaco informed Coastal that it would not accept crude oil from the Hilda.

Coastal then attempted to re-route the Hilda to another port. The Hunts tried to persuade the Hilda's owner to order her to Boston in spite of Coastal's contrary instructions. They offered to indemnify the ship's owner for any damages incurred in doing so. Nevertheless, Coastal successfully re-routed the Hilda to Philadelphia. The Hunts then initiated federal court attachment proceedings against the Hilda's cargo in a Pennsylvania federal district court. The suit, however, was dismissed for lack of jurisdiction.

The campaign by the Hunts and BP to publicize their claims to Sarir oil also hindered Coastal's efforts to market that oil. On several occasions the Hunts or BP communicated with crude oil users to inform them of the title dispute while Coastal was trying to sell oil to them. There was evidence that these communications with Coastal's customers frustrated potential sales by Coastal. The publicity surrounding the Hilda incident, generated in part by a Hunt press release, also hampered Coastal's sales efforts.

Finally, Coastal's bankers refused to extend Coastal's credit so long as it continued to deal in Sarir crude. Coastal was the center of a controversy unrelated to the Sarir oil and the bankers did not want additional publicity concerning the company. Whether this fact raises an inference or is mere coincidence, two of the banks had employees of Standard Oil Company of Ohio (Sohio) on their board of directors. Sohio is owned in part by BP.

In August 1973, Coastal's economic condition forced it to assign its rights to purchase Sarir crude oil to another company. It contends that it lost millions of dollars of profits by assigning these rights. Moreover, Coastal claims that, because it did not have Sarir crude to be refined, it incurred penalties for failing to utilize reserved petroleum processing time at the Montedison refinery. Finally, Coastal seeks to recover the cost of re-routing the Hilda from Boston to Philadelphia.

This antitrust action was filed by Coastal in October 1974. In November BP settled its dispute with the Libyan Government. As it was required to do by the settlement agreement, BP dismissed its suits asserting title to the Sarir crude, including the Texas conversion action against Coastal. The Hunts, however, continued to prosecute their action against Coastal. In May 1975, they settled their dispute with Libya and then dismissed their other title suits.

II.

A. Petitioning Immunity.

In Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers v. Pennington, 381 U.S. 657 (1965), the Supreme Court established the basic principle of antitrust petitioning immunity, that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670. In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the Court extended petitioning immunity to joint efforts to influence adjudicative bodies. These decisions assure "uninhibited access to government policy makers," whether they be legislative, executive, or judicial. George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 32 (1st Cir.), cert. denied, 400 U.S. 850 (1967). The basic question raised by Coastal's appeal is whether this doctrine immunizes the Hunts' challenged conduct from antitrust scrutiny.

C. Petitioning Foreign Governments.

Coastal argues that, because petitioning immunity is based solely upon the first amendment right to petition, it does not apply to litigation brought in foreign courts. We find the argument to be without merit. Petitioning immunity reflects not only first amendment concerns but also a limitation on the scope of the Sherman Act.

Noerr was based on a construction of the Sherman Act. It was not a first amendment decision. While the Court's opinion in California Motor Transport stressed the first amendment underpinnings of petitioning immunity, we do not view that opinion as overruling Noerr's clear holding that the Sherman Act simply does not extend to joint efforts to influence government officials.

The Court's decision in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962), at least implies that petitioning immunity applies to joint efforts to influence foreign governments. The complaint in that case charged the defendant with conspiracy to restrain and monopolize vanadium trade in the United States. The defendants' Canadian subsidiary had been appointed by the Canadian Government as exclusive wartime agent to buy vanadium for Canadian industry. The plaintiff claimed that, through this agency, the defendants refused to purchase plaintiff's vanadium.

The Ninth Circuit, citing Noerr, said, "we do not see how such efforts as appellants claim defendants took to persuade and influence the Canadian Government through its agent are within the purview of the Sherman Act." Continental Ore Co. v. Union Carbide & Carbon Corp., 289 F.2d 86, 94 (9th Cir.1961), rev'd, 370 U.S. 690 (1962). The Supreme Court reversed, but not because petitioning immunity did not extend to communications with foreign governments. Instead, the Court ruled that Noerr did not apply when the contacts with the foreign government are commercial rather than political. 370 U.S. at 707-08.

We recognize that the Continental Ore decision did not directly address the applicability of petitioning immunity when foreign sovereigns are involved. Nevertheless, the fact that the Court distinguished Noerr on factual grounds instead of simply holding it inapplicable does support our conclusion that petitioning immunity is not limited to the domestic political arena.

Only one case addresses the question directly. In Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D.Cal.1971), aff'd per curiam on other grounds, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972), the plaintiff had obtained from an Arab sheikdom a concession to exploit offshore oil deposits. Plaintiffs charged that the defendants induced a neighboring Arab sheikdom and Iran to assert competing territorial claims to the offshore area, thereby interfering with plaintiffs' efforts to exploit their concession.

The district court held that petitioning immunity did not apply to the defendants' conduct. The court noted that Noerr rested on the first amendment and on the need for a representative democracy to keep in touch with its constituents. But, it reasoned, "the constitutional freedom to petition the government carries limited if any applicability to the petitioning of foreign governments." Moreover, the court thought that "the persuasion of the Middle Eastern states alleged in the present case is a far cry from the political process with which Noerr was concerned."

The Justice Department takes the position that petitioning immunity applies to efforts to influence foreign governments. Antitrust Division, United States Department of Justice, Antitrust Guide for International Operations 63 (Jan. 26, 1977) (Case N). Commentators are divided.

We are, of course, not bound by Occidental Petroleum and we decline to follow it. We reject the notion that petitioning immunity extends only so far as the first amendment right to petition and then ends abruptly. The Sherman Act, as interpreted by Noerr, simply does not penalize as an antitrust violation the petitioning of a government agency. We see no reasons why acts that are legal and protected if done in the United States should in a United States court become evidence of illegal conduct because performed abroad. We also reject the idea that the availability of petitioning immunity turns on the political "persuasion" of the government involved. The political character of the government to which the petition is addressed should not taint the right to enlist its aid.

D. Threats of Litigation

Coastal argues that the Hunts' well-publicized threat to litigate wherever and whenever necessary to assert their claim to Sarir crude is not immunized petitioning. The first basis for this contention is that, because threats of litigation are not directed to a government, they do not fall within the rationale of petitioning immunity. The argument is without merit.

Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation. The litigator should not be protected only when he strikes without warning. If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute. This is the position taken by most of the courts that have considered the question.

The Hunts contended below that they initiated the publicity and threats upon the advice of counsel to prevent subsequent purchasers of the crude from taking without notice of the Hunts' claims. In the usual case, Coastal would have the opportunity to rebut this contention by showing that the proffered justification fell within the "sham" exception to petitioning immunity. In this case, however, as we discuss in the next section, Coastal's stipulations and the absence of substantial evidence to the contrary preclude a finding of sham. We, therefore, find that the publicity and threats of litigation were protected by petitioning immunity.

Coastal also argues, citing Professors Areeda and Turner, that, for the Hunts to establish that the threats and publicity were protected, they must show that the conduct was indispensable to the litigation. Areeda and Turner do use that term, but they also explain, "we do not mean to suggest that courts should try to make very refined judgments about what [sort of conduct] is 'unnecessarily harmful.' We merely mean to leave a safety route for condemning highly anticompetitive activities that are not justified by the necessities of political life." 1 P. Areeda & D. Turner, Antitrust Law para. 205, at 52 (1978). If litigation is in good faith and not sham, such a "safety route" need not be provided, for it merely injects another uncertainty into an already complex problem without providing any more useful test for determining when anticompetitive conduct is unprotected.

Notes

1) Both the Federal Trade Commission and the Antitrust Division of the Justice Department have stated that they also will recognize the lobbying of foreign governments as immune from prosecution under the antitrust laws. Antitrust Enforcement Guidelines for International Operations § 3.34 (1995), available at http://www.usdoj.gov/atr/public/guidelines/internat.htm.

2) For more information on all the special defenses in international antitrust litigation see Spencer Weber Waller, Antitrust and American Business Abroad § 8 (3d ed. 1997 & annual supplements).

3) The special defenses appear to have shrunk in ways that suggest that a suit against OPEC, its members or the government owned oil corporations may have a greater chance of success now than in the 1970s when the original cases were filed. See Spencer Weber Waller, Suing OPEC, 64 U. PITT. L. REV. 105 (2002). Two class actions against Citgo, an integrated oil company owned by the Government of Venezuela were filed in late 2006 but it is too early in the litigation to have any substantive decisions from either of the courts supervising the cases.

4) Congress has considered bills in recent years to expressly remove any sovereign immunity or act of state defenses that OPEC and/or its member states may enjoy. Consider the most recent example of such legislation cleverly entitled the NOPEC Act of 2006 (No Oil Producing and Exporting Cartels Act of 2006) which passed the Senate but had not been enacted by the House as to July 2007:

SEC. 8. OIL PRODUCING CARTELS.

`(a) In General- It shall be illegal and a violation of this Act for any foreign state, or any instrumentality or agent of any foreign state, in the circumstances described in subsection (b), to act collectively or in combination with any other foreign state, any instrumentality or agent of any other foreign state, or any other person, whether by cartel or any other association or form of cooperation or joint action--

`(1) to limit the production or distribution of oil, natural gas, or any other petroleum product;
`(2) to set or maintain the price of oil, natural gas, or any petroleum product; or
`(3) to otherwise take any action in restraint of trade for oil, natural gas, or any petroleum product.

`(b) Circumstances- The circumstances described in this subsection are an instance when an action, combination, or collective action described in subsection (a) has a direct, substantial, and reasonably foreseeable effect on the market, supply, price, or distribution of oil, natural gas, or other petroleum product in the United States.

`(c) Sovereign Immunity- A foreign state engaged in conduct in violation of subsection (a) shall not be immune under the doctrine of sovereign immunity from the jurisdiction or judgments of the courts of the United States in any action brought to enforce this section.

`(d) Inapplicability of Act of State Doctrine- No court of the United States shall decline, based on the act of state doctrine, to make a determination on the merits in an action brought under this section.

`(e) Enforcement- The Attorney General of the United States may bring an action to enforce this section in any district court of the United States as provided under the antitrust laws, as defined in section 1(a) of the Clayton Act (15 U.S.C. 12(a)).'.

Would you support such legislation? Is it even necessary? Is it desirable? Should enforcement be limited to the Justice Department? What do you anticipate that the Justice Department do with its new found enforcement powers if the legislation is enacted into law?

5) In 2007, two private treble damage price fixing class actions were filed against Citgo and other oil refining and distribution companies owned directly and indirectly by the governments of OPEC member nations. By suing commercial entities which operate in the United States, the plaintiffs hope to avoid the sovereign immunity and act of state issues used by the courts to dismiss earlier cases. What are their chances of success? How will the NOPEC bill help or hurt their chances?

6) What would even a successful antitrust case against OPEC accomplish? What non-litigation strategies would you suggest to break the power of OPEC? Can you think of any non-antitrust reasons why OPEC should or should not be challenged?