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David K. Pansius

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DAVID K. PANSIUS*

Recognizing that the relevant competitive market can be as encompassing as the world market, American courts have consistently applied U.S. antitrust laws to acts overseas in an effort to ensure the competitiveness of the domestic and foreign commerce of the United States.[1] Unfortunately, foreign governments often harbor contrary policy considerations, consciously or unconsciously encouraging the concentration of given industries.[2] These anticompetitive acts by foreign governments create dilemmas for domestic courts in which extraterritorial enforcement of the antitrust laws is sought.[3] According to the act

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* B.A., 1971, M.A., 1973, University of North Carolina; J.D. candidate, University of Denver College of Law.

1. *See, e.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.1 (2d ed. 1973). An excellent judicial review of the extraterritorial application of U.S. antitrust laws is found at Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976) *as amended on denial of rehearing and rehearing en banc*, March 3, 1977.

2. The conduct of the OPEC nations, as a gross example, requires no citation. Moreover, the temptation to monopolize apparently strikes everyone; for example, the U.S. is considering an agreement with Canada to set world wheat prices. Wall Street Journal, Feb. 28, 1977, at 2, col. 2. *See also* United States v. The Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. 1962), *order modified*, 1965 Trade Cas. ¶ 71,352 (S.D.N.Y. 1965).

However, the general trend may well be toward greater international enforcement of the antitrust laws. *See, e.g.*, Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, signed in Bonn 23 June 1976. Text of the agreement is reprinted in BNA 1976 ANTITRUST & TRADE REG. REP. No. 772, at D-1, D-2.

3. As the district court opinion to the principal case agonized:

> It may well be that recent public disclosure of the dealings of multinational corporations with foreign governments which have an adverse impact upon American interests justifies a reappraisal of the act of state doctrine to determine whether its scope should be confined. However, in the absence of new doctrinal trends in Supreme Court opinions, reassessment of the range of the doctrine must rest with that Court and not this court.

Hunt v. Mobil Oil, 410 F. Supp. 10, 25 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir. 1977).

See Kintner, Joelson & Vaghi, *Groping for a Truly International Antitrust Law*, 14 VIRGINIA J. INT'L L. 75, 79-83 (1973).

of state doctrine, an American court can not inquire into the validity of acts committed by foreign sovereigns within their sovereign authority.[4] Yet the court can not wish to permit large multinationals to employ foreign sovereigns as agents through which they can avoid the antitrust laws.[5] At first glance, *Hunt v. Mobil Oil*[6] poses such a dilemma.

I. INTRODUCTION

Mobil Oil addressed an alleged antitrust violation implemented through private efforts which motivated Libya's nationalization of plaintiff's assets. The court, not wishing to entangle itself in a potentially embarassing investigation of Libya's nationalization policies, invoked the act of state doctrine: Libya was pursuing sovereign policies; the act of state doctrine bars inquiry into sovereign acts;[7] therefore, the motivation behind those sovereign acts was nonjusticiable.[8]

The above reasoning would apply except that, for purposes of an inquiry into motivation, the sovereign was not really the relevant actor. The act of state doctrine bars only inquiries into the validity of sovereign acts; it says nothing concerning private motivation of sovereign acts. The act of state doctrine protects only the sovereign's legal authority; it does not protect private efforts to misuse that authority.[9]

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4. The universal judicial expression of the act of state doctrine is found 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, stated in modern terms, bars judicial examination of "the validity of an act of a foreign state by which that state has exercised its juridiction to give effect to its public interests." RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS § 41 (1965). *See* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1977).

5. Hunt v. Mobil Oil Corp., 550 F.2d 68, 79 (2d Cir. 1977) (dissenting opinion) [hereinafter cited as Mobil Oil].

6. *Id.*

7. *Id.* at 73-74.

8. *Id.* at 77-78.

9. This Comment will repeatedly speak of authority. The concept is analogous, if not identical, to jurisdiction. The RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS § 6 (1965) defines jurisdiction as "the capacity of a state under international law to prescribe or to enforce a rule of law."

However, since capacity can be interpreted to mean power, and power alone, this Comment employs authority to mean that which embodies only legal powers, New Era Milking Co. v. Thompson, 107 Okla. 114, 230 P. 486, 487 (1924); Landry v. Daley, 280 F. Supp. 938, 959 (N.D. Ill. 1968), *i.e.*, the right to act. Board of Comm'rs v. Toland, 121 Kan. 109, 245 P. 1019, 1021 (1926). *See* People v. Wexler, 116 Ill. App. 2d 400, 254

Although disguised in the opinion, it was the lack of a showing of *wrongful* motivation, not the act of state doctrine, which dictated the ruling against Hunt. The court found that Libya's nationalization was politically motivated, and the court found no evidence of wrongful influence such as bribery by defendants. Rather than searching deeper, the court found these facts sufficient to rule that a causal connection between any wrongful acts of defendants and Libya's political act of nationalization could not be established. Therefore, the claim had to fail.[10]

The analysis which follows is in three parts. Placing primary emphasis on the court's ostensible holding, this Comment will first attempt to demonstrate that the act of state doctrine poses no bar to inquiries into the motivation of sovereign acts. Far more briefly, it will detail the "true" holding of *Mobil Oil*. And finally, the essay will offer an alternative rationale to that of act of state through which this holding can be implemented.

II. THE MOBIL OIL STORY

The facts in *Mobil Oil* are relatively straightforward. Hunt, a nonintegrated, independent oil producer, worked an oil concession in Libya. It competed with "The Seven Sisters," vertically integrated oil companies who produced oil in both Libya and the Persian Gulf.[11] The Libyan oil companies, at the behest of the Seven Sisters and in response to growing pressure for concessions from the Libyan government, decided to form an agreement among themselves in order to augment their bargaining power against Libya. This agreement provided that if any party's production was reduced as a result of Libyan governmental action, the loss would be shared by all producers on a proportionate basis.[12]

In late 1971 a dispute arose between Libya and British Petroleum (B.P.). Libya asked Hunt to market B.P.'s oil for them. Hunt, allegedly relying on the agreement and assurances from the Seven Sisters, refused. The eventual result of the

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N.E. 2d 95, 98 (1969) which distinguishes authority from jurisdiction on the basis that authority embodies only the legal right to act, not the power to act.

10. Mobil Oil at 76.

11. *Id.* at 70.

12. Originally the Seven Sisters met secretly among themselves. The independent producers were included in the proceedings in response to a letter from the Justice Department. The original agreement was signed on January 15, 1971. Mobil Oil at 71.

dispute was the nationalization of all of Hunt's assets by Libya.[13]

Hunt alleged that the agreement to limit the freedom of exclusively Libyan producers was used by the Seven Sisters to maintain their competitive advantage in Persian Gulf crude.[14] According to Hunt, the Seven Sisters manipulated the course of the negotiations with Libya, knowing full well that Hunt's required response would result in his nationalization.[15] Consequently, the agreement not only prevented Hunt from reaching an independent settlement with Libya but served to eliminate Hunt from the Libyan oil market altogether.[16]

Although Hunt's broad allegations would be difficult to establish,[17] they nonetheless asserted a conspiracy by the Seven Sisters which, if proven, would constitute a violation of the Sherman Act.[18] The majority, however, ignored the Sherman Act claim and, finding no distinction between inquiring into the motivation behind a sovereign act and judging the validity of that act, invoked the act of state doctrine to deny Hunt's claim:

> We conclude that the political act complained of here was clearly within the act of state doctrine and that since the disputed plead-

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13. Mobil Oil at 71-72.

14. The competitive advantage that the majors were allegedly seeking to preserve was their virtual monopoly of Persian Gulf production. Libyan production enjoyed cost advantages. Consequently the increasing share of Libyan production enjoyed by the independents threatened the world dominance of the Seven Sisters. Therefore, allegedly, the majors formed a conspiracy to eliminate the independents from the Libyan market. 410 F. Supp. at 15.

15. Mobil Oil at 72 n.2.

16. Mobil Oil at 71-72.

17. Judge Van Graafeiland, who dissented, expressed doubts as to whether plaintiff would be able to prove facts sufficient to support his cause of action. Mobil Oil at 79. *See* text accompanying notes 94-99 *infra*.

18. Sherman § 1 states in part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1970).

Sherman § 2 follows:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 15 U.S.C. § 2 (1970). *See, e.g.* United States v. General Motors Corp., 384 U.S. 127 (1966) (a conspiracy to eliminate competition violates the Sherman Act even if the actions would have been lawful if done by the conspirators individually). American Tobacco Co. v. United States, 147 F.2d 93, 107 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946).

ings inevitably call for a judgment on the sovereign acts of Libya the claim is non-justiciable.[19]

III. THE ACT OF STATE DOCTRINE

The court cited persuasive authority for the proposition that the act of state doctrine remains a vital tool of American jurisprudence.[20] The majority failed to show, however, how such authority requires that a bar to an inquiry into the validity of a sovereign act bars an investigation of the private motivation behind that act.[21] A brief consideration of the origins and applications of the act of state doctrine dictates a contrary analysis.

Much of the foundation for the act of state doctrine can be derived from the writings of Mr. Justice Story and his contemporaries. According to Story's analysis the court defers to an act of a foreign sovereign not because he possesses the status of sovereign, but because he exercises sovereign authority.[22]

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19. Mobil Oil at 73.

20 Besides Underhill v. Hernandez (*see* note 4 *supra*), the court relies on Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (*see* text accompanying notes 37-41 *infra*) and Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (*see* note 25 *infra*).

21. The court employs *Dunhill* and *Sabbatino* for the proposition that "[e]xpropriations of the property of an alien within the boundaries of the sovereign state are traditionally considered to be public acts of the sovereign removed from judicial scrutiny by application of the act of state rubric." Mobil Oil at 73. Such a characterization broadens the act of state doctrine.

In fact, even in *Sabbatino*, which upheld a Cuban act of expropriation, the Court consistently limited the doctrine to the validity of the sovereign act. The act of state doctrine prevents a court from declaring a sovereign act "invalid" or "ineffective." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 430 (1964). "[W]e decide *only* that the Judicial Branch will not examine the validity of taking of property within its own territory by a foreign sovereign government . . . ." *Id.* at 428 (emphasis added). Nothing in *Sabbatino*, *Dunhill*, or even *Underhill* interprets the act of state doctrine to bar an inquiry into the motives behind that sovereign act.

22. Story expressed the notion of authority in terms of territorial jurisdiction "it is plain that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country." J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 7 (6th ed. 1865). "This is the natural principle flowing from the equality and independence of nations. For it is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own dominions on all subjects appertaining to its sovereignty." *Id.* § 8.

Therefore, when a court defers to a sovereign act they defer to the sovereign's authority, his right to make laws. *Id.* § 19. It is the "sovereignty" not the "sovereign" which the act of state doctrine protects. *See id.* § 18. Thus Story consistently dealt with the sovereign's laws, not the sovereign himself. The equal authority of nations did not bar inquiries into the nature and effect of sovereign laws. *See* Story's discussion of comity, *id.* §§ 29-38a.

The act of state doctrine does not require judicial recognition of every act performed by foreign sovereigns;[23] the doctrine recognizes only authoritative acts.[24] Its purpose is to preserve the integrity of sovereign authority by barring review of the validity of authoritative acts; that is, one sovereign cannot invalidate the authoritative acts of another sovereign. To do so would contravene the equal authority of sovereigns.[25]

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23. For example, where a sovereign confiscates assets of its citizens held in the United States, the act will be denied effect as contrary to the policy of the United States.

Tabacalera Severiano Jorge v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968); Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965); Rupali Bank v. Provident National Bank, 403 F. Supp. 1285 (E.D. Pa. 1975); Vladikavsky Ry. Co. v. New York Trust Co., 189 N.E. 456 (N.Y. Ct. App. 1934).

24. An act loses its sovereign character when it is performed outside the limits of one's sovereign authority. See discussion of *Rose v. Himely* in text accompanying notes 28-36, *infra*.

In *The Appollon*, the Court denied effect to a U.S. seizure of a French vessel on the St. Mary's River, then the border between the United States and Spanish Florida.

> [H]owever general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons, upon whom the Legislature have authority and jurisdiction. In the present case, Spain had an equal authority with the United States over the river St. Mary's. The attempt to compel an entry of vessels, destined through those waters to Spanish territories, would be an usurpation of exclusive jurisdiction over all the navigation of the river.

22 U.S. (9 Wheat.) 362, 370 (1824).

25. In the Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). Justice Marshall discussed how the sovereign rights of nations inevitably force a nation to cede a certain degree of its territorial powers.

> The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.
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> . . . .
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> A nation would justly be considered as violating its faith, . . . which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

Id. at 136-37.

The act of state doctrine encompasses this principle. A nation will not exercise its territorial jurisdiction to invalidate another nation's exercise of sovereign authority. *See also* J.STORY, *supra* note 22, §§ 29-38a.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) apparently rejects authority as the basis for the act of state doctrine: "While historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not

Consequently, since the act of state doctrine protects only a sovereign's authority, the purpose or motivation of a sovereign act, as distinct from the legality of a sovereign act, remains subject to judicial examination. An American court cannot declare illegal another sovereign's law; it cannot judge its validity. But, nonetheless, an American court can examine the motivation of that act in the proper exercise of its extraterritorial authority over American citizens violating American laws.[26]

The mere presence of a sovereign actor does not in itself halt judicial inquiry. In fact American courts have traditionally examined the circumstances surrounding and motivating a sovereign's act in order to determine if the act of state doctrine is in fact applicable.[27] In *Rose v. Himely*,[28] for example, Chief Justice Marshall expressed no reluctance in examining the purpose behind and circumstances surrounding France's enforcement of a maritime regulation. In *Rose*, a French public vessel seized a ship doing business with rebel forces on Santo Domingo in violation of French law. The French captured the ship outside French territorial waters and sold its cargo in Cuba, the French court in Santo Domingo endorsing the seizure. The original owner libelled the cargo when it reached South Carolina.[29]

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dictate its existence." *Id.* at 421.

However, one must view Harlan's statement in the context of his decision to restrict, not broaden, the application of the act of state doctrine. Harlan upheld Cuba's nationalization in a Marshallesque manner, by creating an exception to the act of state doctrine where international law is sufficiently defined to provide standards of judicial inquiry. *Id.* at 428. These international standards in effect limit the authority of sovereigns—and thereby render the sovereign acts outside mandated standards subject to judicial review. *See* Simson, *The Return of American Banana: A Contemporary Perspective on American Antitrust Abroad*, 9 J. INT'L L. & ECON., 233, 252 (1974) (characterizing *Sabbatino* as advocating a more independent role for the judiciary in act of state cases); Wright, *Reflections on the Sabbatino Case*, 59 AM. J. INT'L L. 304, 310 (1965) (arguing *Sabbatino* would overrule acts of state where those acts are beyond sovereign jurisdiction as defined by international law).

26. *See* note 83 *infra*.

27. The dissenting opinion in *Mobil Oil* cites Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) and Banco de Espana v. Federal Reserve Bank, 114 F.2d 438 (2d Cir. 1940) as authority for this proposition. *Dunhill* is discussed in text accompanying notes 37-41 *infra*. In *Banco de Espana* the court was forced to examine the nature of the sovereign conduct in order to determine if it indeed had been done by a foreign sovereign.

28. 8 U.S. (4 Cranch) 241 (1808).

29. *Id.* at 268.

The Court faced the issue of whether or not the French seizure effectively passed title.[30] In ruling that it did not Chief Justice Marshall examined the purpose and circumstances surrounding the sovereign act of seizure. Justice Marshall reasoned that had the seizure been an act of war, then France would have had the authority to act outside its territorial waters. Since the seizure was to enforce only commercial regulations, however, international custom limited France's authority to France's own territory.[31] The seizure was not "within those limits which circumscribe the sovereign power";[32] therefore, the Court refused to give the seizure effect.[33]

Chief Justice Marshall never questioned the validity of France's regulations, nor France's potential right to seize the vessel.[34] However, Marshall did examine the nature of the act (the fact that it took place outside of territorial waters)[35] as well as the purpose of the seizure which was for commercial regulation, not in pursuance of acts of war.[36]

Spanning over 160 years, the continued willingness of the Court to probe the circumstances surrounding sovereign acts is illustrated by the recent decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba.*[37] In *Dunhill,* certain cigar importers mistakenly paid for cigar shipments by sending the money to the Cuban government instead of the now-expropriated owners of the cigar factories. When Dunhill tried to get its money back, its demands were ignored. The Court faced the question of

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30. The power of the French court in Santo Domingo then is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power, under which it acts, must be looked into; and its authority to decide questions, which it professes to decide, must be considered.

Id. at 269.

31. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign.

Id. at 279.

32. *Id.*

33. Justifying their examination of France's authority, Chief Justice Marshall stated, "[T]he law of nations is the law of all tribunals in the society of nations . . . ." *Id.* at 277.

34. *Id.* at 274.

35. *Id.* at 279.

36. *Id.*

37. 425 U.S. 682 (1976).

whether or not the Cuban refusal was a nonjusticiable act of state.[38]

In *Dunhill* the Court did not merely examine the motivation of the act but went further, passing judgment on the nature of the Cuban political system itself. The majority decided in favor of Dunhill by ruling that the refusal was without sovereign authority.[39] The Court held that the Cuban bureaucrats now running the cigar industries lacked the requisite sovereign authority for their refusal to constitute a sovereign act. Cuba did not prove that these officials had been invested with sovereign authority to repudiate all or any part of the debts incurred by those businesses.[40] Therefore the Court refused to grant act of state immunity to the repudiation.[41]

The inquiry requested by plaintiff in *Mobil Oil* was hardly as dramatic as the issues faced by the Court in *Rose* and *Dunhill.* Unlike these latter cases, plaintiffs did not ask the *Mobil Oil* court to repudiate, or even deny effect to Libya's act of nationalization. Rather, Hunt requested only an inquiry into the motivation behind the act in order to pursue a private remedy. This motivational inquiry would not impinge on Libya's sovereign authority; in fact, the majority itself frequently referred to the political, anti-American purposes of the nationalization.[42] Since the legality of the nationalization was not at issue, the act of state doctrine should have posed no bar.

More generally, in the antitrust context act of state immunity is limited to those instances where the private defendant *acts as the sovereign.*[43] The American courts lack the authority to deny effect to a foreign sovereign's exercise of sovereign authority. Therefore, in *Mobil Oil,* for example, the court could not order the restoration of Hunt's production facilities

38. *Id.* at 689-90.

39. *Id.* at 695. In the portion of the opinion which follows Mr. Justice White argues: "In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns." *Id.* at 704. Therefore the act of state doctrine does not apply "to acts committed by foreign sovereigns in the course of their purely commercial operations." *Id.* at 706. Mr. Justice Stevens, however, did not subscribe to this portion of the opinion, *id.* at 715, leaving only four of the nine justices advocating this "purely commercial" exception to the act of state doctrine.

40. *Id.* at 691-93.

41. *Id.* at 694.

42. *See* text accompanying notes 92, 93 *infra.*

43. *See* text accompanying note 88 *infra.*

nationalized by the sovereign in Libya. However, given the extraterritorial reach of the Sherman Act,[44] the court did have authority to prosecute American violators of that Act; the court did have authority to impose liability on the Seven Sisters for their alleged efforts to get Hunt nationalized.[45]

IV. THE PRECEDENTIAL WEIGHT OF AMERICAN BANANA

The *Mobil Oil* majority relied heavily on *American Banana v. United Fruit Co.*[46] as precedent for the view that the act of state doctrine bars motivational inquiries. In *American Banana* plaintiff sued for treble damages under the Sherman Act, claiming that United Fruit prompted the government of Costa Rica to seize plaintiff's banana plantation and railway.[47] Justice Holmes denied the claim stating that "seizure by a state is not a thing that can be complained of elsewhere in the courts."[48] The fact that Costa Rica acted "by virtue of its sovereign power" within its de facto jurisdiction necessarily made that act legal;[49] therefore, the prior persuasion became legal as well.[50]

However, the ruling cited above was not specifically related to the adjudication of the Sherman Act and, therefore, carries little precedential weight. Holmes had earlier determined that the Sherman Act *did not apply* to acts outside the territory of the United States.[51] Although certainly the act of the sovereign himself will be deemed lawful within his territory,[52] Holmes' statement that the private act of persuasion was also per se lawful referred to whether plaintiff could maintain an action in *tort* against United Fruit.[53] Although antitrust

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44. *See* note 1 *supra*.

45. The extraterritorial reach of the Sherman Act is illustrated by courts now imposing liability on American defendants where the only *significant* injury is to a foreign plaintiff overseas. *See* Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering Co., 5 TRADE REG. REP. (1977-1 Trade Cas.) ¶ 61,256 (S.D.N.Y. Jan. 18, 1977); Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc., 383 F. Supp. 586 (E.D. Pa. 1974).

46. 213 U.S. 347 (1909).

47. *Id.* at 354.

48. *Id.* at 357-58.

49. *Id.* at 357.

50. *Id.* at 358.

51. *Id.* at 355-57.

52. *Id.* at 356.

53. The fundamental reason why persuading a sovereign power to do this or that *cannot be a tort* . . . is that it is a contradiction in terms to

violations can be classified as torts, the statutory cause of action can hardly be limited to tort concepts.[54] While tort has peculiarly domestic connotations, the antitrust laws do not.[55]

Once one admits the extraterritorial reach of the Sherman Act, which Justice Holmes did not,[56] the identity between the lawfulness of the private act of persuasion and its public consummation breaks down.[57] Although overseas, a citizen remains subject to the laws of his nation.[58] Just because the act

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> say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper . . . . It makes the persuasion lawful by its own act.

Id. at 358. Note how this statement conforms to the rule stated in *Parker v. Brown* discussed in text accompanying notes 100-102 *infra*.

54. The Sherman Act, and the subsequent antitrust legislation, represent a broad effort designed to preserve for the public the benefits of free competition. The purpose of the Sherman Act was to condemn activity which "by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade." Sugar Institute, Inc. v. United States, 297 U.S. 553, 597 (1936); United States v. Linseed Oil Co., 262 U.S. 371, 388-89 (1923); Nash v. United States, 229 U.S. 373, 376 (1913).

As Representative Stewart stated in his concluding speech before the House: "The provisions of this trust bill are just as broad, sweeping, and explicit as the English language can make them to express the power of Congress over this subject under the Constitution of the United States . . . ." 21 CONG. REC. 6314 (1890), *quoted in* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 n.46 (1944).

See also W. FUGATE, *supra* note 1, at § 1.1.

55. The Sherman Act specifically applies to commerce "with foreign nations." *See* note 18 *supra*; Pacific Seafarers' Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969) (applying the Sherman Act to U.S. shipping between two foreign ports).

56. The majority in *Mobil Oil* admits that Justice Holmes' "disaffection for [the Sherman Act] needs little documentation;" (at 74 n.6) but distinguishes this bias based on the unanimity of the *American Banana* decision. *See* Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1009 & n.23 (1976).

57. Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970) granted act of state immunity to an antitrust defendant because the court found that the sovereign compelled the defendant to perform the anticompetitive acts. Nonetheless the court took time to distinguish the applicability of *American Banana*, which also would have granted immunity. The court determined that *American Banana's* bar to an inquiry into the motivation behind a soveriegn's act applies "only in those cases where the conspiracy has no effect within the United States." *Id.* at 1297 n.13. Once such effects are shown the motivation behind the sovereign acts becomes a proper subject of inquiry.

58. Blackmer v. United States, 284 U.S. 415 (1932) (Court has power to subpoena United States citizens residing overseas); Cook v. Tait, 265 U.S. 47 (1924) (Congress has power to tax income earned overseas); Branch v. FTC, 141 F.2d 31 (7th Cir. 1944) (U.S. correspondence school barred from using fraudulent advertising in Latin America). *See* W. FUGATE, *supra* note 1, at § 2.22.

he performs is legal according to the laws of his host country, does not necessarily mean the act will be legal according to the laws of the country of his citizenship.[59] The authoritative reach of the Sherman Act is not limited by geographic boundaries. As Judge van Graafeiland noted in his *Mobil Oil* dissent, subsequent cases have ignored the broad *American Banana* bar once the extraterritorial applicability of the Sherman Act has been recognized.[60]

Unfortunately, the Supreme Court has yet to *expressly* overrule *American Banana's* refusal to inquire into the motivation behind a sovereign's acts. For example, in *Continental Ore Co. v. Union Carbide & Carbon Co.*[61] the Canadian government appointed a wholly owned subsidiary of Union Carbide, Electro Met, as its exclusive wartime agent "to purchase and allocate vanadium for Canadian industries. . . ."[62] In a suit alleging monopolization of the vanadium industry,[63] Continental charged that Union Carbide used its exclusive agency to bar Continental's access into the vanadium market in Canada.[64] Both the district and circuit courts denied Continental's claim,

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> [A]lthough the laws of a nation have no direct binding force, or effect, except upon persons within its own territories; yet that every nation has a right to bind its own subjects by its own laws in every other place.

J. STORY, *supra* note 22, at § 21.

59. A conspiracy formed and executed from Japan remains subject to U.S. antitrust laws, regardless of the lawfulness of the acts in Japan. United States v. R.P. Oldham Co., 152 F. Supp. 818, 822 (N.D. Cal. 1957).

Actions in Switzerland that restrained U.S. foreign commerce are actionable even if they had the tacit approval of the Swiss government. United States v. The Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. ¶ 70,600 at 77,456-57 (S.D.N.Y. 1962), *order modified*, 1965 Trade Cas. ¶ 71,352 (S.D.N.Y. 1965).

The antitrust laws apply where actions affect U.S. commerce "irrespective of the citizenship of the actor and the place where the activity took place." Sabre Shipping Corp. v. American President Lines, Ltd., 285 F. Supp. 949, 953 (S.D.N.Y. 1968).

See also United States v. American Tobacco Co., 221 U.S. 106, 120 (1911) (An agreement in restraint of trade, "although actually made in a foreign country where not unlawful, gives no immunity to parties acting here in pursuance of it.").

60. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976) (the modern rule does not bar an antitrust claim merely because alleged injuries resulted from acts of a foreign sovereign). See cases discussed in text accompanying notes 80-89 *infra;* Mobil Oil at 80-81 (dissenting opinion).

61. 370 U.S. 690 (1962).

62. The Court describing plaintiff's allegations in his complaint, *id.* at 695.

63. Vanadium is a metal used in the steel making process.

64. 370 U.S. at 695, 702-03.

arguing that Continental's exclusion was a "transaction wholly in the hands of the Canadian Government. . . ."[65]

In overturning the rulings of the lower courts, the Court seemingly drew the distinction between judging the validity of a sovereign act and judging the motivation behind that act:

> 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. (emphasis added)[66]

The act of state doctrine arguably limited the number of available defendants; Continental could not sue Canada's appointed agent acting in its agency capacity.[67] However, the remaining parties continued to be liable for their private acts of conspiracy.[68] They were "not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government."[69]

Nonetheless, despite the references to "influence" in the opinion, *Continental Ore* does not explicitly endorse an antitrust suit based *solely* on wrongful motivation of a foreign sovereign's anticompetitive acts. In the quote above referring to efforts to influence Continental's elimination, one is not sure if the Court is speaking of influencing the market, or influencing the Canadian government, or both.[70] Consequently, the viability of a purely motivational antitrust claim remains an unresolved question.

Proponents of a broad act of state defense point to *United*

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65. *Id.* at 703, quoting the district court.

66. *Id.* at 706.

67. *See* discussion of *Cantor v. Detroit Edison* in text accompanying notes 100-112 *infra*.

68. *See* discussion of *Noerr* doctrine in text accompanying notes 113-134 *infra*.

69. 370 U.S. at 706.

70. Arguably, the Court was referring to attempts to influence the Canadian government or its agents. The sentence immediately following the reference to "influence" cites *Sisal*: "[R]espondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government." *Id.* at 706.

However, no court has cited this specific language to impose liability solely for attempts to influence foreign governments; therefore, the doubt remains.

States v. Sisal Sales[71] to support the continued viability of *American Banana's* prohibition of inquiries into the motivation of sovereign acts.[72] In *Sisal* the United States charged defendants with a conspiracy to monopolize sisal, a fibre used in making twine. The alleged conspirators had persuaded foreign governments to pass discriminatory legislation, legislation which was employed by the defendants to destroy all competition in the sisal industry.[73] The Court ruled that this discriminatory legislation afforded defendants no protection. "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."[74]

In *Sisal,* the Court found numerous antitrust violations beyond the mere influence of foreign legislators.[75] Therefore, the Court readily sidestepped the specific motivational issue of *American Banana*: "The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties."[76] However, the fact that *Sisal* distinguishes, rather than overrules, *American Banana* can hardly be considered an endorsement of motivational act of state immunity.[77]

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71. 274 U.S. 268 (1927).

72. The essential argument being the *Sisal,* rather than overruling *American Banana,* took pains to distinguish it.

> [T]he holding of *American Banana* that has endured is that the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant.

Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 110 (C.D. Cal. 1971), *aff'd per curiam,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972); *accord,* Mobil Oil at 75-76. *See also* W. FUGATE, *supra* note 1, at § 2.21. *But see* text accompanying notes 51-60 *supra.*

73. 274 U.S. at 274.

74. *Id.* at 276.

75. Among other things the Court found exclusive dealing arrangements and "constant manipulation of the markets." *Id.* at 274-75.

76. *Id.* at 276. *See* Steele v. Bulova Watch Co., Inc., 344 U.S. 280, 288 (1952).

77. Joel Davidow, Chief, Foreign Commerce Section, Antitrust Division, U.S. Department of Justice, in analyzing *Sisal* and *Continental Ore,* came to the conclusion, albeit tenuous, "that the act of state doctrine does not apply if the foreign government officials were mere pawns in a private conspiracy, rather than a major moving force behind the scheme." Davidow, *Antitrust, Foreign Policy, and International Buying Cooperation,* 84 YALE L.J. 268, 283 (1974). The test Davidow articulates is quite similar to the analysie derived from *Cantor v. Detroit Edison* concerning state action immunity. *See* text accompanying notes 103-108 *infra.*

V. AUTHORITY ANALYSIS APPLIED IN THE ANTITRUST CONTEXT

Barring a definitive Supreme Court ruling on the motivational issue, one must return to the nature of the act of state doctrine itself for guidance. The fundamental purpose of the act of state doctrine is to protect sovereign authority, not sovereigns.[78] Applying this authority analysis, the act of state doctrine quarantines only those private acts *genuinely compelled* by the invocation of sovereign authority. The majority of modern cases adopt this approach, limiting the act of state defense to compulsion only.[79]

For example, in striking down restraints on the imports of watches into the United States, *United States v. The Watchmakers of Switzerland Information Center, Inc.*[80] ignored non authoritative acts of the foreign sovereign. The court found immaterial "the fact that the Swiss Government may, as a practical matter, approve of the effects of this private activity . . . ."[81] "In the absence of direct foreign governmental action compelling the defendants' activities," the conspirators remained liable for their infractions of the antitrust laws.[82] Other courts faced with similar anticompetitive policies of foreign sovereigns have followed the rule of *Watchmakers,* denying immunity.[83]

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78. *See* text accompanying notes 20-26 *supra.*

79. The principal exception being *Buttes Gas,* discussed at note 72 *supra.*

The dissenting opinion in *Mobil Oil* finds this case "clearly distinguishable" in that plaintiff's claim was premised on alleged wrongful acts of the sovereign, as well as of the private parties. Mobile Oil at 81 n.3.

80. 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. 1962), *order modified,* 1965 Trade Cas. ¶ 71,352 (S.D.N.Y. 1965).

81. *Id.* at 77,456-57.

82. *Id.* at 77,457.

83. "[M]ere governmental appproval or foreign governmental involvement which the defendants had arranged does not necessarily provide a defense [to the antitrust laws]." Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 606 (1976). *See* Sabre Shipping Corp. v. American President Lines, Ltd., 285 F. Supp. 949, 954 (S.D.N.Y. 1968), *cert. denied,* 407 F.2d 173 (2d Cir.), *cert. denied,* 393 U.S. 940 (1969).

Even *Continental Ore* implies that sovereign compulsion is the only available act of state defense: it was immaterial that defendant "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." 370 U.S. at 707 (emphasis added).

Perhaps the most dramatic example of the need to show compulsion has been the furor arising from Arab efforts to coerce U.S. companies into boycotting Israel. In

As *Watchmakers* indicates, the only real act of state defense is sovereign compulsion; *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*[84] further explains this defense. Interamerican Refining alleged that defendants were engaged in a boycott designed to bar its access to Venezualan crude oil.[85] The court, however, found "that defendants were compelled by regulatory authorities in Venezuala to boycott plaintiff."[86] Such compulsion constituted "a complete defense to an action under the antitrust laws based on that boycott."[87]

The court explained the compulsion defense in terms of the act of state doctrine's function of protecting the legal authority of sovereigns:

January 1977 the Justice Department and Bechtel Corporation reached a tentative settlement of the Justice Department's suit charging Bechtel with conspiring to boycott companies blacklisted by the Arabs. BNA 1977 ANTITRUST & TRADE REG. REP. No. 796, at A-17-18.

The Competitive Impact Statement filed with the proposed consent decree vividly illustrates the compulsion doctrine. The Justice Department would not direct Bechtel to perform "foreign conduct [which] directly conflicts with foreign law valid in a foreign sovereignty," but did enjoin actions to implement the boycott "within the sovereign jurisdiction of the United States." "Such implementation in the United States could not be excused on the ground that it was directed by a foreign state, since that would intrude on the terms of trade within the sovereign territory of the United States where United States law is paramount." *Id.* at E-5.

As dictated by the act of state doctrine, the Justice Department expressly limited the sovereign compulsion defense to the narrow scope of the sovereign's authority. "[F]oreign sovereign compulsion may not override enforcement of conflicting United States law expressing a sovereign and public interest as to conduct within the United States . . . ." *Id.* at E-6.

Consequently, although Bechtel was granted permission to contract and work on projects for Arab nations implementing the boycott, it was barred from making any discriminatory selection of subcontractors based on boycott directives (provided that at least one U.S. subcontractor was solicited). Where discriminatory criteria was to be applied, the Arab nation itself must "*specifically* and *unilaterally*" choose the subcontractors. *Id.* at E-8 (emphasis in original). Thus the Department limited immunity to the specific commands of the sovereign.

One must note that the Justice Department apparently considers foreign sovereign compulsion and the act of state doctrine to be two separate defenses. *Id.* at E-6. However, applied in practice, the Department draws no clear distinction between the two defenses. UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977), *reprinted in* BNA 1977 ANTITRUST & TRADE REG. REP. No. 799, at E-1; *see id.* at E-15, E-16. *See also* UNITED STATES DEPARTMENT OF JUSTICE, MEMORANDUM CONCERNING ANTITRUST AND FOREIGN COMMERCE (1972), *reprinted in* [1972-77 Transfer Binder] TRADE REG. REP. ¶ 50,129, at 55,211. *See* W. FUGATE note 89 *infra* for an attempt to rationalize the act of state-sovereign compulsion distinction.

84. 307 F. Supp. 1291 (D. Del. 1970).

85. *Id.* at 1292.

86. *Id.* at 1296.

87. *Id.*

> [S]overeignty 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 become effectively acts of the sovereign.*[88]

Since the act of state doctrine protects only authoritative acts, the defense extends only to "genuine compulsion." The *Texaco* court explicitly refused to base its opinion on *American Banana;* attempts to influence or manipulate a foreign sovereign in order to defeat the antitrust laws remain subject to liability.[89]

Since the act of state defense applies only in cases of genuine compulsion, the doctrine serves more as a bar to available remedies than as a bar to liability. Generalizing, the act of state doctrine prevents the courts from countermanding the authoritative acts of another sovereign. This will limit courts to remedies which do not conflict with established foreign law.[90] The cause of action is barred altogether only when the corporation stands directly in the shoes of the sovereign, that is, when

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88. *Id.* at 1298 (emphasis added).

89. *See* discussion of *Texaco* holding at note 57 *supra.*

> Noting in the materials before the Court indicates that defendants either procured the Venezualan 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* as a defense.

307 F. Supp. at 1297 (emphasis added) (footnote omitted).

Fugate argues that the sovereign compulsion defense is distinct from the act of state defense. The act of state doctrine prevents "inquiry by U.S. courts into the validity of a foreign's act; the antitrust foreign compulsion principle, on the other hand, concerns antitrust liability for acts of private parties done pursuant to foreign law or at the direction of a foreign government." W. FUGATE, *supra* note 1, § 2.21, at 82.

Fugate has in fact drawn no distinction at all. The sovereign compulsion principle represents nothing more than the act of state doctrine applied to the antitrust context. One does not sue the sovereign in an antitrust suit (*see* note 79 *supra*); rather, one sues the private wrongdoer. The private actor becomes immune from suit only because, through sovereign compulsion, he stands in the shoes of the sovereign. By acting in the sovereign's place, the private actor obtains the sovereign's act of state immunity.

See note 83 *supra* for the Justice Department's current approach to this distinction.

90. The sovereign compulsion doctrine has been incorporated into a number of consent decrees. Thus an injunction does not apply "to any act in a foreign country which defendant . . . can show was officially required of defendant . . . by the government thereof." United States v. American Smelting & Refining Co., 1957 Trade Cas. ¶ 68,836 (S.D.N.Y. 1957). *See* United States v. Standard Oil Co., 1960 Trade Cas. ¶ 69,849 (S.D.N.Y. 1960); United States v. United Fruit Co., 1958 Trade Cas. ¶ 68,941 (E.D. La. 1958); United States v. American Type Founders Co., 1958 Trade Cas. ¶ 69,065 (D.N.J. 1958). *See also* discussion of *Bechtel* note 83 *supra.*

its actions are compelled by the sovereign.[91] Essentially the cause of action is barred because there is no available remedy—the only wrongdoer is the sovereign himself.

VI. THE RULE TO BE DERIVED FROM MOBIL OIL

If the act of state doctrine applies only in cases of sovereign compulsion, on what theory, then, can the *Mobil Oil* majority legitimately rest its holding?

Primarily, the court applied act of state rationales, not act of state rules. The court deferred, not to the sovereign authority of Libya, but to her sovereign status. Libya seized Hunt's property, in part, as retribution against the United States for failure to properly accomodate Arab interests.[92] Thus, although a review of the motivation behind the nationalization would not have violated the commands of act of state, it might have proven personally embarrassing to Libyan President Qadhafi for the court to judge if these ostensibly nationalistic acts had been engineered by private American oil interests.[93]

The court, although it did not articulate it, in effect weighed this embarrassment against the likelihood that an antitrust violation had in fact taken place.[94] The court noted that

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91. The compulsion doctrine has apparent application in the domestic setting as well. *See* note 109 *infra*.

92. Any possible doubt about [the issue of political motivation] is in any event removed since upon the seizure of Hunt's property on June 11, 1973 President alQadhafi announced "[w]e proclaim loudly that this United States needs to be given a big hard blow in the Arab area on its cold insolent face . . . . The time has come for the Arab peoples to confront the United States, the time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless of the cost."

Mobil Oil at 73.

93. The court characterized an inquiry into the Libyan nationalization as a "Serbonian Bog." Mobil Oil at 77.

94. At first reading the language would suggest a blanket application of the act of state doctrine: "we cannot logically separate Libya's motivation from the validity of its seizure." But the language immediately following stressed heavily the delicacy of the inquiry. Mobil Oil at 77.

The court cites *Dunhill* and *Sabbatino* as authority for the proposition that the function of the act of state doctrine is to avoid embarrassment of sovereigns and our State Department. The quote from *Dunhill* applies only to "adjudications involving the *legality* of acts of foreign states . . . ." Mobil Oil at 77 (emphasis added); Alfred Dunhill of London v. Republic of Cuba, 425 U.S. at 697. As discussed earlier, the *Dunhill* court felt no inhibitions in dissecting the nature of Cuban sovereign processes. *See* text accompanying notes 37-41 *supra*.

Because of the language cited in *Mobil Oil* referring to separation of powers,

there was no allegation of scandalous behavior, such as bribery, committed by the Seven Sisters.[95] Although not mentioned by the court, Hunt's pleadings also appear to be deliberately vague.[96] Consequently, given the proven element of at least some political motivation behind the nationalization, the court must have concluded that Hunt could not demonstrate a sufficient causal connection between the acts of the alleged conspirators and the sovereign act of nationalization to warrant an antitrust recovery.

> [A]ppellants admit that antitrust liability cannot be attributed to the defendants unless Hunt can prove that *but for* their combination or conspiracy Libya would not have moved against it.[97]

Quite reasonably, Hunt's vague allegations, coupled with the unchallenged political component of the nationalization, failed to meet this "but for" standard.

However, rather than so ruling, the court sought safer grounds.[98] The court stretched the act of state doctrine in order to avoid a serious judicial inquiry into the nationalization. To inquire into the motivation of an act was to inquire into the validity of the act; this inquiry was barred by the act of state doctrine. By employing this "reasoning" the court avoided a specific ruling on the causal issue.[99]

Sabbatino may generate some confusion. Mobil Oil at 77; Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 423. Nonetheless, the full opinion clearly indicates that the separation of powers analysis derives from the political nature of the controversy, not the potential embarrassment to the participants. The Court indicated that had there been sufficient international standards regarding the illegality of nationalizations, Sabbatino's claim would have been justiciable. 376 U.S. at 428.

95. Mobil Oil at 79.

96. Mobil Oil at 72 n.2.

97. Mobil Oil at 76 (emphasis in original).

98. Technically, one is not penalized for vague pleadings; failure to specifically define one's antitrust allegations should not defeat the complaint. Harman v. Valley National Bank of Arizona, 339 F.2d 564, 567 (9th Cir. 1964). However, if one must rely on distinguishing private from public activity in order to maintain a cause of action, perhaps a rule requiring specific causal allegations should be applied. Even in complex antitrust suits, where public policy demands, allegations in complaints must be more than conclusory. Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076, 1082 (9th Cir. 1976) (public policy interest was the protection of first amendment rights).

99. "Another inquiry could only be fissiparous, hindering or embarassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention expressed in the [act of state] doctrine . . . ." Mobil Oil at 77.

VII. ALTERNATIVE RULES FOR JUDGING THE MOTIVATION OF FOREIGN SOVEREIGNS

The majority in *Mobil Oil* erred, not in its holding, but in its ostensible rule of law. To equate an inquiry into the motivation behind an act with an inquiry into the validity of a sovereign act affords future wrongdoers a broad shield by which to avoid antitrust liability. The sovereign political interest to which *Mobil Oil* was sensitive can be protected through less sweeping measures.

This comment proposes a two-part test which incorporates the *Mobil Oil* rationales into a limited rule specifically designed for the antitrust context. For a plaintiff to recover against a defendant for alleged antitrust violations: (1) the sovereign act which results in injury must be significantly attributable to the independent behavior of the private defendant, and (2) the private efforts to motivate the sovereign, if they employ a state's policymaking processes, must "wrongfully" employ those processes.

The first test derives from *Parker v. Brown.*[100] In upholding a state program designed to restrict competition in, and maintain the prices of, California raisins, the Court held that the Sherman Act did not apply to restraints of trade by officers and agents of the State of California.[101] The raisin program "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command."[102]

However, sovereign participation in itself does not bar the application of the Sherman Act. In *Cantor v. Detroit Edison Co.*,[103] the Court declared illegal Detroit Edison's practice of giving free light bulbs to its customers.[104] The fact that this practice was approved in a tariff issued by the Michigan Public Service Commission did not bar Sherman liability. The Court found that Detroit Edison "exercised sufficient freedom of

100. 317 U.S. 341 (1943).

101. *Id.* at 346.

102. *Id.* at 350.

103. 428 U.S. 579 (1976).

104. The effect of this practice was to eliminate sellers of light bulbs. *Id.* at 584, 581 n.3.

choice" in embarking on the program "that [it] should be held responsible for the consequences of [its] decision."[105]

> Respondent could not maintain the lamp exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's not the Commission's.[106]

The *Cantor* Court, in imposing liability on Detroit Edison, avoided specific causal analysis. Rather, defendant's "participation in the [Commission's] decision [was] sufficiently significant" to invoke the antitrust laws.[107] The exact levels of required significance remain unarticulated.[108]

Despite the lack of an explicit rule, *Cantor* offers a standard which the *Mobil Oil* court could have used to advantage.[109] Although *Cantor* does not mention the *but for* test employed in *Mobil Oil,* that test could be implied from *Cantor.* The necessary "mixture of private and public decisionmaking"[110] implies that the sovereign act must be one which the sovereign would not have performed but for the additional im-

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105. *Id.* at 593. *See* Litton Systems, Inc. v. Southwestern Bell Telephone Co., 539 F.2d 418, 424 (5th Cir. 1976).

106. 428 U.S. at 594.

107. *Id.*

108. For an excellent article which argues for a broad application of *Parker* immunity written before the *Cantor* decision see Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine,* 76 COL. L. REV. 1 (1976).

109. The dissent in *Mobil Oil* cites *Cantor* to support the argument that sovereign participation alone does not confer antitrust immunity on a wrongdoer (at 80). State action immunity is close to, if not but a particular application of, the act of state doctrine. For example note the compulsion language in *Goldfarb*:

> The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. . . . It is not enough that as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 790-91 (1975). The principal distinction between *Parker* immunity and the act of state doctrine is that the former *requires* inquiry into the motivation of sovereign acts, the latter apparently does not. However, should the Supreme Court ever specifically adopt the act of state analysis posited in this Comment, the two doctrines would become so nearly identical that the act of state doctrine could be ignored in the antitrust context. *See* W. FUGATE, *supra* note 1, § 2.21, at 79 n.14. *See generally* Cofinco Inc. v. Angola Coffee Co., 1975-2 Trade Cas. ¶ 60,456 at 67,056-57 (S.D.N.Y. 1975) (illustrating that the act of state defense often requires resolving significant issues of fact).

110. Cantor v. Detroit Edison, 428 U.S. at 594.

petus of private influence. The added possibility of conflict of laws problems might further justify a narrow application of *Cantor* in the international setting.[111]

However qualified by the international context, the *Parker-Cantor* analysis directly addresses the problems inherent in the semipublic antitrust violation. It affords an analytical tool for divorcing private behavior from public behavior in order to determine if private acts violate the antitrust laws.[112] The immunity employed through *Parker* is only as broad as the involvement of the sovereign's authority itself. As a result *Parker-Cantor* avoids the overly-broad prophylactic immunity which results from the application of the act of state doctrine to semipublic sovereign acts.

VIII. NOERR ANALYSIS APPLIED TO FOREIGN POLITICAL PROCESSES

Where the relevant private involvement is in the form of attempts to utilize the policymaking process to influence the foreign sovereign, plaintiff must further show that that influence was a "wrongful" use of that foreign political process.[113] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* provides the initial standards of wrongful use of the political process.[114] *Noerr* ruled that a conspiracy in pursuit of one's right to petition is not subject to the Sherman Act,[115] provided that these efforts to influence government were not "a mere sham to cover what is actually nothing more than an attempt *to interfere directly* with the business relationships of a competitor . . . ."[116] *United Mine Workers of America v.*

111. In one sense *Cantor* itself involves conflict of law questions. Although federal policy normally dominates state policy, the determination of public utility rates and tariffs represents a peculiarly state function. In fact Congress has restricted federal judicial review of state rate determinations. 28 U.S.C. § 1342 (1970).

112. Baker, *Antitrust & World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16, 38-39 (1974).

113. The Court in *Cantor* denies the application of *Noerr*-type immunity to Detroit Edison apparently on the grounds that Detroit Edison's behavior was not directed toward the political process. 428 U.S. at 601-02.

114. 365 U.S. 127 (1961).

115. *Id.* at 136.

116. *Id.* at 144 (emphasis added). *Noerr* involved a suit by a group of trucking companies against a railroad trade association for alleged unfair efforts to deter passage of laws favorable to the trucking industry and to encourage unfavorable laws. Three factual considerations may well have influenced the Court's decision. This was a fight between two large industries; one could not drive the other out of business.

Pennington elaborated on *Noerr*, dramatizing the rule that even a showing of wrongful intent does not invoke the Sherman Act where the focus of that intent is the influence of public works projects,[122] efforts to intimidate public officials.[117]

However, later cases distinguishing *Noerr* clearly demonstrate that there exists a distinction between use and misuse of the right to petition. *California Motor Transport Co. v. Trucking Unlimited*[118] denied *Noerr* protection where defendants' activities were such as to effectively deny plaintiff's access to the regulatory body from which it procured its required licenses.[119] The effect of defendants' acts were "to usurp that decisionmaking process."[120] Other examples of wrongful use of one's right to influence government include bribery,[121] efforts to foreclose bidding on public works projects,[122] efforts to intimidate public officials through threats,[123] and misrepresentation of key facts to an adjudicatory agency.[124]

Although one would be hard pressed to derive an absolute rule from the cases interpreting *Noerr*, a certain theme predominates: Was the influence an attempt to interfere directly with the business relationships of a competitor,[125] or, put another way, was the influence directed at the policymaking process or designed to subvert and thwart that process?[126]

Second, the truckers also participated in their own publicity campaigns. And third, the focus of the influence was on legislative, not adjudicative, bodies, the former apparently better equipped to handle misleading information.

117. United Mine Workers of America v. Pennington, 381 U.S. 657, 670 (1965). *But see also* Aloha Airlines, Inc. v. Hawaiian Airlines, Inc. 1972 Trade Cas. ¶ 74,234 (D. Haw. 1972) (predatory intent with the purpose of eliminating competition invokes the sham exception to *Noerr*).

118. 404 U.S. 508 (1972).

119. *Id.* at 511. *See* Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972).

120. 404 U.S. at 512.

121. Ranger, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966). *But see* Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696 (D. Colo. 1975).

122. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

123. Sacramento Coca-Cola Bottling Co. v. Local 150, Int'l Bhd. of Teamsters, 440 F.2d 1096 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971).

124. Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

125. Israel v. Baxter Laboratories, Inc., 466 F.2d 272, 279 (D.C. Cir. 1972); Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696, 704 (D. Colo. 1975).

126. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); Woods Exploration & Producing Co. v.

Although somewhat undefined in their domestic application, these *Noerr* standards, by their very vagueness serve the foreign context well. Vague standards of misuse will permit the courts to adjust to the varying political processes of foreign nations. Moreover, by focusing on the policy process as the source of immunity, conflict of laws problems are minimized. The court has automatically accomodated, at least to some extent, the policy considerations of foreign governments by granting immunity for use of that government's policy processes.[127]

It has been argued that the *Noerr* doctrine, being derived from the first amendment, is inappropriate for the foreign setting.[128] Such analysis distorts the rationale of *Noerr*. *Noerr* immunity derives more from the fundamental functioning of every state than from the magic of the first amendment. A state needs informative inputs in order to act with a modicum of efficiency. Similarly, citizens require some right to petition in order that government might make some effort to meet their social demands.[129] If anything is common to all nations, it is the right, albeit subject to varying limits, to petition one's own government.[130]

Aluminum Co. of America, 438 F.2d 1286, 1298 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

In intepreting sham as used by *Noerr*, the 10th Circuit states:

> [T]he term "sham" in this context would appear to mean misuse or corruption of the legal process. Therefore, the utilization of the court or administrative agency in a manner which is in accordance with the spirit of the law continues to be exempt from the antitrust laws.

Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361, 1366 (10th Cir. 1972). *See* Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976).

127. *See* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 6 (1971) for a list of the general factors examined in conflict of laws cases.

128. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), for example, found *Noerr* analysis inappropriate for the foreign context, based upon the doctrine's roots in the first amendment. *Id.* at 108.

129. H. LASSWELL & A. KAPLAN, POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY (1950).

130. For example, the Supreme Court in *Continental Ore* did not question the potential applicability of *Noerr* in the foreign context. In fact, the Court spent time distinguishing the case based on the fact that defendants did not petition the political process but rather "engaged in private commercial activity." 370 U.S. at 707.

The Justice Department has expressed a similar view:

> While the *Noerr* case turns in part on U.S. domestic constitutional con-

Contrary to the district court's view in *Mobil Oil*, application of the rule granting immunity for use of the policy process might well bar Hunt's claim.[131] As stated, the act of nationalization was a peculiarly political act, an executive decree. Unlike *Cantor*, which involved "private action taken in compliance with state law" and was thus not subject to *Noerr*,[132] arguably the Seven Sisters appealed to the executive in his role as policymaker.[133] Therefore, whatever influence the Seven Sisters exerted, whatever their anticompetitive intent, as long as they remained properly within the Libyan political processes their acts were immune from antitrust liability.[134]

The recent *Timberlane* decision offers dramatic evidence of the potential utility of *Cantor* and *Noerr* analysis in the foreign setting. *Timberlane Lumber Co. v. Bank of America*[135] found actionable defendants' alleged use of spurious claims in the Honduran courts to thwart plaintiff's entry into the local timber industry exporting to the United States.[136] The court declined to judge the Timberlane claim according to a rigid act of state rule, declaring: "Whether forbearance by an American court in a given situation is advisable or appropriate depends upon the 'balance of relevant considerations.'"[137] Those rele-

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> siderations, the Department does not consider it to be limited to the domestic area. The Supreme Court's discussion in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, implies as much.

ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, *supra* note 83, at E-18 (footnotes omitted). *See also* Rahl, *American Antitrust and Foreign Operations: What is Covered*, 8 CORNELL INT'L L.J. 1, 9-11 (1974).

131. The district court stated that *Noerr* did not apply to *Mobil Oil* since that immunity applied only to action "to procure passage or enforcement" of a law. 410 F. Supp. at 20. As amply illustrated above, such an interpretation overly restricts *Noerr*. *See, e.g.*, note 126 *supra*.

132. Cantor v. Detroit Edison Co., 428 U.S. 579, 601-02 (1976).

133. According to paragraph 64 of Hunt's complaint, the Seven Sisters "manipulated the course of Libyan negotiations." Mobil Oil at 72 n.2. Presumably oil negotiations, given their critical importance to the entire nation of Libya, is an executive policy making function within the scope of *Noerr*.

134. What constitutes misuse of the foreign political process may be tempered by our own biases, however. In many countries bribes, or "baqsheesh," are customary means of influencing the political process. The FTC has initiated investigations into whether foreign bribes by the Lockheed Aircraft Corp. might constitute "unfair trade practices." BNA 1976 ANTITRUST & TRADE REG. REP. No. 779, at A-11. It will be interesting to see if the Federal Trade Commission tempers their prosecution based on foreign political customs.

135. 549 F.2d 597 (9th Cir. 1976).

136. *Id.* at 605.

137. *Id.* at 606.

vant considerations are primarily whether the sovereign agent "has exercised its jurisdiction *to give effect to its public interests.*"[138] The court determined:

> A judgment of a court may be an act of state. Usually it is not, because it involves the interests of private litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to public interests.[139]

Since the Honduran judicial action did not reflect the exercise of public policy for the public interest, the court ruled that the act of state doctrine did not apply.

Although couched in act of state terms, *Timberlane's* public interest test more appropriately addresses the significant private action test of *Cantor* and the abuse of process—sham exception—of the *Noerr* doctrine. For example, *Cantor* would weigh the involvement of the state's public interest by assessing the relative degree of independent private and public decisionmaking involved in the act. *Noerr* would weigh public interest by immunizing acts properly petitioning the sovereign's public policy processes. Most important, *Cantor* and *Noerr* would offer the additional advantage of focusing only on private, not public, behavior. As a result the *Cantor-Noerr* approach avoids the dangers of unwarranted blanket immunity that results from the inappropriate application of act of state rules to private behavior. Thus, at a minimum, *Timberlane* presented a classic *Cal-Motor* abuse of process fact pattern[140] and should have been judged on those grounds.

IX. CONCLUSION

With potentially justiciable international interaction constantly on the rise, courts can no longer employ the act of state doctrine as a safe harbor for weathering difficult foreign antitrust cases.[141] The act of state doctrine must be limited to those circumstances for which it was designed, *i.e.*, acts of sovereign compulsion and direction. Private acts must be judged accord-

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138. *Id.* at 607 (emphasis in original).

139. *Id.* at 607-08.

140. *See* text accompanying notes 118-124 *supra*.

141. As the Justice Department has commented the sovereign act defenses "often are claimed much more broadly than seems appropriate if the Department is to carry out its essential function of protecting the competitiveness of U.S. markets and export opportunities." ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, *supra* note 83, at E-3.

ing to appropriate antitrust rules, adapted for the international setting. To stretch the act of state doctrine to apply to private as well as sovereign behavior will lead only to inevitable confusion.