Defenses to Extra-territorial Reach of Antitrust Law: A Choice of Law Approach

DOUGLAS H. MEAL*

This article focuses on two defenses which some courts and commentators have suggested will on occasion immunize certain anticompetitive conduct of individuals or corporations doing business outside of the United States from liability under the American antitrust laws. The two defenses in question are normally referred to as the "*Noerr-Pennington* doctrine" and the "act of state doctrine." The anticompetitive conduct which these doctrines can arguably shield from antitrust liability consists of private action to "persuade" or "solicit" a foreign governmental action which in turn has an anticompetitive effect on the commerce of the United States.

As a general matter, it is well settled that the American antitrust laws can be applied to conduct occurring outside of the United States.[1] The assertion of

*Douglas H. Meal is a candidate for the MALD degree at The Fletcher School and the JD at Harvard Law School.

1. The Supreme Court originally refused to hold that the Sherman Act could be applied extraterritorially. In *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), Justice Holmes, writing for a unanimous Court, stated that "all law is prima facie territorial" and held that no legislation could be extraterritorially applied absent express indication that it was so intended. It should be noted that Justice Holmes did not deny the power of a jurisdiction ever to apply its law extraterritorially, but simply found no manifestation of such intent expressed in the Sherman Act. Indeed, Justice Holmes gave several specific examples of cases "immediately affecting national interests" where the law of the United States might be applied to conduct occurring in another jurisdiction.

In subsequent years the courts of the United States have reversed this rule; now "[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." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962). *Continental Ore* rests on a long line of cases which cuts against the absolute territoriality principle of *American Banana.* Of special interest is *Strassheim v. Daily*, 221 U.S. 280 (1911), where the Court found the defendant subject to Michigan's fraud statutes although he had never set foot in the state until the fraud was complete. "Acts done outside a jurisdiction," wrote Justice Holmes, "but intended to produce and producing detrimental effects within it, justify a state in punishing the harm as if it had been present at the effect . . . ." 221 U.S. at 284-85. *See also United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (holding acts complained of to be within the jurisdictional scope of the Sherman Act although some of them occurred outside of the United States); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (Judge Hand finding conduct of a foreign national occurring entirely outside of the United States to be within the Sherman Act's jurisdictional scope). Today, then, the extraterritorial reach of antitrust may be regarded as a *fait accompli.* On the broad issue of the application of the antitrust laws abroad, *see generally* P. AREEDA, ANTITRUST ANALYSIS §§ 184-93 (1974); (hereinafter cited as AREEDA); K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 53-78 (1958) (hereinafter cited as BREWSTER); W. FUGATE,

subject matter jurisdiction under the Sherman Act is normally thought to depend on a showing that the questioned extraterritorial conduct had a direct and substantial effect on the foreign commerce of the United States.[2] There is no requirement that part of the questioned conduct occur within the United States, or that the parties whose conduct is questioned do business within the United States, or that these parties be American citizens.[3]

Foreign governmental actions easily can and frequently do have direct and substantial anticompetitive effects on American commerce; *prima facie,* then, the antitrust laws proscribe private efforts to induce foreign governmental actions which have such deleterious effects. Few courts, however, have considered

FOREIGN COMMERCE AND THE ANTITRUST LAWS 20-55 (1958) (hereinafter cited as FUGATE). For an interesting debate on the merits (theoretical and otherwise) of such application, *compare* Timberg, *Extraterritorial Jurisdiction Under the Sherman Act*, 11 RECORD OF THE N.Y. BAR ASSOCIATION 101 (1956) *with* Whitney, *Anti-Trust Law and Foreign Commerce,* 11 RECORD OF THE N.Y. BAR ASSOCIATION 134 (1956).

2. While the Sherman Act is unquestionably applicable as a general matter to extraterritorial anticompetitive conduct, not all anticompetitive conduct which occurs outside of the United States falls within the scope of the proscriptions of the antitrust laws. Generally speaking, the assertion of subject matter jurisdiction where an antitrust claim questions anticompetitive extraterritorial conduct will depend on showing a consequent deleterious effect on American foreign commerce. The classic statement of this principle appears in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). There Judge Hand wrote that "any state may impose liabilities, even upon persons not within its allegiance, for conduct [occurring] outside its borders that has consequences within its borders which the state reprehends." 148 F.2d at 443. As to the degree of the consequences or the "effect" required for the assertion of subject matter jurisdiction, the most frequently stated formula in the leading cases is that a "direct and substantial" effect on United States commerce must be shown. *See, e.g., United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. ¶ 70,600, at 77,457 (S.D.N.Y. 1962), *order modified*, 1965 Trade Cas. ¶ 71,352 (S.D.N.Y. 1965); *United States v. General Electric Co.*, 82 F. Supp. 753, 890-91 (D.N.J. 1949). Most commentators describe this as the standard. *See, e.g.*, FUGATE, *supra* note 1, at 31, *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). *But see United States v. Aluminum Co. of America,* 148 F.2d 416, 444 (1945), where Judge Hand required only a showing of an intent to produce the effect in addition to a cognizable effect itself; *cf. Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102-03 (C.D. Cal. 1971) (court treats "direct" and "substantial" as alternative bases for subject matter jurisdiction). While there are apparent difficulties in the practical application of a rule employing such open ended terms as "direct" and "substantial", the effects doctrine has become the most frequently cited basis for the exercise of antitrust jurisdiction over anticompetitive acts performed outside of the United States.

3. For cases applying American antitrust law to foreign nationals acting entirely abroad, *see, e.g., 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); *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949). An agreement which restricted the importation of products into the United States could give rise to antitrust subject matter jurisdiction, even though — by the very terms of the agreement — the parties charged were not doing business in the United States. Note that an antitrust claim in such a case will be successful only to the extent that personal jurisdiction can be obtained. Note as well that it would be inaccurate to describe the effects doctrine as the only basis for subject matter jurisdiction in these cases. United States citizens may still be bound by American law in their conduct abroad on the basis of their nationality. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30 (1965).

whether persuading a foreign government to act to restrain trade or create a monopoly violates the American antitrust laws. Those courts which have faced the issue have usually had to deal with an argument that either the *Noerr-Pennington* doctrine or the act of state doctrine immunizes such persuasion from antitrust liability. In resolving the particular cases before them, the courts have failed to come to any consensus as to when (if, indeed, at all) either doctrine will afford such immunization. Moreover, no court has really offered persuasive reasons why either doctrine should (or should not) shield such inducement in a given situation. This article directs itself towards the latter failing, offering an approach to each doctrine by which the question of whether this kind of inducement violates the antitrust laws can be answered on a case-by-case basis.

THE NOERR-PENNINGTON DEFENSE

The "*Noerr-Pennington* doctrine"[4] immunizes certain conduct, namely, private solicitation or persuasion of *domestic* (that is, American state or federal) governmental actions, from prosecution under the antitrust laws. Such private "lobbying" efforts would appear on their face to fall within the proscriptions of the Sherman Act if they in fact produced the desired anticompetitive effect. But in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[5] the Supreme Court held that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take a particular action with respect to a law that would produce a restraint or monopoly."[6] The *Noerr* rule was followed in *United*

4. The *Noerr-Pennington* doctrine has been the focus of numerous commentaries. *See generally* Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415 (1973); Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies*, 86 HARV. L. REV. 715 (1973). For a most illuminating commentary which specifically addresses the application of *Noerr-Pennington* in an international context, *see* Note, *Corporate Lobbyists Abroad: The Extraterritorial Application of Noerr-Pennington Antitrust Immunity*, 61 CALIF. L. REV. 1254 (1973) (hereinafter cited as *Lobbyists*). For less extensive discussions, *see also* Baker, *Critique of the Antitrust Guide: A Rejoinder*, 11 CORN. INT'L L.J. 255, 260 (1978); Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100, 132 (1967); Griffin, *A Critique of the Justice Department's Antitrust Guide for International Operations*, 11 CORN. INT'L L.J. 215, 252-54 (1978); Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORN. INT'L L.J. 1, 10-11 (1975); Simson, *The Return of American Banana: A Contemporary Perspective on American Antitrust Abroad*, 9 J. INT'L L. & ECON. 233, 248 n. 75; Note, *International Law — Antitrust Law — Immunities to Extraterritorial Application of United States Antitrust Law*, 12 J. INT'L L. & ECON. 487, 500 n. 62 (hereinafter cited as *Immunities*).

5. 365 U.S. 127 (1961). *Noerr* arose from the competition between railroads and truckers to secure long distance freight business. The truckers complained of the railroads' organization of a public relations campaign which sought the passage of laws harmful to the truckers' interests; the truckers alleged that the railroads' "sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business." 365 U.S. at 138.

6. 365 U.S. at 136.

Mineworkers of America v. Pennington.[7] "Joint efforts to influence public officials," said the Court, "do not violate the antitrust laws even though intended to eliminate competition."[8] Today, the *Noerr-Pennington* doctrine confers a broad immunity from antitrust liability on anticompetitive conduct in the form of bona fide petitioning of American governmental bodies, be they legislative, executive, judicial or administrative in nature.[9]

The question of the applicability of the *Noerr-Pennington* doctrine to the persuasion of foreign governmental bodies has not yet been resolved by the courts; nor have the commentators reached any consensus on the problem. *Noerr* and *Pennington,* of course, construed the antitrust laws only in reference to persuasion of American state and federal officials. Any discussion of whether the *Noerr-Pennington* doctrine applies (or ought to apply) where foreign governments are involved must begin with an examination of the rationales behind the doctrine. In his opinion for the Court in *Noerr,* Justice Black cited two bases for the rule. First he argued that representative democracy is founded on the notion that constituents be allowed freely to make their wishes known to their representatives; application of the antitrust laws to efforts to persuade the government to adopt a certain policy could clearly cut against this notion.[10] Secondly, he noted that the right of petition is a freedom protected by the First Amendment to the American Constitution, and concluded that the application of the antitrust laws to combinations acting to persuade the government to take a particular action could well be unconstitutional.[11] In sum, Justice Black simply refused to read the Sherman Act as intended to prohibit any private con-

7. 381 U.S. 657 (1965). The claim in *Pennington* alleged that the United Mine Workers and certain large coal mining companies had jointly persuaded the Secretary of Labor to establish a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority. The complaint suggested that the lobbying had been undertaken with the intent of crippling small, non-unionized mines, and that enactment of the minimum wage had indeed had this effect. 381 U.S. at 660-61.

8. 381 U.S. at 670.

9. Technically, *Noerr* applied the immunity just to "solicitation of governmental action with respect to the passage and enforcement of laws," 365 U.S. at 138; that is, only lobbying of the executive or legislative branches was protected. In *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), the Supreme Court extended the *Noerr-Pennington* immunity to lobbying efforts directed at judicial or administrative bodies. "Certainly the right to petition extends to all departments of the Government." 404 U.S. at 510. In *Trucking Unlimited* the complaint alleged that one group of highway carriers had conspired to institute a series of frivolous claims in state and federal tribunals with the intent and effect of delaying the application of another group of carriers for certain operating rights. 404 U.S. at 509.

10. "In a representative democracy such as [ours], these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of people to make their wishes known to their representatives." 365 U.S. at 137.

11. 365 U.S. at 137-38. The Court expressly declined to decide the First Amendment issue, preferring instead to read the Sherman Act as not being intended to regulate political activity and hence as technically not raising the First Amendment problems recognized by Justice Black. 365 U.S. at 132 n. 6, 137.

duct which could be regarded as essential to the proper operation of the American governmental system; he thus carved out what became the *Noerr-Pennington* doctrine in order to protect activity fundamental to the democratic process from being chilled by the spectre of liability under the antitrust laws.

The fact that the *Noerr-Pennington* doctrine rests on principles (the "right of petition" and the "right of access to one's representatives") which are really fundamental only to certain systems of government, and in fact peculiarly concern the American political process, has consistently vexed analysis of its applicability in a foreign context.[12] Some authorities focus on *Noerr's* concern with protecting the American political process and conclude that the *Noerr-Pennington* doctrine has absolutely no application where foreign governments are concerned. This conclusion is founded on the proposition that the "rights" which form the basis of the rationale for *Noerr,* embodied as they are in the American political process and the protections of the American Constitution,

12. Analysis of the issue has perhaps been equally vexed by the Supreme Court's only consideration of it, which appears in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). In *Continental Ore* plaintiff alleged that defendants acted to exclude him from the Canadian market in vandium by convincing one defendant (Electro Met of Canada) to exercise its discretionary authority as the purchasing agent of the Canadian government to refuse to deal with the plaintiff. The Court distinguished the *Noerr* principle on grounds that the defendants "were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." 370 U.S. at 707. At least three tenable interpretations may be drawn from the Court's statements concerning the *Noerr-Pennington* immunity. First, it might be contended that the Court's discussion of *Noerr* in the context of a foreign government implicitly extends the *Noerr-Pennington* defense to shield persuasion of a foreign government as a general rule. This reading of the case concludes that the Court felt the defense did not apply because it found no foreign *government* to be involved; instead, the restraint on commerce was effected by the private parties' own actions. A second, slightly different interpretation of *Continental Ore* would agree that the Court extended Noerr to persuasion of a foreign government, but contend that the Court found it inapplicable to these facts because the doctrine applies only to solicitation "seeking to procure the passage or enforcement of laws," and not to influencing discretionary government conduct. Under this reading, Union Carbide's antitrust liability rested not on the fact that no government was involved, but (per an exception to the rule suggested by the language quoted from *Noerr supra* note 9) on the fact that the induced acts went beyond the government's law creating or enforcing functions. Several authorities adopt one of these interpretations and accordingly conclude that *Continental Ore* implicitly extended the *Noerr-Pennington* doctrine to the foreign context. *See, e.g.,* Graziano, *supra* note 4, at 132. *See also* ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 63 (1977) (hereinafter cited as ANTITRUST GUIDE). An entirely opposite (and reasonable) view of *Continental Ore* concludes that the Court never reached the issue of whether the *Noerr-Pennington* defense applies in a foreign context, either because no government at all was involved, or (if one was involved) because its anticompetitive actions were done in the exercise of its discretionary, as opposed to law creating, functions. *See, e.g., 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); Simson, *supra* note 4, at 248 n. 75; *Lobbyists, supra* note 4, at 1269. One commentator even goes so far as to state that *Continental Ore* "impliedly created a foreign government exception to *Noerr.*" *Immunities, supra* note 4, at 500 n. 62. In sum, *Continental Ore* affords little help in deciding the applicability of the *Noerr-Pennington* doctrine in a foreign context.

by definition guarantee access only to United States governmental representatives, and protect petitioning only of the United States government. The fundamental idea is that the *Noerr-Pennington* doctrine is ultimately not concerned with the conduct of private parties, but rather with the relationship between private parties and the American government.[13]

This reasoning was seemingly adopted, by way of dictum, in *Occidental Petroleum Corp. v. Buttes Gas and Oil Co.*,[14] the only case to present a useful discussion of the foreign applicability of the *Noerr-Pennington* doctrine.[15] In *Occidental Petroleum* plaintiffs claimed that defendants had successfully solicited certain activities on the part of some Middle Eastern governments which had the effect of preventing plaintiffs from exploiting an offshore oil concession which they held. The court held that the act of state doctrine required dismissal of the suit.[16] Prior to ruling on the act of state defense, the court considered the defense that the questioned lobbying efforts were protected by *Noerr-Pennington* doctrine. Judge Pregerson argued that they were not. After reciting the rationales for the doctrine expressed by Justice Black in the original *Noerr* opinion, Judge Pregerson noted the doctrine's general concern with preserving the proper relationship between government and private parties in the *American* political system, observing that "*Noerr* has been held inapplicable to situations in which this relationship has not been deemed threatened."[17] Remarking that "[t]he persuasion of Middle Eastern States alleged in the present case is a far cry from the political process with which *Noerr* was concerned," Judge Pregerson concluded that "the interests asserted

13. For expressions of this analysis of the application of the *Noerr* rationales in the foreign context, *see, e.g.*, Devine, *Foreign Establishment and the Antitrust Law: A Study of the Antitrust Consequences of the Principle* [sic] *Forms of Investment by American Corporations in Foreign Markets*, 57 NW. U.L.R. 400, 419 n. 87 (1962) ("it is doubtful whether the American Constitution should or would be interpreted as guaranteeing American nationals a right to petition foreign powers"); Simson, *supra* note 4, at 248 n. 75; *Immunities, supra* note 4, at 500 n. 62 ("the inherent inapplicability of the *Noerr* reasoning to foreign conduct with a foreign sovereign leads to the conclusion that *Noerr* may be of little value to antitrust defendants [lobbying abroad]").

14. 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).

15. The court refused, without analysis, to apply the *Noerr-Pennington* doctrine to protect persuasion of a foreign government in *United States v. AMAX, Inc.*, 1977-1 Trade Cas. ¶ 61,457, at 71,799 (N.D. Ill. 1977). *But see* Farmer, *An Overview of the Justice Department's International Operations Guide*, 5 TRADE REG. REP. (CCH) ¶ 50,325, at 55,688-89; Griffin, *supra* note 4, at 252 (each arguing that the *AMAX* court considered the *Noerr-Pennington* doctrine applicable to protect persuasion of foreign governments).

16. This aspect of *Occidental Petroleum* is discussed *infra* notes 61-63.

17. 331 F. Supp. at 108, citing *George R. Whitten, Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 32-33 (1st Cir. 1970); *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755, 758 (9th Cir. 1970); *Woods Exploration & Producing Co. v. Aluminun Co. of America*, 438 F.2d 1286, 1296 (5th Cir. 1971); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters and Helpers Local No. 150*, 440 F.2d 1096, 109' (9th Cir. 1971).

in this case are dissimilar to these that *Noerr* was concerned with safeguarding; therefore, the wholesale application of that exception to the Sherman Act appears inappropriate."[18]

Judge Pregerson's dictum in *Occidental Petroleum* can be read as leaving some room for application of the *Noerr-Pennington* doctrine in a foreign context. It is apparent that *some* foreign governmental systems endeavor to maintain a relationship between private parties and the government analogous to that which the American governmental system seeks to maintain. Some of these foreign governmental systems seek to do so by encouraging governmental representatives to be accessible to private parties; others protect the right of private parties to petition the government; others do both. In cases involving foreign governmental systems such as these, the private inducement of the foreign government to perform an anticompetitive act may not be a far cry at all from the political process with which *Noerr* was specifically concerned. While the propositions on which *Noerr* rested, then, are undeniably not of universal foreign application, they are just as undeniably not devoid of applicability abroad. It can thus be powerfully argued that, while a wholesale application of *Noerr-Pennington* protection in the foreign context would indeed be theoretically inappropriate, a wholesale denial of the doctrine's international relevance is similarly illogical.

The above reasoning led Professor Areeda to suggest that *Noerr-Pennington* protection ought to extend to petition of *democratic* foreign governments.[19] His thinking rests on the notion that governmental systems similar to that of the United States are far more likely to encourage governmental representatives to be accessible and to protect the right of petition then are essentially dissimilar governmental systems; intuitively, *Noerr's* analysis would seem to make sense in the context of a representative democracy but not in the context of a dictatorship. However, it has quite rightly been said that determining which countries qualify as "democracies" would be a difficult task for any court to undertake.[20] Moreover, it can scarcely be denied that a foreign govern-

18. 331 F. Supp. at 108.

19. AREEDA, *supra* note 1, at ¶ 192.

20. "[I]f the test were whether a country had a body of elected representatives whose primary function was to make policy decisions, a large number of Communist-bloc countries would have to be included. If the objection is made that in those countries the elections are one-sided and the 'legislature' automatically ratifies the decisions of party leaders, the same commentary can be made about the excessive strength of a few political parties and the strict adherence to party line exhibited by legislators in many countries traditionally considered democracies. Though there are certainly many elements which distinguish one system from the other, this example indicates the difficulty of employing a checklist to determine whether or not a country is a 'representative democracy.' The burden on courts of making such highly subjective judgments, would be tremendous." *Lobbyists, supra* note 4, at 1275-76 n. 123. A similar conclusion is reached in Farmer, *supra* note 15, at 55,689: "I find it exceedingly strange that a court could base a ruling upon such a characterization of the essential quality of a foreign government . . . ."

mental system may at bottom be entirely as democratic as that of the United States, but simply not share the American system's concern with protecting private parties' access to governmental representatives and right to petition.[21] Professor Areeda's classification for the extraterritorial reach of *Noerr-Pennington* does not, then, seem well reasoned.

The fundamental weaknesses of this notion that *Noerr-Pennington* protection should extend to persuasion of foreign democracies, when coupled with the undeniable conclusion that the *Noerr* rationales have some application in the international context, have led other commentators to suggest that *Noerr-Pennington* be given virtual across the board application to protect persuasion of foreign governments.[22] Their suggestion simply is that, since the *Noerr* rationales do apply to some foreign governmental systems, though it is impossible to tell to which, the doctrine ought to be extended to protect persuasion of all foreign governments. The rule proposed by this argument is attractive only insofar as it possesses the virtues of simplicity and clarity. The solution is not a solution at all, because it has been reached only by begging the central question: In what specific circumstances are the *Noerr* rationales applicable to private persuasion of foreign governmental action? It is no answer to this question to suggest that by extending *Noerr* to all circumstances involving foreign lobbying, one has assuredly extended the doctrine's protection to the particular situations where *Noerr's* rationales in fact apply. For this reason, the wholesale extension of *Noerr-Pennington* protection to the foreign context affords no theoretical satisfaction whatsoever.

The problem of the extraterritorial application of the *Noerr-Pennington* doctrine ought to be understood and analyzed as a choice of law problem. The Supreme Court did not base its decision in *Noerr* on the fact that the American governmental system is democratic. The *Noerr-Pennington* doctrine results from the Court's conclusion that, as a matter of American law, the right of private parties to have free access to their governmental representatives and to petition the government may not be infringed by an act of Congress; the Court

21. By the same token, an ironclad dictatorship, perhaps lacking the contact with private parties provided by the mechanism of elected representatives, might well have a greater interest in protecting the right of private parties to petition the government directly than even the so-called "democracies." *See Lobbyists, supra* note 4, at 1276.

22. For commentaries which either reach this conclusion expressly or imply it, *see, e.g.*, Farmer, *supra* note 15, at 55,688-89; Graziano, *supra* note 4, at 132; Rahl, *supra* note 4, at 10-11. *See also* ANTITRUST GUIDE, *supra* note 12, at 63. Professor Areeda himself appears to have discarded the "democratic governments rule" for the foreign extension of *Noerr*. He now seemingly feels that the doctrine ought to be fully extended to the international context, reasoning that "every government, whether representaive or not, is privileged to set the terms on which persons within its borders may seek its legislation, decrees, or other sovereign action." 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 239, at 275 (1978) (hereinafter cited as AREEDA & TURNER).

accordingly refused to read the antitrust laws as in any way being intended to limit these rights. Thus, the problem of applying *Noerr* to a foreign context need not, and ought not, be thought to revolve around the question of whether the foreign government involved is, as a matter of fact, "democratic;" such was not the inquiry in the original *Noerr* opinion.

Where an antitrust complaint questions a private party's persuasion of a particular foreign governmental action, *Noerr-Pennington* analysis ought to proceed as follows. The court should begin by considering whether the antitrust laws are as a general matter applicable to the questioned conduct: Did the persuasion result in a direct and substantial anticompetitive effect on American commerce?[23] If so, American law prohibits the questioned conduct. The court should then refer to the law of the foreign state whose government was the object of the questioned persuasion: Does the law of that foreign state (like American law) protect the right of private parties to enjoy free access to governmental officials and to petition the government? If it does, then foreign law protects the questioned conduct, and a classic choice of law problem is posed. If it does not, no conflicts problem exists, and the court should proceed to apply the American antitrust laws to the questioned conduct. The inquiry into whether foreign law protects the anticompetitive persuasion may indeed often be a difficult one.[24] However, this is the type of inquiry in which courts are constantly forced to engage. Any time a court faces a choice of law problem which ultimately requires it to apply the law of another jurisdiction, the court must proceed to determine what the foreign jurisdiction's law is. The virtue of this rule is that it involves the court in a strictly legal inquiry, which, though it may be difficult, at least is of the sort with which courts are familiar. This is far more satisfactory from a practical point of view than asking a court to entertain the essentially philosophical question of whether a given governmental system is democratic. The rule is as well far more theoretically appealing than any of the mechanical rules which have been suggested, because it is explicitly directed towards determining the specific fact situations wherein the *Noerr* rationales may justifiably be said to apply abroad.

23. One interesting commentary suggests that the *Noerr-Pennington* issue would never be reached where plaintiff complains of the persuasion of a foreign government, simply because the court would find that the plaintiff's injury was not caused directly by the defendant's petition, but rather by the foreign government's action in response to that petition. 1 AREEDA & TURNER, *supra* note 22, ¶ 239, at 275. However, the cases consistently suggest that, but for the *Noerr-Pennington* immunity, antitrust liability would attach to defendant's conduct, indicating that the courts perceive the persuasion to be a direct enough cause of plaintiff's injury where a state or the federal government is solicited. *See, e.g., Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 361 U.S. 127, 136-37 (1961). It is difficult to see why the perception should change where the object of the persuasion is a foreign government.

24. This will not always be the case, however. For example, a foreign court inquiring into American law would have little difficulty in concluding, on the basis of *Noerr*, that the right to petition the government is protected by law in this country.

Given a particular case where the antitrust laws prohibit the anticompetitive persuasion, yet the foreign law protects such persuasion from prohibition, the problem then becomes one of deciding which state's law to apply to the questioned conduct. A possible means of resolving the problem would be through reference to modern choice of law methodology, which would suggest an interest balancing approach. The important factors to be considered in striking the balance would seem to include (1) the vital national interests of each of the states whose law is concerned, and (2) the hardship that enforcement of one state's law over that of the other would impose on the parties.[25] It must be conceded that these factors do not point to a clear solution. A foreign state whose law protects rights of petition and of access to representatives undeniably has a vital interest in seeing those rights protected from infringement. It can fairly be argued however, that the enforcement of the antitrust laws, their purpose being the preservation of the traditional American economic system,[26] is of equally vital importance to the United States. An antitrust plaintiff who has suffered a direct and substantial harm on account of the defendant's intentional conduct to cause that harm would certainly undergo a great hardship were the defendant's conduct not made subject to the antitrust laws; but substantial hardship would be inflicted on the defendant who is denied (by virtue of the American antitrust laws) the exercise of certain rights in a foreign state whose law explicitly prohibits such denial.

Fortunately, a functional resolution to this dilemma is afforded by reference to the largely similar balancing process which the Supreme Court undertook (albeit in a purely domestic context) in *Noerr*. There the Court, by declining to read the Sherman Act as being intended to limit the protected rights of petition and access to representatives, implicitly concluded that these protected rights outweighed the otherwise applicable antitrust laws. In view of the balance struck in *Noerr,* it would seem highly unlikely that an American court could reasonably argue that a foreign law which protected similar rights does not outweigh the proscriptions of the Sherman Act. Such a conclusion would put the court in the incredible position of finding these rights to be somehow

25. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965), *infra* note 37. Section 40 also suggests that the territory where the questioned conduct occurs and the nationality of the persons whose conduct is questioned are as a general matter relevant factors to striking the balance. They are of doubtful relevance in resolving the problem at hand, however. In the case of persuasion of a foreign government, the questioned conduct will invariably occur in the territory of the foreign state. While nationality might be relevant to determine whether the substantive law of the foreign state protects the questioned conduct (for example, the foreign law may protect only the right of *citizens* to petition the government), American nationals would be put at an unfair disadvantage with respect to their foreign counterparts if denied (solely on account of their American citizenship) free exercise of rights ostensibly enjoyed by all persons operating within the given foreign governmental system.

26. *See Lobbyists, supra* note 4, at 1276.

of less "vital importance" when guaranteed by a foreign government than when guaranteed by the American government. Surely this is the kind of line-drawing in which no court should or would be willing to engage.

Noerr-Pennington protection should thus be extended to private persuasion of an anticompetitive foreign governmental action only when the law of the foreign state (like American law) provides special protection for the right to petition the government. In conclusion, it should be noted that under the reasoning here *Noerr-Pennington* protection would be extended to protect lobbying abroad only as long and as far as the doctrine continues to protect lobbying in the United States. If, for example, *Noerr* is reversed in the domestic context,[27] such reversal would amount to a rebalancing of the antitrust laws against the right of petition; following the argument made above, the differing result obtained from such rebalancing should certainly be carried over to the international context to deny any application of *Noerr-Pennington* protection abroad.

Similarly, current "exceptions" to the domestic applicability of the *Noerr-Pennington* immunity, representing particular situations where the facts of the case require that the balance of considerations struck in *Noerr* be reversed, should be carried over into the international context along with *Noerr* itself. One such exception states that antitrust liability can not be avoided when the questioned persuasion, ostensibly intended to get the government to impose an anticompetitive restraint, is in fact a "sham" concealing a direct restraint imposed by the private parties themselves. If there is in fact no real communication with one's representatives or petition of one's government, there is no reason to apply a rule based on protecting the right to such communication and petition.[28] A rather more significant exception to *Noerr-Pennington* may exist on the basis of *Continental Ore Co. v. Union Carbide and Carbon Corp.*[29] *Continental Ore* arguably limits the *Noerr-Pennington* defense by

27. Some commentators, in the wake of the Supreme Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), have concluded that the *Noerr-Pennington* doctrine is indeed on the wane and may be headed for ultimate reversal. *See, e.g.*, Simson, *supra* note 4, at 248-49 n. 75; Note, 12 VA. J. INT'L L. 413, 418 n. 21 (1972). *Trucking Unlimited* is discussed *supra* note 9 and *infra* note 28.

28. The requirement that the solicitation be "bona fide", as opposed to a "sham" concealing a direct restraint imposed by the parties themselves, is important. The Court recognized from the outset (in *Noerr*) that the immunity could not apply to "illusory" lobbying efforts. "There may be situations in which a publicity campaign, ostensibly directed towards influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), gave greater content to the "sham" exception to the *Noerr-Pennington* immunity with its holding that "a pattern of baseless, repetitive claims" may amount to an "abuse" of the administrative or judicial processes such that the conduct could not be immunized as an exercise of protected political expression. 404 U.S. at 513.

29. 370 U.S. 690 (1962).

distinguishing "associations for the purpose of influencing the passage or enforcement of laws" (the original *Noerr* formula)[30] from persuasion of a government to use its "discretionary" powers to anticompetitive ends.[31] The former is shielded from antitrust liability, the latter is not. A third exception may have been signalled by *Cantor v. Detroit Edison Co.*[32] *Cantor* would appear to rule that there is no antitrust immunity conferred by *Noerr* in one of two situations — either (1) where a private party induces a government to compel the private party itself to take anticompetitive actions or (2) where a private party, as opposed to persuading a government to act in an anticompetitive manner, instead itself performs an anticompetitive action to which a government merely acquiesces. Each rule fits the facts of the *Cantor* case; it is unclear however, whether the Supreme Court intended to endorse both rules, or just the second one.[33] The "sham," *Continental Ore,* and *Cantor* exceptions should be carried over into the international context along with *Noerr* itself. The protection foreign law accords to anticompetitive persuasion of the government should not shield questioned conduct from antitrust liability any more or any less than the protection given by American law to such lobbying shields such conduct in the domestic context.

The Act of State Defense

In recent years the "act of state doctrine" has been pleaded several times as a defense against an antitrust claim where the questioned anticompetitive conduct in some way involves acts by foreign governments and inducement of those acts by private parties. There would appear to be substantial theoretical problems with the notion that the act of state doctrine can amount to a defense to antitrust liability at all, and thus there are significant difficulties involved in applying the doctrine in the context of private inducement of a foreign governmental action. Much of the difficulty in applying the act of state doctrine to antitrust claims appears to have developed as a direct result of a failure properly to

30. 365 U.S. at 137.

31. The various interpretations of *Continental Ore's* ruling with respect to the *Noerr-Pennington* defense are discussed *supra* note 12. The viability of this interpretation, and hence of the "discretionary action" exception, is clouded by the Supreme Court's opinion in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), where *Noerr-Pennington* protection is extended (by way of dictum) to persuasion of administrative and judicial actions. *See supra* note 9.

32. 428 U.S. 579 (1976). In *Cantor*, the Supreme Court denied antitrust immunity to a regulated utility accused of "tying" light bulbs to its electricity sales by distributing bulbs "free" while in fact recovering bulb costs through the charge for electricity. The utility claimed the immunity on grounds that the light bulb program had been approved (at the utility's solicitation) by the state Public Services Commission, and that — once approved — the utility was obligated by law to obey it.

appreciate the doctrine and the manner by which it operates. This section thus begins by discussing the act of state doctrine generally, and then proceeds to consider the question of the act of state doctrine as a defense to antitrust liability.

The Act of State Doctrine Generally

The classic statement of the American act of state doctrine[34] appeared in the case of *Underhill v. Hernandez.* There Chief Justice Fuller, writing for a unanimous United States Supreme Court, declared:

> 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.[35]

The act of state doctrine, then, may be invoked as a defense to an action which questions the validity of foreign governmental acts. It may be useful at the outset to distinguish the act of state doctrine from two entirely different defenses which also focus on foreign governmental acts: sovereign immunity and sovereign compulsion. Each is often confused with the act of state doctrine. Sovereign immunity is a procedural defense, under which in certain circumstances an American court will decline to exercise jurisdiction over a party to a given action on account of the fact that the party is a foreign sovereign government or an instrumentality of such a government.[36] Sovereign compul-

33. The second rule would appear to make a good deal of sense, appearing to be analogous to the "sham" exception. The parties are in effect using the governmental acquiesence as a "sham" to cover up the anticompetitive restraint which they themselves have directly imposed. As no bona fide governmental *action* was induced, the private parties ought not be able to interpose their right to induce as a shield to antitrust liability. There is much in the *Cantor* opinion, however, which intimates that the first rule is indeed the basis for the decision. The *Cantor* Court concluded that the utility's state-imposed duty to honor the tariff once approved was not protected by *Noerr* because the utility had solicited the tariff itself — in effect inducing its own compulsion. Read this way, *Cantor* would seem to represent a major restriction of traditional *Noerr* protection. *See* 1 AREEDA & TURNER, *supra* note 22, ¶ 215, at 94-95. There does not appear to be much in the way of logic to commend a distinction which allows the right of petition to be exercised to propose a law which forces one's competitors to take certain action, but not to propose a law which forces the petitioner himself to take certain action.

34. The commentaries on the act of state doctrine generally are more than numerous. For two of the most analytically useful, *see* Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967); Kirgis, *Act of State Exceptions and Choice of Law,* 44 COLO. L. REV. 173 (1972). For recent analyses of the doctrine, the cases, and the literature, *see* Rabinowitz, *Viva Sabbatino!*, 17 VA. J. INT'L L. 697 (1977); Swan, *Act of State at Bay: A Plea on Behalf of the Elusive Doctrine*, 1976 DUKE L.J. 807; Comment, *The Act of State Doctrine: A History of Judicial Limitations and Exceptions,* 18 HARV. INT'L L.J. 677 (1977) (hereinafter cited as *Limitations*).

35. 168 U.S. 250, 252 (1897).

36. The American doctrine of sovereign immunity originated with Chief Justice Marshall's famous opinion in *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812). For a general analysis of the law of sovereign immunity in the United States, *see* T. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION (1970). The United States has long

sion is a substantive defense which in certain circumstances will shield a private party from liability for otherwise unlawful conduct because the party's questioned conduct is viewed as having been "compelled" by a foreign sovereign government or the law of a foreign sovereign state.[37] Neither of those defenses

---

held to the restrictive theory of sovereign immunity, whereby the court is required to decline jurisdiction only with regard to a foreign sovereign's public or governmental, as opposed to private or commercial, activities. *See* Letter from Jack B. Tate, Acting Legal Adviser of the Department of State, to Philip B. Perlman, Acting Attorney General, May 19, 1952, *reprinted in* 26 DEP'T STATE BULL. 984 (1952). Congress codified the restrictive theory of sovereign immunity in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602 *et seq., reprinted in* 15 INT'L LEGAL MATS. 1388 (1976).

The doctrine of sovereign immunity and the act of state doctrine do rest largely on the same policy notions; both were created by the judiciary out of a concern to preserve comity among nations and the proper division of power among the branches of the United States government. *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972). *See also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705 (1976). However, the rationales behind each are not coterminous; thus, in *Dunhill* a majority of the Supreme Court refused to endorse a restrictive theory of the act of state doctrine analogous to the restrictive theory of sovereign immunity. *But see* ANTITRUST GUIDE *supra* note 12, at 55 (endorsing a restrictive theory of the act of state doctrine on the basis of the Foreign Sovereign Immunities Act of 1976).

37. *See, e.g., Interamerican Refining Corp. v. Texas Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970). *Interamerican Refining* appears to be the only case to recognize sovereign compulsion as an absolute defense to antitrust liability. The across-the-board rule developed in this case has been criticized by the Antitrust Division of the Department of Justice (*see* ANTITRUST GUIDE, *supra* note 12, at 52) and by commentators (*see, e.g.,* Rosenthal, *The Antitrust Perspective,* 12 J. INT'L L. & ECON. 263, 266 n. 1 (1978); *Immunities, supra* note 4, at 504). Other cases suggest that the sovereign compulsion defense will attach to shield only anticompetitive acts performed *within the territory* of the compelling sovereign from antitrust liability. This rule traces to the Imperial Chemical Industries (ICI) litigation. In a judgment designed to give effect to an antitrust enforcement decree against ICI, a United Kingdom corporation, the court stated that "[n]o provision of this judgment shall operate against [ICI] for action taken in compliance with any law of the United States Government, or of any foreign government or instrumentality thereof, to which [ICI] is at the time being subject, and concerning matters which, under the law of the United States, such foreign government or instrumentality thereof has jurisdiction." *Quoted in British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, 3 All E.R. 88, 92 (1954). Several other courts have reached identical solutions in framing enforcement decrees pursuant to finding violation of United States antitrust laws by individuals or corporations acting abroad. *See, e.g., United States v. General Electric Co.*, 115 F. Supp. 835 (D.N.J. 1953), where the court limited the application of the enforcement decree to N.V. Philips' Gloeilampenfabrieken (Philips), a Dutch company, by stating that "Philips shall not be in contempt of this judgment for doing anything outside of the United States which is required or for not doing anything outside of the United States which is unlawful" under Dutch law or under the law of any other state in which Philips might do business. 115 F. Supp. at 878. In *United States v. Holophane Co.*, 119 F. Supp. 114 (S.D. Ohio 1954), the court found certain patent and trademark licensing agreements between Holophane and its foreign subsidiaries illegal under Section 1 of the Sherman Act. The court's enforcement decree, *United States v. Holophane Co.*, 1954 Trade Cas. ¶ 67,679 (S.D. Ohio 1954), provided that nothing in the court's requirement that Holophane commence to export its products into its subsidiaries' territories "shall be construed as requiring the exportation by Holophane of any such products in violation of the valid patent or trade-mark or trade-name rights of any person in any foreign country." Intriguingly, an equally divided Supreme Court affirmed this clause *per curiam. Holophane Co. v. United States,* 352 U.S. 903 (1956). Finally, in *United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. 1962); *order modified,*

depends for its application on the claim calling into question the validity of an action by a foreign government; at bottom, it is this feature which distinguishes the act of state doctrine.

The act of state doctrine is best understood, both in light of its course of development and in terms of its role in American jurisprudence today, as a complex rule having two components: a choice of law principle rooted in modern notions of choice of law methodology and a principle of comity arising from the respect thought to be owed to one sovereign by another. The doctrine operates as follows. A claim is brought which questions the validity of a public act of a foreign government — an "act of state."[38] Under the act of state doc-

---

1965 Trade Cas. ¶ 71,352 (S.D.N.Y. 1965), the court found a complex network of agreements and practices among Swiss and American watchmakers to violate Section 1 of the Sherman Act. In modifying its final judgment ordering termination of the anticompetitive agreements and practices, the court provided that nothing in the final judgment should be deemed to prohibit any defendant from (1) performing any act in Switzerland which is required of it under the law of Switzerland, or (2) refraining from any act which is illegal under the law of Switzerland. *See also Sabre Shipping Corp. v. American President Lines, Ltd.*, 285 F. Supp. 949 (S.D.N.Y. 1968). There Judge Ryan said that defendants' proof that their alleged unlawful anticompetitive activities were performed at the direction of their home government "would not necessarily immunize them from prosecution or civil responsibility for *acts done in United States commerce.*" 285 F. Supp. at 954 (emphasis added). The Department of Justice has accordingly concluded, in opposition to *Interamerican Refining*, that the sovereign compulsion defense is not applicable to acts performed within the United States. *See* ANTITRUST GUIDE, *supra* note 12, at 52. It can be expected that the Department will in the future adhere to this position in deciding what actions to bring and in making enforcement decisions. *See, e.g., United States v. Bechtel Corp.*, No. C-76-99 (N.D. Cal. 1976).

The best solution to the sovereign compulsion problem would seem to be one which steers away from the mechanical theories of the district court in *Interamerican Refining* or of the Department of Justice (as expressed in the ANTITRUST GUIDE), in favor of an interest balancing approach along the lines proposed in RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40. Section 40 provides:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship the inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Several commentators have endorsed this approach as being the superior method of resolving sovereign compulsion cases. *See, e.g.*, Rosenthal, *Antitrust Jurisdiction and the Activities of Foreign Governments*, Dep't of Justice Press Release at 8 (Jan. 29, 1976); *Immunities, supra* note 4, at 504-06.

38. The requirement of a bona fide governmental act is important. In *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), the majority opinion of the Supreme Court gave content to the "public act" requirement, by refusing to apply the act of state doctrine on the

trine, the court first must choose whether to apply foreign law (the law of the state whose government's act is questioned) or some other law to the questioned governmental act.[39] If the choice is foreign law, the court then applies it to the act by invoking the comity component of the doctrine and, assumes that the foreign government's act is valid under its own law. If the choice is some other law the court proceeds to decide, by reference to normal choice of law rules, what other law is to be applied and applies it to the acts in question.[40] The comity component never arises.

The course of the development of the choice of law component of the act of state doctrine mirrors the development of modern choice of law methodology. Chief Justice Fuller's broad statement of the doctrine in *Underhill v. Hernandez* flows from the traditional conflicts rule of *lex loci delecti*: the law of the place of the allegedly wrongful act determines whether a person has sustained a legal injury.[41] In recent decades widespread disaffection from the rule of *lex loci delecti* has developed. Many commentators objected that while the rule afforded a large degree of predictability of result, its inexorable reference to the law of the place of the conduct often led to inequitable results. Many times one state's law would have to be applied to decide a case in which that state could only be said to have a minimal interest, particularly in view of the

---

ground that the conduct in question did not amount to a "public act of those with authority to exercise sovereign powers." 425 U.S. at 694. In *Dunhill*, the Court concluded that a commercial governmental agency's refusal to return certain mistakenly tendered funds could not constitute an act of state. The Court felt that by its refusal Cuba had simply asserted its superior right to the funds, not acted to seize them. Justice Marshall was not impressed with this distinction. "Under any realistic view of the facts of this case, the interventors' retention of and refusal to return funds paid to them by Dunhill constitute an act of state . . . ." 425 U.S. at 716 (Marshall, J., dissenting).

39. The "choice of law" component of the act of state doctrine is often overlooked in favor of the "comity" component. Recognition of this component, however, is essential to understanding the proper application of the act of state doctrine as a defense to the American antitrust laws. The clearest recognition of the choice of law component among the leading cases is in *Ricaud v. American Mutual Co.*, 246 U.S. 304 (1918), where the Supreme Court said that an action taken by a foreign government within its own boundaries becomes "a rule of decision for the courts of this country." 246 U.S. at 310. For a detailed discussion of the choice of law component, *see* Kirgis, *supra* note 34. *See also* Henkin, *supra* note 34, at 187; Simson, *supra* note 4, at 251.

40. If the court has been "freed" from applying foreign law by an "exception" to the act of state doctrine, it is also freed from assuming the validity of the foreign sovereign's act under its own law. Consider that the subsequent reference to ordinary choice of law rules might itself require the court to choose to apply foreign law; but this time there is no "assumption of validity" attached to that choice. The logical result would be that the court would examine the validity of the foreign government's act under the law of the foreign state. *See* Kirgis, *supra* note 34, at 189. Not surprisingly, there appear to be no cases where an American court has reached this bizarre, though theoretically reasonable, result.

41. *See* RESTATEMENT OF THE CONFLICT OF LAWS §§ 377-78 (1934) for the relevant tort rules. For particularly vigorous and eloquent arguments for the absolute applicability of the *lex loci delecti* principle, *see, e.g., American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Slater v. Mexican National R.R. Co.*, 194 U.S. 120, 126 (1904).

apparent interests of one or more other states.[42] Consequently, a new approach has evolved, which generally speaking attempts to choose the applicable law through an "interest balancing" mechanism. Now, the law of the jurisdiction which may be said to have the greatest interest in the case will normally be applied.[43] Clearly, the balance of factors relevant to a determination of which jurisdiction has the greatest interest will not always come down on the side of the jurisdiction where the questioned conduct occurred — so perishes the rule of *lex loci delecti.*[44]

The current operation of the choice of law component of the act of state doctrine tracks this general trend in choice of law methodology. The modern version of the choice of law component was signalled in *Banco Nacional de Cuba v. Sabbatino.*[45] Justice Harlan's majority opinion in *Sabbatino* evinces a clear understanding of modern choice of law methodology and the effect it should have on the traditional workings of the act of state doctrine. In *Sabbatino,* Banco Nacional de Cuba had brought an action to recover on certain contract rights which had been expropriated by the Cuban government from a Cuban corporation and subsequently assigned to the bank. The respondent defended against the bank's claim on the ground that the act of expropriation was illegal, and that Banco Nacional de Cuba thus did not validly hold the rights on which it brought the action.

Sabbatino could easily have been resolved had the Court held to the *Underhill v. Hernandez* version of the act of state doctrine's choice of law component, which on the one hand required American courts to apply the law of the foreign state to acts of its government done within its territory, while on the

42. *See, e.g.,* Cavers, *A Critique of the Choice of Law Problem,* 47 HARV. L. REV. 173 (1933); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws,* 10 STAN. L. REV. 205 (1958); Yntema, *The Hornbook Method and the Conflict of Laws,* 37 YALE L.J. (1928). *See generally* CAVERS, THE CHOICE OF LAW PROCESS 59-87 (1965); VON MEHREN & TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 24-59, 102-48 (1965).

43. *See, e.g., Neumeier v. Kuehner,* 31 N.Y.2d 121, 335 N.Y.S.2d 64 (1972); *Babcock v. Jackson,* 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963).

44. For the general modern approach to choice of law methodology, *see* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 6, 145,188 (1971). Section 6 lists the general choice-of-law principles, suggesting an interest balancing approach. Section 145 recites the general principle for choice of law in tort, listing the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, place of incorporation and place of business of the parties, and the place where the relationship (if any) between the parties is centered as relevant factors to make the determination. Section 188 cites the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the nationality or domicile or place of business of the parties as relevant factors entering into the determination of choice of law in contract. For the application of this methodology to the situation where two sovereign states prescribe rules of law which require inconsistent conduct by a private person, *see* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965), *supra* note 37.

45. 376 U.S. 398 (1964).

other allowed American courts to apply "some other law" to such acts when effected outside of the state's territory. In *Sabbatino,* the respondent's defense asked the Court to apply "some other law" (namely, "international law") to an act of the Cuban government (the expropriation) performed within Cuban territory. Under the traditional rule, such an application was clearly beyond the Court's power.

However, the *Sabbatino* Court expressly rejected "laying down or reaffirming an inflexible and all-encompassing rule" such as that of *Underhill v. Hernandez,* and consequently declined to adjudicate the case on the basis of its version of the choice of law component. Rather, the Court suggested that henceforth the choice would be made according to "[T]he balance of relevant considerations," wherein the territory where the questioned act of state occurs, while remaining an important factor, is no longer automatically decisive of the issue.[46]

As a consequence of the general trend towards what might be called "modern" choice of law methodology, and particularly in the wake of the *Sabbatino* Court's incorporation of that methodology into the act of state doctrine, American courts have in recent years often been willing to apply "some other law" to judge the validity of acts of foreign governments done within their own territory. In accord with the Supreme Court's thinking in *Sabbatino,* each such decision rests on the premise that either the interest of the foreign jurisdiction is insufficient, or the interest of the United States is too great, to require application of foreign law to the act in question. Consequently, the law of the United States (be it domestic state law or "international law" as incorporated into domestic federal law) is applied.

The situations where such application of American law will occur have often misleadingly been labeled as "exceptions" to the act of state doctrine.[47] This description results from the fact that in these situations the court declines to invoke the comity component of the doctrine. In fact, when a court refuses to give effect to the comity component in this manner it ought to be understood as following the act of state doctrine (namely, *Sabbatino's* modern version of the choice of law component), rather then as following an *exception* to it. This point may be best illustrated by undertaking a brief review of the major modern "exceptions" to the act of state doctrine. The applicability of each is based on nothing more than a conclusion in a given case that the interests of the United States outweigh the interest of the foreign state; the court accordingly declines to give effect to the comity component of the doctrine, and instead applies American law to the questioned conduct.

46. 376 U.S. at 428.
47. *See, e.g., Limitations, supra* note 34.

The broadest of these "exceptions" is called the "Bernstein exception." It allows courts of the United States to sit in judgment of acts of foreign governments done within their own territories at the discretion of the United States executive branch.[48] The normal procedure is for the executive branch to send a letter to the court where the act of state doctrine has been raised as a defense, informing the court that in its estimation the act of state doctrine need not be applied in the particular case. The court, taking note of the "Bernstein letter," then declines to assume the validity of the foreign government's questioned act (that is, it declines to invoke the comity component of the doctrine) and instead determines the validity of the acts under the applicable (invariably American) law. The "Bernstein exception" is founded on the notion that the decision of which law to apply to acts performed by a foreign government necessarily requires a balancing of the relevant interests of the jurisdictions involved. The next step in the reasoning involves a recognition of the constitutional superiority of the executive branch with regard to matters of foreign policy and particularly that branch's peculiar expertise in and responsibility for relations with foreign states; the judiciary consequently concludes that it ought to defer to the executive's determination (if it expresses one) of whether the United States' interest in the case is great enough to choose not to apply the foreign state's law to acts of its own government.[49]

48. The "Bernstein exception" stems from *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij,* 210 F.2d 375 (2d Cir. 1954). In a previous case, *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1946), and in a prior appeal in this case, 173 F.2d 71 (2d Cir. 1949), the act of state doctrine had been applied to certain confiscations of Bernstein's property within Germany during the Nazi regime. Accordingly, the court first found German law to be applicable to the questioned acts, and then assumed the acts of the German government to have been legal under the law of Germany. Bernstein lost both actions. Following the 1949 decision, acting State Department Legal Adviser Jack B. Tate published a letter purporting "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." The 1954 case was Bernstein's new appeal on the basis of Tate's letter; there the court agreed to amend its 1949 decision ("in view of this supervening expression of Executive policy") by "striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question." 210 F.2d at 376.

49. The "Bernstein exception" was passed on in rather bizarre fashion by the Supreme Court in *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759 (1972). The case involved an action brought by Banco Nacional against Citibank to recover the excess on the sale by Citibank of the collateral on a loan on which Banco Nacional was the obligor. Citibank counterclaimed for the compensation allegedly owed to it by Cuba for the expropriation of its property there. Banco Nacional defended against the counterclaim on act of state grounds. There followed a "Bernstein letter" from the Department of State which said the act of state doctrine ought not be applied to Citibank's counterclaim. In an opinion by Justice Rehnquist, three members of the Court concluded that the "Bernstein letter" allowed abandonment of the act of state doctrine, and directed that Citibank's counterclaim be adjudicated by reference to "otherwise applicable legal principles." 406 U.S. at 768. Two other Justices, while concurring that Citibank's counterclaim ought to be adjudicated by other legal principles, denied that the State Department's letter ought to be a reason for doing so. 406 U.S. at 772-73 (Douglas, J., concurring); 406 U.S. at 773 (Powell, J., concurring). Four dissenting Justices, in an opinion by Justice Brennan, rejected the idea that the "Bernstein ex-

Two other "exceptions" to the act of state doctrine refer to *specific* types of acts of foreign governments in which the interest of the foreign state is deemed to be too small in view of the interests of the United States to require application of the foreign state's law. One arose out of the Foreign Assistance Act of 1964. Section 620(e)(2) of that Act requires the United States' courts to decline to apply the act of state doctrine (in favor of applying international law as incorporated into United States federal law) where a party asserts a claim of title or other right to property based upon a confiscation or taking in violation of "principles of international law."[50] The Supreme Court has never passed on the constitutionality of this portion of the Act or the validity of the principles of international law it codifies.[51] The rationale for this rule is simple: expropriations are absolutely contrary to American public policy, and thus are thought to be of particular interest to the United States; consequently, American courts will apply the law of the United States, rather than the law of the expropriating state, to determine their validity. Another so-called exception to the general rule may have been created or at least foreshadowed by *Alfred Dunhill of London, Inc. v. Republic of Cuba.*[52] There the Supreme Court's plurality opinion states that the act of state doctrine need not be applied where the acts in question are of a commercial nature (*jure gestionis*) as opposed to being of a "public" or "governmental" nature (*jure imperii*). That is, this exception deems commercial acts of a foreign government to be of insufficient interest to the foreign state to require the application of the law of that jurisdiction to them, and consequently allows American courts to judge their validity under the law of the United States.[53]

---

ception" amounted to a legitimate part of the operation of the act of state doctrine. On the whole, *Citibank*, while generally affirming the broad concept of situations in which "some other law" will be applied to the questioned governmental acts, hardly amounted to a ringing endorsement of the Bernstein exception itself.

50. This portion of the Act, 22 U.S.C. § 2370(e)(2), developed as a reaction to *Sabbatino's* holding that the act of state doctrine is applicable in the case of an expropriation; indeed, it is often referred to as the *Sabbatino* Amendment. The "principles of international law" which American courts are directed to apply by the *Sabbatino* Amendment describe foreign states' obligations regarding expropriated property as "including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof." 22 U.S.C. § 2370(e)(1).

51. In *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968), the Second Circuit upheld the constitutionality of the *Sabbatino* Amendment in general, and applied it to bar application of the "comity" component of the act of state doctrine. However, in applying "some other law" to the questioned acts, the court used its own principles of international law, and consequently did not reach the validity of the Congressional version.

52. 425 U.S. 682 (1976).

53. In *Dunhill*, the petitioner complained of Cuba's failure to return to it certain funds mistakenly paid to a Cuban government-controlled cigar manufacturer for cigars sold to the petitioner before the Cuban government's nationalization of the cigar industry. Payment should have been made to the prior owners. Justice White wrote a plurality opinion arguing that the questioned act here was commercial and that as a consequence the act of state doctrine ought not operate to require the application of Cuban law to judge its validity. A fifth member of the Court joined the

The choice of law procedure outlined above is one important component of the act of state doctrine. Once the doctrine operates to require the application of foreign law to the questioned acts, the "comity component" of the doctrine comes into play to facilitate that application. Unlike the choice of law component, the comity component has not changed at all since *Underhill v. Hernandez;* it still requires that the court assume the questioned acts of the foreign government to have been valid under its law.

The comity component is really the expression of what might be called the rationale behind the act of state doctrine — the judiciary takes concern to avoid possibly interfering with the conduct of foreign policy by the political branches of government.[54] As Justice Harlan put it in Sabbatino,

> 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.[55]

Thus, having decided that the law of the foreign state ought to be applied to the questioned acts of its government, the court will decline to usurp the apparent interpretation of that law made by the foreign government by replacing it with one of its own. It would seem that this policy of judicial restraint makes eminently good sense, particularly when connected with the choice of law component of the act of state doctrine. If the interest of the United States in the

---

plurality's judgment on grounds that there was no act of a foreign government involved in the Cuban refusal to return the money to Dunhill. A vigorous four member dissent written by Justice Marshall argued that the act of state doctrine ought to require application of Cuban law to the questioned act, because (1) the Cuban refusal to pay Dunhill was an act of a foreign government, (2) the act in question was governmental as opposed to commercial, and (3) even if the act were commercial, this ought not affect the operation of the act of state doctrine. There is considerable debate as to whether the "commercial exception" can be regarded as good law after *Dunhill.* In *Bokkelen v. Grumman Aerospace Corp.,* 432 F. Supp. 329 (E.D.N.Y. 1977), the court declined to apply the commercial exception because it did not consider the plurality opinion authoritative and did not find independent support for the rule. *But see Hunt v. Mobil Oil Corp.,* 550 F.2d 68, 72-73 (2d Cir.), *cert. denied,* 98 S. Ct. 608 (1977). In *Mobil Oil* the court apparently did not realize that *Dunhill's* commercial act rule did not command a majority of the Court. 550 F.2d at 72-73. *See also* ANTITRUST GUIDE, *supra* note 12, at 55, where the commercial act rule is regarded as good law on the basis of the Foreign Sovereign Immunities Act, *supra* note 36, which set up a commercial/governmental distinction for sovereign immunity.

54. This rationale for the doctrine is cited in similar form by nearly every modern case on the issue. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 697 (1976); *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759, 765 (1972); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 427-28 (1964); *Hunt v. Mobil Oil, Inc.,* 550 F.2d 68, 77-78 (2d Cir.), *cert. denied,* 98 S. Ct. 608 (1977); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.,* 549 F.2d 597, 605 (9th Cir. 1976); *Bokkelen v. Grumman Aerospace Co.,* 432 F. Supp. 329, 333 (E.D.N.Y. 1977).

55. 376 U.S. at 423.

questioned acts is too low to allow its law, rather than the foreign law, to be applied to them, it would be rather anomalous for a court to conclude that the United States' interest is nonetheless high enough to allow it to make an interpretation of the foreign law which flies in the face of the interpretation made by the foreign government itself.

The Act of State Doctrine as a Defense to Antitrust Liability

Ever since its pronouncement in *Underhill v. Hernandez,* and with increasing frequency in recent years, American courts have been required to face the question of whether and under what circumstances the act of state doctrine could constitute a defense to liability under the United States antitrust laws. In view of the preceding description of the general workings of the act of state doctrine, it would appear on its face to be of no applicability as a defense to antitrust liability. By its precise terms, the act of state doctrine purports to prevent an American court from judging the validity of the act of a foreign government in certain situations. But the United States antitrust laws have long been interpreted by the courts as being intended to restrain only *private* anticompetitive actions; they are thus inapplicable by their very terms to the anticompetitive acts of governments.[56] Consequently, an antitrust claim questioning the anticompetitive act of a foreign government would have to be dismissed for lack of subject matter jurisdiction under the antitrust laws themselves. An act of state defense would never be reached and would thus never have to be raised. On the other hand, an antitrust claim simply questioning the anticompetitive act of a private party would appear by its very nature to preclude employment of the act of state doctrine as a defense. The act of state doctrine only arises in the context of a claim questioning the validity of an act of a *foreign government*; it would thus seem to be of no moment to a claim questioning the validity of any act (anticompetitive or otherwise) of a private party.

56. By its terms the Sherman Act applies to "persons". In *Olsen v. Smith*, 195 U.S. 332 (1904), the Court ruled that "persons" did not include governments, and thus that state governments were immune from suit under the Sherman Act. This rule has been consistently followed. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Parker v. Brown*, 317 U.S. 341 (1943). It has never expressly been extended to immunize foreign governments as well, probably because such suits have always been barred in any event by the doctrine of sovereign immunity. It would seem difficult to justify a distinction under which foreign, but not state, governments would be regarded as "persons" in terms of the Sherman Act's proscriptions. Most commentators agree, then, that the Sherman Act is just not applicable to the conduct of governments, be they federal, state, or foreign. *See, e.g.,* BREWSTER, *supra* note 1, at 94; Fugate, *Antitrust Jurisdiction and Foreign Sovereignty,* 49 VA. L.R. 925, 932 (1962). *But see* Joelson & Griffin, *The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law,* 9 INT'L LAW. 617, 622-36 (1975); *cf. Pfizer, Inc. v. Government of India,* 98 S. Ct. 584 (1978) (holding that foreign governments are persons for the purpose of bringing treble-damage actions under Section 4 of the Clayton Act).

While the courts of the United States have, in accord with the preceding analysis, *never* applied the act of state doctrine to a claim attempting to attach antitrust liability to the acts of a foreign government, they have on the other hand frequently allowed the doctrine to be used as a defense to an antitrust claim questioning the acts of a private party. The first case in which the act of state doctrine was applied to shield a private party's anticompetitive conduct from antitrust liability was *American Banana Co. v. United Fruit Co.*[57] There the plaintiff alleged that Costa Rican soldiers and officials had seized its banana plantation in Panama. The plaintiff claimed that the expropriation was done at the instigation of the defendant, and that such instigation amounted to monopolization in violation of Section 2 of the Sherman Act. The Supreme Court unanimously held that these facts did not make out a cause of action under the Sherman Act. Justice Holmes partially rested the Court's opinion on what today we call the act of state doctrine. He argued that "[t]he substance of the complaint is that, the plantation being within *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power." Citing *Underhill v. Hernandez* for the proposition that "a seizure by a state is not a thing that can be complained of elsewhere in the courts," he concluded that "persuading a sovereign to do this or that cannot be a tort." In explaining this conclusion, Justice Holmes argued that "it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its own conduct to be desirable and proper." Since the very meaning of sovereignty is that the decree of the sovereign makes law, Justice Holmes reasoned that the government makes the persuasion lawful by its own act in response to it.[58]

In *American Banana* the acts complained of were not the acts of seizure by the Costa Rican government, but rather the acts of defendant United Fruit Company which ostensibly caused the seizure. As it did not ask the court to judge the validity of any foreign governmental act, on its face the plaintiff's case presented no act of state issue at all. But for Justice Holmes the close connection of *bona fide* acts of state with the acts complained of was enough. For the Court expressly to pass on the validity of United Fruit's acts would have, he thought, been for it implicitly to pass on the validity of Costa Rica's acts; it seemed impossible for the Court to condemn the persuasion without simultaneously condemning the result of the persuasion (the seizure). This argument does not appear to be well reasoned. What is the inherent logical problem in assuming or even declaring a foreign government's conduct to have been valid, while condemning as invalid a private party's attempt to influence

57. 213 U.S. 347 (1909).
58. *Id.* at 357-58.

or persuade that conduct? Surely no one would seriously argue that the illegality of one person's conduct inevitably makes every other person's conduct stemming from it illegal as well. It is consequently difficult to accept Holmes' argument that declaring one person's conduct to be wrongful is tantamount to declaring the ensuing conduct of another to have been identically invalid.

The inherent instability of this branch of *American Banana* may be carried a step further. Implicit in Justice Holmes' opinion is the notion that, at some point, a private party's conduct can become so closely identified with the acts of a foreign government that a declaration that the private parties had violated the American antitrust laws would be tantamount to saying that the foreign government had done so as well. But the antitrust laws apply only to *private* anticompetitive conduct; by the very terms of these statutes, *no* government, foreign or not, can violate them. It is thus nonsensical to argue that subjecting a private party to antitrust liability can ever amount to a judgment that a foreign government's actions were also invalid under the antitrust laws, even if their conduct was identical. The simple fact is that foreign governments are not subject to liability under the antitrust laws, and thus are just not capable of violating them. Consequently, nothing can conceivably amount to a declaration that they did violate them.

It was not until 1971, some sixty-two years after *American Banana,* that an American court directly passed on that case's rule that the act of state doctrine protects conduct inducing foreign sovereign acts from antitrust liability. Two Supreme Court cases had come close. In *United States v. Sisal Sales Corp.,* part of the anticompetitive conduct complained of was the defendants' procurement of favorable foreign laws; there the Court found antitrust liability on the basis of defendants' other anticompetitive conduct, leaving open the question of whether the procurement itself could make out an antitrust violation.[59] In *Continental Ore Co. v. Union Carbide & Carbon Corp.,* the plaintiff complained of defendants' procurement of a co-conspirator's anticompetitive actions, taken while exercising discretionary powers granted by a foreign government; in finding antitrust liability the Court failed to state clearly whether it

59. 274 U.S. 268 (1927). In *Sisal Sales*, three United States banking corporations organized Comisión Exportadora de Yucatan, a Mexican corporation organized to buy sisal in Mexico, and Sisal Sales corporation, an American corporation organized to sell sisal around the world. The United States alleged that the defendants conspired to solicit certain tax legislation from the Mexican governmental authorities, which when enacted, gave a natural advantage to Comisión Exportadora in Mexico. The complaint alleged that the defendants used this advantage to eliminate competition among Mexican producers, and then to fix prices for sisal worldwide. The Supreme Court held that these allegations made out an antitrust violation. It appears that the Court based its holding not on the defendants' solicitation of the new tax laws, but on their other anticompetitive conspiratorial conduct which culminated in the price fixing scheme.

regarded the co-conspirator's actions themselves to have been those of a foreign government.[60]

The first case to pass on *American Banana's* act of state holding was *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*[61] There plaintiff charged defendants with instigation of an international dispute over sovereign rights to a portion of the Persian Gulf where the plaintiff had oil concessions, consequently preventing him from exploiting those concessions. The plaintiff argued that defendants, who also had Persian Gulf concessions, had thus violated Sections 1 and 2 of the Sherman Act. Judge Pregerson correctly stated that "[t]he facts of [*American Banana*] are strikingly similar to those now before the court."[62] He consequently held, on the authority of that case, that the act of state doctrine barred a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by defendants, and consequently dismissed the suit. Not surprisingly, the court was able to cite little more than *American Banana* as authority for this position, although the court did say that *Sisal Sales* and *Continental Ore* "intimated" that *American Banana's* act of state holding had endured.

While arguing that the case ought to be dismissed solely on the grounds of the *American Banana* rule, the court developed an interesting rationale to support its dismissal of the suit. Noting that a private antitrust claim requires proof of damages resulting from the forbidden anticompetitive conduct, Judge Pregerson claimed the plaintiff could only prove damages by undertaking, and forcing the court to undertake, a close examination of the authenticity of and motivation behind certain acts of the foreign governments in question. Concluding that demanding such close examination of foreign governmental acts asked the court to "sit in judgment" of them as much as would demanding a declaration of their invalidity, the court decided that the act of state doctrine ought to bar the former as much as it would the latter.[63]

While it took sixty-two years for an American court to follow the act of state defense as laid down by Justice Holmes in *American Banana,* it required but three years for a court to follow the essentially identical version stated by Judge Pregerson in *Occidental Petroleum.* This was in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*[64] There plaintiff alleged that defendants had conspired to eliminate it from the lumber business in Honduras, and that as part of the conspiracy had solicited and obtained actions from the Honduran

60. 370 U.S. 690 (1962). *Continental Ore* is discussed *supra* note 12.

61. 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).

62. 331 F. Supp. at 109.

63. *Id.* at 110.

64. 549 F.2d 597 (9th Cir. 1976).

government which hurt the plaintiff's business there. The District Court dismissed the plaintiff's antitrust action on the authority of *Occidental Petroleum.*[65] On appeal the Court of Appeals again accepted the *American Banana/Occidental Petroleum* rule, but held it to be inapplicable to the facts of the case at hand, principally because the plaintiff's complaint alleged other agreements and actions (totally unrelated to those of the Honduran government) as being part of the illegal conspiracy. The court thus felt the complaint made out a *Sisal Sales* situation, and accordingly held that the act of state doctrine did not require its dismissal.[66]

The most dramatic accord with the *American Banana/Occidental Petroleum* rule appears in *Hunt v. Mobil Oil Corp.* There plaintiff, a Libyan oil producer, alleged that defendants, Persian Gulf crude oil producers, had conspired to manipulate the plaintiff's relations with the Libyan government so that the government eventually nationalized plaintiff's Libyan holdings, thereby diminishing competition for the Persian Gulf oil producers from the Libyan oil producers. The District Court held that the act of state doctrine required dismissal of the claim, on the basis of *American Banana* as confirmed by *Occidental Petroleum.*[67] The Court of Appeals affirmed, again citing *American Banana.*[68] But the court here seems to have gone rather beyond *American Banana*, in a direction signalled earlier by *Occidental Petroleum* — perhaps because Justice Holmes' "persuasion" rubric did not fit the terms of Hunt's claim well.[69] Thus, the court noted that Hunt, to prove damages, would have to examine, and would force the court to examine, the motivations of the Libyan government in passing the nationalization decree. Much as Judge Pregerson argued in *Occidental Petroleum,* the court declared that it could not "logically separate" examination of Libya's motivation for the seizure from examination of the validity of it, and consequently concluded that if the act of state doctrine bars the latter, it necessarily bars the former as well.[70]

As much as the *American Banana* principle seems unsupported by the terms

65. *Id.* at 601.
66. *Id.* at 608.
67. *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1976).
68. *Hunt v. Mobil Oil Corp.*, 550 F. 2d 68 (2d Cir.), *cert. denied,* 98 S.Ct. 608 (1977).
69. Hunt claimed that the seven major Persian Gulf oil producers had conspired to get him to agree to adopt a hard line in negotiations with the Libyan government, thus assuring that his property would be nationalized by Libya and that their Persian Gulf production would not be endangered by competition from Hunt's Libyan production. It seems rather difficult to label this alleged conduct of the seven as "persuasion" of the Libyan government to expropriate Hunt. It is still more difficult to say that by in fact nationalizing Hunt, the Libyan government intended to validate the persuasion, since it did not even know such persuasion existed. This probably explains the *Mobil Oil* court's discomfort with the *American Banana* rationale, and its use of the second *Occidental Petroleum* argument.
70. 550 F. 2d at 77.

of the act of state doctrine, the rule of *Occidental Petroleum,* as amplified by *Mobil Oil,* appears less so. Again, in these cases no foreign governmental acts were questioned, and hence no issue of the act of state defense appeared to be raised, by the plaintiffs' antitrust claims. Each court nevertheless dismissed the claim on act of state grounds. In explaining their actions, they went well beyond *American Banana's* fear that declaring the persuasion invalid would give a similar taint to the result of the persuasion. The *Occidental Petroleum* court decided that the plaintiff's case would require "inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns,"[71] and concluded that the act of state doctrine barred doing this as much as it barred judging the validity of foreign governmental acts under the law of the foreign state. The *Mobil Oil* court spoke in virtually the same terms: "[I]nquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog, [is] precluded by the act of state doctrine."[72]

These formulations of the doctrine go far beyond *American Banana,* where Justice Holmes reinforced the doctrine's basic premise that American courts ought not to declare foreign governmental acts to be invalid, but stretched that premise to proscribe implicit as well as explicit declarations of invalidity. Under the teachings of *Occidental Petroleum* and *Mobil Oil* the act of state doctrine forbids American courts from even examining foreign governmental acts. While inquiry into foreign governmental acts may indeed be a "Serbonian Bog," it is clear that such inquiry does not necessarily have anything to do with implicitly "judging the validity" of foreign governmental acts, and thus ought have nothing to do with the act of state doctrine. "Investigation" of conduct and "judging" of conduct are simply two entirely different procedures, of which it is virtually nonsensical to say they are "logically inseparable" (as the court does in *Mobil Oil*).[73] One is a process of collecting facts, the other is the entirely different process of applying legal principles and attaching legal labels to facts.

The theoretical problems with *Mobil Oil* and *Occidental Petroleum* are made apparent if one views them in terms of the choice of law component of the act of state doctrine. Only if the choice of law component directs the court to apply foreign law to the questioned acts does the comity component of the act come into play to require that the court decline to judge their validity. When the court in *Mobil Oil* states that the act of state doctrine requires it to decline to examine acts of a foreign government, it thus implies that the doctrine has already directed it to apply foreign law to make that examination. Clearly, it makes no sense to speak in such terms: substantive law is "applied" to acts to

71. 331 F. Supp. at 110.
72. 550 F. 2d at 77.
73. *Id.*

judge their validity, not to disclose them to the court. There being consequently no inherent theoretical reason why the examination of foreign governmental acts should amount to a judgment of their validity, the act of state doctrine ought not be thought to bar an American court from undertaking such examination.

The approach adopted by the courts in *Mobil Oil* and *Occidental Petroleum* is fundamentally unstable for another reason. The fact is that American law frequently *requires* American courts to receive evidence concerning the acts of foreign governments and the role played by American citizens is motivating such acts. One good example of a statute which requires the examination which *Occidental Petroleum* and *Mobil Oil* view to be forbidden is the Foreign Sovereign Immunities Act of 1976;[74] this legislation requires American courts to examine foreign governmental acts in terms of whether they are "commercial" or "public" in order to determine whether a defendant foreign sovereign will be accorded immunity with regard to those governmental acts.[75] A second example is the Foreign Corrupt Practices Act of 1977, which attempts to put an end to bribery of foreign governmental officials by American individuals and corporations.[76] Under this legislation it is unlawful for any American "domestic concern" to give anything of value to a foreign governmental official for the purpose of inducing such official to use his position to assist the business of the domestic concern.[77] Such a requirement inevitably will involve the courts in examining foreign governmental acts.

Indeed, even the operation of the act of state doctrine itself would seem to require the examination of foreign governmental acts. The majority opinion in *Dunhill* states that the very assertion of an act of state defense requires the court to investigate the nature of the conduct complained of to determine whether it amounted to a bona fide "public act."[78] The plurality opinion would have the court sink further into the "Serbonian Bog" by requiring it to extend the examination to a consideration of whether the questioned acts are "governmental" or "commercial" in nature.[79] And of course the *Sabbatino* Amendment

74. 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602 *et. seq.*, *reprinted in* 15 INT'L LEGAL MATS. 1388 (1976). *See generally* Congressional Committee Report on the Jurisdiction of United States Courts in Suits Against Foreign States, *reprinted in* 15 INT'L LEGAL MATS. 1398 (1976); Department of State Regulations Under the Foreign Immunities Act, *reprinted in* 16 INT'L LEGAL MATS. 159 (1977). *See also* Atkeson, Perkins and Wyatt, *H.R. 11315 — The Revised State-Justice Bill on Foreign Sovereign Immunity: Time for Action,* 70 AM. J. INT'L L. 298 (1976).

75. Foreign Sovereign Immunities Act of 1976 § 1605(a)(2), 28 U.S.C. § 1605(a)(2), *reprinted in* 15 INT'L LEGAL MATS. 1388, 1389 (1976).

76. *Reprinted in* 17 INT'L LEGAL MATS. 214 (1978).

77. Foreign Corrupt Practices Act of 1977 § 104(a), *reprinted in* 17 INT'L LEGAL MATS. 214, 216 (1978).

78. 425 U.S. at 690-95. *See supra* note 38.

79. *Id.* at 695-706. *See supra* note 53.

continues to impose on courts the duty, in the event an act of state defense is raised, to examine the foreign governmental acts in question to determine whether they are "takings" under the terms of the Amendment, such that their validity should be judged under American law.[80] As a result, the legacy of *Occidental Petroleum* and *Mobil Oil* would appear to be a classic *Catch-22* situation wherein courts are barred from applying the act of state defense on grounds of the act of state doctrine; under the cases, assertion of the act of state doctrine *requires* examination of foreign governmental acts (*Dunhill*), but at the same time examination of foreign governmental acts is *forbidden* by the act of state doctrine (*Mobil Oil*).

In spite of their clear theoretical weaknesses, it might be argued that these cases nevertheless follow the policy on which the act of state rule is founded. *Occidental Petroleum*[81] and *Mobil Oil*[82] both speak of how by declining to examine the acts of foreign governments, the court avoids creating political difficulties or embarassment for the executive branch in its conduct of foreign relations, and hence effectuates the policy on which the rule rests. Two comments on this line of argument should be made.

First: The policy of judicial restraint in cases affecting or involving foreign policy is but one of several policies relevant to the act of state defense as applied to antitrust claims. It is also United States policy to prevent anticompetitive conduct abroad which has a substantial deleterious effect on American foreign commerce. More generally, it is American policy to adjudicate cases on the basis of American law where the United States is the jurisdiction having the greatest interest. The act of state doctrine is the product of a balancing of all the relevant policies, not just the policy of avoiding conflicts with foreign governments. Thus, the rule does not always operate to require American courts to decline to judge the validity of foreign governmental acts — witness the *Bernstein, Dunhill*, and *Sabbatino* Amendment "exceptions." Any time the choice of law component of the doctrine directs the court to apply "some other law" to questioned foreign governmental conduct, the case can theoretically culminate in a judgment that the conduct was invalid. This may well upset the foreign government so as to create difficulties for the executive branch in its relations with it. While it would be correct to state that in such a case one policy

80. Foreign Assistance Act of 1964 § 620(e)(2), 22 U.S.C. 2370(e)(2). *See supra* note 50 and attached text.

81. "[I]nquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert." 331 F. Supp. at 110.

82. "[I]nquiry could only be fissiparous, hindering or embarrassing to the conduct of foreign relations, which is the very reason underlying the policy of judicial abstention expressed in the doctrine in issue." 550 F. 2d at 77.

behind the act of state doctrine has not been effectuated, it would be incorrect to argue that the doctrine itself, or the *balance of policies* behind it, has not been. By the same token, it is wrong to argue that effectuation of one of the policies behind a rule effectuates the rule. In view of the fact that American courts are often allowed by the act of state doctrine to declare acts of foreign governments invalid, and are often *required* by the doctrine to examine acts of foreign governments, it seems exceedingly doubtful that a balancing of all the policies would indicate that as a general rule American courts ought to be forbidden to examine foreign governmental acts.

Second: Assuming *arguendo* that the balance of all the above mentioned policies does indicate that as a general rule American courts ought not even examine acts of foreign governments, the utility of placing such a rule under the rubric of the act of state doctrine seems doubtful. Applying a rule to a situation where by its terms and history the rule is inapplicable so distorts the labeling process fundamental to the notion of a rule of law that one may well question the wisdom of such application even if it otherwise represents sound policy. The general confusion created may well outweigh the justice of the result reached in a particular case; as the saying goes, "hard cases make bad law." If American courts ought in certain cases to be forbidden to examine acts of foreign governments, this result should be obtained directly rather than through the act of state doctrine.

Conclusion

This article has examined two defenses to the American antitrust laws which may be available to immunize individuals or corporations doing business abroad from antitrust liability for conduct inducing anticompetitive foreign governmental action. Whether the *Noerr-Pennington* defense ought to protect such persuasion from antitrust liability is best analyzed as a choice of law problem. Thus, the decision as to whether the doctrine will apply in a foreign context should be made on a case by case (or a state by state) basis, according to whether the law of the foreign state in question affords the same protection of the right to petition the government as is afforded by American law. In the event that it does, the choice of law problem thus presented ought to be resolved by immunizing the protected persuasion from antitrust liability. Accordingly, the *Noerr-Pennington* doctrine should be of some, though by no means universal, application in the international context.

On the other hand, the act of state doctrine ought not to be available as a defense to antitrust claims. Consequently, it should not be available as a shield from liability in the particular case of an antitrust claim which questions private inducement of a foreign government's anticompetitive act. No act of state immunity can arise in the context of such a claim because the questioned acts of

persuasion may not properly be called acts of state. Moreover, the validity of the acts of state which *are* involved in the case (namely, the governmental response to the private inducement) is simply not questioned. As a result the act of state doctrine should have no application as a defense to an antitrust claim questioning anticompetitive lobbying directed at a foreign government.