

PETITIONING FOREIGN GOVERNMENTS: THE ACT OF STATE AND *NOERR- PENNINGTON* DOCTRINES

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With growing application of the antitrust laws to conduct abroad,¹ commentators and practitioners have increasingly focused their attention on the act of state and *Noerr-Pennington* doctrines as defenses for persons seeking anticompetitive acts of foreign governments.² The two doctrines have grown separately in the law, each with its own historical justification, limitations, and exceptions. The act of state doctrine was developed to protect primarily the interests of the United States government and, secondarily, the interests of foreign governments. The *Noerr-Pennington* doctrine was designed to preserve the rights of persons seeking government anticompetitive acts. The former focuses on acts of government; the latter focuses on acts of private persons.³

Despite their separate development, the two doctrines overlap in

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¹ See generally Norton, *Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws*, 28 INT'L & COMP. L. Q. 575 (1979); Kintner and Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. IND. & COM. L. REV. 199 (1977); Beausang, *The Extraterritorial Jurisdiction of the Sherman Act*, 70 DICK. L. REV. 187 (1966).

² These two doctrines do not provide the only defenses for persons petitioning foreign governments. Also relevant are the "balancing of considerations" rules applicable to jurisdiction and comity. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3rd Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1977) (vacating and remanding dismissals by Judge Burke of the U.S. District Court for the Northern District of California), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983) (dismissing complaints for lack of jurisdiction and *forum non conveniens*), *aff'd*, 749 F.2d 1378 (9th Cir. 1984). See also S. 397, 99th Cong., 1st Sess. (1985), which would codify the "jurisdictional rule of reason" and grant U.S. courts power to limit recovery to actual damages in the interest of international relations. The present article assumes the existence of jurisdiction over the defendant and further assumes that comity considerations would not prevent the exercise of jurisdiction. The defense of foreign compulsion may also be relevant. See *International Refinery Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 419 (Revised) (Tent. Draft No. 3 1982).

³ See B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 148 (1982) [hereinafter cited as HAWK].

significant areas. This overlap presents the issue of how great the nexus between the two doctrines should be. If, for example, the government act being sought is found not to be an act of state, should the defendant's petitioning activity nevertheless find protection under the *Noerr-Pennington* doctrine? Conversely, if *Noerr-Pennington* is inapplicable, should the defendant be allowed to invoke the act of state doctrine?

This article addresses the relationship between the act of state and *Noerr-Pennington* doctrines. In doing so, it reviews the bases for the doctrines and investigates the most troublesome areas of their application in the international context. The article also discusses the relative strengths and weaknesses of the doctrines as defenses to petitioning activity directed at foreign governments and considers areas where clarification of the law may be necessary.

I. ACT OF STATE DOCTRINE

While the *Noerr-Pennington* doctrine was developed primarily within the last generation, the act of state doctrine is as old as the republic itself.⁴ The classic statement of the doctrine appears in *Underhill v. Hernandez*,⁵ in which the Supreme Court held:

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. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.⁶

The doctrine, in effect, prohibits United States courts from adjudging the validity of acts of foreign governments committed within their territory. The three most recent important Supreme Court cases on the doctrine arose in the context of confiscation by a foreign state of private property within its borders.⁷ In the first

⁴ See *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822); *L'Invincible*, 14 U.S. (1 Wheat.) 238 (1816); *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812); *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293 (1808). The doctrine has its roots in seventeenth and eighteenth century perceptions of national sovereignty. See Riley, *The Act of State Doctrine: Antitrust Conspiracies to Induce Foreign Sovereign Acts*, 10 LAW & POL'Y INT'L BUS. 495, 496-97 (1978).

⁵ 168 U.S. 250 (1897). See also *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918).

⁶ *Underhill*, 168 U.S. at 252.

⁷ *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). See generally Bishop, *Outline of the Act of State Doctrine and*

of these, *Banco Nacional de Cuba v. Sabbatino*,⁸ an agency of the Cuban government brought suit in the United States to recover the proceeds from the sale of sugar that had been seized by the Cuban government prior to its sale from the seller's assignee. The lower court dismissed the case on the ground that the Cuban expropriation violated international law and was therefore invalid.⁹ The Supreme Court reversed, holding that the act of state doctrine barred consideration of the validity of public acts committed by a recognized foreign sovereign power within its territory.¹⁰ The Court observed that application of the doctrine is not compelled by the United States Constitution or international law,¹¹ and that the doctrine does not even apply when international law has been violated.¹² The doctrine does, however, have "constitutional" underpinnings" because it "arises out of the basic relationships between branches of government in a system of separation of powers."¹³ The Court explained that the doctrine expresses the concern of the judicial branch "that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign policy.¹⁴ The majority rejected the argument that the doctrine should not apply unless the executive branch specifically interposes it in a particular case, but expressly left open the question of whether the executive branch could direct that the doctrine not apply.¹⁵

The year after *Sabbatino* was decided, Congress passed the "Hickenlooper Amendment"¹⁶ in an attempt to overrule the holding in *Sabbatino* that the act of state doctrine may bar adjudication of violations of international law. By its terms, this legislation makes the doctrine inapplicable to cases based upon such violations. The courts, however, have limited the effect of the Hick-

its *Exceptions*, 1 INT'L LITIG. Q. 71 (June 1985).

⁸ 376 U.S. 398 (1964).

⁹ *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961).

¹⁰ *Sabbatino*, 376 U.S. at 427-37.

¹¹ *Id.* at 421-23.

¹² *Id.* at 430-31.

¹³ *Id.* at 423.

¹⁴ *Id.*

¹⁵ In so stating the Court shifted away from the doctrine's earlier use to prevent embarrassment to the executive branch. Zimmerman, *Applying an Amorphous Doctrine Wisely: The Viability of the Act of State Doctrine After the Foreign Sovereign Immunities Act*, 18 TEX. INT'L L. J. 547, 555 (1983).

¹⁶ Pub. L. No. 89-171, 79 Stat. 653 (1965), so called because it was an amendment to the Foreign Assistance Act of 1965. It is presently codified at 22 U.S.C. § 2370(e)(2) (1976).

enlooper Amendment to situations where the confiscated property is located in the United States or where it is located outside the United States and an attempt is made to market it here.¹⁷

In *First National City Bank v. Banco Nacional de Cuba*,¹⁸ a plurality of three justices¹⁹ answered in the affirmative the question left open in *Sabbatino*. A Cuban banking agency brought the suit seeking the amount in excess of principal and unpaid interest realized by a New York bank on the sale of collateral used to secure a loan to the Cuban government. By way of setoff and counterclaim, the New York bank sought damages for the expropriation of its property in Cuba. The district court granted the bank's motion for summary judgment,²⁰ but the court of appeals reversed.²¹ During the initial pendency of the case before the Supreme Court, the State Department submitted a letter stating that the act of state doctrine should not be applied to bar consideration of the bank's counterclaim. The Court thereupon remanded the case to the Second Circuit to allow it to reconsider its earlier opinion in light of the letter.²² The Second Circuit nevertheless dismissed the counterclaim on the authority of *Sabbatino*.²³ The Supreme Court reversed.²⁴

The Court's plurality opinion observed that the doctrine "precludes any review whatever of the acts of the government of one sovereign state done within its own territory by the courts of another sovereign state." The plurality noted, however, that the doc-

¹⁷ *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 327 (5th Cir. 1982), cert. denied, 460 U.S. 1041 (1983); *Empresa Cubana Exportadora de Azucar y sus Derivados v. Lamborn & Co.*, 652 F.2d 231, 237 (2d Cir. 1981).

¹⁸ 406 U.S. 759 (1972).

¹⁹ The plurality consisted of Chief Justice Burger and Justices Rehnquist and White. Justice Douglas concurred in the result on the basis of *National City Bank v. Republic of China*, 348 U.S. 356 (1955), in which the Court reversed the dismissal of a counterclaim against the Republic of China on the ground that a foreign government should not be allowed to take advantage of the court system without incurring the risks that may result, and on the further ground that the State Department had not requested immunity for the foreign government. Justice Powell concurred in the judgment on the ground that federal courts have an obligation to hear these kinds of cases unless it is shown that the exercise of jurisdiction would interfere with the conduct of foreign policy.

²⁰ *Banco Nacional de Cuba v. First National City Bank of New York*, 270 F. Supp. 1004 (S.D.N.Y. 1967).

²¹ *Banco Nacional de Cuba v. First National City Bank of New York*, 431 F.2d 394 (2d Cir. 1970).

²² See *First National City Bank v. Banco Nacional de Cuba*, 400 U.S. 1019 (1971).

²³ *Banco Nacional de Cuba v. First National City Bank of New York*, 442 F.2d 530 (2d Cir. 1971).

²⁴ *First National City Bank v. Banco Nacional De Cuba*, 406 U.S. 759 (1972).

trine "is not an inflexible one" and that it represents an exception to the general rule that United States courts will decide the cases before them.²⁵ The plurality further noted that "[t]he act of state doctrine, like the doctrine of immunity for foreign sovereigns, has its roots not in the Constitution, but in the notion of comity between independent sovereigns." The doctrine is "buttressed by judicial deference to the exclusive power of the Executive over the conduct of relations" with foreign powers, and is justified "on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations."²⁶ Given these considerations, the plurality held that when the executive branch "expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts."²⁷ In so holding, the plurality adopted the so-called *Bernstein* exception to the act of state doctrine.²⁸

In the third case, *Alfred Dunhill of London, Inc. v. Republic of Cuba*,²⁹ another plurality of the Court recognized a second exception to the act of state doctrine. In *Dunhill*, the former owners of Cuban cigar manufacturing concerns sought recovery against three American cigar importers for money owing both before and after the Cuban government designated "interventors" to confiscate and run the concerns. The importers had paid the sums owing prior to "intervention" to the Cuban government. The lower courts ruled that the former owners were entitled to recover those amounts, while the government interventors were entitled to recover the post-intervention sums. The courts further held that the importers

²⁵ *Id.* at 763.

²⁶ *Id.* at 765.

²⁷ *Id.* at 768.

²⁸ Under the *Bernstein* exception the executive branch can relieve the judicial branch of the act of state doctrine's restraint upon the exercise of jurisdiction. The *Bernstein* exception arose out of Judge Learned Hand's opinion in *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 250-51 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947), a suit growing out of Nazi Germany's confiscation of Jewish property. Judge Hand found nothing in that case to indicate that the executive branch had acted in the manner necessary to remove application of the doctrine. In a subsequent case, however, the same court amended its mandate to permit the introduction of evidence concerning acts of officials in Germany during the Nazi period, following receipt by plaintiff's attorney of a State Department letter declaring the executive branch's policy to relieve the courts from any restraint on their jurisdiction in passing on the validity of acts of Nazi officials. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954). For a discussion of other possible exceptions, see Bishop, *supra* note 7, at 76-83.

²⁹ 425 U.S. 682 (1976).

were entitled to offset the amounts they had already paid for the pre-intervention period against the post-intervention claims of the intervenors. The issue on appeal was whether one of the importers, Dunhill, was entitled to recover an affirmative amount from the intervenors since the amount it had already paid exceeded the amount it owed for the post-intervention period. The Second Circuit held that affirmative judgment was barred by the act of state doctrine.³⁰

The Supreme Court reversed, finding no evidence in the record that the intervenors possessed governmental, as opposed to commercial, authority. No government order or decree had been offered to show "that Cuba had repudiated its obligations" or "that it had as a sovereign matter determined to confiscate the amounts due" the importers.³¹ Thus, there was no occasion for application of the act of state doctrine.

A plurality of four justices³² went on to hold that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.³³ The plurality drew upon domestic cases recognizing that, when a state enters the marketplace, it divests itself of its sovereignty and takes on the characteristics of a trader.³⁴ The same reasoning, noted the plurality, provided the basis for the State Department's adoption of a "restrictive view" of sovereign immunity. Under this view, commercial activities of foreign governments, such as repudiation of commercial debts, were stripped of their sovereign immunity.³⁵ The plurality recognized that avoiding embarrassment to the Executive in the conduct of foreign relations is "the major underpinning" of the act of state doctrine, but based upon the views presently expressed by the Executive, "the purely commercial conduct of foreign governments" need not be recognized as acts of state in order to avoid embarrassing conflicts.³⁶

These three cases provide the analytical background of the act of state doctrine. As further discussed below, the doctrine typically is brought into play in the antitrust context where an action against

³⁰ *Mendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973).

³¹ 425 U.S. at 695.

³² Justices White, Powell, Rehnquist, and Chief Justice Burger.

³³ 425 U.S. at 696.

³⁴ *Id.*

³⁵ *Id.* at 698-99.

³⁶ *Id.* at 697-98.

a private party is predicated on a claim that a foreign government, upon the petition of the private party, acted wrongfully. In this context, the act of state doctrine was the only theory, at least until 1981, apart from jurisdictional and comity defenses, allowed by the courts as a petitioning defense at the international level.³⁷

II. THE *Noerr-Pennington* Doctrine

Unlike the act of state doctrine, which developed in an international setting, the *Noerr-Pennington* doctrine has its roots in conduct at the domestic level.

A. *Basic Tenets*

The basic tenets of the *Noerr-Pennington* doctrine were set forth in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*³⁸ Plaintiffs were a group of truck operators and their trade association which brought suit against a group of railroads, an association of the presidents of the railroads, and a public relations firm for conspiring to restrain trade in and monopolize the long distance freight business. The defendants allegedly carried out the conspiracy through a publicity campaign designed to foster the adoption of laws detrimental to the trucking business and to engender distaste for the truckers among the general public. The campaign was alleged to have been corrupt and fraudulent because the defendants' only motive was to destroy the truckers as competitors, and because the publicity was made to appear as if it expressed the view of the public when in fact the defendants were behind it. The plaintiffs charged that the defendants also influenced legislation and caused the defeat of at least one legislative proposal that would have favored the truckers. The defendants' response to the complaint included a counterclaim alleging that the truckers had engaged in similar acts against the railroads. After a trial on the merits, the district court entered judgment for the truckers and against the railroads on both the complaint and counterclaim, finding that the railroads had used fraudulent and deceitful tactics for the purpose of destroying the truckers. The court further found that the truckers' activities were purely defensive and without any fraudulent purpose. It awarded only nominal damages to the individual truckers, holding that no damages were

³⁷ See *infra* note 67.

³⁸ 365 U.S. 127 (1961), *reh'g denied mem.*, 365 U.S. 875 (1961).

recoverable for loss of business due to the defeat of the legislation, but allowed substantial damages in favor of the truckers' association, as well as injunctive relief.³⁹ The court of appeals affirmed.⁴⁰

In reversing the court of appeals, the Supreme Court assumed that no violation of the Sherman Act could "be predicated upon mere attempts to influence the passage or enforcement of laws."⁴¹ The Court found it "equally clear" that the Sherman Act could "not prohibit two or more persons from associating together in an attempt to persuade the legislature or the Executive to take particular action,"⁴² even though that action might result in a restraint or monopoly. A holding to the contrary would not only impair the power of government to take desired action but would also interfere with the whole concept of representative democracy, through which people may freely inform government of their wishes. Such a ruling would also raise constitutional questions relating to the right of petition, the Court said.⁴³ The right of petition, moreover, could not be made to depend upon the petitioners' self interest, so that the railroads' anticompetitive interests did not affect the legality of their conduct.⁴⁴ Nor could the use of deceitful publicity constitute a Sherman Act violation, for the Act only condemns trade restraints and does not establish a code of ethics for the political arena.⁴⁵ The Court also noted the district court's finding that the defendants sought not merely to influence legislation but also to destroy the truckers' goodwill. While indicating that the effect of such conduct would be to render the first amendment principles discussed above inapplicable, the Court decided that this finding was not supported by the evidence.⁴⁶ Finally, while acknowledging that "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor" would be subject to antitrust prosecution, the Court found that no such sham had occurred.⁴⁷

The principles of *Noerr* were extended to attempts to influence

³⁹ *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conf.*, 155 F. Supp. 768 (E.D. Pa. 1957).

⁴⁰ *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conf.*, 273 F.2d 218 (3rd Cir. 1959).

⁴¹ 365 U.S. 127 at 135.

⁴² *Id.* at 136.

⁴³ *Id.* at 137-38.

⁴⁴ *Id.* at 138-39.

⁴⁵ *Id.* at 140-41.

⁴⁶ *Id.* at 142.

⁴⁷ *Id.* at 144.

executive action in *United Mine Workers v. Pennington*.⁴⁸ This case involved a counterclaim brought by the owners of a coal company against a union and its welfare and retirement fund trustees, alleging that the counterdefendants had engaged in various anticompetitive activities to drive smaller coal companies out of business and to increase the wages of their members. These activities included inducing the Secretary of Labor to establish a high minimum wage for employees of contractors selling coal to the TVA, urging the TVA to curtail its spot market purchases, and engaging in a destructive price-cutting campaign through two companies controlled by the union. After a jury trial, the trial court entered judgment against the union, and the court of appeals affirmed.⁴⁹

The Supreme Court reversed the lower court for failing to take proper account of *Noerr*.⁵⁰ It held that “[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition,” and that the trial court’s jury instruction which permitted the jury to find an anticompetitive purpose in the counterdefendants’ approach to the Secretary of Labor was therefore erroneous.⁵¹ The Court also held that the trial court erred in not instructing the jury that the counterplaintiffs could not recover any damages they may have suffered as the result of the Secretary of Labor’s minimum wage determinations.⁵²

In *California Motor Transport Co. v. Trucking Unlimited*,⁵³ the third important Supreme Court case in this area, the Court made it clear that *Noerr* immunity extends beyond efforts to influence the legislative and executive branches of government. The Court also expanded on the “sham exception” doctrine recognized in *Noerr*. Plaintiffs alleged that defendants conspired to monopolize the highway common carriage business by opposing all pending applications by competitors for operating rights. The court of appeals reversed the trial court’s dismissal of the complaint for failure to state a claim,⁵⁴ and the Supreme Court affirmed.⁵⁵ The Court observed that the same philosophy applicable to the legislative and executive branches “governs the approach of citizens or groups of

⁴⁸ 381 U.S. 657 (1965).

⁴⁹ *Pennington v. United Mine Workers of America*, 325 F.2d 804 (6th Cir. 1963).

⁵⁰ *Pennington*, 381 U.S. at 659-72.

⁵¹ *Id.* at 670.

⁵² *Id.* at 671-72.

⁵³ 404 U.S. 508 (1972).

⁵⁴ *Trucking Unlimited v. California Motor Transport*, 432 F.2d 755 (9th Cir. 1970).

⁵⁵ *Trucking Unlimited*, 404 U.S. at 509-16.

them to administrative agencies . . . and to courts.”⁵⁶ It noted, however, that the present complaint alleged that the defendants sought to destroy competition by instituting proceedings without probable cause and without regard to the merits, thereby depleting the value of the plaintiffs’ business and barring them “from meaningful access to adjudicatory tribunals.”⁵⁷

The Court then listed several types of “unethical conduct” that “often result” in sanctions. These included perjury of witnesses, use of a patent obtained by fraud, conspiring with a licensing authority to eliminate a competitor, and bribing of a public purchasing agent.⁵⁸ The Court then noted that “[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.”⁵⁹ Although one baseless claim may go unnoticed, “a pattern of baseless, repetitive claims” may give rise to a conclusion that the administrative and judicial processes have been abused.⁶⁰ In the context of administrative and judicial processes, these kinds of actions cannot be considered mere political expression.⁶¹ Even first amendment rights, according to the Court, are not immune from regulation when used to violate a valid statute.⁶²

B. *Applicability Abroad*

These three cases outline the basic parameters of the *Noerr-Pennington* doctrine as it applies within the United States. Whether the doctrine applies to the petitioning of foreign governments has yet to be finally resolved. Although the Supreme Court has not squarely ruled on the issue, it implied in *Continental Ore Co. v. Union Carbide & Carbon Corp.*⁶³ that the doctrine may apply abroad. That case involved allegations that the defendants completely eliminated the plaintiff from the Canadian vanadium market through control of a subsidiary appointed by the Canadian government as the exclusive wartime agent for the purchase and allocation of vanadium for Canada. The Court held that these facts would entitle the plaintiff to relief, stating that there was no evidence indicating that the Canadian government would have ap-

⁵⁶ *Id.* at 510.

⁵⁷ *Id.* at 512.

⁵⁸ *Id.* at 512-13.

⁵⁹ *Id.* at 513.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 514.

⁶³ 370 U.S. 690 (1962).

proved of a policy geared toward excluding the plaintiff from the market.⁶⁴ During the course of its opinion, the Court found the *Noerr-Pennington* doctrine inapplicable because the defendants "were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws."⁶⁵

The Court's failure in *Continental Ore* to distinguish *Noerr* on the ground that a foreign government was involved provides significant support for the view that the *Noerr-Pennington* doctrine does apply to the petitioning of foreign governments. In addition, the Department of Justice has argued that the doctrine applies abroad,⁶⁶ and at least two lower courts appear to have accepted this position.⁶⁷ The commentators also lean in favor of application.⁶⁸ This article, therefore, proceeds on the assumption that the

⁶⁴ *Id.* at 706.

⁶⁵ *Id.* at 707.

⁶⁶ ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, 62-63 (1977) [hereinafter cited as ANTITRUST GUIDE].

⁶⁷ *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1364-73 (5th Cir. 1983); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1155-57 (E.D. Pa. 1981), *supp. op.* 513 F. Supp. 1334, *aff'd in part and rev'd in part sub nom. on other grounds* *re* *Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983). In four cases, the courts expressly declined to rule on the issue. *Associated Container Transportation (Australia), Ltd. v. United States*, 705 F.2d 53, 60 n.10 (2d Cir. 1983); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 886, 892 n.6 (5th Cir. 1982); *Bulkferts, Inc. v. Salatin, Inc.*, 574 F. Supp. 6, 9 (S.D.N.Y. 1983); *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 690 n.3 (S.D.N.Y. 1979). Only one case has squarely held that the doctrine does not apply abroad. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 107-08 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972). The court in *Laker Airways Ltd. v. Pan American World Airways*, 604 F. Supp. 280, 287 n.20 (D.D.C. 1984), expressed doubt about the doctrine's applications abroad. The court's actual holding was that, because of comity considerations, foreign corporations should not be restrained from petitioning foreign legislatures, as distinguished from foreign courts, for the purpose of inducing them to promulgate jurisdiction-ousting laws—a proposition not inconsistent with the recognition of a *Noerr-Pennington* right to induce substantive foreign government action. In *Australia/Eastern U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807, 812-13 (D.D.C. 1982), the court held that the Justice Department could not be forced to apply the doctrine abroad on constitutional grounds.

⁶⁸ The following have argued that the doctrine does or should apply abroad: 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 239(b) (1977 & AREEDA Supp. 1982) [hereinafter cited as AREEDA & TURNER]; HAWK, *supra* note 3, at 147-48; Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L L. 645, 693 (1977); Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L. J. 1, 10-11 (1974); Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100, 131-32 (1967) (stating that *Noerr* implies that protection extends to foreign government action); Davis, *Solicitation of Anticompetitive Actions from Foreign Governments: Should the Noerr-Pennington Doctrine Apply To Communications With Foreign Sovereigns?*, 11 GA. J. INT'L & COMP. L. 395, 399 (1981); Comment, *Noerr Petitioning Immunity Extended to Attempts to Influence Foreign Governments:*

doctrine applies to the petitioning of foreign governments.

III. APPLICATION OF THE DOCTRINES

The most pressing questions involving application of the act of state and *Noerr-Pennington* doctrines abroad are concentrated in four broad subject categories. The first question is whether a court may consider the causal relationship between the anticompetitive act of a foreign government and the conduct of the defendant. This "motivation" question has been confined to litigation over the act of state defense, but it has implications for *Noerr-Pennington* as well. The second category addresses the nature and scope of the commercial activity exception to the petitioning defenses. The third category involves the application of the doctrines to various branches of foreign government. The fourth relates to the sham exception principle.

A. Motivation

So long as act of state analysis is confined strictly to the validity of the acts of a foreign government, its role as a defense to anti-trust claims resulting from petitioning activity is limited. Certainly an antitrust plaintiff may challenge a defendant's petitioning activity without questioning the validity of the foreign government's reaction.⁶⁹ For the plaintiff to prove damages, however, it must demonstrate that the defendant's conduct had an anticompetitive effect, *i.e.*, that the foreign government reacted in the manner sought by the defendant and did so because of the defendant's conduct. Although the motivation for the foreign government's action is not strictly a question of validity, it has nevertheless been

Coastal States Marketing, Inc. v. Hunt, 58 ST. JOHN'S L. REV. 128, 138-39 (1983); Note, *The Noerr-Pennington Doctrine and the Petitioning of Foreign Governments*, 84 COLUM. L. REV. 1343 (1984) (but would make an exception for the petitioning of foreign courts).

The following have argued to the contrary: I W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.28 155-56 (1982); McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 240-41 (1976); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the "Noerr-Pennington" Doctrine*, 45 U. CHI. L. REV. 80, 120-21 (1977). The following commentator appears undecided: Campbell, *Corporate Lobbyists Abroad: The Extraterritorial Application of Noerr-Pennington Antitrust Immunity*, 61 CALIF. L. REV. 1254, 1277-81 (1973).

⁶⁹ See, *e.g.*, *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 910 (E.D. Mich. 1981) ("claims . . . are viewed as avoiding allegations of direct wrongdoings by the foreign sovereigns themselves").

held to be an inquiry forbidden by the act of state doctrine.⁷⁰

1. *Cases Pro and Con*

The Supreme Court first suggested that United States courts could not inquire into the motivation for a foreign government's action in *American Banana Co. v. United Fruit Co.*,⁷¹ the first antitrust case to consider the act of state doctrine. Here the Court upheld the dismissal of the plaintiff's complaint alleging that the defendants induced Costa Rican soldiers to seize the plaintiff's farm and railroad in Panama in order to thwart the plaintiff's plans to ship bananas from Panama. In an opinion written by Justice Holmes, the Court decided that persuading a sovereign power to undertake certain action cannot be a tort since the sovereign, being maker of the law, cannot commit an unlawful act.⁷²

More recently, and somewhat more directly, the Second Circuit addressed the motivation question in *Hunt v. Mobil Oil Corp.*⁷³ In *Hunt*, the plaintiffs claimed that the defendants, seven major oil producers, conspired to preserve their competitive advantage in the international oil market by precluding the plaintiffs from reaching any settlement with the demands of a Libyan dictator and by otherwise manipulating the plaintiffs' dealings with Libya. The plaintiffs alleged that the defendants' conduct caused their operations eventually to be nationalized by Libya, and that they suffered substantial lost profits as a result. Finding that the success of the plaintiffs' case necessarily depended upon establishing a causal link between the defendants' conduct and the action taken by Libya, the court dismissed the claim based on the act of state doctrine.⁷⁴ It found that the plaintiffs had "meticulously attempted to avoid the issue of validity"⁷⁵ but that their claim was "not viable unless the judicial branch examines the motivation of the Libyan action and that inevitably involves its validity."⁷⁶ The court further found that the State Department had already determined that the reason for Libya's action was "political reprisal against the United States and economic coercion against other

⁷⁰ See *infra* notes 71-82 and accompanying text.

⁷¹ 213 U.S. 347 (1909).

⁷² *Id.* at 358. The Court's holding with respect to jurisdiction, which has since been repudiated, is discussed in note 85, *infra*.

⁷³ 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977).

⁷⁴ *Id.* at 72-79.

⁷⁵ *Id.* at 77.

⁷⁶ *Id.*

United States nationals in Libya,"⁷⁷ and that this official characterization should not be adjudicated further. The court held that further adjudication would require the judiciary to inquire into the "Serbonian bog"⁷⁸ of a foreign sovereign's policy, something not contemplated by the separation of powers principle.

The Ninth Circuit relied upon *Hunt* in *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*⁷⁹ Here the plaintiffs alleged that the defendant paid bribes to the petroleum minister of Umm Al Qaywayn for the purpose of obtaining a valuable offshore oil concession in that country and preventing the plaintiffs from receiving the concession. The facts thus raised an issue expressly left undecided in *Hunt*, namely, the application of the *Hunt* approach to bribery.⁸⁰ In a per curiam opinion, the Ninth Circuit noted that the plaintiffs' claim depended upon "establishing that the motivation for the sovereign act was bribery."⁸¹ The court held that adjudication of that issue would cause embarrassment and, further, that the act of state doctrine "has traditionally barred antitrust claims based on the defendant's alleged inducement of foreign sovereign action."⁸² The court, therefore, rejected the claim.

Despite the clear holding that the act of state doctrine bars consideration of the motivation questions found in these and other cases,⁸³ some courts have taken a contrary position. This position

⁷⁷ *Id.* The court assumed, without expressly stating, that the State Department's determination was irreconcilable with the plaintiffs' theory of the case.

⁷⁸ *Id.*

⁷⁹ 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984).

⁸⁰ *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 79 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977).

⁸¹ 712 F.2d 404 at 407.

⁸² *Id.* In *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), the Ninth Circuit rejected application of the act of state doctrine and remanded the case with instructions to apply a three-part test of jurisdiction and comity. *Id.* at 609-15. See also 749 F.2d 1378 (9th Cir. 1984) (same case on subsequent appeal). This test was further elaborated on by the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3rd Cir. 1979). Some of the literature concerning this issue assumes that the *Timberlane-Mannington* jurisdictional/comity test would provide a substitute for act of state considerations. See, e.g., 1 J. ATWOOD AND K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* §§ 8.06-8.09, 243-49 (2d ed. 1981) [hereinafter cited as ATWOOD & BREWSTER]; Zimmerman, *supra* note 15, at 560-63; Riley, *supra* note 4, at 526-32 (1978). Although overlap exists between the jurisdictional/comity test and act of state considerations, the Ninth Circuit's analysis in *Clayco* indicates that, at least in that court's view, one does not substitute for the other.

⁸³ *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380 (5th Cir. 1980); *De Roburt v. Gannett Co.*, 548 F. Supp. 1370, 1374 (D. Hawaii 1982); *General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3, 6 (D.D.C. 1979); *Dominicus Americana Bohio v. Gulf & Western Indus. Inc.*, 473 F. Supp. 680,

has its roots in *United States v. Sisal Sales Corp.*,⁸⁴ in which the government alleged that the defendants conspired to monopolize the sisal market by, among other things, securing legislation from the Mexican and Yucatan governments that recognized the defendants as the exclusive buyers of sisal. The Supreme Court reversed dismissal of the action, holding that *American Banana* was distinguishable. The distinction, however, was based primarily upon *American Banana's* jurisdictional holding.⁸⁵ The Court did note that, although the conspirators were aided by foreign legislation, it was "by their own deliberate acts, here and elsewhere, that they

689-90 (S.D.N.Y. 1979) (this court, however, notes an exception for "corruption of government officials," which may be inconsistent with *Clayco*); *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977) (inquiry into whether defendant improperly influenced government decision would not be allowed); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 110 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972); *cf. Thillens, Inc. v. Community Currency Exchange Ass'n of Illinois, Inc.*, 729 F.2d 1128, 1131 (7th Cir. 1984) (defendant legislators entitled to immunity when cause of action depended on proof of their motive), *cert. dismissed sub nom. Thillens, Inc. v. Wall*, 105 S. Ct. 375 (1984).

See also *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1977) (vacating and remanding dismissals by Judge Burke of the U.S. District Court for the Northern District of California), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983) (dismissing complaints for lack of jurisdiction and *forum non conveniens*), *aff'd*, 749 F.2d 1378 (9th Cir. 1984).

Where the court said that while it would not "impugn . . . the nobility of a foreign nation's motivation," the court was nevertheless "interested in the depth and nature of its interest" in determining whether a case should be dismissed on act of state grounds. 549 F.2d 597 at 607. Despite its interest, the court reversed an order dismissing the case on act of state grounds. The court found that the alleged acts of the foreign government, which included court proceedings and the use of guards and troops to shut down the plaintiff's operations, did not reflect a "sovereign decision" that the plaintiff's business should be crippled, and were therefore not acts of state. The court thus avoided the motivation question. *Id.* at 608.

⁸⁴ 274 U.S. 268 (1927).

⁸⁵ In *American Banana*, 213 U.S. 347 (1909), the Court found that because the conduct occurred outside the United States, "[i]t is surprising to hear it argued that [the conduct is] governed by the act of Congress A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law." *Id.* at 355, 359. In *Sisal*, 274 U.S. 268 (1927), on the other hand, the conspiracy was "entered into by parties within the United States and made effective by acts done therein." The object was control of the sisal market both internally and externally. The injury was thus to the United States, "not merely of something done by another government at the instigation of private parties." *Id.* at 276. The view in *American Banana* that the antitrust laws do not apply to combinations outside the United States has been repudiated. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1977) (vacating and remanding dismissals by Judge Burke of the U.S. District Court for the Northern District of California), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983) (dismissing complaints for lack of jurisdiction and *forum non conveniens*), *aff'd*, 749 F.2d 1378 (9th Cir. 1984).

brought about forbidden results within the United States.”⁸⁶ The conspirators’ acts were not limited to soliciting the foreign legislation.⁸⁷ Soliciting the legislation was nevertheless an important part of the conspiracy, and the Court implicitly assumed a provable causal connection between the solicitation and the resulting legislation.

Relying in part on *Sisal*, the Fifth Circuit rejected the *American Banana* and *Hunt* approaches in *Industrial Investment Development Corp. v. Mitsui & Co.*⁸⁸ The plaintiffs here alleged that, although they had formed a joint venture with an Indonesian company to harvest logs in that country and had negotiated with the government for a necessary license, the license was never issued due to the influence of the defendants. After the trial court dismissed the complaint based on *Hunt*, the Fifth Circuit reversed. The court of appeals found that the validity of the Indonesian government’s behavior was not at issue and, moreover, that the plaintiffs did not need to prove to any degree of certainty that the license would have issued had the defendants not interfered. Rather, it was enough for the plaintiffs to show that the defendants caused the “potential” of the plaintiff’s commercial venture “to die aborning.”⁸⁹ While it was essential to prove a causal relationship between the defendants’ actions and the harm suffered, the plaintiffs did not have to prove that the defendants were the sole cause of their injury. Finally, the court disagreed with *Hunt* that “motivation and validity are equally protected by the act of state rubric,” especially “where adjudication would result in no embarrassment to executive department action.”⁹⁰

⁸⁶ 274 U.S. at 276.

⁸⁷ *Id.* at 272-74.

⁸⁸ 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

⁸⁹ *Id.* at 54.

⁹⁰ *Id.* at 55, citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), and *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1977) (vacating and remanding dismissals by Judge Burke of the U.S. District Court for the Northern District of California), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983) (dismissing complaints for lack of jurisdiction and *forum non conveniens*), *aff’d*, 749 F.2d 1378 (9th Cir. 1984). *Continental Ore* does not really support the Fifth Circuit’s proposition; motivation there was not an issue. The Court held in *Continental Ore* only that the exercise of discretionary power conferred upon the defendant by a foreign government was not protected by the act of state doctrine when the power was exercised to exclude a competitor. The Court did say, however, that the defendants would not be insulated from liability just because their conspiracy “involved some acts by the agent of a foreign government.” 370 U.S. at 706. *Timberlane* would appear to support the Fifth Circuit, but only to the extent it leaves open the possibility of litigating a foreign government’s motivation if the government’s interest in

Another noteworthy case is *Williams v. Curtiss-Wright Corp.*⁹¹ Here the Third Circuit held that the act of state doctrine would not bar adjudication of a claim that the defendant monopolized the jet engine market by, *inter alia*, persuading foreign governments not to purchase from the plaintiff. The court found the commercial exception to the act of state doctrine inapplicable,⁹² and distinguished *Hunt* on the ground that it involved an expropriation.⁹³ The court conceded that acquiring evidence to prove the causal connection may be difficult, but left open the possible use of "other sources of proof" if direct evidence was unavailable.⁹⁴ Finally, the court observed that the act of state doctrine should not be applied "in the absence of a showing that adjudication may hinder international relations."⁹⁵

2. Policy Considerations

Whether the act of state doctrine should be held to bar consideration of a foreign government's motive is a difficult policy question. Considerations favoring a bar include possible political embarrassment to the United States, as *Hunt* suggested. Another consideration is the difficulty of proving the causal connection⁹⁶ and foreign

the subject matter of the litigation is sufficiently small.

⁹¹ 694 F.2d 300 (3rd Cir. 1982).

⁹² *Id.* at 302; see also *infra* notes 106-19 and accompanying text.

⁹³ 694 F.2d at 304.

⁹⁴ *Id.*, citing *Continental Ore.*

⁹⁵ *Id.*, citing *Mitsui and Timberlane*. See also *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981), a military procurement case involving illegal foreign kickbacks, where the court noted that "damage-related act of state issues are not as significant as those implicated when the judicial inquiry will more directly evaluate the justification or validity of a foreign act of state." *Id.* at 909. The court here criticized *Hunt* and relied upon its exception for foreign corruption in denying the defendant's motion for partial summary judgment on act of state grounds, even though the foreign government's reasons for the action it took were in issue. Cf. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983) (another military procurement case in which the court reversed an act of state dismissal on grounds that the plaintiff could establish fact of damage without references to lost sales to foreign governments). Foreign government motivation was considered in non-antitrust contexts in *Empresa Cubana Exportadora De Azucar y Sus Derivados v. Lamborn & Co.*, 652 F.2d 231, 236 (2d Cir. 1981) (intent of Cuba in seizing assets discussed); *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975), *cert. denied*, 423 U.S. 847 (1975); *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

⁹⁶ In *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980), *cert. denied and appeal dismissed*, 451 U.S. 901 (1981), for example, the court observed that the absence of discovery abroad of alleged cartel activity "has made it impossible" to determine whether a foreign government was involved in the activity, *id.* at 259, but nevertheless rejected the act of state and foreign compulsion defenses. *Id.* at 263. The weight to be ac-

resentment resulting from attempts to do so. Proving the causal connection is difficult not only because of the problem of conducting discovery in foreign countries, but also because governments are multi-faceted entities rarely motivated by only one factor; each government act may involve multiple actors, each with his own reason for acting. Foreign resentment may occur because the foreign government may regard its actions as an internal matter of no concern to outsiders and because, as *American Banana* hinted, the antitrust court's investigation may come to a conclusion inconsistent with the foreign government's official reasons for acting.⁹⁷ Potential for unfairness resulting from these problems exists for both the plaintiff and the defendant, but it may impact the defendant more seriously, because the foreign government act, occurring later in time than the defendant's attempted inducement, will often appear to have been caused by it.

On the other hand, it is naive to assume that the United States will inevitably be embarrassed in its conduct of foreign relations, or, at least, that such embarrassment is necessarily sufficient to bar enforcement of United States antitrust policy.⁹⁸ Moreover, given the creativeness of modern courts in fashioning rules of fairness, difficulty of proof may be an insufficient justification for refusing a case. From a plaintiff's point of view, the risk of not being able to introduce proper evidence is surely preferable to not being permitted to proceed at all. And whatever unfairness to a defendant results from a *post hoc ergo propter hoc* presumption may be countered by other factors, such as the foreign government's interest in making available evidence demonstrating that the government's

corded a foreign government's statement regarding its own conduct is considered in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1191, 1192 & n.121, 1193 & n.122, 1194-95 (E.D. Pa. 1981); *cf.* *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1149 (N.D. Ill. 1979).

⁹⁷ See *AREEDA & TURNER*, *supra* note 68.

⁹⁸ Indeed, one need only review the recent *Laker* litigation for an example of United States court resolve in enforcing the antitrust laws in the face of foreign retaliation in the form of jurisdiction-ousting court decrees. *Laker Airways, Ltd. v. Sabena, Belgium World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *Laker Airways, Ltd. v. Pan American World Airways*, 604 F. Supp. 280 (D.D.C. 1984). Foreign resentment evidenced by legislation barring United States discovery procedures abroad and nullifying the effect abroad of antitrust judgments entered in the United States has generally failed to inhibit the enthusiasm of United States courts in enforcing the antitrust laws. See *HAWK*, *supra* note 3, at 315-42 and Supp. 1982 at 71-85; *Davis*, *supra* note 68, at 435-37; Joelson, *International Antitrust: Problems and Defenses*, 15 *LAW & POL'Y IN INT'L BUS.* 1121, 1126-29 (1983). See generally *ATWOOD & BREWSTER*, *supra* note 82, §§ 4.06-4.18 (2d ed. 1981). Such fierce insensitivity to foreign policy implications would logically lead to abandonment of the act of state doctrine.

action was totally unrelated to the defendant's petitioning activity.⁹⁹ As to the difficulty of isolating the defendant's influence on the foreign government from among all other possible influences, perhaps a "principal motivation" test could be used.¹⁰⁰ This difficulty, in any event, does not bar application of the antitrust laws in domestic situations where similar multiple motivations for official conduct may be present.¹⁰¹

The question is obviously one that needs to be resolved by the Supreme Court. Pending such a resolution, application of the act of state doctrine will continue to be triggered in most circuits¹⁰² when a foreign government's motive arises as an issue.

3. *Implications for Noerr-Pennington*

As can be seen, the distinction between validity and motive may defeat the defense of act of state, depending on the circuit. This distinction will not, however, affect the *Noerr-Pennington* doctrine. Absent sham activity, which would make the doctrine inapplicable, the courts are not concerned with whether the challenged conduct succeeded in motivating the government entity; they are willing to assume that it did. The defendant is nevertheless shielded from liability because of the protected nature of its conduct. Application of the *Noerr-Pennington* doctrine may thus have caused a different result in some of the cases discussed above. Inducing legislation, for example, as in *Sisal*, is one of the activities most closely guarded by *Noerr-Pennington*.¹⁰³ Thus, in those cir-

⁹⁹ Cf. *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1149 (N.D. Ill. 1979) (where several defendants invoking the protection of foreign laws were supported by amicus briefs filed by the foreign countries involved.)

¹⁰⁰ Cf. the "principal purpose" test discussed *infra*, note 187 and accompanying text.

¹⁰¹ In domestic state action cases, for example, a key criterion for application of the *Parker v. Brown*, 317 U.S. 341 (1945), immunity doctrine is whether the state legislation in question "contemplated" the anticompetitive conduct of the local governmental entity. See, e.g., *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978); *Tom Hudson & Assoc. v. City of Chula Vista*, 746 F.2d 1370 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3503 (1985); *Scott v. City of Sioux City, Iowa*, 736 F.2d 1207 (8th Cir. 1985), *cert. denied*, 105 S. Ct. 1864 (1985). But see *Thillens, Inc. v. Community Currency Exchange Assoc. of Illinois*, 729 F.2d 1128, 1131 (7th Cir. 1984) (when conspiracy theory depended upon proof of defendant legislators' motives, legislation would be immune from liability), *cert. dismissed sub nom. Thillens, Inc. v. Wall*, 105 S. Ct. 375 (1984). See also *AREEDA & TURNER*, *supra* note 68 ¶¶ 204d, 203.3d (Supp. 1982).

¹⁰² See *supra* notes 71-83 and accompanying text.

¹⁰³ See generally *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). What other impediment may have prevented application of the doctrine in *Sisal* and the other cases discussed at notes 84-95, however, is not clear. Courts have held, for example, that where the defendant's conduct, which is otherwise protected, is part of a broader

cuits where the act of state defense is vulnerable on the motive question, the *Noerr-Pennington* doctrine could prove to be a more stable defense.

To the extent that the act of state doctrine bars consideration of motive, however, the protection afforded antitrust defendants by *Noerr-Pennington* will be redundant, at least in actions for damages.¹⁰⁴ Indeed, so long as the act of state doctrine forbids courts to inquire into the causal connection between a defendant's conduct and a foreign government's subsequent action, not even *Noerr-Pennington's* sham exception rules will have any application.¹⁰⁵

B. Commercial Activity

Both the act of state and the *Noerr-Pennington* defenses exhibit a certain weakness when the government action being induced is considered to be a "commercial activity." This weakness stems from the attitude that when a government body enters into an economic market as an ordinary buyer or seller, persons dealing with it should be treated as dealing with any other entrepreneur and be subject to the same restrictions as in any other commercial situation.

1. Commercial Exception/Acts of State

As discussed earlier, a commercial exception to the act of state doctrine was recognized by a plurality of the Court in *Dunhill*.¹⁰⁶ This position is consistent with the "restrictive" principle of sovereign immunity adopted by the Foreign Sovereign Immunities Act of 1976 (FSIA).¹⁰⁷ That Act removes the immunity of foreign governments to suit in United States courts in cases stemming from foreign state commercial activities having an impact on the United States. The FSIA declares that the commercial character of an ac-

anticompetitive scheme — such as may have been the case in *Sisal* — the *Noerr-Pennington* doctrine may be inapplicable. See *infra* note 206 and accompanying text. Whether the *Noerr-Pennington* doctrine applies may also depend on the nature of the inducements used and the kinds of government bodies being induced.

¹⁰⁴ Professor Hawk points out that the distinction between motive and validity may have no relevance in private actions for injunctive relief, where section 4 of the Clayton Act, providing for recovery of private damages, has no application. HAWK, *supra* note 3, at 143-44.

¹⁰⁵ See *infra* notes 164-65 and 182-215, and accompanying text. But see McManis, *supra* note 68, at 235-39, which expresses the view that the act of state doctrine should not protect payments abroad.

¹⁰⁶ See *supra* notes 32-36 and accompanying text.

¹⁰⁷ 28 U.S.C. § 1605(a)(2) (1982). See McManis, *supra* note 68, at 234.

tivity is to be determined by reference to the activity's "nature" rather than by reference to its "purpose."¹⁰⁸ Under this definition the "essentially commercial nature of an activity" is determinative, so that a government contract for the purchase of goods or services, even if used for public purposes, would be considered commercial in nature.¹⁰⁹

Most courts since *Dunhill* have assumed the existence of a commercial exception to the act of state doctrine, but they have not been consistent in deciding what constitutes commercial activity. Courts have held, for example, that the purchase of cement for military purposes,¹¹⁰ the purchase of armored cars,¹¹¹ the services performed by an international freight forwarder on behalf of the Iranian Air Force,¹¹² and the sale of golf carts by a government agency¹¹³ are all commercial activities. On the other hand, courts have ruled that military procurements,¹¹⁴ a decision to disallow importation of nonmilitary airplanes,¹¹⁵ and regulations preventing a nationalized bank from performing its contracted obligations¹¹⁶ are noncommercial acts of state.

The Ninth Circuit introduced further confusion in this area with its decision in *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries ("OPEC")*.¹¹⁷ This case did not involve petitioning activity, but it

¹⁰⁸ *Id.* § 1603(d) (1982).

¹⁰⁹ H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 16 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6615. In *Yessenin-Volpin v. Novosti Press Agency, Tass*, 443 F. Supp. 849, 856 (S.D.N.Y. 1978), however, the court held that the commercial exception does not apply in a libel action to the acts of two Soviet news agencies that sent allegedly libelous materials into the United States, because these agencies were engaged in acts of intergovernmental cooperation. The court also found that one of the defendants, which was arguably only 63 percent owned by the foreign government, qualified for FSIA protection. See also *In re Complaint of Sedco, Inc.*, 543 F. Supp. 561, 566 (S.D. Tex. 1982) (exploratory drilling by national oil company was not commercial).

¹¹⁰ *National American Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622, 641-42 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

¹¹¹ *Sage International, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 908-11 (E.D. Mich. 1981).

¹¹² *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396, 400-01 (D.N.J. 1979).

¹¹³ *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 394-95 (D. Del. 1978).

¹¹⁴ *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977).

¹¹⁵ *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3rd Cir. 1982). A government loan was held to be an act of state in *DeRoburt v. Gannet Co.*, 548 F. Supp. 1370, 1376-77 (D. Hawaii 1982), *rev'd*, 733 F.2d 701 (9th Cir. 1984).

¹¹⁶ *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985).

¹¹⁷ 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

did examine the commercial exception to the act of state doctrine. The plaintiffs sought an injunction against the price-fixing activities of the OPEC countries. In affirming dismissal of the case on the basis of the act of state doctrine, the court rejected the "objective nature-of-the-act test" of the FSIA. Indeed, the court stated that the concept of act of state "is not diluted by the commercial activity exception," although "purely commercial activity may not rise to the level of an act of state."¹¹⁸ Furthermore, the court ruled that the act of state doctrine could be applicable even when the doctrine of sovereign immunity is not. The former, it commented, applied here because of foreign policy implications and the court's recognition of state sovereignty over natural resources.¹¹⁹ Both the holding and dicta of this case are inconsistent with the FSIA exception for commercial activities.¹²⁰

2. Commercial Exception/*Noerr-Pennington*

Confusion also exists in the *Noerr-Pennington* cases regarding the existence of a commercial exception.¹²¹ The question has arisen only in cases where the defendant has dealt with the governmental entity not as a regulator, but as a purchaser of goods or services.¹²² Two early expositions of the commercial exception are *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*¹²³ and *Hecht v. Pro-Football, Inc.*¹²⁴ In the former case the court opined that the

¹¹⁸ *Id.* at 1360.

¹¹⁹ *Id.* at 1361. *Cf. Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 408 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984) ("[g]ranting a concession to exploit natural resources entails an exercise of powers peculiar to a sovereign").

¹²⁰ See also *Carey v. National Oil Corp.*, 453 F. Supp. 1097, 1102 (S.D.N.Y. 1978), *aff'd on other grounds*, 592 F.2d 673 (2d Cir. 1979) (foreign government's inducement of state-owned oil corporation to breach contract was not a commercial act). The inconsistency noted in the text is more fully discussed in Zimmerman, *supra* note 15, at 563-68, and Comment, *Act of State and Sovereign Immunities Doctrines: The Need to Establish Congruity*, 17 U.S.F.L. Rev. 91, 105-12 (1982), the latter of which argues that the act of state doctrine should not be applied to prevent adjudication under the FSIA.

¹²¹ *Pennington*, 325 F.2d 804 (6th Cir. 1963), could be construed as authority that a commercial exception does not exist, but the issue was not there raised. See Fischel, *supra* note 68 at 85-86.

¹²² One commentator has suggested that the commercial exception to petitioning immunity should not apply when the government entity is acting as a seller. Comment, *Noerr-Pennington Antitrust Immunity and Proprietary Government Activity*, 1981 ARIZ. ST. L.J. 749, 760-61 (1981). While the issue does not appear to have arisen in any reported case, applicability of the exception may depend upon whether the purpose of the selling activity is purely economic or whether it involves regulatory or other social objectives as well.

¹²³ 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970).

¹²⁴ 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

Noerr umbrella should not apply "to public officials engaged in purely commercial dealings," finding support for its view in *Continental Ore*.¹²⁶ The court hypothesized that a different result would have followed in *Continental Ore* had the defendants sought a change of policy from executive or legislative officials instead of trying to subvert the rationing program.¹²⁶ In *Hecht*, the District of Columbia Circuit suggested that under the authority of *Trucking Unlimited*,¹²⁷ which had then just been decided by the Ninth Circuit, governmental agencies charged with procurement were in a position similar to adjudicative agencies, to which modified *Noerr-Pennington* considerations applied.¹²⁸ The District of Columbia Circuit confirmed its recognition of the commercial exception after the Supreme Court's *Trucking Unlimited* decision.¹²⁹

The Ninth Circuit, on the other hand, has since flatly rejected any commercial exception to *Noerr-Pennington* in *In re Airport Car Rental Antitrust Litigation*.¹³⁰ It did, however, temper its rejection somewhat by noting that "the nature of the government activity is one factor in determining the type of public input acceptable to the particular decision-making process."¹³¹ This dictum seems to adopt an approach similar to *Hecht*. Relying upon *In re*

¹²⁶ *Whitten*, 424 F.2d at 33.

¹²⁶ *Id.* The theory touched upon in *Whitten* and more fully elaborated in *Woods Exploration & Producing Co. v. Aluminium Co. of America*, 438 F.2d 1286, 1296-97 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), that *Noerr-Pennington* insulates only attempts to influence broad policy questions but not narrow issues between specific parties, has been criticized. See *Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546, 556 n.6 (S.D.N.Y. 1980).

¹²⁷ See *supra* notes 53-62 and accompanying text for discussion of *Trucking Unlimited*.

¹²⁸ *Hecht*, 444 F.2d at 942. The Ninth Circuit itself appeared to adopt *Whitten's* commercial exception in *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters and Helpers Local No. 150*, 440 F.2d 1096, 1099 (9th Cir. 1971), *cert. denied*, 404 U.S. 826 (1971).

¹²⁹ *Federal Prescription Serv., Inc. v. American Pharmaceutical Assoc.*, 663 F.2d 253, 263-64 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1981). See also *Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152, 158-59 & n.18 (5th Cir. 1971) (court appears to adopt the commercial exception in the footnote but observes that the point was not preserved for appeal); *F. Buddie Contracting, Inc. v. Seawright*, 47 ANTITRUST & TRADE REG. REP. (BNA) 757, 760 (N.D. Ohio Aug. 15, 1984); *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 TRADE CAS. (CCH) ¶ 64,527, at 72,928 (N.D. Ga. 1981); *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 689-90 & n.3 (S.D.N.Y. 1979). In three other cases involving private corporations dealing with a government entity in the capacity of a purchaser, the *Noerr-Pennington* doctrine was found inapplicable for reasons other than the commercial exception. *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 841-43 (9th Cir. 1980); *Kurek v. Pleasure Driveway and Park Dist.*, 557 F.2d 580, 593 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978), *on remand*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Duke & Co., Inc. v. Foerster*, 521 F.2d 1277, 1282 (3rd Cir. 1975).

¹³⁰ 693 F.2d 84, 88 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3114 (1983).

¹³¹ *Id.*

Airport Car Rental, the Fifth Circuit also rejected a commercial exception in *Greenwood Utilities Commission v. Mississippi Power Co.*,¹³² even though it seemed to recognize instances where "all would agree" that the exception should apply.

3. *Scope of the Exception*

Notwithstanding the Ninth and Fifth Circuits' recent pronouncements, most circuits will continue to recognize some form of commercial exception¹³³ in both act of state and *Noerr-Pennington* cases. To the extent the exception is recognized, the courts should restrict it to situations where the government entity itself engages in a trading activity. The problem arises in deciding what, if any, further restrictions should be placed on the exception. In addressing that problem, one should consider whether the liability of the petitioner is to be coextensive with that of the entity being petitioned, *i.e.*, whether the petitioner may be held liable when the government entity cannot, and vice versa. While disagreement on this issue exists at the domestic level,¹³⁴ different considerations

¹³² 751 F.2d 1484, 1505 & n.14 (5th Cir. 1985). The court stated in note 14 that:

All would agree that antitrust liability should not attach in exclusive franchise agreements . . . and that, conversely, if as the result of a price fixing agreement by private parties the government pays more for products it purchases in the marketplace, the participants in the anticompetitive scheme should not escape liability because of the identity of the victim.

Another case has held that *Noerr-Pennington* protected an alleged conspiracy to persuade local governmental authorities to adopt specifications that would have the effect of barring local governments from purchasing competitors' products. *United States v. Johns-Manville Corp.*, 259 F. Supp. 440, 452-53 (E.D. Pa. 1966). See also *Household Goods Carrier Bureau v. Terrel*, 452 F.2d 152, 156-57 (5th Cir. 1971) (lobbying the U.S. Department of Defense to discontinue considering a competitor's product for purchase was protected by *Noerr-Pennington*). Still another case has rejected the reasoning of the courts recognizing the commercial exception, but in a regulatory rather than a strict commercial setting. *Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 996 n.9 (S.D.N.Y. 1981). The issue here was whether the defendant's inducement activities with respect to the granting of a franchise were proper. The court noted in footnote nine that the granting of a government franchise is not a commercial activity but a sovereign act. The court relied heavily on the Seventh Circuit's similar decision in *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975).

¹³³ See Fischel, *supra* note 68, at 117-18; ANTITRUST GUIDE, *supra* note 66, at 54-55; ATWOOD & BREWSTER, *supra* note 82, § 8.09 (2d ed. 1981). The commercial exception should not apply to the sovereign compulsion defense. HAWK, *supra* note 3, at 155-56. But see ANTITRUST GUIDE, *supra* note 66, at 55 n.100.

¹³⁴ Compare *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 229 (7th Cir. 1975) ("since the governmental actions . . . were not themselves subject to the Sherman Act, the same was true under *Noerr* of the concerted efforts to induce those governmental actions"); In re *Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072, 1091 (N.D. Cal. 1979) ("[t]he courts should be reluctant to extend immunity to private parties who have

apply at the international level. Specifically, Congress, through the FSIA, has determined that foreign countries should normally be held liable for their commercial acts under the antitrust laws. Congress has made no such determination as to states.¹³⁶ Because both foreign governments and persons petitioning them may incur antitrust liability for commercial transactions, the same transactions should give rise to that liability for both classes of defendants.¹³⁶

To the extent that the FSIA defines the limits of foreign governments' immunity, therefore, that Act will have a bearing on the scope of the commercial exception to the petitioning defenses. The problem with the definition of commercial acts adopted by the FSIA and the *Dunhill* plurality, however, is that it sometimes requires United States courts to pass on the validity of foreign government acts in politically sensitive, albeit commercial, areas.¹³⁷ A court must then choose between the competing policies of recognizing commercial liability and avoiding a decision that may have international repercussions. The Ninth Circuit found the latter concern paramount in *OPEC*,¹³⁸ but its decision cannot be taken as an indication that every purchase or sale by a foreign government is exempt from the antitrust laws. Few would disagree, for example, that golf cart sales would normally be an appropriate target of antitrust regulation, whether the sales are by a private or public

sought to influence government activity that would not be protected under the state action doctrine"); and *Huron Valley Hospital, Inc. v. City of Pontiac*, 466 F. Supp. 1301, 1315 (E.D. Mich. 1979), *vacated on other grounds*, 666 F.2d 1029 (6th Cir. 1981) ("*Noerr-Pennington* immunity presupposes *Parker v. Brown* immunity"), with *In re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568, 584 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982) ("there is . . . no necessary or logical relationship between the imposition of liability on those who advocate anticompetitive activities and on those who participate in them"); *AREEDA & TURNER*, *supra* note 68, ¶¶ 203.2a, 212.6 (Supp. 1982); *Fischel*, *supra* note 68, at 94-95.

¹³⁶ *Hoover v. Ronwin*, 104 S. Ct. 1989, 1995 (1984) (action of state legislature in adopting legislation "*ipso facto*" is immune from antitrust laws); *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). Under *Parker v. Brown* and its progeny, states are immune from antitrust liability. In general, political subdivisions of states share in the immunity to the extent that their anticompetitive conduct is shown to be part of a "clearly articulated and affirmatively expressed state policy." Active state supervision is not required for immunity. See *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985); *Hoover v. Ronwin*, 104 S. Ct. 1989, 1995 (1984); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54 (1982); *California Retail Liquor Dealers Ass'n v. Midland Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-91 (1975). *But see* *Limeco, Inc. v. Division of Lime*, 546 F. Supp. 868, 869-71 (N.D. Miss. 1982) (no state action exemption when state enters the commercial market).

¹³⁶ Cf. *ATWOOD & BREWSTER*, *supra* note 82, § 5.18 n.133.

¹³⁷ See *HAWK*, *supra* note 3, at Supp. 41-43.

¹³⁸ See *supra* notes 117-20 and accompanying text.

entity. But if the golf cart sales represented an important expenditure of national resources, or if they were supervised closely by the foreign government's chief executive or a special cabinet department, or if they otherwise involved the making of important policy decisions, it may well follow that they should qualify for immunity under the *OPEC* theory of act of state.¹³⁹

To give due weight to these competing concerns, a combination of factors must be used in determining whether the commercial exception applies. These factors include: (1) the political and economic importance of the trading activity to the United States government, (2) its importance to the foreign government, (3) the purpose for which the goods are to be used, (4) the foreign government personnel involved in directing the trading activity, and (5) the probable international political repercussions.¹⁴⁰ Application of these factors necessarily complicates the bright line approach of the FSIA. By narrowing the scope of the commercial exception, however, this multi-factored analysis diminishes the exception's importance as a consideration in international petitioning cases. It also leaves foreign governments free to pursue their important national policies without the interference of United States antitrust law.

Once the foreign government act qualifies as "noncommercial," petitioning activities seeking to influence that act should be immune, subject to other applicable restraints on petitioning activity.¹⁴¹ In most cases it will be immaterial whether the petitioner's

¹³⁹ Cf. *Greenwood Utilities Commission v. Mississippi Power Co.*, 751 F.2d 1484, 1505 (5th Cir. 1985) (rejecting commercial exception because the government can engage in a policy decision at the same time it acts as a participant in the marketplace); Comment, *The Act of State Doctrine: The Need for a Commercial Exception in Antitrust Litigation*, 18 SAN DIEGO L. REV. 813, 827-28 (1981) ("if the court wishes to review the actions of a foreign government in a commercial matter it need only apply a strict definition of 'act of state' and thus deny the action its sovereign status").

¹⁴⁰ See AREEDA & TURNER, *supra* note 68, ¶ 239b (Supp. 1982). HAWK, *supra* note 3, at 133-34; Comment, *Foreign Sovereign Immunity and the Act of State: The Need for a Commercial Act Exception to the Commercial Act Exception*, 17 U.S.F.L. REV. 763, 787-92 (1983). Cf. S. 397, 99th Cong., 1st Sess. (1985), which would require a court to dismiss a private antitrust suit challenging foreign conduct if the court concluded that the interests of a foreign nation were paramount to those of the United States.

¹⁴¹ These restraints may consist of various exceptions to the petitioning doctrines, as well as separate legislation prohibiting certain kinds of petitioning activity. Examples of separate legislation are the Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (codified at 15 U.S.C. § 78 (1982)) which prohibits payments by United States concerns to foreign governments, and the Trading With the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-39, 41-44 (1982)), which allows the President to restrict trade with foreign governments under specified circumstances.

immunity applies by virtue of the act of state doctrine or *Noerr-Pennington* doctrine, for the two will reinforce each other. If one is found inapplicable, however—if, for example, the *Bernstein* exception prevents application of the act of state doctrine—the court should permit appropriate reliance on the other so as not to defeat the defendant's reasonable legal expectations.¹⁴²

C. *Nature of the Government Entity*

The level or importance of the government entity being petitioned has played a significant role in determining the availability of an inducement defense. In the act of state area, this factor is sometimes considered in an effort to determine whether a particular act is an act of state. In the *Noerr-Pennington* cases, this factor is used to determine the appropriateness of specific inducement activity. In general, the closer the government act is to the Executive or legislature, the greater the protection will be for the conduct inducing that act.

1. *Nature/Act of State*

American courts have generally refrained from defining precisely when an act of a foreign government entity becomes an act of state. Often, the courts presume that the foreign government act qualifies as an act of state without any real discussion or analysis.¹⁴³ This is especially the case when the executive branch is involved,¹⁴⁴ or when the government entity is performing acts traditionally recognized as acts of state.¹⁴⁵

Not all acts of foreign governments, however, have been considered acts of state. According to the RESTATEMENT OF FOREIGN RE-

¹⁴² Cf. *In re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568, 584-85 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982), in which the court expressed concern that relating *Noerr-Pennington* to *Parker v. Brown* would create unpredictability for persons seeking to influence public officials.

¹⁴³ See, e.g., *General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3, 6-7 (D.D.C. 1979).

¹⁴⁴ See, e.g., *DeRoburt v. Gannett Co.*, 548 F. Supp. 1370, 1376-84 (D. Hawaii 1982), *rev'd on other grounds*, 733 F.2d 701 (9th Cir. 1984) (libel suit brought by President of Nauru barred by act of state); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 98-101, 108-13 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972) (consideration of attempts to influence ruler of the Trucial State Sharjah was barred by act of state).

¹⁴⁵ See, e.g., *Empresa Cubana Exportadora De Azucar y Sus Derivados v. Lamborn & Co.*, 652 F.2d 231, 237 (2d Cir. 1981) (expropriation is "a classic act of state"); *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977) (control of foreign trade by denial of import licenses is an act of state).

LATIONS, for a government act to qualify as an act of state it must involve "the public interests of a state as a state."¹⁴⁶ Applying this guideline, the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America* held that judicial decrees resulting from proceedings initiated by a defendant in a foreign court did not amount to acts of state.¹⁴⁷ The Ninth Circuit reasoned that there was no indication that the decrees, which had the effect of crippling the plaintiff's operations, reflected a "sovereign decision."¹⁴⁸ The RESTATEMENT itself notes that a judgment of a foreign court may be an act of state but usually is not because it involves only the interests of private litigants.¹⁴⁹

Similarly, in *Mannington Mills, Inc. v. Congoleum Corp.*¹⁵⁰ the Third Circuit held that a ministerial act performed by a government agency, such as the granting of a patent, does not rise to the level of an act of state. The Third Circuit subsequently clarified that its decision was limited to ministerial acts that are not of substantial concern to the executive branch in its conduct of international affairs.¹⁵¹

Courts have also held that government agencies vested only with commercial, as distinguished from governmental, authority function outside the realm of the act of state doctrine.¹⁵² As the *OPEC* case well demonstrates, however, commercial acts performed by a

¹⁴⁶ RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 41 comment d (1965). See also Note, *The Noerr-Pennington Doctrine and the Petitioning of Foreign Governments*, 84 COLUM. L. REV. 1343, 1364-66 (1984) (discussing various criteria).

¹⁴⁷ *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 607-08 (9th Cir. 1977) (vacating and remanding dismissals by Judge Burke of the U.S. District Court for the Northern District of California), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983) (dismissing complaints for lack of jurisdiction and *forum non conveniens*), *aff'd*, 749 F.2d 1378 (9th Cir. 1984).

¹⁴⁸ 549 F.2d 597 at 608. Cf. *United States v. Sisal Sales Corp.*, 274 U.S. 268, 272 (1927) (lien foreclosures were alleged to have been among the defendant's illegal acts); *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 689 (S.D.N.Y. 1979) (defendant was alleged, among other things, to have engaged in meritless litigation in a foreign court).

¹⁴⁹ RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 41 comment d (1965). See also *Timberlane*, 549 F.2d at 607-08. The court in *Timberlane* did not consider the *Noerr-Pennington* doctrine.

¹⁵⁰ 595 F.2d 1287, 1294 (3rd Cir. 1979). See also *Forbo-Giunbiasco S.A. v. Congoleum Corp.*, 516 F. Supp. 1210, 1217-18 (S.D.N.Y. 1981) (relying upon *Mannington*).

¹⁵¹ *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 303 (3rd Cir. 1982).

¹⁵² See generally *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 693-94 (1976) (joined in by a majority). See also *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 397-98 (D. Del. 1978) ("agency or instrumentality" of Polish government that exported golf carts was not vested with status of a foreign nation).

central branch of government may be deemed to be acts of state.¹⁵³ Finally, neither acts by foreign government officials for their own financial benefit nor conduct that violates the laws of the foreign government¹⁵⁴ constitutes an act of state.¹⁵⁵

These examples show that whether an act of a foreign government will be held to constitute an act of state depends on various circumstances.¹⁵⁶ The guiding question is the degree to which the agency is acting on behalf of the government and is carrying out its policies.¹⁵⁷ Ironically, the act of state doctrine itself limits a plaintiff's ability to prove that an official's conduct was undertaken

¹⁵³ See *supra* notes 117-20 and accompanying text.

¹⁵⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980); *Jimenez v. Aristeguieta*, 311 F.2d 547, 557-58 (5th Cir. 1962). But see *AREEDA & TURNER, supra* note 68 ¶ 239b (Supp. 1982). See also *Symposium - Federal Jurisdiction, Human Rights, and the Law of Nations: Essays on Filartiga v. Pena-Irala*, 11 GA. J. INT'L & COMP. L. 305 (1981).

The courts have also held that conduct by a foreign government inconsistent with United States policy, if it impacts directly upon property in the United States, is not an act of state. *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487-88 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir. 1967), *cert. denied*, 389 U.S. 830 (1967) (foreign confiscatory decrees purporting to divest foreign nationals of property in the United States are given no effect by United States courts). See also *Allied Bank International v. Banco Credito Agricola De Cartago*, 757 F.2d 516, 521-22 (2d Cir. 1985) (act of state doctrine would not apply in debt repayment dispute where situs of debt was determined to be the United States); *Weston Banking Corp. v. Turkiye Garanti Bankasi*, 456 N.Y.S.2d 684, 687-88 (1982) (act of state doctrine does not apply to foreign government attempt to alter terms of promissory note when "debt sought to be enforced was not located within the State whose acts are said to be dispositive"); *Linseman v. World Hockey Association*, 439 F. Supp. 1315, 1324 (D. Conn. 1977) ("act of state doctrine shields only conduct which is perpetrated within the territorial boundaries of the foreign country").

¹⁵⁵ One state court has held that acts by officers of a foreign city were not acts of state because the act of state doctrine requires the action to "have been taken by the sovereign nation rather than a subdivision of that government." *In re Adoption by McElroy*, 522 S.W.2d 345, 349 (Tenn. Ct. App. 1975), *cert. denied*, 423 U.S. 1024 (1975). See also *American Industrial Contracting, Inc. v. Johns-Manville Corp.*, 326 F. Supp. 879, 881 (W.D. Pa. 1971) (doctrines of international law apply only to nations, not to provinces such as Quebec). These authorities have been criticized. *ATWOOD & BREWSTER, supra* note 68 at 253. In light of the fact that nongovernmental bodies may perform acts of state, see *infra* note 156 and accompanying text, the holdings of these cases are inappropriate.

¹⁵⁶ The Supreme Court suggested in *Continental Ore* that even a private entity could perform acts of state if the entity received proper authorization and direction from the government. *Continental Ore Co. v. Union Carbide and Carbon Co.*, 370 U.S. 690, 706-07 (1962). The Court observed, however, that nothing in the record indicated that Canadian law compelled the discriminatory purchases undertaken by the defendant or that any Canadian official "approved or would have approved of joint efforts to monopolize." This statement suggests that a different result would have been reached had the necessary authorization been shown. See also *ANTITRUST GUIDE, supra* note 66, at 54-55 (action of nongovernmental agent, if clearly "authorized to perform the alleged acts of state as a delegated sovereign function," may constitute act of state).

¹⁵⁷ See *HAWK, supra* note 3, at 128-29.

without authority under the foreign government's law. For example, acceptance of a bribe payment by a government official will not constitute an act of state unless the official was acting within the scope of his official authority.¹⁵⁸ But proving that the official acted without authority may require the plaintiff to produce evidence of official misconduct, something that is usually forbidden by the act of state doctrine. If the foreign government has repudiated or condemned the official's act, the United States court may proceed without concern for act of state considerations.¹⁵⁹ If it has not, however, the court must limit itself to a cursory analysis of the official's conduct. In this situation the level of importance of the government official will prove to be significant. The higher his status within the government, the greater the presumption will be that he acted with government authority. The lower his status—or if the official was outside the government, as in *Continental Ore*—the greater the presumption will be that he acted without governmental authority and the more penetrating the court's analysis of his authority may be. A finding that a low level official acted beyond his authority will be unlikely to have foreign policy repercussions.

2. *Nature/Noerr-Pennington*

Like the act of state doctrine, the *Noerr-Pennington* doctrine may apply to all levels of government, but the degree of its protection among these levels varies markedly. The greatest degree of protection applies to activities directed toward the "political" branches of government, *i.e.*, the executive and legislative branches.¹⁶⁰ The extent of the protection typically afforded is illus-

¹⁵⁸ See D. I. Baker, Testimony before the Subcommittee on International Economic Policy of the House Committee on International Relations, TRADE REG. REP. (CCH) ¶ 50,238 at p. 55,446 (1975).

¹⁵⁹ *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979) (repudiated government act could not give rise to act of state defense). See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) (court doubted whether action by foreign government official in violation of laws of the foreign country and unratified by the government could be characterized as an act of state); *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962) (Venezuela sought extradition of former government official; act of state defense not applicable).

¹⁶⁰ See *Trucking Unlimited v. California Motor Transport Co.*, 404 U.S. 508, 512-13 (1972). See, *e.g.*, *First American Title Co. v. South Dakota Land Title Association*, 714 F.2d 1439, 1446-47 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984); *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612, 620-21 (6th Cir. 1982), *cert. denied*, 459 U.S. 1209 (1983); *Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 994-95 (S.D.N.Y. 1981); *Wilmorite, Inc. v. Eagan Real Estate, Inc.* 454 F. Supp. 1124, 1132-33 (N.D.N.Y.

trated by the Seventh Circuit's decision in *Metro Cable Co. v. CATV of Rockford, Inc.*,¹⁶¹ in which the plaintiffs alleged that the defendants used both payments of money and misrepresentations to induce a city council to grant a cable television franchise. Although other courts had found these types of activities to give rise to antitrust liability when used to influence judicial or administrative officials,¹⁶² the Seventh Circuit nevertheless held them immune from antitrust liability in the legislative context. It did so despite its observations that the franchising function "could have been delegated to an administrative tribunal."¹⁶³

Significantly less protection applies to attempts to influence government officials in the judicial and administrative areas, as *Trucking Unlimited* indicates.¹⁶⁴ How much less is defined by the

1977), *aff'd*, 578 F.2d 1372 (2d 1978), *cert. denied*, 439 U.S. 983 (1978). The broad protection applies to indirect attempts to influence the legislature, such as pressuring businesses not to do business in a state until legislation is passed, *Missouri v. National Organization for Women*, 620 F.2d 1301, 1309-16 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980), or attempting to influence voters in an election, *Subscription Television, Inc. v. Southern California Theatre Owners Association*, 576 F.2d 230 (9th Cir. 1978).

There is some question whether *Noerr-Pennington* protection applies to all kinds of political activity. Compare *Osborn v. Pennsylvania-Delaware Service Station Dealers Association*, 499 F. Supp. 553, 557-58 (D. Del. 1980), with *Crown Central Petroleum Corp. v. Waldman*, 486 F. Supp. 759, 768-69 (M.D. Pa. 1980), *rev'd on other grounds*, 634 F.2d 127 (3rd Cir. 1980), which take different approaches to the question of whether a gasoline dealer's boycott directed at the Department of Energy could give rise to a *Noerr-Pennington* defense. The defense extends to information given to the police that leads to anticompetitive consequences. *Ottensmeyer v. Chesapeake & Potomac Telephone Co.*, 756 F.2d 986, 993-94 (4th Cir. 1985); *Forro Precision, Inc. v. International Business Machines Corp.*, 673 F.2d 1045, 1059-60 (9th Cir. 1982).

¹⁶¹ 516 F.2d 220 (7th Cir. 1975).

¹⁶² See *infra* notes 201-02 and accompanying text.

¹⁶³ *Metro Cable*, 516 F.2d at 228. See also *First American Title Co. v. South Dakota Land Title Association*, 714 F.2d 1439, 1447 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984) (misrepresentations in the legislative context are constitutionally protected). Cf. *Cow Palace, Ltd. v. Associated Milk Producers, Inc.*, 390 F. Supp. 696, 704-05 (D. C. 1975) (bribery allegations dismissed under *Noerr-Pennington* because they did not suggest a harm to competition).

¹⁶⁴ See *supra* notes 53-62 and accompanying text. Conduct occurring in a private context generally has no protection, even if it is ultimately intended to influence public regulatory bodies. *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 482 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (violations of statute to provoke court challenge); *Mid-Texas Communications Systems, Inc. v. American Telephone and Telegraph Co.*, 615 F.2d 1372, 1382-84 (5th Cir. 1980), *cert. denied*, 449 U.S. 912 (1980) (refusal to interconnect to provide agency review); *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 543-47 (5th Cir. 1978), *cert. denied*, 449 U.S. 924 (1979). One case has held, however, that attempts to delay the adoption of revised safety specifications by private standard-setting agencies has *Noerr-Pennington* protection inasmuch as the agencies' recommendations were widely adopted by governmental entities. *Wheeling-Pittsburgh Steel Corp.*

scope of the "sham exception" to *Noerr-Pennington*, the parameters of which are discussed below.¹⁶⁵ Basically, this exception applies to certain conduct purportedly designed to influence public officials and undertaken in bad faith with the real purpose of directly restraining competition. Although conduct in the "political" context could conceivably fall within this exception,¹⁶⁶ the courts have applied the exception almost exclusively to conduct in the judicial and administrative areas.

3. *Noerr-Pennington and Foreign Subdivisions*

Since the extension of the sham exception to the international arena is unclear, it remains to be seen whether petitioners of foreign governments should expect varying levels of *Noerr-Pennington* protection, depending on the nature of the government entity being petitioned.¹⁶⁷ Analysis of this issue must logically start with the language of the opinion in *Trucking Unlimited*. Unfortunately, the Supreme Court does not carefully articulate the rationale for the distinction between the "political" and "nonpolitical" branches of government.¹⁶⁸ One may nevertheless infer that the

v. *Allied Tube & Conduit Corp.*, 573 F. Supp. 833, 838 (N.D. Ill. 1983). The court there found, moreover, that the private agencies engaged in "quasi-legislative activities," so that attempts to influence them were judged under the same criteria as attempts to influence legislative bodies. *Id.* at 841-43. *See also* *Garst v. Stoco, Inc.*, 604 F. Supp. 326, 329-32 (E.D. Ark. 1985) (statutory health agencies, although private bodies for some purposes, would be considered government bodies for *Noerr-Pennington* purposes). *But see* *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* 456 U.S. 556, 570-73 (1982) (nonprofit trade association that promulgates engineering standards may be liable for issuance of anticompetitive standards or guidelines); *ECOS Electronics Corp. v. Underwriters Laboratories*, 743 F.2d 498, 501-03 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1178 (1985) (although affirming summary judgment for the defendant, court outlines requirements for antitrust liability for standard-making organizations); *Richard Hoffman Corp. v. Integrated Building Systems, Inc.*, 581 F. Supp. 367, 374 (N.D. Ill. 1984) (firm hired by city to prepare specifications that prescribe use of its own products is not immune, at least where allegations of collusion with city are present).

¹⁶⁵ *See infra* notes 182-215 and accompanying text.

¹⁶⁶ The case coming closest to recognizing sham activity in a "political" branch is *Harman v. Valley National Bank of Arizona*, 339 F.2d 564 (9th Cir. 1964). The plaintiff there alleged that the defendants had conspired to induce a state attorney general to file an action that resulted in placing a savings and loan association in receivership.

¹⁶⁷ One of the few authorities to consider this issue, if only briefly, is *ATWOOD & BREWSTER*, *supra* note 82, § 8.12. The authors suggest that the foreign government's political system could be relevant to how, but not whether, the *Noerr-Pennington* doctrine is applied. *See also* Comment, *supra* note 68, at 140-43 (1983) (advocating a "rule of reason" approach).

¹⁶⁸ *See* Fischel, *supra* note 68, at 98-100 (noting the Court's failure to explain why the unethical nature of petitioning activity should be relevant in the adjudicatory context but

distinction is based upon the Court's perception that greater opportunities for harassment exist in "nonpolitical" arenas, that political expression has traditionally been directed toward the "political" branches, and that the opportunities for acquiring information in the "nonpolitical" branches are more limited than in the other branches. These considerations necessitate differing treatment among those seeking to exert influence.¹⁶⁹

These considerations, however, cannot readily be transposed to the international scene. Political expression, for example, may be absent from all branches of the foreign government. The government may lack an effective information gathering apparatus at any level. The executive branch of the government may have a tradition of accepting payments which would be considered bribes in other parts of the world, and harassment of business competitors in the absence of payments may be a way of life. The government, moreover, may not be committed to a basic policy of open competition, and may otherwise be economically weak and unable to resist the pressures for anticompetitive regulations.¹⁷⁰ Under some or any of these circumstances, an extension of the sham exception rules to all branches of a foreign government may seem justified.

Important arguments can also be made to support the theory that the sham exception rules should not apply to any subdivision of a foreign government. These arguments relate to the foreign government's sensitivity to extraterritorial enforcement of United States antitrust laws,¹⁷¹ and to the notion that foreign governments should be in the best position to decide what kinds of communications within their own borders are acceptable for persons seeking sovereign action.¹⁷² Also relevant is the act of state consideration that United States courts should not become involved in adjudging the motive or validity of foreign government decisions. This reasoning applies equally to decisions of ancillary branches of foreign governments, and it would seem especially appropriate in decisions by those branches which have no exact counterparts in the United

not in the political context).

¹⁶⁹ *Trucking Unlimited*, 404 U.S. at 512-15.

¹⁷⁰ See *ATWOOD & BREWSTER*, *supra* note 82, § 4.03; Comment, *Corporate Lobbyists Abroad: The Extraterritorial Application of Noerr-Pennington Antitrust Immunity*, 61 CALIF. L.REV. 1254, 1272-79 (1973).

¹⁷¹ See *Davis*, *supra* note 68, at 435-37 (discussing foreign blocking legislation).

¹⁷² See *AREEDA & TURNER*, *supra* note 68, ¶ 239b1. "[E]very government, whether representative or not, is privileged to set the terms on which persons within its borders may seek its legislation, decrees, or other sovereign action."

States government and whose intergovernmental relationships are difficult to discern.¹⁷³ From a business perspective, an extension of the sham exception may effectively shackle United States businessmen from competing in the foreign country on equal footing with other foreign businessmen.¹⁷⁴

In view of these countervailing considerations, adoption of a system similar to the one now in place domestically would be desirable. Such a system would allow the greatest petitioning freedom in the executive and legislative areas, where the foreign government is likely to be most sensitive about its sovereignty; yet it would restrict petitioning activity where sham-type influences are likely to be most invidious. The Foreign Corrupt Practices Act of 1977,¹⁷⁵ moreover, reduces whatever need there may be for greater court supervision of foreign petitioning activity. That Act prohibits United States concerns from engaging in what Congress considers to be the most objectionable kind of foreign petitioning, payments of money.¹⁷⁶

Although the Fifth Circuit did not explicitly consider the issue, it implicitly adopted the domestic sham exception rules in *Coastal States Marketing, Inc. v. Hunt*.¹⁷⁷ The court there considered whether the *Noerr-Pennington* doctrine protected the defendant from the antitrust consequences of litigation and threats of litigation in foreign countries. After reviewing the plaintiff's sham exception arguments, the court concluded that stipulations agreed upon by the parties during pretrial proceedings established that the defendant had acted in good faith sufficient to bring the foreign litigation within the protection of petitioning immunity.¹⁷⁸ The court gave no consideration to the form of governments in the foreign countries involved.

¹⁷³ Cf. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1191-95 (E.D. Pa. 1981), *supp. op.* 513 F. Supp. 1334, *aff'd in part and rev'd in part sub nom.* In re Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238 (3rd Cir. 1983), where the court examines the role of Japan's Ministry of International Trade and Industry (MITI) vis-a-vis pricing agreements among manufacturers. MITI is a cabinet-level ministry of the Japanese government. *Id.* at 1191.

¹⁷⁴ See Davis, *supra* note 68, at 437-38; see also Hawk, *supra* note 3, at 147-48.

¹⁷⁵ Foreign Corrupt Practices Act of 1977 §§ 103-04, 15 U.S.C. §§ 78dd-1, 78dd-2 (1982).

¹⁷⁶ See 15 U.S.C. § 78dd-1 (1982).

¹⁷⁷ 694 F.2d 1358 (5th Cir. 1983).

¹⁷⁸ *Id.* at 1369. See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1155-57 (E.D. Pa. 1981), *supp. op.* 513 F. Supp. 1334, *aff'd in part and rev'd in part sub nom.* In re Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238 (3rd Cir. 1983), where the court again assumed that the same sham exception rules apply abroad as at home.

The opinion in *Coastal States Marketing* also demonstrates that *Noerr-Pennington* extends to acts of a foreign government that may not be regarded as acts of state. As a general rule, the broadest *Noerr-Pennington* protection applies to acts of state, while the sham exception rules apply to other acts of foreign governments. The general rule, however, has many exceptions inasmuch as an act of any branch of foreign government could conceivably qualify as an act of state, and the broad *Noerr-Pennington* protection presumably applies only to the executive and legislative branches. It is also possible that an act of even the executive or legislative branch will not qualify as an act of state.¹⁷⁹ In this event the broad *Noerr-Pennington* protection should continue to apply unless the act was undertaken by a government official in his private capacity,¹⁸⁰ in which case there would be no petitioning immunity.

D. Sham Exception

As mentioned above, the sham activity exception to the *Noerr-Pennington* doctrine is based upon a private defendant's actual purpose to restrain competition.¹⁸¹ It has yet to be applied in any case decided in the international context.

1. What Constitutes Sham Activity

On the basis of *Trucking Unlimited*, most courts agree that a "pattern of baseless, repetitive claims" used as an anticompetitive device in either a judicial or administrative context gives rise to an antitrust violation.¹⁸² Difficulty occurs, however, in defining what kind of suits are "baseless" and how "repetitive" they must be.

A law suit or administrative proceeding is baseless where its purpose is not to involve official action by a government body, but rather to interfere improperly with a competitor's business.¹⁸³ Im-

¹⁷⁹ As discussed above, the failure to qualify as an act of state could be due to various reasons, such as application of the *Bernstein* exception, *supra* note 28, or the Hickenlooper Amendment, *supra* note 16. A court might also consider the act to have been committed by an executive or legislative official in his private capacity. See *supra* note 154 and accompanying text.

¹⁸⁰ See *supra* note 154 and accompanying text.

¹⁸¹ See *supra* notes 164-66 and accompanying text.

¹⁸² *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 643-45 (1977) (Blackmun, J., concurring); see *Otter Tail Power Co. v. United States*, 410 U.S. 366, 379-80 (1973); *Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 840-41 (9th Cir. 1980).

¹⁸³ *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1175 (10th Cir. 1982).

proper interference occurs where the purpose of the institution of the lawsuit or administrative filing is to suppress competition¹⁸⁴ or to deplete the competitor's resources with the expense of protracted litigation and negotiation.¹⁸⁵ Naturally, a claimant may have various motives, proper as well as improper, for instituting a legal proceeding against a competitor.¹⁸⁶ Consequently, the courts have suggested that the plaintiff must demonstrate that the "principal" purpose¹⁸⁷ or "sole" purpose¹⁸⁸ of the proceeding was an anticompetitive one.

Several indicia are relevant to determining the existence of an improper purpose. Generally, courts require the antitrust plaintiff either to prove the existence of "specific acts, other than those incidental to the normal use of the courts, directed at attaining the

¹⁸⁴ *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983); *Ernest W. Hahn, Inc.*, 615 F.2d at 840-41; *Gainesville v. Florida Power & Light Co.*, 488 F. Supp. 1258, 1265-66 (S.D. Fla. 1980) ("the requisite motive for the sham exception is the intent to harm one's competitors not by the result of the litigation but by the simple fact of the institution of litigation").

¹⁸⁵ *MCI Communications Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081, 1156-58 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 234 (1983); *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896-97 (2d Cir. 1981); *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1346-47, 1358 (5th Cir. 1980) (allegation that suit was filed to interfere with plaintiff's mechanic's lien and to "strangle plaintiff's source of funds"), *cert. denied*, 450 U.S. 1030 (1981).

¹⁸⁶ See, e.g., *Alexander v. National Farmers Org.* 687 F.2d 1173, 1200-03 (8th Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), where the court found that the defendant's pattern of litigation, although motivated in part by the desire to "break [the plaintiff's] back," was nevertheless immune as directed against the plaintiff. Litigation and threats of litigation against the plaintiff's customers, however, were not immune. See also *First Am. Title Co. v. South Dakota Land Title Assoc.*, 714 F.2d 1439, 1447-48 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984); *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980) (competitor's antipathy does not eradicate first amendment protection).

¹⁸⁷ See *United States v. Otter Tail Power Co.*, 360 F. Supp. 451, 451-52 (D. Minn. 1973), *aff'd*, 417 U.S. 901 (1974); cf. *WCCB-TV, Inc. v. Telerep., Inc.*, 601 F. Supp. 284, 286 (W.D.I.N.C. 1984) ("[a]nti-competitive intent alone does not make a petition to a court a 'sham'").

¹⁸⁸ See *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 110 n.15 (1978). A good discussion of the "principal purpose" and "sole purpose" tests is contained in *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1371-72 (5th Cir. 1983), which concludes that a defendant should be protected so long as its desire for judicial relief "is a significant motivating factor." See also *MCI Communications Corp.*, 708 F.2d at 1155-56.

In *Grip-Pak, Inc.*, 694 F.2d at 471-73, the court noted that the sham exception applies where the antitrust defendant filed suit seeking "to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome." The court held that the exception could apply even where there was a colorable claim and probable cause for the antitrust defendant's suit. *Id.* at 472-73. But see *Hydro-Tech Corp.*, 673 F.2d at 1177 nn. 7, 8.

illegal objective,"¹⁸⁹ or to make a showing of acts that are "abusive of the judicial processes."¹⁹⁰ Evidence of such acts includes the antitrust court's assessment that the defendant had no reasonable basis for its previous litigation;¹⁹¹ the antitrust defendant's specific acts of misconduct in the previous litigation, such as making misrepresentations to the court or failing to communicate settlement offers;¹⁹² and the antitrust defendant's admission that agency protests were filed automatically and without regard to merit.¹⁹³ Lack of success in the alleged sham litigation or administrative proceeding may also constitute evidence of abuse,¹⁹⁴ although it is not conclusive on the issue.¹⁹⁵ Success, on the other hand, is probably conclusive evidence that the antitrust defendant's conduct was not abusive.¹⁹⁶

The Supreme Court has not decided whether one suit or proceeding alone is sufficient to give rise to the sham exception, and the Justices themselves appear to be divided.¹⁹⁷ A majority of

¹⁸⁹ *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1358 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

¹⁹⁰ *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 (10th Cir. 1982) (filing a lawsuit "without probable cause" and with an anticompetitive intent does not constitute a sham). *See also Semke v. Enid Automobile Dealers Assoc.*, 456 F.2d 1361, 1366-67 (10th Cir. 1972) (no sham was shown because defendants were not guilty of "fraud, corruption or misuse of state processes"); *Mountain Grove Cemetery Assoc. v. Norwalk Vault Co. of Bridgeport, Inc.*, 428 F. Supp. 951, 955 (D. Conn. 1977) ("some abuse or corruption of the judicial process" is required).

¹⁹¹ *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 809-12 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984).

¹⁹² *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896-97 (2d Cir. 1981).

¹⁹³ *Clipper Express v. Rocky Mtn. Motor Tariff Bureau*, 690 F.2d 1240, 1257 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

¹⁹⁴ *Clipper Express*, 690 F.2d at 1257; *see Ernest W. Hahn, Inc., v. Coddling*, 615 F.2d 830, 841 n.13 (9th Cir. 1980); *Landmarks Holding Corp.*, 664 F.2d at 897.

¹⁹⁵ *Wilmorite, Inc. v. Eagan Real Estate, Inc.*, 454 F. Supp. 1124, 1133 (N.D.N.Y. 1977), *aff'd*, 578 F.2d 1372 (2d Cir. 1978), *cert. denied*, 439 U.S. 983 (1978) (dismissal of three suits instigated by defendants in opposition to zoning change did not give rise to sham exception). *Cf. Subscription Television, Inc. v. Southern Cal. Theatre Owners Assoc.*, 576 F.2d 230, 232-33 (9th Cir. 1978) (*Noerr-Pennington* applied despite later determination that anti-pay television legislation was unconstitutional).

¹⁹⁶ *Mid-Texas Communications Sys., Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1383 (5th Cir. 1980); *accord City of Mishawaka v. American Elec. Power Co.*, 465 F. Supp. 1320, 1346 (N.D. Ind. 1979), *modified*, 616 F.2d 976 (7th Cir. 1980); *Baker Driveway Co. v. Bankhead Enters.*, 478 F. Supp. 857, 860 (E.D. Mich. 1979); *AREEDA & TURNER, supra note 68, ¶ 203.1d* (Supp. 1982). *But see Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471-73 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983). Success in obtaining an ex parte temporary restraining order is not indicative of a lack of abuse. *Id.* at 473. *See also Winterland Concessions Co. v. Trela*, 735 F.2d 257, 263 n.4 (7th Cir. 1984).

¹⁹⁷ In *Vendo Co. v. Lekto-Vend Corp.*, 433 U.S. 623 (1977), the Court faced the issue whether a federal court could issue an injunction against the execution of a state court judg-

lower courts appear to hold that one vexatious or baseless action is sufficient to state a cause of action,¹⁹⁸ while a minority hold to the contrary.¹⁹⁹ Of course, a multiplicity of suits that are meritorious does not give rise to a violation.²⁰⁰

Apart from baseless and repetitive claims, other conduct giving rise to the sham exception includes fraud, misrepresentations and perjury,²⁰¹ bribery,²⁰² conspiracy with a government official,²⁰³

ment on antitrust grounds. The Court held that a federal court could not, based upon the Anti-Injunction Act, 28 U.S.C. § 2283 (1976). *Vendo Co.*, 433 U.S. at 630-43. In his concurring opinion, Justice Blackmun, joined by Chief Justice Burger, suggested that because only one state court suit was involved, the state-court plaintiff could not be said to have used the state court proceeding "as an anticompetitive device." *Id.* at 645. Justice Stevens, joined by Justices Brennan, White and Marshall, however, filed a dissent, taking the position that a single abuse of the adjudicatory process could violate the antitrust laws. *Id.* at 661-62.

¹⁹⁸ *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1154-55 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); *Clipper Express v. Rocky Mtn. Motor Tariff Bureau*, 674 F.2d 1252, 1266-67 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 543 n.6 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); *First Nat'l Bank of Omaha v. Marquette Nat'l Bank of Minneapolis*, 482 F. Supp. 514, 519-21 (D. Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981); *Associated Radio Serv. v. Page Airways, Inc.*, 414 F. Supp. 1088, 1094-96 (N.D. Tex. 1976); *Technicon Medical Information Sys. Corp. v. Green Bay Packaging, Inc.*, 480 F. Supp. 124, 127-28 (E.D. Wis. 1979); *Colorado Petroleum Marketers Assoc. v. Southland Corp.*, 476 F. Supp. 373, 378 (D. Colo. 1979); *Cyborg Systems, Inc. v. Management Science America, Inc.*, 1978-1 TRADE CAS. (CCH) ¶ 61,927 (N.D. Ill. 1978). In *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 734 F.2d 1157 (6th Cir. 1984), the court suggested that, while one suit may be sufficient to give rise to the sham exception, the plaintiff's burden of proving baselessness is increased if only one suit is involved. *Id.* at 1162-63.

¹⁹⁹ *Mountain Grove Cemetery Association v. Norwald Vault Co. of Bridgeport, Inc.*, 428 F. Supp. 951, 955 (D. Conn. 1977); *Huron Valley Hospital, Inc. v. City of Pontiac*, 466 F. Supp. 1301, 1314 (E.D. Mich. 1979), *vacated*, 666 F.2d 1029 (6th Cir. 1981); *Central Bank of Clayton v. Clayton Bank*, 424 F. Supp. 163, 167 (E.D. Mo. 1976), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977) (all requiring multiple, repetitive suits). In *Los Angeles Memorial Coliseum Comm'n v. City of Oakland*, 717 F.2d 470, 472-73 (9th Cir. 1983), the court intimated that a single state court suit would not be sufficient to justify issuance of a federal court injunction enjoining it. *See also* *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 487 (8th Cir. 1985) (single lawsuit is insufficient absent allegations that the lawsuit involves serious misconduct similar to the access-barring abuses described in *Trucking Unlimited*).

²⁰⁰ *Ad Visor, Inc. v. Pacific Tel. & Tel. Co.*, 640 F.2d 1107, 1109-10 (9th Cir. 1981) (63 state court collection suits were not part of an anticompetitive scheme).

²⁰¹ *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972); *Clipper Express v. Rocky Mtn. Motor Tariff Bureau*, 690 F.2d 1240, 1259-63 (9th Cir. 1982) ("fraudulent furnishing of false information" regarding rates), *cert. denied*, 459 U.S. 1227 (1983); *Federal Prescription Serv. Inc. v. American Pharmaceutical Assoc.*, 663 F.2d 253, 263 (D.C. Cir. 1981) (misrepresentations in the adjudicatory process are not protected), *cert. denied*, 455 U.S. 928 (1982); *Israel v. Baxter Laboratories*, 466 F.2d 272, 277-79 (D.C. Cir. 1972); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1292-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 460 F. Supp. 1359, 1385 (D. Hawaii 1978).

threats and intimidation,²⁰⁴ rigged or phony bids,²⁰⁵ petitioning activity that is part of a much broader anticompetitive scheme,²⁰⁶ and petitioning activity where the petitioner knew or should have known that the government action sought would be "improper."²⁰⁷ A few courts have also given attention to the "meaningful access"

²⁰² *Trucking Unlimited*, 404 U.S. at 513; *Federal Prescription Serv., Inc.*, 663 F.2d at 263; *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 TRADE CAS. (CCH) ¶ 64,527 at 72,924 (N.D. Ga. 1981). *But see* *Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794, 803-05 (7th Cir. 1961). In *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 687 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976), the court held that commercial bribery, standing alone, does not constitute an antitrust violation. No reference was made to the *Noerr-Pennington* cases.

²⁰³ *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1563-68 (5th Cir. 1984), *petition for cert. filed sub nom. Gulf Coast Cable Television Co. v. Affiliated Capital Corp.*, 53 U.S.L.W. 3543 (U.S. Dec. 14, 1984) (No. 84-951). *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 742-46 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); *Duke & Co. v. Foerster*, 521 F.2d 1277, 1282 (3rd Cir. 1975); *Harman v. Valley Nat'l Bank of Ariz.*, 339 F.2d 564, 566 (9th Cir. 1964); *Central Telecommunications, Inc. v. City of Jefferson City*, 589 F. Supp. 85, 89-90 (W.D. Mo. 1984); *Richard Hoffman Corp. v. Integrated Bldg. Syst.*, 581 F. Supp. 367, 374 (N.D. Ill. 1984); *Ashland-Warren, Inc.*, 1982-1 TRADE CAS. (CCH) at 72,929. *But see* *Alphin Aircraft, Inc. v. Henson*, 1984-2 TRADE CAS. (CCH) ¶ 66,161, at 66,502 (D. Md. July 5, 1984); *Cow Palace, Ltd. v. Associated Milk Producers, Inc.*, 390 F. Supp. 696, 704-05 (D. Colo. 1975). Public officials do not become conspirators simply because they have been persuaded to undertake the action urged by the defendant. *Federal Prescription Serv., Inc.*, 663 F.2d at 264-65; *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 229-30 (7th Cir. 1975). *See generally* AREEDA & TURNER, *supra* note 68, ¶¶ 203.3a-203.3c (Supp. 1982).

²⁰⁴ *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters and Helpers Local No. 150*, 440 F.2d 1096, 1099 (9th Cir. 1971), *cert. denied*, 404 U.S. 826 (1971).

²⁰⁵ *United States v. Young Bros., Inc.*, 728 F.2d 682 (5th Cir. 1984) (affirming antitrust conviction, but no petitioning immunity asserted), *cert. denied*, 105 S. Ct. 246 (1984); *Kurek v. Pleasure Driveway & Park Dist. of Peoria*, 557 F.2d 580, 592-93 (7th Cir. 1977), *vacated on other grounds*, 435 U.S. 992 (1978); *F. Buddie Contracting, Inc. v. Seawright*, 47 ANTITRUST & TRADE REG. REP. (BNA) ¶ 75,759 (N.D. Ohio Aug. 15, 1984) (unreasonable restraint of trade may occur where there has been tampering with competitive bidding process). Bid rigging may also fall under the commercial exception. *See supra* notes 121-33.

²⁰⁶ *Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1371 n.42 (5th Cir. 1983); *Clipper Express*, 690 F.2d at 1263-65; *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 994 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980); *Rex Chainbelt, Inc. v. Harco Prods., Inc.*, 512 F.2d 993, 1000-03 (9th Cir. 1975), *cert. denied*, 423 U.S. 831 (1975); *Harman v. Valley Nat'l Bank of Ariz.*, 339 F.2d 564, 566 (9th Cir. 1964). Indeed, any independently illegal conduct committed during the course of petitioning activity may subject the defendant to antitrust scrutiny. *See Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 303-04 (1973), in which the Court held that if the plaintiff, who alleged that the defendants had deprived him of his seat on a stock exchange in violation of the antitrust laws, had lost his seat in violation of the exchange's rules, "the antitrust action should very likely take its normal course."

²⁰⁷ *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1499-1500 (5th Cir. 1985). The court expressly cautioned, however, that the petitioner should not be placed in the position of having to predict the validity of the government action sought. *Id.* *See also* *Subscription Television, Inc. v. Southern Cal. Theatre Owners Assoc.*, 576 F.2d 230, 233 (9th Cir. 1978).

language of *Trucking Unlimited*.²⁰⁸ Although one court has said that barring access "is the cornerstone to the sham exception,"²⁰⁹ others have held that barring access is not a prerequisite,²¹⁰ and it does not appear to have developed as conduct separate and apart from other sham activity. One of the few courts to have actually applied the sham exception under this language found that the defendant's administrative tariff filings denied the plaintiffs "timely" access to administrative consideration.²¹¹

A final kind of petitioning activity lacking the usual immunity, although not traditionally characterized as sham activity,²¹² involves action which is routinely approved by the government agency to which it is directed, such as in common carrier or public utility rate-setting procedures. When the rate-setting agency does little or no more than adopt the anticompetitive rates proposed by a defendant, the defendant may be held liable for antitrust consequences even though the agency's approval has the effect of requiring the defendant to comply with the rates set.²¹³ Liability in this situation is based on the theory that the rates are really the product of the person or persons being regulated rather than that of the government agency.²¹⁴ The cases do not establish how much partic-

²⁰⁸ *Trucking Unlimited*, 404 U.S. at 512.

²⁰⁹ *Wilmore, Inc. v. Egan Real Estate, Inc.*, 454 F. Supp. 1124, 1134-35 (N.D.N.Y. 1977), *aff'd*, 578 F.2d 1372 (2d Cir. 1978), *cert. denied*, 439 U.S. 983 (1978).

²¹⁰ *Litton Sys. v. American Tel. & Tel. Co.*, 700 F.2d 785, 809 n.36 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984); *Clipper Express*, 690 F.2d at 1257-59 (discussing several cases on the subject); *Federal Prescription Service, Inc.*, 663 F.2d at 263-65; *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 507 F. Supp. 939, 947 (E.D. Mich. 1981) ("[i]n the judicial setting, access will not generally be denied, unless in a *de facto* way by presentation of perjury or other misconduct before the court").

²¹¹ *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 982-83 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

²¹² *See id.* at 981 (the court observed that the sham exception "standing alone" did not apply to a rate making proceeding).

²¹³ *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-602 (1976); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1180-81 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 931-32 (2d Cir. 1981); *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 981-83 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). *Cf. Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08 (1962) (the Court rejected a *Noerr-Pennington* defense because of the defendant's exercise of its discretionary powers as a purchasing agent of the Canadian government); *Civil Aeronautics Bd. v. British Airways Bd.*, 433 F. Supp. 1379, 1387-88 (S.D.N.Y. 1977). *But see* *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721, 1730-31 (1985), where the court reversed a judgment against private rate setting bureaus on the ground that their conduct was justified under the state action exemption.

²¹⁴ In *Cantor*, the Court noted: "There is nothing unjust in a conclusion that respondent's participation in the [state public service agency's] decision is sufficiently significant to re-

ipation in the rate-setting process the agency must have before the defendant may obtain *Noerr-Pennington* protection, but they do suggest that the agency's role must be "dominant," or at least "significant."²¹⁵

2. Foreign Implications

To date American courts have not had much opportunity to apply the sham exception rules to the "nonpolitical" branches of foreign governments. Although the Ninth Circuit had little difficulty with the concept in *Coastal States Marketing*,²¹⁶ courts should anticipate several problems. One will be determining which foreign government agencies or branches qualify as "political."²¹⁷ Election to office cannot be the criterion, because many foreign government chief executives would fail to qualify. In nondemocratic governments, the level or importance of the government agency may thus prove to be the only available criterion.

A second problem will involve deciding which law to apply in determining whether a claim filed before the "nonpolitical" government entity is baseless. A claim not baseless under foreign law may be procedurally baseless under United States law and may have anticompetitive effects. Currently, under these circumstances United States courts evidence a tendency to apply their own criteria for baselessness.²¹⁸ It would be appropriate, however, for courts to give consideration to the foreign law policy and the defendant's good faith in attempting to effectuate that policy.

quire that its conduct implementing the decision . . . conform to applicable federal law." 428 U.S. at 594. In *City of Mishawaka, Indiana v. Indiana & Mich. Elec. Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978), the court held that "if an anticompetitive practice is the product, at least in part, of the company being regulated . . . then the anticompetitive condition is in reality the work of that company." *Id.* at 1320, quoting *City of Shakopee v. Northern States Power Co.*, Civ. No. 4-75-591, slip op. at 6 (D. Minn. 1976).

Alternatively, liability may be imposed on the theory that the defendant's filing of rates does not constitute petitioning activity. See *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1155 n.114 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983); *Litton Sys. v. American Tel. & Tel. Co.*, 700 F.2d 785, 807-08 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984); *In re Wheat Rail Freight Rate Antitrust Litigation*, 579 F. Supp. 517, 537-38 (N.D. Ill. 1984), *aff'd*, 759 F.2d 1305 (7th Cir. 1985).

²¹⁵ See *Cantor*, 428 U.S. at 594-95.

²¹⁶ See *supra* notes 177-78 and accompanying text.

²¹⁷ See *supra* note 160 and accompanying text.

²¹⁸ *Cf. Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Forbo-Giubiasco S.A. v. Congoleum Corp.*, 516 F. Supp. 1210, 1217-18 (S.D.N.Y. 1981) (in denying defendant's motion for summary judgment on act of state grounds, court held that it could determine not the validity of a foreign patent but only "whether the foreign patents were obtained through inequitable conduct").

One may hypothesize, for example, a situation in which the law of foreign country X permits A, the first entrant into a new market in X, to bring suit under specified circumstances to bar or limit subsequent entrants. The purpose of the law may be to encourage A to enter the market by protecting him from competitors while he develops the new market. One may further hypothesize that A brings suit in X to limit the participation of B, a potential competitor, in the market. In response, B sues A in the United States on an antitrust theory, jurisdiction and the requisite effect on commerce being assumed. What defenses are available to A? Clearly the defense of sovereign compulsion is not available, for A's action in X is purely discretionary.²¹⁹ Under the authority of *Timberlane*, the act of state defense is likewise probably not available.²²⁰ Inasmuch as the sole purpose of A's suit is to interfere with B's competitive activity, for which there is no legal basis in the United States, B would further argue that A's foreign law suit is a sham under the *Noerr-Pennington* doctrine. Because of the undisputed foreign law basis for A's suit, however, A's suit should not be regarded as baseless, and A should be allowed to invoke the protection of *Noerr-Pennington*.²²¹

A third problem will be defining what constitutes a conspiracy with a government official when the official involved not only has policy-setting functions but also participates in operating a state-owned enterprise.²²² Under present domestic law a defendant may be said to have conspired with a government official if the defendant induces the official to act on the basis of his personal interest in the outcome of the regulated matter.²²³ In a case in which the

²¹⁹ *Continental Ore Co.*, 370 U.S. at 707 ("[t]here is nothing to indicate that such law in any way compelled discriminatory purchasing"); Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100, 133-38 (Apr. 1967).

²²⁰ See *supra* notes 147-48 and accompanying text.

²²¹ See *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Assoc.*, 749 F.2d 1378, 1384 (9th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3826 (U.S. May 7, 1985) (No. 84-176), where, in applying the seven-part test for determining whether international comity would permit the exercise of jurisdiction, the court observed "a potential conflict with the Honduran government's effort to foster a particular type of business climate." See also *Continental Ore Co.*, 370 U.S. 690, 706 (1962) (as part of the justification for its decision, the Court noted that "there is no indication that the Controller or any other official . . . would have approved of joint efforts to monopolize"); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 403(2)(c), 403(2)(d), 403(2)(g) (Revised) (Tent. Draft No. 2 1981) (limitations on jurisdiction to prescribe); § 491 (Tent. Draft No. 4 1983) (recognition and enforcement of foreign judgments).

²²² Cf. ANTITRUST GUIDE, *supra* note 66, at 53-57; HAWK, *supra* note 3, at 113.

²²³ AREEDA & TURNER, *supra* note 68, § 203.3c (Supp. 1982).

official participates in a state-owned enterprise, however, his personal interests may be difficult to distinguish from his official responsibilities. Under these circumstances, if the defendant deals with the official as a regulator, the defendant should be free to use appropriate persuasion. The mere fact that the official's compensation from the state-owned enterprise increases as a result of his regulatory decision in the defendant's favor should not give rise to the conspiracy exception to *Noerr-Pennington*.

Finally, some commentators have recently suggested that the "routine approval" exception extends to any situation in which the defendant procures an order compelling it to perform anticompetitive activity.²²⁴ Such an extension would be unwarranted. In principle, an order compelling specific anticompetitive conduct is no different from government acts that achieve the same result through less obvious but equally effective means, such as legislation. A defendant procuring foreign compulsion, therefore, should normally be protected not only by the act of state and foreign compulsion defenses but by *Noerr-Pennington* as well.²²⁵

The courts have never addressed the question of whether the sham exception rules would apply generally to acts of state so as to bar an act of state defense. Presumably, the sham exception rules

²²⁴ *ATWOOD & BREWSTER*, *supra* note 82, § 8.23 at 272-73, noting that the "fairness justification" and "comity rationale" for the defense of government compulsion is diminished under these circumstances. The authors do, however, observe the act of state doctrine may still be brought into application. *Id.*

²²⁵ See Joelson, *supra* note 98, at 1128-29. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 208-09 (1958), appears to be authority to the contrary. The Court there held that if a party actively "courts" legal impediment to the production of relevant evidence, he will be subject to appropriate sanctions for failure to produce the evidence, including dismissal or a default judgment. *Id.* The case, however, appears to be limited in its application to discovery during the course of pending litigation. See, e.g., *S.E.C. v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 114-19 (S.D.N.Y. 1981); *United States v. Bank of N. S.*, 691 F.2d 1384, 1388-89 (11th Cir. 1982), *cert. denied*, 402 U.S. 1119 (1983); *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 295-304 (S.D. Cal. 1981); *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 226-33, 629 P.2d 231, 302-09 (1980), *cert. denied*, 451 U.S. 901 (1981). *Societe* has not been applied to compulsion in more substantive areas. The case may be further distinguished on the ground that the act of state implications of the holding do not appear to have been argued to the Court, and the case was decided prior to *Noerr*.

Relevant to *Societe* is *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 998-99 (10th Cir. 1977), in which the court suggested that a party's good faith, albeit unsuccessful, attempt abroad to avoid the impact of foreign regulations restricting discovery would relieve the party of sanctions for failure to comply with a discovery order. See also *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 346-47 (7th Cir. 1983); *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 420(2) (Revised) (Tent. Draft No. 3, 1982).

would not so apply. If genuine foreign policy concerns are present, the nature of the defendant's conduct should not cause a court to abandon the doctrine whose role it is to address those concerns.

There are, however, two situations in which courts have ruled that the defendant's conduct has a bearing on the application of the act of state doctrine. One is the corruption of government officials. As discussed earlier, the *Hunt* case left unresolved the question whether the act of state doctrine applies when the defendant has induced government action through bribery.²²⁶ Although the Ninth Circuit in *Clayco Petroleum* subsequently held that the doctrine still applied,²²⁷ at least two other courts have held to the contrary.²²⁸ The other situation is, according to *Sisal*, that in which the defendant has engaged not only in the petitioning of the foreign government, but also in other anticompetitive activity.²²⁹ Apart from these limited situations, sham-type activity should have no bearing on application of the act of state doctrine. Thus, when a defendant's *Noerr-Pennington* defense fails, the court must still consider the act of state defense.

IV. CONCLUSION

Application of *Noerr-Pennington* to the petitioning of foreign governments is in a developmental stage. Consequently, it is difficult to predict what effect *Noerr-Pennington* will have upon the act of state doctrine and what their subsequent interrelationship will be. One may nevertheless safely conclude that the *Noerr-Pennington* doctrine will add significant depth to the defenses already available to persons petitioning foreign governments. Hopefully, this relatively new doctrine will contribute to the formulation of clear and predictable rules applicable to contacts with foreign governments.

²²⁶ See *supra* notes 73-82 and accompanying text.

²²⁷ 712 F.2d 404 (1983).

²²⁸ *Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979) ("even an unrepudiated act of state may be scrutinized by the courts if it resulted from the corruption of government officials"); *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 909-10 (E.D. Mich. 1981) ("corrupt activity by foreign sovereigns is beyond the umbrella of the Act of State Doctrine"). The court in *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 326 (5th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983), expressly declined to address the issue. See Recent Decision, *International Law - Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases?*, 59 NOTRE DAME L. REV. 455, 467-69 (1984), which argues for a corruption exception to the act of state doctrine.

²²⁹ See *supra* notes 84-87 and accompanying text. See also HAWK, *supra* note 3, at 134-39.