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, 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. 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.

Despite their separate development, the two doctrines overlap in

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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 Manning 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).

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. The classic statement of the doctrine appears in Underhill v. Hernandez, 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.

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. In the first

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* Underhill, 168 U.S. at 252.

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." 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" 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-

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its Exceptions, 1 Int'l Litt. Q. 71 (June 1985).


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).

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.\textsuperscript{17}

In \textit{First National City Bank v. Banco Nacional de Cuba},\textsuperscript{18} a plurality of three justices\textsuperscript{19} answered in the affirmative the question left open in \textit{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,\textsuperscript{20} but the court of appeals reversed.\textsuperscript{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.\textsuperscript{22} The Second Circuit nevertheless dismissed the counterclaim on the authority of \textit{Sabbatino}.\textsuperscript{23} The Supreme Court reversed.\textsuperscript{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-
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. 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." 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." In so holding, the plurality adopted the so-called Bernstein exception to the act of state doctrine.

In the third case, Alfred Dunhill of London, Inc. v. Republic of Cuba, 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

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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.
were entitled to offset the amounts they had already paid for the pre-intervention period against the post-intervention claims of the interventors. The issue on appeal was whether one of the importers, Dunhill, was entitled to recover an affirmative amount from the interventors 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 interventors 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

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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.\(^3\)

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.*\(^8\) 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

\(^3\) See infra note 67.

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. The court of appeals affirmed.

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." 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," 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. 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. 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. 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. 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.

The principles of Noerr were extended to attempts to influence

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31 365 U.S. 127 at 135.
32 Id. at 136.
33 Id. at 137-38.
34 Id. at 138-39.
35 Id. at 140-41.
36 Id. at 142.
37 Id. at 144.
executive action in *United Mine Workers v. Pennington.* 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.

The Supreme Court reversed the lower court for failing to take proper account of *Noerr.* 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. 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.

In *California Motor Transport Co. v. Trucking Unlimited,* 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, and the Supreme Court affirmed. The Court observed that the same philosophy applicable to the legislative and executive branches “governs the approach of citizens or groups of

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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.
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.” 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.”

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. The Court then noted that “[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.” 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. In the context of administrative and judicial processes, these kinds of actions cannot be considered mere political expression. Even first amendment rights, according to the Court, are not immune from regulation when used to violate a valid statute.

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. 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-

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64 Id. at 510.
65 Id. at 512.
66 Id. at 512-13.
67 Id. at 513.
68 Id.
69 Id.
70 Id. at 514.
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

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64 Id. at 706.
65 Id. at 707.
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 antitrust 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. 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


held to be an inquiry forbidden by the act of state doctrine.\(^7\)

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.*,\(^7\) 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.\(^7\)

More recently, and somewhat more directly, the Second Circuit addressed the motivation question in *Hunt v. Mobil Oil Corp.*\(^7\) 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.\(^7\) It found that the plaintiffs had “meticulously attempted to avoid the issue of validity”\(^7\) but that their claim was “not viable unless the judicial branch examines the motivation of the Libyan action and that inevitably involves its validity.”\(^7\) 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

\(^7\) See *infra* notes 71-82 and accompanying text.

\(^7\) 213 U.S. 347 (1909).

\(^7\) Id. at 358. The Court’s holding with respect to jurisdiction, which has since been repudiated, is discussed in note 85, *infra*.


\(^7\) Id. at 72-79.

\(^7\) Id. at 77.

\(^7\) Id.
United States nationals in Libya,\textsuperscript{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"\textsuperscript{78} of a foreign sovereign's policy, something not contemplated by the separation of powers principle.

The Ninth Circuit relied upon \textit{Hunt} in \textit{Clayco Petroleum Corp. v. Occidental Petroleum Corp.}\textsuperscript{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 \textit{Hunt}, namely, the application of the \textit{Hunt} approach to bribery.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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,\textsuperscript{83} some courts have taken a contrary position. This position

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

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} 712 F.2d 404 (9th Cir. 1983), \textit{cert. denied}, 104 S. Ct. 703 (1984).


\textsuperscript{81} 712 F.2d 404 at 407.

\textsuperscript{82} \textit{Id.} In \textit{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. \textit{Id.} at 609-15. \textit{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 \textit{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 \textit{Timberlane-Mannington} jurisdictional/comity test would provide a substitute for act of state considerations. \textit{See}, e.g., \textit{I. J. ATWOOD \& K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 8.06-8.09, 243-49 (2d ed. 1981) [hereinafter cited as \textsc{ATWOOD \& BREWSTER}]}; \textit{Zimmerman, supra} note 15, at 560-63; \textit{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 \textit{Clayco} indicates that, at least in that court's view, one does not substitute for the other.

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


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).

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." The conspirators' acts were not limited to soliciting the foreign legislation. 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. 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." 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."

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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 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.* Another 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, and distinguished *Hunt* on the ground that it involved an expropriation. 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. 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."

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 connection and foreign the subject matter of the litigation is sufficiently small.

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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. C.f. 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
action was totally unrelated to the defendant's petitioning activity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 circuits\textsuperscript{102} when a foreign government's motive arises as an issue.

3. \textit{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 \textit{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 \textit{Noerr-Pennington} doctrine may thus have caused a different result in some of the cases discussed above. Inducing legislation, for example, as in \textit{Sisal}, is one of the activities most closely guarded by \textit{Noerr-Pennington}.\textsuperscript{103} Thus, in those cir-

\textsuperscript{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.)

\textsuperscript{100} Cf. the "principal purpose" test discussed \textit{infra}, note 187 and accompanying text.

\textsuperscript{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). \textit{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 \textit{sub nom.} Thillens, Inc. v. Wall, 105 S. Ct. 375 (1984). \textit{See also} AREEDA \& TURNER, supra note 68 ¶¶ 204d, 203.3d (Supp. 1982).

\textsuperscript{102} See \textit{supra} notes 71-83 and accompanying text.

\textsuperscript{103} See \textit{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 \textit{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. 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.108

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). 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.

106 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.

108 See supra notes 32-36 and accompanying text.

tivity is to be determined by reference to the activity’s "nature" rather than by reference to its "purpose." 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.

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, the purchase of armored cars, the services performed by an international freight forwarder on behalf of the Iranian Air Force, and the sale of golf carts by a government agency are all commercial activities. On the other hand, courts have ruled that military procurements, a decision to disallow importation of nonmilitary airplanes, and regulations preventing a nationalized bank from performing its contracted obligations 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"). 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, 866 (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).
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

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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.
Noerr umbrella should not apply "to public officials engaged in purely commercial dealings," finding support for its view in Continental Ore. 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. In Hecht, the District of Columbia Circuit suggested that under the authority of Trucking Unlimited, 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. The District of Columbia Circuit confirmed its recognition of the commercial exception after the Supreme Court's Trucking Unlimited decision.

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. 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." This dictum seems to adopt an approach similar to Hecht.

125 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, 583 (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.,\textsuperscript{133} even though it seemed to recognize instances where "all would agree" that the exception should apply.

\section*{3. Scope of the Exception}

Notwithstanding the Ninth and Fifth Circuits’ recent pronouncements, most circuits will continue to recognize some form of commercial exception\textsuperscript{133} 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, \textit{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,\textsuperscript{134} different considerations

\textsuperscript{133} 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).

\textsuperscript{133} See Fischel, \textit{supra} note 68, at 117-18; \textsc{Antitrust Guide}, \textit{supra} note 66, at 54-55; Atwood & Brewster, \textit{supra} note 82, § 8.09 (2d ed. 1981). The commercial exception should not apply to the sovereign compulsion defense. Hawk, \textit{supra} note 3, at 155-56. \textit{But see Antitrust Guide, supra} note 66, at 55 n.100.

\textsuperscript{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. 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.

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. 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, 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 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”).


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.


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


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.


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

central branch of government may be deemed to be acts of state.\textsuperscript{153} Finally, neither acts by foreign government officials for their own financial benefit nor conduct that violates the laws of the foreign government\textsuperscript{154} constitutes an act of state.\textsuperscript{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.\textsuperscript{156} The guiding question is the degree to which the agency is acting on behalf of the government and is carrying out its policies.\textsuperscript{157} Ironically, the act of state doctrine itself limits a plaintiff’s ability to prove that an official’s conduct was undertaken

\textsuperscript{153} See supra notes 117-20 and accompanying text.


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”).

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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. 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. 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. The extent of the protection typically afforded is illus-

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).
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

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1977), aff'd, 578 F.2d 1372 (2d Cir. 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).

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\(^{161}\) 516 F.2d 220 (7th Cir. 1975).

\(^{162}\) See infra notes 201-02 and accompanying text.


\(^{164}\) 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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{168} One may nevertheless infer that the

\begin{itemize}
  \item 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. \textit{Id.} at 841-43. \textit{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). \textit{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).
  \item See infra notes 182-215 and accompanying text.
  \item 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.\textsuperscript{167} One of the few authorities to consider this issue, if only briefly, is \textit{Atwood} & \textit{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. \textit{See also} Comment, supra note 68, at 140-43 (1983) (advocating a "rule of reason" approach).
  \item 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
\end{itemize}
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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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

\textsuperscript{169} Trucking Unlimited, 404 U.S. at 512-15.

\textsuperscript{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).

\textsuperscript{171} See Davis, supra note 68, at 435-37 (discussing foreign blocking legislation).

\textsuperscript{172} See Areeda & Turner, supra note 68, ¶ 239b1. "Every 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.\textsuperscript{173} From a business perspective, an extension of
the sham exception may effectively shackle United States busi-
nessmen from competing in the foreign country on equal footing
with other foreign businessmen.\textsuperscript{174}

In view of these countervailing considerations, adoption of a sys-
tem similar to the one now in place domestically would be desira-
ble. 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 re-
strict petitioning activity where sham-type influences are likely to
be most invidious. The Foreign Corrupt Practices Act of 1977,\textsuperscript{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.\textsuperscript{176}

Although the Fifth Circuit did not explicitly consider the issue,
it implicitly adopted the domestic sham exception rules in \textit{Coastal
States Marketing, Inc. v. Hunt.}\textsuperscript{177} The court there considered
whether the \textit{Noerr-Pennington} doctrine protected the defendant
from the antitrust consequences of litigation and threats of litiga-
tion in foreign countries. After reviewing the plaintiff's sham ex-
ception 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 for-

gn litigation within the protection of petitioning immunity.\textsuperscript{178}
The court gave no consideration to the form of governments in the
foreign countries involved.

Japanese Elec. Prod. Antitrust Litig.}, 723 F.2d 238 (3rd Cir. 1983), where the court exam-
ines the role of Japan's Ministry of International Trade and Industry (MITI) vis-a-vis pric-
ing agreements among manufacturers. MITI is a cabinet-level ministry of the Japanese gov-

erment. \textit{Id.} at 1191.

\textsuperscript{174} See Davis, \textit{supra} note 68, at 437-38; \textit{see also} Hawk, \textit{supra} note 3, at 147-48.


\textsuperscript{177} 694 F.2d 1358 (5th Cir. 1983).

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-

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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.


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 competition\textsuperscript{184} or to deplete the competitor's resources with the expense of protracted litigation and negotiation.\textsuperscript{185} Naturally, a claimant may have various motives, proper as well as improper, for instituting a legal proceeding against a competitor.\textsuperscript{186} Consequently, the courts have suggested that the plaintiff must demonstrate that the "principal" purpose\textsuperscript{187} or "sole" purpose\textsuperscript{188} 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 principal purpose or sole purpose of the proceeding was an anticompetitive one."

_.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).


\textsuperscript{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,”\textsuperscript{189} or to make a showing of acts that are “abusive of the judicial processes.”\textsuperscript{190} Evidence of such acts includes the antitrust court’s assessment that the defendant had no reasonable basis for its previous litigation;\textsuperscript{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;\textsuperscript{192} and the antitrust defendant’s admission that agency protests were filed automatically and without regard to merit.\textsuperscript{193} Lack of success in the alleged sham litigation or administrative proceeding may also constitute evidence of abuse,\textsuperscript{194} although it is not conclusive on the issue.\textsuperscript{195} Success, on the other hand, is probably conclusive evidence that the antitrust defendant’s conduct was not abusive.\textsuperscript{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.\textsuperscript{197} A majority of

\textsuperscript{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). \textit{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).
\textsuperscript{192} Landmarks Holding Corp. v. Berman, 664 F.2d 891, 896-97 (2d Cir. 1981).
\textsuperscript{193} Clipper Exxpress v. Rocky Mt. Motor Tariff Bureau, 690 F.2d 1240, 1257 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983).
\textsuperscript{194} \textit{Clipper Exxpress}, 690 F.2d at 1257; \textit{see} Ernest W. Hahn, Inc., v. Codding, 615 F.2d 830, 841 n.13 (9th Cir. 1980); \textit{Landmarks Holding Corp.}, 664 F.2d at 897.
\textsuperscript{197} In \textit{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, while a minority hold to the contrary. Of course, a multiplicity of suits that are meritorious does not give rise to a violation.

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

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.


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).

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).

threats and intimidation,\textsuperscript{204} rigged or phony bids,\textsuperscript{205} petitioning activity that is part of a much broader anticompetitive scheme,\textsuperscript{206} and petitioning activity where the petitioner knew or should have known that the government action sought would be "improper."\textsuperscript{207} A few courts have also given attention to the "meaningful access"
language of *Trucking Unlimited*.\textsuperscript{208} Although one court has said that barring access “is the cornerstone to the sham exception,”\textsuperscript{209} others have held that barring access is not a prerequisite,\textsuperscript{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.\textsuperscript{211}

A final kind of petitioning activity lacking the usual immunity, although not traditionally characterized as sham activity,\textsuperscript{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.\textsuperscript{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.\textsuperscript{214} The cases do not establish how much partic-

\textsuperscript{208} *Trucking Unlimited*, 404 U.S. at 512.


\textsuperscript{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 Exxpress*, 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”).


\textsuperscript{212} See *id.* at 981 (the court observed that the sham exception “standing alone” did not apply to a rate making proceeding).


\textsuperscript{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.”

2. Foreign Implications

To date American courts have not had much opportunity to ap-
ply the sham exception rules to the “nonpolitical” branches of for-
ign governments. Although the Ninth Circuit had little difficulty
with the concept in Coastal States Marketing, courts should ant-
icipate several problems. One will be determining which foreign
government agencies or branches qualify as “political.” Election
to office cannot be the criterion, because many foreign government
chief executives would fail to qualify. In nondemocratic govern-
m ents, 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” gov-
ernment 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 crite-
r ia for baselessness. 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.”
(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 an-
ticompetitive condition is in reality the work of that company.” Id. at 1320, quoting City of

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
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).

See supra note 160 and accompanying text.

See supra note 177-78 and accompanying text.

Cf. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Forbo-
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. Under the authority of Timberlane, the act of state defense is likewise probably not available. 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.

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. 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. In a case in which the

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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).
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.\(^\text{224}\) 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.\(^\text{225}\)

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

\(^\text{224}\) 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.*

\(^\text{225}\) 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. Although the Ninth Circuit in *Clayco Petroleum* subsequently held that the doctrine still applied, at least two other courts have held to the contrary. 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. 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.

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228 See supra notes 73-82 and accompanying text.
229 See supra notes 84-87 and accompanying text. See also Hawk, supra note 3, at 134-39.