NOTE

THE LIABILITY OF FOREIGN GOVERNMENTS UNDER UNITED STATES ANTITRUST LAWS

I. INTRODUCTION

The domestic economy of the United States faces a growing problem. Competition is being threatened by the increased presence of powerful foreign government enterprises in the domestic market. Currently, fifty-nine of the 500 largest commercial enterprises in the world are government-owned and controlled, and the number is growing. From 1957 to 1976, the number of such firms increased twelvefold. Their rate of growth has surpassed that of privately-owned non-American based firms headquartered outside the United States. Because it is large and unrestricted, the United States market has been an attractive target for foreign government enterprises. These firms have an advantage over domestic competitors because they possess almost unlimited resources, and because of their relative immunity from United States antitrust laws. The free market system alone may not provide adequate protection against these great concentrations of economic power. As Leonard Silk has indicated, economic exploitation through state cartels, monopolization of supply channels, state bargaining, and central planning may doom the market itself.

The keystone to the United States market system is the Sherman Antitrust Act. Embodying fundamental economic policy, the Sherman Act prohibits conduct that monopolizes or restrains "commerce . . . with foreign nations," as well as conduct that hampers domestic competition. Few other nations, however, embrace the jurisprudence of the Sherman Act, especially within the context of transnational trade. Therefore, a longstanding debate concerning the extraterritorial jurisdiction of United States antitrust laws has surrounded those controversies in which enterprises operating primarily overseas, but whose commercial activity affects consumers or competitors within the United States, are charged in United States courts with Sherman Act violations.

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1 Sales by state enterprises account for 21% of the sales of these 500 largest firms. D. Lamont, Foreign State Enterprises 4 (1979).
4 See generally B. Hawk, United States, Common Market, and International An-
During the past fifty years, United States courts consistently have construed the language of the Sherman Act to hold that anti-competitive activities or decisions occurring primarily within a foreign jurisdiction, but which substantially affect the trade and economy of the United States, are subject to Sherman Act jurisdiction in federal courts, regardless of the legitimacy of those activities as measured by the law of the situs.5

Notwithstanding the expansive view of the extraterritorial jurisdiction of the Sherman Act taken by United States courts, several legal barriers have prevented effective use of antitrust laws to protect the United States market from the anti-competitive practices of foreign governments or government-owned enterprises. The three main obstacles have been the doctrine of sovereign immunity, the act of state doctrine, and the limited coverage of the substance of the Sherman Act.6 In the last few years, however, absolute sovereign immunity has been replaced by the theory of restrictive sovereign immunity as codified in the Foreign Sovereign Immunities Act;7 judicially created exceptions have similarly eroded the breadth of the act of state doc-

5 See Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-92 (3d Cir. 1979). See also Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 COLUM. L. REV. 1247, 1249-50 (1977). Generally speaking, when allegedly illegal conduct is performed by a non-United States citizen on foreign soil, United States courts have held that American jurisdiction applies to that conduct if supported by either the "protective theory"—applicable when challenged conduct threatens or interferes with United States governmental operations or security—or the "objective territorial" theory—applicable when the challenged conduct was intended to have an effect within the United States. See United States v. Columba-Colella, 604 F.2d 356, 358 (5th Cir. 1979). See also Comment, Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach, 70 YALE L.J. 259, 260-64 (1960). Additional bases for the assertion of extraterritorial jurisdiction have been recognized in international law. See Dickinson, Jurisdiction With Respect to Crime, Introductory Comment, 29 AM. J. INT'L L. 443, 445 (Supp. 1985); and Ongman, Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope, 71 N.W.U.L. REV. 733, 737 (1977).

6 The Sherman Act's prohibitions apply only to "persons," including corporations, but do not expressly apply to foreign governments. Thus, there is substantial ambiguity as to whether the Act would be interpreted to apply to a corporation or enterprise wholly-owned and operated by a foreign government or to the foreign government itself.

and finally, the Supreme Court decisions in *Pfizer, Inc. v. Government of India* and *City of Lafayette v. Louisiana Power & Light Co.* have broadened significantly the definition of "person" under the Sherman Act and thereby potentially broadened its coverage. Each of these developments has moved the law closer to a recognition of antitrust liability for the commercial activities of foreign governments.

Although the trend is to break down these legal barriers, they still pose formidable obstacles to antitrust actions against foreign governments. There is a deep-rooted inertia stubbornly working in opposition to the trend. Courts are uncomfortable with the thought of sitting in judgment of foreign governments. The fact that foreign relations is a realm into which the courts have been reluctant to venture is understandable in view of the sensitive nature of the subject and the judiciary's lack of special expertise. Consequently, although Congress and the Supreme Court appear to have dismantled certain barriers of general application, it is uncertain whether such dismantling will be recognized, in light of international comity and separation of powers concerns, in the radical context of antitrust litigation against foreign governments.

The leading case in this trend is *Alfred Dunhill v. Republic of Cuba*, 425 U.S. 682 (1976). See also *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977). The only antitrust case brought against a foreign government, the court based its dismissal of the action upon, among other grounds, sovereign immunity and the supposedly limited coverage of the Sherman Act. Although requested to do so by the court, the Justice Department declined to submit an amicus brief expressing its views on the law. As of this writing, the decision is on appeal to the Ninth Circuit.

The "foreign compulsion" defense, which generally is thought to immunize a private corporation from antitrust liability when its challenged conduct was coerced by a foreign government, is available here. See *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D.C. Del. 1971). See also speech by Davidow, "U.S. Antitrust and Doing Business Abroad: Recent Trends and Developments," (Sept. 28, 1979); and Comment, *Foreign Government Compulsion as a Defense in United States Antitrust Laws*, 7 VA. J. OF INT'L L. 100 (1966). Although this Note does not consider the less controversial issue of the liability of non-sovereign foreign corporations, the recurring appearance of the foreign compulsion defense suggests the increasing need, in equity and law, to determine whether foreign governments responsible for anticompetitive behavior affecting American citizens within the United States may be sued directly in United States courts.
II. SOVEREIGN IMMUNITY

At the time of the passage of the Sherman Act in 1890, absolute sovereign immunity was the general rule. Adopted by the Supreme Court in *The Schooner Exchange v. McFadden*, the rule precluded a court from taking jurisdiction over a government without regard to the type of activities in which it was engaged. The original rationale behind the rule was respect for the dignity of a sovereign. Initially, sovereign immunity caused few problems because of the relatively small scope of government activities. However, the concept began to create difficulties as governments ventured outside traditional roles. A gradual shift toward the domestic restriction of sovereign immunity can be traced to 1824 when, in *Bank of the United States v. Planters' Bank*, John Marshall wrote "that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."

With respect to foreign governments, restrictive immunity was slow to gain acceptance in the United States, although it had become the norm in international practice. With the exception of Great Britain and the Communist bloc, most countries early on made the transition to restrictive immunity in recognition of increasing commercial activities of governments. Meanwhile, the United States government was subjected to considerable liability in the courts of other countries.

As international recognition of absolute sovereign immunity diminished, United States courts sought a new rationale for continuing to apply the doctrine. The new justification was found in the old principle of separation of powers. In *Ex Parte Republic of Peru*, the Supreme Court reasoned that sovereign immunity affected the conduct of foreign relations, which was the responsibility of the executive branch of government. Thus, it was not until

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11 U.S. (7 Cranch) 116 (1812). The rule, however, was not required by the Constitution or statute: "Judicial power shall extend ... to controversies ... between a state, or citizens thereof, and foreign states, citizens, or subjects." U.S. Const. art. III, § 2, cl. 1; 28 U.S.C. § 1332(a)(2) (1976).

12 U.S. 904, 906 (1824).


318 U.S. 578, 589 (1943). See also Republic of Mexico v. Hoffman, 324 U.S. 30 (1945), in which the Court held that it was obliged to give dispositive effect to the State Department's refusal to recommend immunity.
1952, after the Department of State released the so-called "Tate Letter," that the courts began applying the new doctrine on a case-by-case basis. Subsequently, the courts depended increasingly upon the State Department to recommend when restrictive immunity should be applied.

A danger of this dependency was the potential for inconsistent applications of the doctrine in cases where political considerations pressured the State Department to recommend immunity without regard to the nature of the governmental activities involved. One of the motives behind the passage of the Foreign Sovereign Immunities Act of 1976 (FSIA) was a desire to free the judiciary from its dependence on the State Department. As revealed in its legislative history

[a] principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants these often crucial decisions are made on purely legal grounds and under procedures that insure due process.¹⁹

Under the restrictive doctrine, the legal determination of whether a government should be entitled to immunity turns on whether the particular activity is a public act (jure imperii) or a private act (jure gestionio). The latter is not entitled to immunity. It is difficult to draw the line separating public from private acts. Several methods were discussed in Victory Transport, Inc. v.

¹⁸ Letter from Jack B. Tate, Acting Legal Adviser of the Department of State, to Phillip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T STATE BULL. 983 (1952). The State Department gave three reasons for this shift in policy: (1) the increased international acceptance of the restrictive principle, and the feeling that if the United States was allowing itself to be sued in other countries on that theory, its courts should have jurisdiction over foreign sovereigns; (2) the recognition that communist countries benefitted from the absolute theory, which afforded immunity to state-owned enterprises but not to private companies of non-communist countries; and (3) the fact that the growth of governmental involvement in commercial activities necessitated a means by which interest parties may have their rights and duties determined by courts.

¹⁹ The purpose of the legislation was (1) to "codify the... restrictive theory of sovereign immunity;" (2) to "transfer the determination of sovereign immunity from the executive branches to the judicial branch" as a way of ensuring both legal consistency and procedural due process; (3) to establish a "procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state," thereby obviating the need in most cases for seizure or attachment of a foreign sovereign's property; and (4) to change the rule that absolutely guarded a sovereign's property from seizure in execution of a judgment. Id. at 6605-06. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7, reprinted in [1976] U.S. Code Cong. & Ad. News 6606. 5 U.S. CODE CONG. & AD. NEWS 6606 (1976) [hereinafter cited as LEGIS. HISTORY].
Comisario General, a suit against the Spanish consul to compel arbitration, although the court noted that neither the Tate Letter nor the courts or commentators had suggested a satisfactory test for distinguishing public from private acts. The "nature of the transaction" approach used by some European courts had yielded "astonishing" results. Under this approach, only functions which could not be performed by individuals could be characterized as sovereign, thereby limiting sovereign acts to a very narrow range of activity. Thus, the "nature of the transaction" approach exposed governments to an unacceptably high degree of potential liability. As an alternative to the "nature of the transaction," the court considered the "purpose of the transaction" approach to differentiate public and private acts. Under the "purpose" test, any government scheme having a public purpose would be deemed a public act. This approach was equally unacceptable to the court because it immunized too much government conduct—a public purpose could be found in almost any pursuit undertaken by governments. The difficulties encountered have led many to declare that the distinction between acts jure imperii and acts jure gestionio is "unworkable."

In order to find a workable alternative, the Victory Transport court devised its own "traditional activities" approach. This doctrine limited immunity to "strictly political or public acts about which sovereigns have traditionally been quite sensitive." The five categories that were deemed sufficiently sensitive to justify "sacrificing the interests of private litigants to international comity" were:

(1) internal administrative acts, such as expulsion of an alien;
(2) legislative acts, such as nationalization;
(3) acts concerning the armed forces;
(4) acts concerning diplomatic activity; [and]
(5) public loans.

The FSIA incorporates aspects of both the nature of the transaction approach and the purpose of the transaction approach to distinguish public and private acts. In general, the statute excludes from immunity all "commercial activity," defined as either a course of commercial conduct or a particular commercial act."

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\[Footnotes\]

20 336 F.2d 354 (2d Cir. 1964).
21 Id. at 359.
22 Id. at 360.
23 Id.
   A foreign state shall not be immune from the jurisdiction of courts of the United
The nature of the activity rather than its purpose determines whether the activity is commercial. However, in claims involving public debts, the governmental purpose is to be determinative.

By adopting the "commercial activity" exception, Congress excluded from immunity an area that has traditionally been outside the scope of sensitive government activities. Commercial activity should be defined broadly because the "nature of the activity" test was chosen over the "purposes" test. Furthermore, Congress intended to give the courts a "great deal of latitude" in determining what is commercial. Therefore, few, if any, commercial activities were meant to be given immunity under the FSIA.

There is little reason to doubt that Congress expected anticompetitive commercial activities to come within the purview of section 1605. Nevertheless, it was argued in Outboard Marine Corp. v. Pezetel that commercial activity is limited to ordinary legal disputes based on private contract or tort claims. Support for this view lies in the emphasis given to these types of actions in the legislative history of the FSIA. In Outboard Marine, the court did not accept this argument, but relied instead on the broad, unqualified language of the statute. A closer look at the legislative history, however, reveals concern about anticompetitive conduct.

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States or of the States in any case... in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. The Act defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d) (1976).

"Id." at § 1606(b).
H.R. REP. NO. 1487, supra note 19, at 1615. This view was not taken in International Assoc. of Machinists v. OPEC, 477 F. Supp. 553, 567 (C.D. Cal. 1979). In that case, the court narrowly construed "commercial activity" partially because of the sensitive nature of the subject, but primarily because the court thought its ruling must rest on specific facts. Although every case should turn on its specific facts, this does not necessarily mean that "commercial activity" was intended to be given a narrow interpretation.

The only situation that would call for a narrow construction is where a government function involves both commercial activity and non-commercial activities. In such a situation, it would be overbroad to characterize the entire function as commercial by virtue of some of its component activities. Instead, the individual activity should be examined to determine its nature. For example, even though the purchase of army boots could be characterized as commercial, this would not make all military activity commercial in nature. The OPEC case was the subject of a Recent Development appearing in 9 DEN. J. INT'L L. & POL. 141 (1980).

"Id."
In a statement submitted during hearings on the bill, the fear was expressed that "application of U.S. antitrust authority to collusive efforts of foreign governments via cartels may be jeopardized by broad interpretations of sovereign immunity." Moreover, Representative Jordan of Texas asked Monroe Leigh, legal adviser to the State Department, whether this bill would aid citizens who were harmed by the Arab boycott of Jewish businesses. Mr. Leigh replied that this "bill would provide the means for commencing such a lawsuit." In fact, the earlier 1973 hearings on the act contemplated that "an action [could be brought] arising out of restrictive trade practices by an agency or instrumentality of a foreign state."

Commercial activities of foreign governments that have "direct effect" inside the United States come within the § 1605(a)(2) exception to sovereign immunity. The classic illustration for application of such an exception is where a Canadian factory emits smoke that crosses the border and causes damage. By analogy, direct economic harm, as well as physical harm, was contemplated by the act. Thus, a government in the business of exporting to the United States would be liable for any business torts causing direct injury in the United States. Because an antitrust action is a tort or in the nature of a tort action, it follows that a foreign government should be liable for violations of United States antitrust law. Recoverable damages in tort, however, are limited by the FSIA.

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33 Id. See also Trial Smelter Arbitration (United States—Canada), Decision of Mar. 11, 1941, United States Department of State, 8 Arbitration Series (1941); Reprinted in 35 AM. J. INT'L L. 684-734 (1941); cited in the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 18, Reporters' Note 3, 55 (1965).

34 H.R. REP. No. 1487, supra note 19, at 1613; 1976 HEARINGS, supra note 30, at 28.

No punitive (as in treble) damages are allowed against the foreign state itself, although such penalties are allowed against instrumentalities or agencies of the state.\textsuperscript{36}

Nothing in the language of the FSIA or in its legislative history precludes antitrust liability for foreign governments. This omission has prompted the Antitrust Division of the Justice Department to conclude that sovereign immunity is no longer a barrier to potential liability for governments acting in a “proprietary” capacity. In making enforcement decisions, the Justice Department intends to avoid “unnecessary” interference with government functions.\textsuperscript{37}

Despite the absence of express limitations on antitrust liability in the FSIA, opponents of liability find implied restraints. The principal argument is that antitrust enforcement would upset international comity, one of the remaining justifications for sovereign immunity. Because antitrust laws are not universally accepted, it is argued that their application to some foreign governments would be particularly irritating.\textsuperscript{38}

In recent years, Western European countries have begun actively enforcing their laws governing restrictive trade practices, and they have had little experience with extraterritorial applications.\textsuperscript{39} In contrast to the FSIA, which extends liability to commercial activity outside the United States, the European Con-

\textsuperscript{36} 28 U.S.C. § 1605(e) (1976). This limitation on damages is discussed in Outboard Marine Corp. v. Pezetel, 461 F. Supp. at 394-95. The case raises the interesting question of how to distinguish a government from a government instrumentality or agency. Under the FSIA, three requirements must be satisfied for an entity to qualify as an agency or instrumentality. First, the entity must be a separate legal person, corporate or otherwise. Second, it must be a political subdivision or an organ of a foreign state, or a foreign state must have a majority ownership interest in it. Third, the entity must be neither a citizen of a state of the United States nor be created by the laws of any third country. 28 U.S.C. § 1603(b) (1976).

\textsuperscript{37} JUSTICE DEPARTMENT ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977), reprinted in P. AREEDA, ANTITRUST ANALYSIS 64 (1978 Supp.) [hereinafter cited as ANTITRUST GUIDE]. See letter from Department of Justice, May 6, 1980, concerning the pending uranium cartel antitrust litigation and expressing concern with possible foreign comity implications. TRADE REG. REP. ¶ 50,416 (CCH).


vention on State Immunity limits liability to business activity conducted from an office "on the territory of the State of the forum." Despite the limited provisions of the Convention on State Immunity, European government enterprises are subject to the provisions in the EEC Treaty that prohibit anticompetitive behavior. "Ordinarily, public enterprises are subject to the rules of competition in exactly the same way as private enterprises. . . . Not only do the competition rules apply directly to government enterprises, inasmuch as they are enterprises," but certain duties are imposed "on the governments themselves." The differences that may exist between the laws of competition in the United States and in Western Europe should not preclude the extension of United States antitrust laws to the commercial activities of those governments. In § 1605(a)(2), the FSIA extends the extraterritorial jurisdiction of United States courts over foreign governments almost as far as the already existing reach of jurisdiction over extraterritorial private activities. As indicated above, prior to the FSIA, United States foreign relations law permitted the regulation of extraterritorial activity, even though the United States law was not totally consistent with the laws in other countries. Where United States laws are different, the regulated foreign activity must have a direct, substantial, and foreseeable effect within the United States. Furthermore, the regulation cannot be in violation of principles of justice generally recognized by countries with reasonably developed legal systems. Antitrust liability for foreign governments should meet these requirements because neither restrictive sovereign immunity nor regulation of anticompetitive commercial activity are in opposition to generally accepted principles of justice.

The differences between the legal systems of Western Europe and the United States are not so great as to cause serious friction

40 European Convention on State Immunity, article 7, reprinted in 1976 Hearings, supra note 30, at 39. The FSIA was influenced greatly by the European Convention. Rep. Davidson of California asked Mr. Leigh of the State Department whether there was "any inconsistency between the new convention and this bill?" Mr. Leigh replied that except for the FSIA's execution provisions, the FSIA and the European Convention were generally the same. 1976 Hearings supra note 30, at 37.


42 Restatement (Second) of Foreign Relations Law of the United States § 18(b) (1965). This section generally involves matters of an economic nature. The foreseeability condition does not require subjective intent. Id. at Comment f. Legislation (S. 1010) to establish a study commission to examine the international application of United States antitrust laws died in the House Committees on the Judiciary and Foreign Affairs.
and injury to international comity.\textsuperscript{43} However, the differences between the United States and nonmarket or developing nations are considerably more pronounced. In this context, distinguishing between "sovereign" and "commercial" activities of governments becomes more complicated; the distinctions may be difficult to draw unless the two governments distinguish the two concepts in a similar way. The Antitrust Division of the Justice Department is of the view that particular cases "may turn in part on questions of foreign law, custom, and practice."\textsuperscript{44}

The concept of legally enforced competition is alien to communist national economies. In \textit{Edlow International Co. v. Nuklearna Elektrarna Krsko}, the district court held that Yugoslavia's communist system of property ownership was not determinative of the question of sovereign immunity.\textsuperscript{45} A similar result was reached in an antitrust case involving the Polish government's manufacture of golf carts. In that case, the court held that "it does not follow that because a business in such a country has objectives and government ties alien to those of enterprises in a capitalist system that each such business is equal in stature to the government under which it operates."\textsuperscript{46}

The problem of applying restrictive immunity to communist governments was foreseen in the deliberations that led to the passage of the FSIA. Although the state trading agencies in these countries attempt to invoke sovereign immunity, "the U.S. has been steadfast in refusing to recognize that [defense] and so have nearly all countries."\textsuperscript{47} In fact, "one of the motivations for the development of the restrictive theory of sovereign immunity was the fact that the Soviet Union in the 1920s was acting through state trading corporations, which claimed immunity."\textsuperscript{48} Although such countries normally will assert sovereign immunity, "they realize that the restrictive theory is the international law principle that is applied in the countries in which they trade."\textsuperscript{49} Conse-

\textsuperscript{43} Of course, the British government has been considering legislation to repudiate the extraterritorial reach of U.S. antitrust laws. See, e.g., \textit{Britain to Limit Reach of U.S. Antitrust Laws}, London Financial Times, Sept. 14, 1979, at 1, col. 5.

\textsuperscript{44} \textit{Antitrust Guide}, \textit{supra} note 37, at 66 n.21.


\textsuperscript{47} 1976 \textit{Hearings}, \textit{supra} note 30, at 56 (statement of Monroe Leigh).

\textsuperscript{48} \textit{Id.}

sequently, they have waived sovereign immunity in many international agreements.

The situation in the developing countries differs from that in Western Europe or communist bloc countries. In developing nations, the problem stems not from the legal or economic organization, but rather from the position of competitive disadvantage to which these countries historically have been relegated. In addition to being disadvantaged competitively and exploited, many of these countries are dependent on a few basic commodities for generation of national income. Commodity producers have an inherent interest in conserving their natural resources.50

The special situation of commodity producers has been recognized by the United Nations General Assembly, which has resolved that a government has sole and permanent sovereignty over its natural resources.51 Furthermore, “all states have a right to associate in organizations of primary commodity producers.”52 There is, however, an implied limitation in these declarations. The right of all states “to dispose of their natural wealth and resources” should be exercised with “respect for the economic independence of states.”53 The purpose of these resolutions has been to stop foreign exploitation of dominant economic positions. Traditionally, this exploitation has come from Western commodity consumer nations. As has been demonstrated by the OPEC cartel, exploitation can also come from the monopolistic position of many commodity producer nations. In either event, the economic effect is the same.54 Any exploitation undermines the “economic independence” of dependent nations and intrudes upon their rights of sovereignty.

In the OPEC case, wherein the court pointed out that the United States was a signatory to many of these U.N. resolutions, it was held that international law should be followed in determin-

50 See Timberg, supra note 16, at 28-29, 37.
53 G.A. Res. 1803, supra note 51.
54 To a certain extent, it is justifiable in order for developing nations to catch up with industrialized nations. Even under this rationale, if the exploitation is against other developing nations as well as industrialized nations, it is unjustifiable. Moreover, exploitation should not continue if it jeopardizes the economic health of another nation. However justified, the exploitation should stop once a position of rough equality has been reached.
ing what is "commercial." Nevertheless, the FSIA was passed after the aforementioned U.N. resolutions, and its legislative history makes no mention of them. The history of the Act clearly indicates that state "mining enterprises" or "mineral extraction" ventures were to be included in "commercial activities." In a statement submitted to the subcommittee hearings on the bill, specific reference was made to the growing involvement of foreign governments in the market of raw materials. "In the resource area, state-owned firms now predominate in the oil fields in many developing countries." There is no evidence that a double standard or a special status for developing nations was intended by the bill. On the contrary, concern was expressed about the collusive activities of commodity producers. Therefore, it may be argued that developing nations should be treated in the same manner as other countries under the FSIA.

The reason for concern over the incongruity of United States antitrust law and the laws of other countries is international comity. Comity is related to the original rationale for sovereign immunity, respect for the dignity of governments, except that it contains a greater element of practicality. Disrespect for the dignity of other governments will result in disharmonious relations among countries. Assuming that comity is still a major concern underlying restrictive sovereign immunity, it remains to be seen whether comity justifies a total exemption of foreign governments from United States antitrust laws. International law recognized a

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55 International Ass'n of Machinists v. OPEC, 477 F. Supp. at 567.
56 Assuming, arguendo, that a General Assembly Resolution is international law, it is nevertheless superseded by conflicting national legislation that is subsequent in time. The United States Supreme Court has stated that "an Act of Congress . . . is on full parity with a treaty" and that when a statute which is subsequent in time is "inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." Reid v. Covert, 354 U.S. 1, 18 (1957).
57 H.R. REP. No. 1487, supra note 19, at 1613, 6615. The OPEC court stated that proprietary interest in oil companies were just one "medium" or "format" through which governmental interests were being accomplished, 477 F. Supp. at 569 n.14. This sounds very much like the "government purposes" test which was rejected by the FSIA. See note 27 supra.
58 1976 HEARINGS, supra note 30, at 71 (statement of Monroe Leigh).
59 According to a State Department legal adviser, the purpose of sovereign immunity in modern international law is "not to protect the sensitivities of other governments, but rather "to promote the functioning of all governments by protecting a state from the burden of defending laws suits abroad which are based on its public acts." Id. at 27. (statement of Monroe Leigh).
lesser degree of immunity for the commercial acts of governments.

Comity is not the single objective of United States foreign policy to which all other policies must be sacrificed. It must be balanced with other competing interests. The strong policy behind United States antitrust laws is among those interests. In addition, comity implicitly includes notions of reciprocity and fairness. Foreign governments wishing to participate in the United States market should respect the laws of that marketplace. As long as those laws are enforced in a nondiscriminatory manner, there should be no cause for complaint. The antitrust laws do not interfere with exclusively internal affairs of foreign governments. As indicated above, Sherman Act jurisdiction exists only when conduct overseas has a substantial, foreseeable effect on United States commerce. Moreover, foreign governments and international trade benefit when the channels of trade are kept free from anticompetitive restraints. That foreign governments benefit from United States antitrust laws was well illustrated in Pfizer v. Government of India.

Having accepted the protection of United States laws, and seeking to profit from trade in the United States domestic market, foreign governments should observe the commands of United States antitrust laws.

III. THE ACT OF STATE DOCTRINE

Alongside sovereign immunity, there developed a related legal principle, the act of state doctrine, which also has served to shield foreign governments from antitrust liability. The two doctrines

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The courts have held that the "immunity of a foreign state is judge-made law. It does not rest on the Constitution or any federal statute." Wacker v. Bisson, 348 F.2d 602, 609 (5th Cir. 1965); see also National City Bank of New York v. Republic of China, 348 U.S. 358 (1954). Thus, Congress clearly had the power in the FSIA to modify or eliminate sovereign immunity. Some commentators, ignoring the literal terms of the statute and without citation to legislative history or other authority, have concluded that Congress could not have intended the admittedly serious result of allowing antitrust suits against foreign governments. Note, Sherman Act Jurisdiction and the Act of Foreign Sovereigns, 77 COLUM. L. REV. 1248, 1255 (1977). A more plausible presumption exists, however, that because the courts have article III and statutory jurisdiction over foreign states, in general, and when Sherman Act jurisdiction otherwise would apply to particular conduct affecting the United States economy, Congress specifically provided in the FSIA that the courts had an obligation to decide private antitrust actions against foreign governments acting in a commercial capacity.
resemble each other and have often been confused. Thus, it is useful to examine their differences. The act of state doctrine may, under proper circumstances, be invoked by either a government or a private defendant; sovereign immunity is reserved solely for governments. Whereas sovereign immunity deprives a court of jurisdiction, act of state only removes certain issues from consideration by a court. Finally, unlike sovereign immunity, the act of state doctrine is not a matter of international law as it only applies to acts done within the territory of the foreign state.65

The original rationale for the act of state doctrine was similar to that for sovereign immunity: courts should respect the dignity of other governments when acting within their proper sphere. The classic statement of the doctrine is found in Underhill v. Hernandez:

> 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 the sovereign powers as between themselves.66

According to the modern formulation of the act of state doctrine, three conditions are prerequisite to its application. There must be:

1. a public act,
2. committed by a foreign government recognized by the United States, and
3. occurring within the territory of the foreign state.67

The act of state need not be in accordance with international law.68

Most of the early act of state cases involved the expropriation

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66 168 U.S. 250, 252 (1897). The Supreme Court never has indicated "clearly where the court found the rule and why it is proper to apply it." Henkin, The Foreign Affairs Powers of the Federal Courts: Sabbatino, 64 Colum. L. Rev. 805 (1964). Henkin suggests that Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), interpreting the Rules of Decision Act, Judiciary Act of 1789, ch. 20, 34, 1 Stat. 92, may have been an original basis for the assertion that the doctrine did not originate in an international setting.
68 As F.A. Mann has noted, the "alleged sacrosanctity of the foreign act of state finds no support in the judicial practice of any country outside the Anglo-American sphere of legal influence and Holland. No international tribunal has ever adopted it." Mann, International Delinquencies Before Municipal Courts, 70 L.Q. Rev. 181, 198 (1954).
of property by foreign governments. In American Banana v. United Fruit Co., Justice Holmes extended the doctrine to cover claims involving antitrust violations. Later cases left the validity of American Banana's broad holdings in doubt. Although these doubts were apparently undercuts in Occidental Petroleum Corp. v. Buttes Gas & Oil Co. and Interamerican Refining Corp. v. Texaco Maracaibo, Inc., which reaffirmed that part of American Banana regarding the act of state doctrine, the Supreme Court has not upheld an act of state defense in an antitrust case since 1909.

The 1962 case Banco Nacional de Cuba v. Sabbatino announced the modern rationale for the act of state doctrine. Following the policy set forth in sovereign immunity cases, the Court stated that the main purpose of the act of state doctrine was to preserve the separation of powers in national government. Foreign relations should remain the primary concern of the executive branch because of its constitutional duties and special expertise in that field. Furthermore, the court stressed that the judiciary should avoid embarrassing the executive branch in its conduct of foreign relations. Thus, the Court has identified two related considerations underlying the doctrine: (1) the absence of settled or ascertainable legal standards by which the validity of a foreign state's public act may be measured; and (2) the risk that a judicial declaration of the validity or invalidity of the act of a foreign state may conflict with the positions of the political branches on the

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12 307 F. Supp. 1291 (D. Del. 1970). A subsequent case, Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977), purported to expand the act of state doctrine to preclude all judicial inquiry into the motivations of public officials, even when they are not defendants in a suit. This view has been regarded as overbroad. Outboard Marine Corp. v. Pezetel, 461 F. Supp. at 397. See also Industrial Inv. Corp. v. Mitsui & Co., 594 F.2d 48, 54-55 (5th Cir. 1979). Act of state does not offer blank check immunity. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). Where it is applicable, it only precludes determining (1) the validity of the act (directly or collaterally) and (2) judicial redress for the act. Occidental Petroleum v. Buttes Gas & Oil Co., 331 F. Supp. at 109. It does not preclude an inquiry to determine causation. Hunt v. Mobil Oil Corp., 550 F.2d at 79.

Interestingly, however, the controversy between the parties in the Occidental Petroleum case subsequently arose in the courts of the United Kingdom. The judges of the Court of Appeal, Civil Division, came to a conclusion contrary to the Ninth Circuit's concerning the application of the act of state doctrine. The well-reasoned opinions analyzed the distinctions between the act of state doctrine and other related doctrines. Buttes Gas & Oil Co. v. Hammer, [1975] 2 All E.R. 51.
matter and thus interfere with or embarrass the conduct of foreign relations by those branches.\textsuperscript{74}

Implicit in the notion of separation of powers is an exception to the act of state doctrine. The considerations underlying the doctrine do not call for its application "where it is clear that the executive branch of the government does not consider inquiry into the act of a foreign state inimical to its conduct of foreign policy."\textsuperscript{75} In such a situation, "there would appear to be no reason for the court to abstain from a ruling on the merits."\textsuperscript{76} This view of the Restatement of Foreign Relations Law reflects the result reached in \textit{Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Moatschappy}.\textsuperscript{77}

In \textit{Bernstein}, the Second Circuit relied upon a State Department press release to avoid applying the act of state doctrine in a postwar claim involving an act of Nazi Germany. Initially, other courts did not favorably receive the so-called \textit{Bernstein} exception. In \textit{Sabbatino}, the Supreme Court avoided applying the \textit{Bernstein} exception, leaving its validity in doubt.\textsuperscript{78} In \textit{Banco Nacional de Cuba v. First National City Bank}, the Second Circuit withdrew from its earlier position, stating that \textit{Bernstein} was a unique case which stemmed from a wartime act involving a government no longer in existence.\textsuperscript{79} The equities were entirely on the plaintiff's side. Noting that \textit{Bernstein} had never been relied upon successfully, the court held that it should be limited to its facts and not be relied upon unless there was a more official pronouncement by the executive branch. The Supreme Court reversed, with a plurality holding that "where 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."\textsuperscript{80} The rationale was simply the old maxim, "the reason for the law ceasing, the law itself should cease."\textsuperscript{81} Because a majority of the justices did not join in this opinion, the validity of the \textit{Bernstein} exception is still in doubt.

\textsuperscript{74} \textit{Id.} at 423. \textit{See also} First National City Bank v. Banco National de Cuba, 406 U.S. 759, 765-68, 788 (1972).

\textsuperscript{75} \textit{Restatement (Second) of Foreign Relations Law of the United States} § 41, Comment h (1965).

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} 210 F.2d 375 (2d Cir. 1954).

\textsuperscript{78} 376 U.S. at 420.

\textsuperscript{79} 442 F.2d 530, 534-35 (2d Cir. 1971).


\textsuperscript{81} \textit{Id.}
In repeated pronouncements, both the executive and legislative branches of government have sought to reduce the application of the act of state doctrine.\(^2\) Shortly after the *Sabbatino* case, Congress passed the Hickenlooper, "anti-Sabbatino" amendment requiring courts to consider foreign confiscation cases on their merits, unless the President suggests otherwise.\(^3\) Disenchantment with the act of state doctrine is also readily apparent in the hearings leading to the passage of the FSIA.\(^4\)

Although the FSIA did not expressly alter the act of state doctrine, Congress clearly indicated that the doctrine was closely intertwined with sovereign immunity.\(^5\) Logically, they cannot be treated as separate and unrelated doctrines, but must be considered together. Not to do so would nullify the results of the FSIA. The House committee was of the opinion that "in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the act of state doctrine may be improperly asserted to block litigation."\(^6\) The committee was very much concerned with the potential for circumventing restrictive sovereign immunity by letting absolute immunity "re-enter through the back door under the guise of the act of state doctrine."\(^7\)

Such circumvention was attempted in *Alfred Dunhill v. Republic of Cuba*.\(^8\) According to the State Department's counsel,

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\(^2\) Both the State Department and the Justice Department have spoken for the executive branch. A letter from the legal adviser for the State Department to the Solicitor General stated: "[i]t is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States." (Washington, Nov. 26, 1975). *Reprinted in Alfred Dunhill v. Republic of Cuba, 425 U.S. at 706, Appendix 1.*

Likewise, the Justice Department has stated that the act of state is not a bar to antitrust actions when: (1) the act occurred inside the United States; (2) the act was not that of a truly sovereign entity acting within the scope of its powers; or (3) the act was commercial. *Antitrust Guide, supra* note 37, at 97. In its *amicus* brief in the *Hunt* case, the Justice Department took the position that since the act of state doctrine rests on principles of judicial abstention rather than jurisdictional or constitutional commands, it "thus constitutes a limited exception to the ordinary obligation of courts to adjudicate cases and controversies over which they have jurisdiction." Justice Department Brief as *amicus curiae* at 8-9, *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977).


\(^5\) According to Mr. Leigh of the State Department, "when you're discussing the sovereign immunity question, you also have to worry about the act of state question." 1976 *Hearings, supra* note 30, at 33.


\(^7\) *Id.*

\(^8\) 425 U.S. 682 (1975).
Dunhill "did not initially turn on sovereign immunity, for the simple reason that the attorneys for the government of Cuba were aware [that it] would probably have been rejected." Fortunately, the Supreme Court was unpersuaded by this ploy and held there was no act of state. Citing this decision, the House committee found "it unnecessary to address the act of state doctrine in this [FSIA] legislation because decisions such as that in the Dunhill case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine."

Despite re-emergence in antitrust cases, the general trend has been for courts to narrow the application of act of state. This trend is evident in the re-defining of the basic requirements of the doctrine. The first requirement is that there be a "public act." This requirement is inherently difficult to define. It must suffice to compare examples of judicial holdings in specific factual situations. An element of formality is probably involved, but it is by no means conclusive. The Dunhill plurality emphasized that "[n]o statute, decree, order or resolution of the Cuban Government itself was offered in evidence indicating that Cuba . . . as a sovereign matter determined to confiscate the amounts due." Reacting sharply to this statement, the dissent argued that

[w]hile it is true that an act of state generally takes the form of an executive or legislative step formalized in a decree or measure, that is only because duly constituted governments generally act through formal means. When they do not, their acts are no less the acts of a state.

Nonaction or refusals to act have been held to be acts of state. Situations involving acts that are less likely to be held acts of state include actions by agents or instrumentalities. The deter-

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9 1976 HEARINGS, supra note 30, at 33.
10 Other courts have also rejected the act of state in circumstances where sovereign immunity has been initially raised and rejected. Outboard Marine Corp. v. Pezetel, 461 F. Supp. 397; see also National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 640 (S.D.N.Y. 1978).
11 H.R. REP. No. 1487, supra note 19, at 6619.
13 Id. at 718-19 (Marshall, J., dissenting) (citations omitted).
mining factors in these cases are the scope of authority delegated and the degree of separation and independence involved. Another type of act that is unlikely to qualify as an act of state is a judicial determination. According to the Restatement (Second), a court adjudication may be an act of state. However, typically, it is not, either because it involves the interests of private litigants or because court decisions are not the usual way in which the state gives effect to its public interests.97 Similar considerations preclude the granting of a patent from being construed as an act of state.98

In contrast to the above situations, expropriation of property is almost always considered to be an act of state, even if it involves commercial property.99 The explanation for the different treatment is that such decisions usually involve a considered choice of government policy. On the other hand, the court in Dunhill held a repudiation of commercial debt not to be an act of state.100 Pointing to the distinction between commercial acts and public or government acts under restrictive sovereign immunity, the plurality intended to create a "commercial act" exception to the doctrine. The opinion stated that sovereign immunity and act of state must always be considered together. Furthermore, it was argued that holding foreign governments liable for their commercial acts would not likely offend them.

The dissent in Dunhill countered by stressing that restrictive sovereign immunity as yet had not been codified and that its parameters were unclear. More importantly, the dissent emphasized that sovereign immunity and act of state are different. Under Sabbatino, the act of state doctrine required a case by case analysis rather than sweeping exceptions.101

Critics of Dunhill have questioned the validity of the commercial exception holding. The Court actually found that there was no act of state involved; the discussion of a commercial exception was mere dicta. Moreover, only four justices concurred with the com-

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97 RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 Comment d (1965). See also Timberlane v. Bank of America, 549 F.2d 597 (9th Cir. 1976).
100 425 U.S. 682 (1976).
101 425 U.S. at 728 (Marshall, J., dissenting). Reference was being made to Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 428.
mercial exception holding; the other five disagreed. Although the strength of this holding may be doubtful, it has been cited or observed as precedent by lower federal courts.102

Whether an antitrust violation could be considered an act of state should depend on the facts of the case. Such conduct would undoubtedly be commercial, but it might involve a considered choice of public policy.103 The determination is facilitated if a separate and independent government entity doing business is involved. Separate government corporations have been held liable for antitrust violations.104

The second major requirement of the act of state doctrine is that the act taken place within the territory of the state. A recurring example of this requirement is found in expropriation cases. Although a United States court will respect the decision of a foreign government to confiscate property lying within the borders of the foreign state, it will not uphold a similar decision involving property located in the United States105 or in a third country.106 This rule is followed regardless of whether the property is tangible or intangible.107 However, ascertaining the location of property might be more difficult in the case of intangible property.

Determining the place of the act is no easy task in antitrust cases. In the antitrust context, it helps to draw a distinction between an act and its effects. The effects must be felt within the United States and must be direct.108 In other contexts, courts have said that an indirect effect outside of the foreign state does not preclude act of state.109 However, the effects cannot be too attenuated.110 Although the physical consequences of an act of state may be unlimited, its legally insulated consequences are not unlimited.

102 Hunt v. Mobil Oil Corp., 550 F.2d at 79. See also Industrial Inv. Dev. v. Mitsui & Co., 594 F.2d at 52.
103 The politically motivated Arab boycott of Jewish business is one example.
104 The position of the Antitrust Division of the Justice Department is that "state-owned or controlled firms, will be expected to observe the prohibitions of our antitrust laws." AN-

TITRUST GUIDE, supra note 37, at 66.
105 Republic of Iraq v. First National City Bank, 355 F.2d 47 (2d Cir. 1965).
107 Id. This case involved a confiscated trademark.
108 This "direct effect" requirement is necessary under both the FSIA and the Illinois Brick line of antitrust cases. See Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
The difficulties entailed have led one commentator to conclude that the location requirement is inapplicable in the antitrust context.\textsuperscript{111} Such a conclusion draws implied support from the Restatement (Second), which stresses that the requirement refers to an act affecting some form of intangible interest.\textsuperscript{112} Nevertheless, competition could be considered analogous to a form of duty giving rise to an intangible right or interest. Thus, it would not be unreasonable to hold that this requirement must still be met by foreign governments attempting to invoke the act of state doctrine in defense to an antitrust suit. It may be very difficult for a foreign government to disprove that its anticompetitive practices have not had a direct impact in the United States.

If the foreign government cannot counter the plaintiff's contention of direct effects within the United States it will not receive the full benefit of the act of state defense. At this stage of analysis, the foreign act is judged according to conflict of laws principles.\textsuperscript{113} The foreign act will be upheld only if to do so would be consistent with the policy and law of the United States.\textsuperscript{114} That is, "where there is confliction between our public policy and comity, our sense of justice and equity as embodied in our public policy must prevail."\textsuperscript{115}

Even at the stage where conflict of law analysis takes the place of act of state analysis, antitrust laws should not automatically apply to violations by foreign states. Areeda and Turner caution that "substantive antitrust analysis must not be applied mechanically where foreign contacts are involved—not even in the so-called per se area. More subtlety is required."\textsuperscript{116} In addition


\textsuperscript{112} RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 43 (1965). The act of state doctrine "does not prevent examination of the validity of an act of a foreign state with respect to a thing located, or an interest localized, outside of its territory. . . ." Id. The comments to this section all refer to property. No mention is made of competition as a localized interest.

\textsuperscript{113} Conflict of laws analysis roughly corresponds to act of state analysis abroad. The courts of France, West Germany, and the Netherlands will respect a foreign act of state unless it is contrary to public policy. Id. § 41, Reporters Note 4.

Increasingly, courts in other countries will not give effect to foreign acts of state which violate international law (such as expropriation). This does not seem to have caused serious foreign relations problems for the countries concerned. Letter from the legal advisor of the State Department to the Solicitor General, November 26, 1975, reprinted in Alfred Dunhill v. Republic of Cuba, 425 U.S. at 704, App. 1.

\textsuperscript{114} RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 43, Reporters Note 1.


\textsuperscript{116} ANTITRUST GUIDE, supra note 37, at 278.
to finding the requisite effects, a court should take into considera-
tion international comity and fairness.\textsuperscript{117}

The \textit{Timberlane} court adopted a balancing approach at this
stage of analysis.\textsuperscript{118} Endorsing this approach, the \textit{Mannington Mills}
court listed ten factors for consideration:

(1) degree of conflict between each country's laws and policy;
(2) nationality of the parties;
(3) relative importance of a violation here and abroad;
(4) available remedies abroad and pending litigation;
(5) intended or foreseeable harm to the United States;
(6) effect on foreign relations;
(7) whether relief will force parties to perform illegal acts;
(8) whether a court order can be effectuated;
(9) whether a similar order coming from abroad would be
accepted here;
(10) whether a treaty is involved.\textsuperscript{119}

Against these considerations of reciprocity, comity, and limita-
tions on judicial power, the importance of United States antitrust
policy and the Congressional purpose in adopting the FSIA must
be weighed. Courts should avoid needlessly thwarting the goals of
United States antitrust law,\textsuperscript{120} and likewise should avoid abnegating
the protected rights of citizens to litigate valid grievances within
the courts' jurisdiction. It has been noted that unlike expropriation
cases, antitrust cases involve both public and private injury.\textsuperscript{121}

\textbf{IV. SCOPE OF COVERAGE UNDER ANTITRUST STATUTES}

Perhaps the most substantial obstacle to bringing an antitrust
action against a foreign government is the wording of the Sher-
man and Clayton Acts themselves. Section 1 of the Sherman Act

\textsuperscript{117} Timberlane v. Bank of America, 549 F.2d 597 (9th Cir. 1976). One possible balancing ap-
proach for deciding whether to apply United States antitrust law is Professor Currie's
"governmental interest" methodology, a means for reconciling the conflicting interests of na-
tions. Where there is an apparent conflict between the interests of two states, the court should
consider a moderate and restrained interpretation of the policy or interest of either state in
order to avoid conflict. If, after moderation of the conflicting policies, a conflict remains, the
law of the forum (United States) will prevail. W. REESE & M. ROSENBERG, CONFLICT OF LAWS

Even under the traditional conflict of laws rule, the result might be the same. That is, in
a tort action (as antitrust suits have been characterized), the law of the place of injury, \textit{lex
loci delicti}, would govern.

\textsuperscript{118} 549 F.2d at 613-14.

\textsuperscript{119} Manington Mills, Inc. v. Congoleum Corp., 595 F.2d at 1297.

\textsuperscript{120} Industrial Inv. Dev. v. Mitsui & Co., 594 F.2d at 54-55.

\textsuperscript{121} Manington Mills, Inc. v. Congoleum Corp., 595 F.2d at 1293.
provides in part that "[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony...." Moreover, "person" or "persons" includes "corporations and associations existing under or authorized by the laws of the Territories, the laws of any state, or the laws of a foreign country."  

Although no governments, state or foreign, were included expressly in this definition, none were excluded either. A brief look into the scheme behind the antitrust laws lays the foundation for analysis of whether governments should be included within their present scope. The Sherman and Clayton Acts are among the simplest of statutes found in the United States Code. They have changed relatively little during the ninety and sixty-six years of their respective existence. This simplicity and longevity is indicative of the interpretation that should be attached to them. The Supreme Court has described the Sherman Act as the "Magna Carta of free enterprise." This "charter of freedom" is engrained with "a generality and adaptability comparable to that found to be desirable in constitutional provisions." Even in the sphere of extraterritorial application, the Sherman Act has been held to be a congressional exercise of the "full scope...[of] powers under the commerce clause of the Constitution."  

Against this background, it is not surprising that courts generally have given "persons" an expansive reading. In Georgia v. Evans, the Supreme Court held that a state government was a "person" for purposes of being a plaintiff under the Sherman Act. In the same year, in United States v. Cooper Corp., the Court recognized that there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction

123 Id. § 12.
124 For purposes of this section of the note, cases relating to both state and foreign governments shall be considered together. Of course, considerations of federalism, a major concern with state governments, are not present in the foreign national government context.
126 Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933).
128 316 U.S. 159 (1941).
which may indicate an intent, by the use of the term, to bring
state or nation within the scope of the law.\textsuperscript{129}

Two years after \textit{Evans}, however, the Supreme Court in \textit{Parker v. Brown} held that a California regulatory scheme, aimed at maintaining and stabilizing the prices for agricultural products, was exempt from antitrust laws.\textsuperscript{130} This gave rise to the so-called state action exemption or \textit{Parker} doctrine.\textsuperscript{131} Although this case restricted antitrust liability for certain state actions, it did not reach that result through a literal interpretation. Instead, the Court searched the legislative history but failed to discover any intent to restrain this sort of state activity.\textsuperscript{132} Here, the state "as sovereign, imposed the restraint as an act of government."\textsuperscript{133} A question that was left unanswered was the possible liability of a state which entered into a "combination [with others] for restraint of trade."\textsuperscript{134}

Thirty-five years passed before the Supreme Court directly confronted the question of a government's status within the meaning of "persons."\textsuperscript{135} In 1978, the Government of India joined with several other foreign nations to sue Pfizer, Inc. and certain other pharmaceutical companies under the Clayton Act alleging damages as purchasers of antibiotics.\textsuperscript{136} Again, the court eschewed a technical or semantic approach when interpreting "persons." Instead, the Supreme Court held that a foreign nation could be a plaintiff within the meaning of "person." Only by giving "person" an inclusive rather than exclusive meaning could the expansive remedial and deterrent purposes of the statute be served.\textsuperscript{137}

During the same term as \textit{Pfizer}, the Supreme Court considered the antitrust liability of municipalities in \textit{City of Lafayette, La. v. Louisiana Power & Light Co.}.\textsuperscript{138} The Court used this opportunity to qualify some of the language in \textit{Parker}. The state action exemp-

\begin{footnotes}
\footnote{129}{312 U.S. 600 (1941).}
\footnote{130}{317 U.S. 341 (1943). \textit{Georgia v. Evans} and \textit{Parker v. Brown} offer good examples of how the word "persons" can vary in meaning from the context of a person as a plaintiff to the context of a person as a defendant.}
\footnote{131}{For a recent application of the state action immunity doctrine, see California Retail Liquor Dealers Ass'n v. Mideal Aluminum, Inc., 445 U.S. 97 (1980).}
\footnote{132}{317 U.S. at 351.}
\footnote{133}{\textit{Id.} at 352.}
\footnote{134}{\textit{Id.}}
\footnote{135}{This was indirectly addressed in \textit{Goldfarb v. Virginia State Bar}, 421 U.S. 773 (1975).}
\footnote{136}{\textit{Pfizer}, Inc. v. Gov't of India, 434 U.S. 308 (1978).}
\footnote{137}{\textit{Id.} at 313.}
\footnote{138}{435 U.S. 389 (1978).}
\end{footnotes}
tion was still applicable to “purely state governmental activities,” but the court was reluctant to hold that the antitrust laws would not apply to any state activity.\textsuperscript{139} To qualify for immunity under the \textit{Parker} doctrine, there must be a “state policy to displace competition with regulation or monopoly public service.”\textsuperscript{140} Moreover, a state monopoly must refrain from predatory conduct, because even a lawful monopolist may be subject to antitrust laws when it attempts to extend or exploit its monopoly in an unauthorized manner.\textsuperscript{141}

Municipalities, while deriving their existence from the states, are not equally sovereign. \textit{Parker} did not hold that all governmental entities, whether state agencies or subdivisions of a state, were, because of their status, exempt from antitrust laws.\textsuperscript{142} To the extent that they exceed the scope of their properly delegated powers, municipalities lose their immunity.\textsuperscript{143}

In addressing the issue of whether a municipality was a “person,” the court cited \textit{Georgia v. Evans} and \textit{Chattanooga Foundry & Pipe Works v. City of Atlanta}.\textsuperscript{144} Even though both of these cases involved government bodies as plaintiffs, “the basis of those decisions plainly preclude[d] a reading of ‘person’ or ‘persons’ to include [them] as plaintiffs, but not as defendants.”\textsuperscript{145} Because national policy disfavors immunity, there must be an overriding public policy to limit the construction of “persons.”\textsuperscript{146}

Chief Justice Burger concurred in the \textit{Lafayette} opinion. In his view, the determinative factor was the fact that a city-owned power company was commercial in nature. Citing \textit{Dunhill} as authority, the Chief Justice analogized the “commercial” exception to the act of state doctrine to the present situation.\textsuperscript{147} Because the city was engaged in “proprietary” activities, it should have been subject to antitrust laws.

The Chief Justice’s “proprietary-governmental” activities distinction has not been well received.\textsuperscript{148} According to the dissent,
it could only lead to a "quagmire [with] distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." 148 Lower courts generally have not applied this test, although one court attempted to reconcile it with the plurality by stating that commercial activities often are not entered into pursuant to state policies. 150 The court of appeals, affirmed by the Supreme Court in Lafayette, flatly rejected such a test. 151

The Lafayette dissent also made several arguments against subjecting municipal governments to antitrust liability. Unlike big business, municipalities are controlled politically by the electorate. The only potential areas of liability should be where one municipality's anticompetitive activity is felt in another municipality. In that situation, political controls would not be as effective. 152 Another problem with antitrust liability against states is that treble damages and criminal sanctions may be unconstitutional under the Eleventh Amendment to the United States Constitution. 153

Many courts and commentators have drawn analogies between the Parker line of cases and act of state cases. 154 Others have cautioned against drawing such analogies. 155 The reason for caution is that different considerations underlie the two doctrines. With the Parker doctrine, the main consideration is federalism, the rela-

the distinction has no fixed content, is not itself indispensable, but that its function in accommodating certain categories of activity within particular legal contexts was necessary.

148 435 U.S. at 433 (Stewart, J., dissenting, quoting Indian Towing Co. v. United States, 350 U.S. 61, 65-68). The dissent is probably right. This test would be very difficult to apply. Nevertheless, it is the same test used to determine restrictive sovereign immunity.

In Indian Towing Co. v. United States, 350 U.S. 61 (1955), a similar test for municipal tort liability was criticized because (1) the states were in conflict as to where to draw the line; (2) the law within each state was in conflict; and (3) the theory was inherently unsound—all government activity is governmental, and most government activity has been duplicated by private individuals.


152 This "political control" argument was not accepted in Caribe Trailer Systems v. Puerto Rico Maritime, 475 F. Supp. 711 (D.D.C. 1979). In the context of foreign national governments, the political control argument would cut in favor of subjecting governments to United States antitrust law since foreign governments are beyond the political control of the United States electorate.

153 435 U.S. at 443. See also New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974). A similar concern is shared by the FSIA, which limits recovery of punitive damages to suits against instrumentalities or agencies of foreign governments as opposed to suits against the governments themselves.


tionship between the central government and its subordinate state governments. With the act of state doctrine, the main concern is comity, relations between co-equal and independent sovereigns. In each case, however, the question is whether Congress intended to include governmental conduct within the prohibitions of the antitrust laws.

Despite dissimilarities, a few comparisons can be made between the two doctrines. The trend has been for courts to extend antitrust liability with respect to state governments before making a similar extension to foreign governments. This pattern is understandable in view of the fact that the national government is in a stronger position to regulate the affairs of state governments. At present, no court has held that foreign governments can be considered “persons” and thus subject to suit under United States antitrust laws. The closest that a court has come was in the Outboard Marine case. It ruled that a communist government's state trading company could be held liable. An earlier case held that a government-controlled corporation could be subject to liability. Although the Outboard Marine court expressly disavowed deciding whether foreign governments could be sued as “persons” under the antitrust laws, it was not persuaded that international comity would prevent a court from treating them as such. The court stated that “even if Poland were directly involved ... there can be no genuine insult to sovereignty when a foreign enterprise undertaking to do business in a given market is subject to non-discriminatory laws of that marketplace.” For the time being, this may be the extent of the judicial venture, at least until a parallel movement occurs with respect to state governments. On the other hand, the recent OPEC decision by a federal district court constitutes the only ruling that a foreign government was not a “person” under the antitrust laws. One of the reasons given was that to hold otherwise “would require judicial interference in sensitive foreign policy matter.” In addition, the OPEC court


This dichotomy between foreign governments and their instrumentalities corresponds roughly to the liability which City of Lafayette extended to state subdivisions and instrumentalities, but not to states qua states.


158 477 F. Supp. at 572. The court distinguished the Pfizer case in that “[giving a foreign sovereign the option to sue merely allows the nation to use our judicial system if it wishes. Allowing foreign sovereigns to be sued, however, would require their presence in our
noted that liability had not been extended to state governments.\textsuperscript{159}

Certainly, if antitrust liability is ever fully extended to states, liability of foreign governments probably will not be far behind.\textsuperscript{160} However, even in the absence of court or congressional repudiation of the Parker doctrine, there are strong policy reasons that would support antitrust liability of foreign governments. The antitrust laws are intended to keep the domestic economy free from anticompetitive practices. This objective cannot be achieved if the enforcement mechanisms are hamstrung by outdated immunities. It is an anomaly that American exporters are given special protection through the Webb-Pomerane Act against powerful state enterprises abroad, while domestic businessmen and consumers are put in a disadvantage against these very same state enterprises at home.\textsuperscript{161} The fundamental issue, of course, is that foreign government enterprises are totally beyond the political control of United States citizens. Those enterprises damage American citizens by conduct contrary to America's fundamental economic policy. In most cases, U.S. courts are the only forum for redress.\textsuperscript{162}

\section*{IV. Conclusion}

Within the past few years, the trend has been to reduce the traditional immunities against antitrust liability. This trend has been particularly evident in the area of government liability. The barriers to liability, sovereign immunity and the act of state doctrine, have been narrowed by Congress and the courts. Simultaneously, coverage under the Sherman and Clayton Acts has expanded. Despite this trend, practical barriers to antitrust liability remain because the trend appears to be meeting resistance in the lower courts. Many lower courts simply have been hesitant to apply the new law. Thus, uncertainty still exists as to the boundaries of the definition of "commercial activity" under the FSIA. Likewise, the validity of the "commercial act" exception to the act of state doctrine. Thus the latter poses the greater threat to sensitive matters of foreign policy." Id. at 572 n.18 (emphasis in original). The court also applied the sovereign immunity defense, notwithstanding the FSIA; thus, since its holding on the two issues stemmed from a common rationale, its interpretation of congressional intent not to reach foreign governmental actions with the Sherman Act was infected by sovereign immunity principles.

\textsuperscript{159} 477 F. Supp. at 572.

\textsuperscript{160} An interesting caveat was expressed in both the Parker and City of Lafayette cases. Both chose not to decide whether there could be liability for states when acting in combination with "others." 317 U.S. at 351-52; 435 U.S. at 441.


\textsuperscript{162} This observation was proffered by Justice Powell, dissenting in Pfizer, 434 U.S. at 330.
trine is in doubt. Finally, the extent of government liability under *Lafayette* is not clear. It seems, however, that the "commercial-govermental" distinction has not been accepted in the context of state government immunity.

Some of the underlying causes of the uncertainty can be identified. The "quagmire" of distinguishing governmental from nongovernmental activities definitely muddies the water. The close mesh of sovereign immunity and act of state, and the relationship between act of state and state action immunity (*Parker* doctrine) also add to the confusion. Finally, that mysterious criterion, comity, pervades any discussion of foreign governmental liability. Comity, in reality, is a complicated variety of conflicting political considerations. It is a factor in both the sovereign immunity and act of state doctrines. Never codified and not recognized in the Constitution, the elusive concept of comity forces a balancing of the desire for unfettered commerce among nations with the needs and rights of a free nation and its citizens to respond to economic warfare.\(^{132}\)

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132 See generally Hill, *The Law-making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024, 1043 (1967). See also Gumbel v. Pitkin, 124 U.S. 131, 134 (1888). The most appropriate solution for reconciling the interests of comity with national economic policy would be the establishment of an International Code of Competition. The United Nations Conference on Trade and Development (UNCTAD) has led continuing efforts to draft a worldwide Restrictive Business Practices Code. Although its provisions have been directed both at businesses and governments, the principal thrust of this convention has been directed at regulating multinational corporations. See Davidow, *The UNCTAD Restrictive Business Practices Code*, 13 Int'l Law. 587, 590 (1980). There has been disagreement as to the extent that governments should be covered. Developing countries have argued that their national enterprises should be accorded preferential or differential treatment. In contrast, the developed countries have urged that there should be no such discrimination. Another dispute is whether the convention should exempt restrictive business practices "directly caused by sovereign acts of state or authorized by intergovernmental agreements." *Id.* at 592-93. In any event, it is clear that multinational corporations are not the only entities that can act to restrain competition; "state-owned enterprises and international state cartels are equally capable of such practices. A purported code for competition that neglects such enterprises is wholly inadequate." Gill, *The UNCTAD Restrictive Business Practices Code: A Code for Competition?*, 13 Int'l Law. 607, 609 (1980). In addition to the disagreement over its scope, a further weakness is its lack of enforcement provisions. Implementation is left ultimately to individual countries. Meanwhile, the United States will have to fashion its own response to the anticompetitive conduct of foreign governments, and the courts will continue to grapple with the issue of the antitrust liability of foreign governments.

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